IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC8/2022

BETWEEN	**TODD WILLIAM FRANK SUTTON** FIRST APPELLANT
AND	**TODD WILLIAM FRANK SUTTON** and **HOFFMANN TRUSTEES LIMITED** as trustees of the **TODD SUTTON TRUST** SECOND APPELLANT
AND	**JOANNA ELISIA BELL** RESPONDENT

SUBMISSIONS ON BEHALF OF THE APPELLANTS

Dated: 3 June 2022

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MAY IT PLEASE THE COURT

A. Summary of argument

1. In the judgment under appeal, the Court of Appeal held that the provisions of s 44 of the Property (Relationships) Act 1976 (the Act) could apply to a disposition of property made prior to the claimant being in a de facto relationship as defined by s 2D of the Act.

2. Accordingly, the Court found that the First Appellant (Mr Sutton) had transferred his separate property, his home at Point Chevalier, to the Second Appellant, a family trust (the Trust) settled for the benefit of his children, in order to defeat the claim or rights of the Respondent (Ms Bell).

3. As a consequence of these findings, the Court upheld the decision of the High Court and the Family Court orders, requiring the Trust to transfer the property to Mr Sutton and Ms Bell as tenants in common in equal shares.

4. The fundamental flaws in the Court of Appeal's judgment are that, contrary to the plain words of the section, the Court held:

   (a) Mr Sutton had the requisite intention to defeat Ms Bell's claims or rights under s 44(1) at the time of the disposition to Trust, even though Ms Bell did not have any claims or rights under the Act at that time;

   (b) that, because Mr Sutton and Ms Bell could have entered into a s 21 contracting out agreement this meant s 44 applied to the disposition as they were in "*contemplation of*" entering into a qualifying relationship;

   (c) that s 44 of the Act could be applied retrospectively to avoid or set aside a disposition even though, at the time of the disposition, the transfer was lawfully permitted and could not have been avoided. In that regard the decision offends against the principle that legislation should have prospective, not retrospective effect. This is reflected principally by the presumption against retrospectivity in s 12 of the Legislation Act 2019 and, in respect of criminal offences, s 10A of the Crimes Act 1961 and s 26(1) of the New Zealand Bill of Rights Act 1990.[1] To apply s 44 retrospectively is contrary to the right to justice afforded under s 27 of the New Zealand Bill of Rights Act 1990; and

   (d) that even though Ms Bell agreed to the disposition at the time, the transaction lacked the requisite good faith under s 44(2) to (4) of the Act.

5. The Court also failed to consider the role of section 26 and 26A in considering the discretionary relief available under s 44. It failed to

[1] Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 12.

take into account the mandatory consideration as to *the interests of any minor or dependent children.* As a consequence, the Court did not consider it just to provide Mr Sutton with a credit for his initial contribution to Pt Chevalier and postpone vesting of Ms Bell's share in the property until the youngest child turned 18.

B. The facts

6. The facts are conveniently set out in the background of the judgment under appeal.[2] In brief, Mr Sutton and Ms Bell met in July 2003. At that stage Mr Sutton was living in his former matrimonial home at Pt Chevalier, a home which he had acquired during his earlier marriage in mid-2002 and purchased from his former wife at an agreed value of $488,000.00. To do so, he had borrowed $350,000.00, secured against the Pt Chevalier property.

7. Sometime in February or March 2004, Ms Bell moved into the Pt Chevalier home when one of Mr Sutton's flatmates moved out. As Mr Sutton said, what then commenced was a business relationship, enabling Ms Bell to rent out her apartment. The parties did, however, maintain an intimate relationship and shared a bedroom, with Ms Bell using the spare room as a working office.

8. In September 2004 Mr Sutton won a raffle, the prize including a free legal consultation with Hoffmann Law. He met Mr Sherer of Hoffmann Law on 24 September 2004. The two discussed transferring the Pt Chevalier property into a family trust.

9. After that consultation, Mr Sutton was advised by Mr Sherer to settle a trust and to transfer the Pt Chevalier property to it. The Sutton Family Trust was settled on 9 November 2004 with the express intention of benefitting his children only. The discretionary beneficiaries included any de facto partner or wife. The final beneficiaries were Mr Sutton's children, both born and unborn.

10. The property was transferred to the trustees by agreement for sale and purchase dated 29 November 2004 at a sum of $550,000.00. This figure was provided by Quotable Value. After a refinancing of the mortgage, it was recorded that the Trustees owed $209,000.00 to Mr Sutton. Mr Sutton embarked on an annual gifting programme until the date of separation in September 2012. By that date, all but $20,000.00 of the debt owed to Mr Sutton had been gifted via seven dispositions in reduction of his advances to the trustees.

11. Following the commencement of the de facto relationship in January 2005, the parties had two children together.

12. The parties subsequently separated in September 2012. In July 2017, Ms Bell brought proceedings under the Act, seeking orders under s 44 in respect of the Pt Chevalier property.

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[2] *Sutton v Bell* [2021] NZCA 645, [2021] NZFLR 610 [Judgment under appeal] at [1]–[2]. COA101.0188.

13. Initially, the Family Court was asked to determine the date for the commencement of the de facto relationship. On 27 July 2018, Judge Clarkson determined, following a defended hearing, the commencement date as March 2004.[3]

14. Judge Druce subsequently made orders, on 17 July 2019, pursuant to s 44 of the Act.[4] This was because, based on Judge Clarkson's earlier finding, the parties had been in a de facto relationship for eight months at the date of the sale of the Pt Chevalier property to the Trust. The Judge also considered that the trustees had not received the property in good faith and for valuable consideration under s 44(2) to (4).[5]

15. Mr Sutton appealed both decisions to the High Court in March 2020. He was granted leave to introduce further email evidence which established, to the satisfaction of Walker J, that the de facto relationship did not in fact commence until sometime between December 2004 and January 2005.[6] This was *after* the settlement of the Trust and the sale of the Pt Chevalier property to it.

16. Despite finding that the parties were not in a de facto relationship at the date of the transaction, the Judge considered there was still jurisdiction following separation to make orders pursuant to s 44(2) of the Act.[7] The High Court made this finding, notwithstanding Ms Bell not having any rights or claim under the Act in the Pt Chevalier property at the date of disposition.

17. [Redacted].

C. Submissions

18. The Court of Appeal commenced its judgment by identifying what it said to be the two principal issues raised on appeal, namely:[8]

    (a) Whether s 44 of the Act can apply to a disposition of property made before the relevant de facto relationship has commenced?

    (b) If it can, was the Hight Court correct to find that Mr Sutton had transferred Point Chevalier to the trust in order to defeat the rights the Act would otherwise have given Ms Bell?

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3 *Cannon v Cox* [2018] NZFC 5556 [First Family Court decision]. COA101.0012.

4 *Cannon v Cox* [2019] NZFC 5363, [2019] NZFLR 556 [Second Family Court decision]. COA101.0027.

5 At [61]–[62]. COA101.0046.

6 *Sutton v Bell* [2020] NZHC 1557 [High Court Judgment] at [74] and [75]. COA101.0154.

7 At [78]. COA101.0155.

8 Judgment under appeal, above n 2, at [3]. COA101.0189.

19. As to the first issue, the Court held that a claim under s 44 could be made where property was disposed of before the start of the relevant qualifying relationship.[9]

20. In making this finding, the Court relied on what it said was "*the relationship between the s 21 contracting out provisions and the s 44 avoidance provisions*" as a basis for resolving the first issue. The Court wrongly relied on the availability of the contracting out provisions as a basis for assessing *"the significance or otherwise of the existence of a qualifying relationship, here a de facto one"*.[10]

21. As a matter of both fact and law this tendentious reasoning is difficult to follow. To show why, it is necessary to first consider the legislative history of both ss 44 and s 21 and explore the Court's conclusion as to whether the relationship said to exist between the two sections was sufficient to provide the jurisdictional basis for the retrospective application of s 44.

THE ORIGINS OF S 44

22. In the judgment under appeal, the Court of Appeal came to the following finding: *"In our view, … Parliament cannot have intended the existence of a qualifying relationship at the time of a disposition of property to be a necessary precondition for the availability of s 44 relief"*.[11] On an examination of the history and origins of s 44 this appears to be a rather optimistic statement on the part of the Court, for which there is little, if any, support.

22.1. The anti-avoidance provisions in the Act have a long history.

22.2. Section 44(1) began its life as s 13 of the Divorce Act 1898, which was largely based on s 4 of the Matrimonial Causes Procedure Amendment Act 1893 (NSW). Section 13 provided:

> **13 Fraudulent deeds may be set aside**
> Where it is proved to the satisfaction of the Court that any deed, conveyance, agreement, or instrument has been executed or made by or on behalf of, or by direction of, or in the interest of a respondent husband or wife, or a co-respondent, *in order to defeat the claim or rights of the petitioner* in respect of damages, alimony, costs, or maintenance of children, such deed, conveyance, agreement, or instrument may, on the application of the petitioner, and on such notices being given as the Court or Judge may direct, be set aside on such terms as the Court think proper. …

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9 At [60]. COA101.0205.

10 At [37]. COA101.0199.

11 At [57]. COA101.0204.

22.3. The disposition provision flowed through, in identical terms, to s 34 of the Divorce and Matrimonial Causes Act 1908 and s 34 of the Divorce and Matrimonial Causes Act 1928.

22.4. It then became s 81 of the Matrimonial Proceedings Act 1963. Since this point onwards, the disposition provision has been written in materially the same language. Section 81 of the Matrimonial Proceedings Act provided:

> **81 Dispositions may be set aside**
> (1) Where the Court is satisfied that any property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any party to proceedings under this Act in order to defeat the claim or rights of any person under Part VI, Part VII, or Part VII of this Act or in respect of damages or costs, the Court may, on the application of that person, make any order under subsection (2) of this section.

22.5. In June 1972, a Special Committee (made up of the New Zealand Law Society and representatives from the Department of Justice) presented a report on matrimonial property to the then Minister of Justice, the Right Hon Dan Riddiford.[12] The Committee's principal recommendation was "*that there is need to enact as soon as possible a single, clear and comprehensive statute to regulate matrimonial property in New Zealand*".[13]

22.6. The Committee recognised that ss 80 and 81 of the 1963 Act provided "safeguards" against one spouse having an unfettered right to deal with and dispose of property, but did not make any recommendations for change to s 81.[14] In light of the fact the Committee undertook a detailed review of the 1963 Act in its report, it must be presumed that the Committee considered s 81 to be adequate as is.

22.7. The Matrimonial Property Act 1976 came into force on 1 February 1977, making substantial changes to relationship property law. Amongst its significant changes included the (1) presumption of equal division, the cornerstone of the current Act, and (2) the ability of spouses to contract out of the Act.

22.8. Despite its root-and-branch reform, the disposition provision remained largely unchanged. It now became s 44, included under a sub-part headed "*Protection of Spouse's Rights*". It read:

> **44 Dispositions may be set aside**
> (1) Where the Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to

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12 *Matrimonial Property: Report of a Special Committee,* presented to the Minister of Justice, June 1972.

13 At [3].

14 At [40].

> defeat the claim or rights of any person under this Act, the Court may, on the application of that second-named person, make any order under subsection (2) of this section.

22.9. The Matrimonial Property Act 1976 continued in force with little substantive amendment for 25 years.

Calls for reform to the Matrimonial Property Act 1976

22.10. A Ministerial Working Group was established in 1988. The Working Group was principally concerned with the failure of the Matrimonial Property Act 1976 to apply when one spouse died.[15] However, it also recommended tightening the rules on avoiding the Act, so that disposed property may be more easily "clawed back" and to give the Courts wider power to recover trust property.

22.11. Nearly a decade later, the Law Commission released a report in 1997 titled *Succession Law: A Succession (Adjustment) Act*, with major recommendations for reform to the Act. No recommendations for reforming the disposition provision were made by the Commission.

22.12. The first reform proposals were introduced into Parliament in 1998 through two bills — the Matrimonial Property Amendment Bill 1998 and the De Facto Relationships (Property) Bill 1998. Following a tumultuous process, the legislation was finally enacted as one and the Act renamed the Property (Relationships) Act 1976.

The 2001 Act

22.13. The Property (Relationships) Amendment Act 2001 came into force on 1 February 2002 with wide-sweeping reforms. The Act was expanded to include people in de facto relationships and to apply following the death of one spouse.

22.14. Parliament introduced new ss 44A to 44F, giving the Courts greater powers to make orders relating to trusts and companies. Section 44C allowed the Courts to make orders for compensation where a disposition to trust had been made by either or both partners with the "*effect of defeating a claim or rights*" of one spouse or partner. In contrast to s 44, no intention had to be proved under s 44C.

22.15. Despite the addition of s 44C, s 44 remained largely identical to its predecessor provisions, in line with previous amendments to the Act. The only amendment made was to insert the words "Party B", which was introduced to define more precisely the distinction between the person who had made the disposition and the one whose interests were intended to be defeated by it.[16]

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15 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988).

16 *Gray v Gray* [2013] NZHC 2890 at [32].

22.16. Section 44 has not been amended since 2001. When compared to its original form, it can be seen that it is, by and large, the same provision:

> 1898: Where it is proved to the satisfaction of the Court that any deed, conveyance, agreement, or instrument has been executed or made by or on behalf of, or by direction of, or in the interest of a respondent husband or wife, or a co-respondent, *in order to defeat the claim or rights of the petitioner* in respect of damages, alimony, costs, or maintenance of children, such deed, conveyance, agreement, or instrument may, on the application of the petitioner, and on such notices being given as the Court or Judge may direct, be set aside on such terms as the Court think proper. …
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> 2001: Where the High Court or the District Court or the Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person *in order to defeat the claim or rights of any person (**party B**) under this Act*, the court may make any order under subsection (2).

22.17. Meanwhile, New South Wales' law ended up in a rather different place. Section 42 of the Property (Relationships) Act 1984 relevantly provides:

> **42 Transactions to defeat claims**
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> (2) In this section, ***disposition*** includes a sale and a gift.
>
> (2) On an application for an order under this Part, a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction of or in the interest of, a party, which is made or proposed to be made *to defeat an existing or anticipated order* relating to the application (being an order adjusting interests with respect to the property of the parties or either of them, an order for maintenance or an order for costs) or which, irrespective of intention, is likely to defeat any such order.

22.18. Section 42 deals with dispositions intended to or having the effect of defeating an existing or anticipated right of another under the Act. Anticipated orders are not expressly included in s 44. Section 42 also applies "irrespective of intention". Yet, under New Zealand law, these provisions have been deliberately separate from one another in ss 44 and 44C. The provisions are mutually exclusive: s 44C orders can only be made where s 44 does not apply.[17]

22.19. Over its 124-year history, Parliament has never seen fit to define more precisely what level of intent has been required to meet the

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[17] Property (Relationships) Act 1976, s 44C(1)(c).

s 44(1) threshold. Nor has it seen fit to draft the section so as to apply to prospective or anticipated claims or rights that did not exist under the Act at the date of disposition.

22.20. Section 44 owes much to the avoidance provisions found in insolvency laws, where there are express provisions capturing "*antecedent transactions*". An example can be found in s 75 of the Bankruptcy Act 1908, which held that any settlement of property made within one year prior to the settlor becoming bankrupt was void as against the Official Assignee. Subpart 7 of the current Insolvency Act 2006 contains a similar provision.

22.21. Similarly, the anti-avoidance provisions under the Income Tax Act 2004 define one variant of tax avoidance as *"directly or indirectly avoiding, postponing or reducing any liability to income tax or* ***any potential or prospective liability in future tax****"*.[18]

22.22. The Appellant submits that, given the serious consequences that flow from transactions that are voided or set aside, express wording is required in the relevant provision where Parliament intends a statute to apply to antecedent transactions. This is particularly so in the context of the Property (Relationships) Act, where the Act has been applied to retrospectively void dispositions to third parties that were, at the time, validly made. No such express wording can be found in s 44 of the Property (Relationships) Act.

THE ORIGINS OF S 21

23. Section 21 of the 1976 Act provided:

> **21 Power to make agreements**
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> (1) Subject to s 47 of this Act, a husband and wife, or any two persons in contemplation of their marriage to each other, may, for the purpose of contracting out of the provisions of this Act, make such agreement with respect to the status, ownership, and division of their property (including future property) as they may think fit.

23.1. The legislative history of s 21 is conveniently set out in the High Court judgment of *M v H*.[19] In the High Court, Brewer J considered the issue of whether a couple's contracting out agreement had been entered into "*in contemplation of their marriage to each other*" as required under the Matrimonial Property Act 1976. He discussed at length the legislative history of the contracting out provisions, noting at the outset that Parliamentary discussions were premised on the assumption that the parties to such an agreement would be married.[20]

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18 Income Tax Act 2004, YA 1.

19 *M v H* [2017] NZHC 2385 [Brewer J's decision].

20 See Brewer J's decision, above n 20, at [31].

23.2. The Judge referred to the comments of the then Minister of Justice, the Rt Hon Dr A M Finlay, in introducing the Bill to Parliament:[21]

> *"It is not the Government's intention to impose a fixed regime of matrimonial property on all married couples."*

Contracting out was thus envisaged, resulting in the eventual inclusion of s 21. It should be noted, however that de facto relationships were not covered in the Matrimonial Property Act 1976, and indeed, as the Judge noted, a clause in the Matrimonial Property Bill 1976 which proposed to include de facto relationships within its scope was struck out.[22] The result was that the Act was expressly stated to apply only to married couples, namely a husband and wife.

23.3. The Judge considered that the wording of s 21 and the inclusion of the phrase "*in contemplation of their marriage*" simply recognised the realistic likelihood that a couple may wish to contract out of the Act before entering into a marriage. On this basis, Brewer J preferred a narrow interpretation of the phrase. Section 21(1) therefore required a clear and present intention of the parties to be married, for otherwise, the provisions of the Matrimonial Property Act would not apply to them.[23]

23.4. This case was upheld on appeal,[24] and referred to by the Court of Appeal in the present case.[25] It was noted that Brewer J's analysis had been approved previously by the Court of Appeal.

23.5. The Court referenced similar "contemplation" terminology in s 13 of the former Wills Amendment Act 1955 which read: *"Notwithstanding anything in s 18 of the principal Act or any other enactment or rule of law, a will expressed to be made in contemplation of marriage shall not be revoked by the solemnisation of the marriage contemplated"*.[26]

23.6. Against that background, it can be seen that the "in contemplation" provisions of the Act were intended to be narrow in scope.

23.7. The original contracting out provisions found in s 21 were effective from 1 February 1977 until 31 December 1983.

23.8. Section 21 has been amended four times since, all of which have made merely minor adjustments to the provision.

23.9. It was first amended on 1 January 1984 by the addition of ss 12A and 12C, which largely concerned agreements being deemed to have

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21 At [33], citing (3 October 1975) 402 NZPD 5116.

22 At [35], referring to the Matrimonial Property Bill 1976 (125-1).

23 At [37].

24 *M v H* [2018] NZCA 525.

25 Judgment under appeal, above n 2, at [68]. COA101.0207.

26 At [69]. COA101.0208.

been made for valuable consideration. This version of s 21 was effective under 31 July 2001.

23.10. Secondly, and effective from 1 August 2001 to 25 April 2005, the Act was amended to include de facto partnerships and to split out the formality requirements, set aside provisions and miscellaneous provisions into ss 21A to 21T.

23.11. Thirdly, and effective from 26 April 2005 to 18 August 2013, civil union partnerships were added within s 21's scope.

23.12. The current version, which changed the words "husband and wife" to "spouses", has been effective from 19 August 2013.

23.13. As noted by the Hon. Jim McLay in a seminar presented on the new Act in 1977, there was no serious contention before the Select Committee that spouses should be prevented from making arrangements between themselves that would differ from the scheme of the Act. Special arrangements may sometimes be particularly necessary (for instance, in second marriages).[27]

23.14. The significance of this statement is of course that the Select Committee recognised that spouses would be entitled to make separate and independent arrangements which differ from the Act. What was not discussed, and was not necessary to discuss, was the fact that, prior to the commencement of the qualifying relationship (at that time only marriage), Parliament did not see fit to interfere with any arrangements a party may have made in relation to their own property which fell outside the ambit of the Act.

23.15. As a consequence, the enactment of s 21 did not in any sense forfeit discussion or engage the provisions of s 44 as contemplating voiding any transaction antecedent to the marriage.

23.16. Sections 21 and 44 coexisted peacefully from 1976 until revisited in the judgment of the court below in the judgment under appeal last year. It has never been previously argued that the specific words of s 21, which now provide for a contracting out agreement to be entered into *"in contemplation of entering into a marriage or de facto relationship"*, engage the provisions of s 44(1) so as to enable the avoidance of a legitimate transaction entered into prior to the commencement of the qualifying relationship.

23.17. This is unsurprising, because as the legislative history shows, s 44 has existed largely in its present form for 124 years. The interpretation given it in the judgment of the Court below had never been adopted in the 123 years prior to the Court's finding.

23.18. Further and significantly, while the Court of Appeal in *M v H* expressly approved the narrow interpretation of s 21 found in the judgment of Brewer J, the Court below in the present case stated: *"it would not,*

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[27] Jim McLay *The Matrimonial Property Act 1976* (Papers presented at the Legal Research Foundation Inc Seminar, 2 February 1977) at 16.

in our view, be appropriate to apply the strict test that applied to determining "in contemplation of marriage" to "in contemplation" of a de facto relationship".[28] In that respect the Court of Appeal has, without discussion, effectively overruled its own previous decision.

23.19. In addition, the Court of Appeal in *M v H* noted, when considering agreements entered into prior to the coming into force of the 2001 amendments, that *"it would be odd if the subsequent marriage of a de facto couple, a circumstance no longer relevant to their property sharing rights under the Act, would have the effect of nullifying an existing, valid and enforceable property sharing agreement"*.[29] In our view, this was a foreseeable consequence that ss 21O, 21P and 21R of the Act were designed to avoid.

23.20. On that basis, the Court of Appeal in *M v H* held that the antecedent agreement was valid and enforceable as to its specific terms.

23.21. Against that background, it is submitted, it would be odd that Parliament, having considered that antecedent agreements entered into prior to the coming into force of the 2001 amendments were valid and enforceable, would have intended that transactions entered into by a party when not in a qualifying relationship under the Act would be susceptible to a subsequent claim under s 44.

23.22. There is nothing in the Parliamentary papers or academic discussions which justifies the interpretation taken by the Court of Appeal that the existence of the "contemplation" provision in s 21(1) permits s 44 claims to be successfully brought where the disposition in issue was made prior to the commencement of a qualifying relationship under the Act. Nor that there is any relationship between ss 21 and 44 to justify that interpretation.

DE FACTO RELATIONSHIPS

24. It is significant, in the context of this appeal, to consider what Parliament means by a *"de facto relationship"*.

24.1. The introduction of de facto relationships into the scheme of the legislation was effected by the 2001 Amendment Act. A de facto relationship is defined in s 2D in considerable detail. That needs to be so because the consequence to a couple of being in such a relationship are to them as important and significant as to a couple who choose to marry or enter into a civil union. Once such a relationship is found to exist, then their future dealings with property fall within the exclusive jurisdiction of the Act.

24.2. There is, however, a further significant provision relating to de facto relationships. Section 2E(1)(b) defines a "relationship of short duration" which, in respect of de facto relationships, means one in which the de facto partners have lived together for less than three years or such further period as the Court may consider just. The

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[28] Judgment under appeal, above n 2, at [70]. COA101.0208.

[29] *M v H,* above n 25, at [64].

effect of a relationship of short duration is significant in that s 14A of the Act provides, subject only to defined exceptions, that the equal sharing regime will not apply to those relationships.

24.3. Since the coming into force of the de facto amendments in February 2002, the Courts have been concerned on a number of occasions with deciding the preliminary issue of whether a de facto relationship is a relationship of short duration. An example of such a case, referred to by Walker J in the High Court Judgment, was the decision of Heath J in *B v F*.[30] The issue in that case, as has been the case in many others, was whether the parties were living together as a de facto couple in terms of the Act so as to engage its provisions. It is significant, that in delivering his judgment, Heath J commented:[31]

> *It is important to ensure that property consequences do not flow from relationships formed between two people that are not necessarily indicative of an intent to share property. For that reason some rigor is required in analysing whether a de facto relationship exists.*

24.4. Additionally, the Judge observed that *"[t]he result of this appeal demonstrates problems that can arise when the existence or otherwise of a qualifying relationship is determined as a preliminary question".*[32] Given the detailed and non-exhaustive list of matters in s 2D that a Court is required to have regard to in determining whether a de facto relationship exists, and the corresponding rigorous and disciplined approach to the "in contemplation" provisions the Court of Appeal in *M v H* adopted, it is a clear that a high evidential burden needs to be met to in order to find either a de facto relationship, or a de facto relationship of short duration, is in existence or contemplated.

24.5. The factual analysis of the Court of Appeal in the present case fell far short of what would be required in such circumstances.

24.6. It is submitted that to suggest, as the judgment of the Court below does, there is a third category of relationships, that is couples *contemplating* entering into a de facto relationship, is best described as social engineering and better left to Parliament. It introduces a layer of complexity and analysis which was simply never within the contemplation of Parliament.

RETROSPECTIVE LEGISLATION

25. In *R v Pora,* the Court of Appeal considered the issue of the increase in the minimum non-parole period introduced in 1999 in relation to the alleged murder committed by Teina Pora in 1992. The Court

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30 High Court judgment, above n 6, at [61]; referring to *B v F* [2010] NZFLR 67 (HC). COA101.0149.

31 *B v F,* above n 31, at [48].

32 At [70].

stated: "*The starting point must be the text and purpose of the statute being considered (s 5(1) of the Interpretation Act 1999). Next it is appropriate to look to the wider legislative context … It is the function of the Court to give effect to the will of Parliament as expressed in statutes."*[33]

25.1. The Court also cited with approval the decision of *Re Bolton, ex parte Beane,* where the High Court of Australia held "*the courts nevertheless endeavour so to construe the enactments of the Parliament as to maintain the fundamental freedoms which are part of our constitutional framework. It is presumed that that is the intention of Parliament … Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the Courts will not construe a statute as having that operation."*[34]

25.2. While the Court of Appeal in this case cited with approval judgments that held the provisions of the Property (Relationships) Act applied retroactively, the cases cited involved the disposition of property made after the commencement of a de facto relationship but before the Act's equal sharing regime for de facto relationships came into force on 1 February 2002 (the retroactive decisions).[35] Nevertheless, the Court of Appeal rejected the retroactive decisions insofar as they retained the requirement that a qualifying relationship had to be in existence at the date of the disposition.[36]

25.3. Without accepting that the retroactive decisions were correctly decided overall, it is submitted that those decisions were correctly decided on the issue of the need for a qualifying relationship to be in existence as a pre-condition to the application of s 44.

25.4. Here, however, the Court of Appeal has construed s 44 of the Act so as to abrogate the fundamental freedom of a party to deal with their property as their own unless they fall under the exclusive jurisdiction of the Act by virtue of being in a qualifying relationship (of either marriage, civil union partnership, or de facto relationship). To that extent, the judgment under appeal offends the proposition that a new law should not operate in respect of past events as though it was in force when those events took place.

25.5. Although it may be more a matter of semantics than substance, such situations have been described in the legislative context as being both retroactive and retrospective. However it may be described, the legal status of the transaction, that is the disposition of property which occurred when no restrictions had applied, can (on the Court

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33 *R v Pora* [2001] 2 NZLR 37 at [5].

34 At [55]; citing *Re Bolton, ex parte Beane* (1987) 162 CLR 514 (HCA) at 523.

35 Judgment under appeal, above n 2, at [43]–[51], referring to *Ryan v Unkovich* [2010] 1 NZLR 434 (HC), *Genc v Genc* [2006] NZFLR 1119 (HC), *Gray v Gray* [2013] NZHC 2890 and *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71. COA101.0200.

36 At [48]–[51]. COA101.0201.

of Appeal's view) be changed retrospectively to thus overrule the property rights of the disposer that existed at the time.

25.6. In the criminal law it is abundantly clear, both in legislation and the common law, that retrospective laws offend civil rights. Although this principle does not apply to the same extent in the civil jurisdiction, the law must be applied as it exists at the time of the transaction.[37]

25.7. Thus it is submitted that the retrospective application of s 44 in this case is contrary to common law principles and contrary to the right to justice as enacted in s 27 of the New Zealand Bill of Rights Act.

WAS THE DISPOSITION TO THE SUTTON TRUST BY MR SUTTON ENTERED INTO *"IN ORDER TO DEFEAT THE CLAIM OR RIGHTS OF MS BELL"*?

26. The courts below in this case, purportedly following the judgment of this Court in *Regal Castings Ltd v Lightbody*, held that a disposition made in good faith may nevertheless be set aside as being intended to defeat an interest under s 44(1).[38] In particular, the Court below said that *"An intent, or knowledge of the effect of the disposition, suffices. The conscious desire approach no longer reflects the test. That means that a disposition made in good faith, but nevertheless in order to defeat, meets the threshold for s 44(1)"*.[39]

26.1. In adopting this shorthand approach, the Court below has misconstrued *Regal Castings* and wrongly applied it to the interpretation of s 44(1), a very different section from that which was under consideration by this Court in *Regal Castings.*

26.2. Since 1898 there have been a number of shades of interpretation as to the requisite intent required to be proved under ss 44(1). The leading authority for 27 years was *Coles v Coles*, where the test was expressed as follows: *"What is plain is that the words "in order to defeat" mean that the spouse who entered into the challenge transaction did so because of a conscious desire to remove some item or items of matrimonial property from the reach of the Courts"*.[40]

26.3. Whilst the Act was amended in 2001, Parliament did not see fit to amend s 44(1), notwithstanding the decision in *Coles*.

26.4. There were four separate judgments in the Supreme Court's decision in *Regal Castings*. For present purposes, the focus is on Blanchard and Wilson JJ's judgment, which has subsequently been applied to s 44(1) cases.

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37 For a discussion of this issue, see Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago Law Review 631.

38 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

39 Judgment under appeal, above n 2, at [98]. COA101.0216.

40 *Coles v Coles* (1987) 3 FRNZ 101 (CA) at 624.

26.5. Blanchard J noted that the expression "intent to defraud" was not happily chosen, but had been regarded as a "shorthand" for intent to hinder, delay or defeat a creditor's recourse to the property of the debtor.[41] He then turned to what was necessary to prove an "intent to defraud":

> *[53] … But what constitutes such an intent? To answer that question it is essential to distinguish between the debtor's purpose and his or her intention, as William Young P did in his dissenting judgment, and as, with some justification, he considered the majority's reasons did not. It is not necessary to show that the debtor wanted creditors to suffer a loss, or that it was his purpose to cause loss. It is, however, necessary to show the existence of an intention to hinder, delay or defeat them and that the debtor has accordingly acted dishonestly. …*
>
> *[54] Whenever the circumstances are such that the debtor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss. …*
>
> *[55] … There may be room for argument over whether … there is or is not a presumption, perhaps irrebuttable, of an intent to defraud. It would be a rare case in which a difference of view on that question would affect the outcome. …*

26.6. Blanchard and Wilson JJ expressly recognised that in some rare cases there may be a rebuttable presumption of an intent to defraud.

26.7. In their view, it was "plain" that Mr Lightbody had an intent to defraud Regal's recourse to his interest in his house. They relied on the following evidence in so finding:

(a) Mr Lightbody's action in exchanging that interest for an unsecured debt not repayable for seven years and simultaneously gifting away $27,000 of the debt constituted a disposition at an undervalue.

(b) The debt did not have to be paid for seven years, which was bound to hinder or delay Regal's recourse to Mr Lightbody's only significant asset.

(c) It was highly unlikely Regal would have been able to assign an unsecured debt for value.

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41 *Regal Castings Ltd v Lightbody*, above n 39, at [52].

(d) The transaction was done in circumstances of secrecy in respect of Regal which was a "well-recognised badge of fraudulent intent".[42]

(e) The transaction took place at a time where Capro's ability to trade depended upon Regal's willingness to continue to support Capro.

(f) The transaction "undoubtedly imperilled Regal for the future".[43] If it had known about it, Regal would certainly have declined to continue to be Capro's supplier.

26.8. Having taken into account all of these factors, Blanchard and Wilson JJ turned to consider whether there were any other plausible explanations for Mr Lightbody's actions:

> *[67] It beggars belief that Mr Lightbody acted without any appreciation of the risk being created for Capro by the transfer of the house. We have been unable to think of any plausible reason why someone in the position of the Lightbodys would go to the trouble and expense of setting up a family trust and transferring the house to it other than protection of that asset against the claims of creditors. …*
>
> *[68] … This was not a bona fide family arrangement. It was intended to protect the house against Regal – to hinder or delay its right of recourse to the house – and created an inevitable and significant risk for Regal. Accordingly, the transfer must be characterised as having been made with fraudulent intent in terms of s 60.*

26.9. The alternative explanations as to transfer that Blanchard J looked for needed to be both plausible and legitimate, hence his comment above that "[t]his was not a bona fide family arrangement".

26.10. Tipping J, in his separate judgment, agreed with the conclusion reached by Blanchard and Wilson JJ:[44]

> *[126] … I would draw the inference that Mr Lightbody did intend to defraud creditors in the relevant sense when he gave away his interest in the family home. The following points, in combination, lead me to that conclusion. The property was effectively given away. Both Mr Lightbody and Capro were at the very least in precarious financial circumstances when this was done. If viewed as a sale, the debt representing the purchase price was in practical terms*

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42 At [61], citing *Twyne's Case* (1602) 3 Co Rep 80b at p 81a.

43 At [66].

44 McGrath J also agreed with the conclusion reached by Blanchard and Wilson JJ: At [165]–[167].

> *put out of the reach of creditors for seven years with no convincing explanation for why payment was deferred for such a long time. The whole transaction was done behind the back of Regal, which had a legitimate commercial interest in it, despite Mr Lightbody's guarantee not being secured, and finally Mr Lightbody remained in possession of the asset which was given away. These are all classic "badges" of intent to defraud as Kerr puts it. The present is precisely the kind of transaction that the Statute of Elizabeth and its successors were designed to invalidate.*

26.11. The Supreme Court judges (Elias CJ dissenting) did not take knowledge of the consequences as the sole determinative factor in finding the requisite intent had been proven. Rather, they embarked on a considerable evaluation of the evidence before them, considered whether there were any other plausible and legitimate explanations and, being satisfied there were not, found the transfer must be characterised as one having been made with fraudulent intent.

26.12. It is clear that, in many cases where the disposer has knowledge of the consequences of the disposition on the rights or claims of a person under the PRA, the proof of intention will naturally flow as a consequence (*Horsfall v Potter*).[45] But it is far from clear that knowledge of the consequences accords with an intent to defeat in the relationship property context. Mostly it will, but not always. In some instances, a party may have knowledge of the consequences but, in all the circumstances, have a plausible and legitimate reason for making the disposition (*Ryan v Unkovich*).[46] There may even be cases where a party has a plausible reason for acting as they did without any knowledge of the consequences of the disposition (arguably, *Blake v Blake*).[47]

26.13. In the majority of s 44 cases, where knowledge of the consequences of a disposition is found on the facts, it is unlikely that the other circumstances will displace a finding that the disposer intended to defeat the claim or rights of another party under the Act. However, there are circumstances, particularly in the relationship property context, where there are other plausible and legitimate explanations for disposing of property. These should be taken into account in proving the intention, as they were in *Regal Castings*.

26.14. In the present case, apart from the fact that at the time the sale of Pt Chevalier to the Trust took place Ms Bell did not have any claim or rights under the Act, the following facts should have been taken into account in the s 44(1) to (4) analysis:

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45 *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638.

46 *Ryan v Unkovich,* above n 36.

47 *Blake v Blake* [2021] NZHC 2590, [2021] NZFLR 696.

(a) the transaction was entered into with the knowledge, consent and support of Ms Bell;

(b) there were other reasons for the disposition, not the least of which was Mr Sutton's desire to provide for his children's needs as having priority over the needs of all other beneficiaries;[48]

(c) at the time Mr Sutton could not have had the relevant intention required under s 44(1) because neither he nor any other person would have known that the provisions of s 44(1) would be applied retrospectively to a transaction he was entitled to make at the time;

(d) the sale was at valuation and in exchange for a debt back, which was also a permitted type of transaction under the law at the time; and

(e) the Trustees who received the property also did so in good faith as they were possessed of the knowledge that could be attributed both to Mr Sutton as to the status of the property and also the legal effect of the transaction under the law as it was at the time.

26.15. Against that background, it is submitted that insofar as the Court of Appeal dealt with the issue of requisite intent it failed to do so in accordance with the statute and the legal rights of the parties as they existed at the time. In the circumstances the discussion on s 44(1) was cursory and insufficient.

THE REAL WORLD IMPLICATIONS FOR THIS JUDGMENT

27. New Zealand, like most similar nations, is characterised by relationships between couples which may broadly be described as monogamous. That is to say, couples from all walks of life develop and form exclusive relationships but without, at the date of commencing the relationship, having formed an intent to marry on a particular date, or even less likely, be in a, as legally defined, de facto relationship.

27.1. Given the judgment of the Court below has the effect of voiding transactions under s 44 entered into before there is a qualifying relationship, there is now a positive onus on couples who are not in a qualifying relationship under the Act to enter into s 21 agreements should they wish to protect their property rights. This is on the off chance that a couple may, at some unknown future date, be parties to a qualifying relationship. This proposition tends to run counter to the reasoning of Parliament when s 21 agreements were introduced in 1976, where Parliament recognised there were couples who may wish to take their property affairs outside the statutory regime when married.

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48 Memorandum of Wishes: COA 301.0067.

27.2. The Court's decision has two real and significant consequences:

(a) transactions which people are permitted to engage in on their own behalf with their own property may later be retrospectively set aside; and

(b) to avoid the consequence of such setting aside the parties are required to engage separate lawyers and go through the process of entering into a s 21 agreement, which may never be required.

27.3. The Court's decision also ignores the real world fact that for two parties to obtain a valid s 21 agreement, both are required to engage separate lawyers, who are each required to certify not only that the agreement complies with all provisions of the Act, but that it is fair at the time entered into and will be fair and just for the foreseeable future. These undertakings by lawyers are onerous.

27.4. This decision also requires couples who are not in a qualifying relationship to nonetheless disclose to each other, and their respective lawyers, every agreement they have entered into in respect of their income and property holdings together with a detailed schedule of assets and liabilities. The potential for this process to destroy relationships cannot be underestimated. Further, the reality is there will be a whole segment of society unlikely to be able to afford the costs associated with entering into multiple s 21 agreements which may never, in fact, be required. The entire contracting out process is extremely detailed and very expensive.

27.5. Finally, there is a real sense of artificiality about the Court's decision, in expecting that couples not yet in a de facto relationship will nonetheless know that they are in mutual contemplation of such a relationship with one another. As the numerous Court decisions illustrate, determining the commencement date of a de facto relationship is already a legally complex task and likely one that is foreign to a layperson. Requiring parties to understand the point of time *before* that date, in which their actions taken in respect of their individual property rights may be impugned and in which they will be held to account for failing to obtain a s 21 agreement, is bordering on the farcical. The Court's description of this as a "milestone" adds another layer of complexity and confusion.[49]

CONCLUSION

28. It is submitted that the decision of the Court of Appeal is wrong both in fact and law and ought to be reversed, thus quashing the orders made in the Courts below.

SECTIONS 26 AND 26A

29. The substantial amendments in 2001 creating the now Property (Relationships) Act 1976 included additional provisions in the form

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[49] Judgment under appeal, above n 2, at [72]. COA101.0209.

of four principles. Of the four principles, the third, section 1M(c) provides for:

> *a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship*.[50]

29.1. Other provisions under the Act provide for children's interests to be taken into account. These include occupation and tenancy orders (ss 27 and 28), ancillary furniture orders (s 28), orders under specific provisions of the Child Support Act 1991 (s 32), and importantly for this case, orders providing for the appointment of a lawyer to represent any minor or dependent children (s 37A).

29.2. The 2001 amendments introduced section 26 and section 26A with some commentators noting that these provisions may indicate Parliament moving away from the clean break principle.[51] In giving effect to principle 1M(c), s 26 provides that:

> **26 Orders for benefit of children of marriage, civil union, or de facto relationship**
>
> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.
>
> (2) If the court makes an order under subsection (1), the court may reserve such interest (if any) of either spouse or partner, or of both of them, in the relationship property as the court considers just.
>
> (3) An order under this section may be made and has effect regardless of any agreement under Part 6.

29.3. Section 26A provides for postponement of sharing:

> **26A Postponement of sharing**
>
> (1) On the division of relationship property under this Act, the court may make an order

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50 See the definitions of "child of the marriage", "child of the civil union" and "child of the de facto relationship" in s 2 of the Act.

51 Professor W Atkin *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [18.47].

> postponing the vesting of any share in the relationship property, either wholly or in part, until a specified future date or until the occurrence of a specified event if the court is satisfied that immediate vesting would cause undue hardship for a spouse or partner who is the principal provider of ongoing daily care for 1 or more minor or dependent children of the marriage, civil union, or de facto relationship.
>
> (2) The court may order postponement of vesting under this section only for as long as necessary, and only to the extent necessary, to alleviate the undue hardship.
>
> (3) Nothing in this section limits section 33.

29.4. Sections 26 and 26A have a dual purpose:

(a) firstly, in respect of all proceedings under the Act, to impose a mandatory duty to have regard to the interest of any minor or dependent children; and

(b) secondly, to give the court wide powers including the power to settle relationship property for the benefit of the children of the relationship.

29.5. Section 26A allows the Court to postpone the vesting of some or all of the parties' share in relationship property if immediate vesting would cause "undue hardship" for a spouse or partner with primary responsibility for the care of children.

29.6. Whilst the wording of s 26, namely that the court must simply consider it to be "just", does not restrict the court's discretion to exceptional or special circumstances, a line of case law developed which appeared to endorse a restrictive approach.

29.7. In a paper for the Otago Law Review, Nicola Peart, a respected academic, lamented the conservative approach taken to that date by the Family Court in respect of s 26.[52]

29.8. She argued that the Act is social legislation capable of responding to changing societal values and socio-economic circumstances. Three relevant changes in the past two decades needed to be factored in, namely the unparalleled use of trusts, New Zealand's ratification of the United Nations Convention on the Rights of the Child in 1993 and the global financial crisis. In noting that, in the context of relationship property proceedings, the Convention is rarely mentioned, she called for a revised approach to the property sharing regime based on socio-economic changes.

29.9. In considering the policy reasons behind the approach taken to that

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[52] Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago Law Review 27.

date she stated:[53]

> *The difficulty with these remedies and arguments is that they are raised in relationship property proceedings where the focus is on giving effect to a dominant social policy of equality between parties to a relationship. The interests of other trust beneficiaries, including children of the separated couple are subordinated to the policy of equality between the parties even though both the Property (Relationships) Act and the general law mandate that children's interests should be considered and protected in whatever way is appropriate*.

29.10. The restrictive approach taken to the application of section 26 was rejected in the case of *Babylon.*[54] The High Court had ordered the setting aside of a matrimonial property agreement pursuant to s 44 of the Act. The issue was then, in fashioning any relief, to what extent the interests of children of the marriage should be taken into account. This was in circumstances where the children of the marriage were adults.

29.11. In considering the application of s 26 to relief sought under s 44(2) the Court reviewed the authorities as to the threshold test. The court had particular regard to the more detailed expression of the purpose of the Act appearing in ss 1C and 1M which elevated the subsidiary nature of the children's interest in division of relationship property from the previous provisions.

29.12. In noting that the authorities were at that stage divided on the correct application of s 26 and there being no decisions at that stage from the Court of Appeal, Heath J favoured a more "*sweeping approach"* and rejected the need to show exceptional circumstances. It was held that the enquiry was simply directed as to whether there is a need to provide for the interests of the minor or dependent children. Such an order will not usually be required if the court is satisfied that the parents intend to fulfil their roles responsibly.[55]

29.13. The Law Commission in its recent review of the Act noted that despite various provisions (including section 26) directed to children's interests, these interests are seldom prioritised, generally play a minor role in PRA matters and such orders are rare.[56]

29.14. This is despite the impact of parental separation on children. To this end, the Commission noted:[57]

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53 At 36.

54 *Babylon v Babylon* (2009) 27 FRNZ 622.

55 At [83].

56 Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) [Law Commission Report] at 12.8 and 12.9.

57 Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018) at 7.8.

> *Parental separation can have significant and wide-ranging impact on children. Children may experience new care arrangements. They might be dealing with inter-parental conflict. The family home may be sold as one household splits into two, and children might have to move to a new house, neighbourhood or region. They may lose important connections to family, whanau and friends as well as peer and community support networks, especially if a change of school is required*.

29.15. Furthermore, the Commissioner noted that for some children parental separation is associated with a prolonged period of low living standards.[58]

29.16. The Commission, in proposing a new presumption in favour of temporary or interim occupation or tenancy orders for the benefit of any minor or dependent children of the relationship, also had particular regard for the need for stable housing for children:[59]

> *Occupation and tenancy orders can provide children with stability during the upheaval of parental separation by maintaining continuity of housing, schooling, social and sporting activities while children adjust to new care arrangements. They can also ensure the children's needs for adequate housing are met and provide the primary caregiver with a temporary reprieve in order to plan an orderly transition from one household to two.*
>
> *This proposal responds to submissions highlighting the significance of the family home to children's wellbeing. Barnardos submitted that the family home may be associated with the formation and preservation of the child's identity, as well as being a physical place of safety and belonging. When children have to move following parental separation, they not only lose their place of safety and sanctuary, they may also lose important connections to their friends, peer and community support networks if they are required to move schools or neighbourhoods. Barnardos submitted in favour of the courts routinely assessing, on a case-by-case basis, whether making specific orders concerning the child's family home is appropriate*.

29.17. Having stated their preliminary view that the Act should take a more child-centred approach, the Commission made specific recommendations to reform the law in this area.[60] The preferred option was to elevate children's best interests to a primary

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58 At 7.9.

59 At 7.48 and 7.49.

60 Law Commission *Dividing relationship property – time for change?* (NZLC IP41, 2017) at 29.

consideration. The Commission considered that:[61]

> *This would give children's interests a higher priority and align the PRA more closely with the wording of UNCROC. A Court would be required to give more weight to children's interests when balanced against those of the partners and other third parties*.

29.18. The Commission's findings are echoed in other commentators increasingly linking poor outcomes for children in rental accommodation, as opposed to stable housing.[62]

29.19. These findings contradict Walker J's comments in this case to the effect that security of home ownership is not an essential requirement for family stability, many families in New Zealand live in rental accommodation and moving home is a part of family life.[63]

INTERRELATIONSHIP BETWEEN SS 26 AND 26A AND REMEDIAL PROVISIONS

30. Nicola Peart has specifically considered the applicability of s 26 to the remedial provisions of s 44. She writes:

> *Section 44(2) gives the court a range of possible orders to remedy an offending disposition. The order can be made in favour of the applicant spouse or partner or such other person(s) as the court directs. The court could make an order in favour of children of the relationship. The order may also relate to only part of the disposition or to the value of the property rather than the property itself. There is therefore ample scope in s 44 to take account of the interests of children, both in relation to determining whether to set aside the disposition and how to remedy any adverse effect of the disposition. Yet the case law to date reveals little acknowledgement of children's interests when applying s 44. The relationship property rights of the applicant spouse or partner seem to dominate at the expense of any interest that the children might have in the trust.*

30.1. This passage was referred to by Walker J in granting leave to appeal.[64]

30.2. Section 44(2) and (3) provide the Court with an unfettered and wide remedial discretion. Section 44(3) provides that, for the purposes of

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61 At 29.11.

62 See, for example, *Renting has a negative impact on children - study [1 News]* TVNZ; Auckland Council *Renting in Auckland: The current rental situation* (April 2021); Alan Johnson "PART FOUR: Housing market changes and their impact on children" in *Our Children, our choice: priorities for policy* (Child Poverty Action Group, June 2014) at 71; and Richard K Green "Do kids of Homeowners Do Better Than Kids of Renters?" (2013) 15 Cityscape: A Journal of Policy Development and Research 283.

63 High Court Judgment, above n 6, at [124]. COA101.0169. See also *Sutton v Bell* [2020] NZHC 2014 [Leave Judgment] at [20]. COA101.0179.

64 High Court Judgment, above n 6, at [39]. COA101.0183.

giving effect to any order under subsection (2), the Court may make such further order as it thinks fit. Section 25, which provides for when the Court may make orders, is also applicable. Section 25(3) provides that the Court may, at any time, make any order or declaration related to the status, ownership, vesting, or possession of any specific property as it considers just. Section 33 provides ancillary powers to the Court which enable it to make all such other orders and give such directions as may be necessary or expedient to give effect or better effect to any order made under any of the provisions of ss 25 to 32.

30.3. If the Court finds the requirements of s 44(1) to (4) are satisfied, the appellants submit that the Court of Appeal was wrong to reject the remedial relief sought by the appellants pursuant to ss 26 and 26A. It is just in the circumstances of this case for each party to be entitled to a charge over the property to the extent of their initial cash contribution and to postpone vesting until their youngest child, Amy, reaches the age of 18 in February 2027. This would allow the trustees the opportunity to acquire Ms Bell's share and thus preserve the Trust for the children during their minority.

30.4. This remedy, which has been considered in previous decisions, was disregarded by the High Court and Court of Appeal in the present case. For example, in *Lu v Huang,*[65] in which 'ringfencing' was allowed, the court stated:[66]

> *It is consistent with the various provisions of s 44 (and ss 25(3) and 33(1)) that where there are competing claims to the property, those claims should be determined in accordance with the equities of the whole situation* …

APPLICATION TO THE FACTS OF THIS CASE

31. At the forefront of this appeal are the parties' two children. [Redacted].

31.1. In the memorandum of wishes[67] prepared at the time the Trust was settled in 2004, Mr Sutton made it clear that his childrens' needs were to have priority over all other beneficiaries needs. The children are the only final beneficiaries of the Trust.

31.2. In accordance with the Trustees' obligations to the children beneficiaries, Mr Sutton paid all of the outgoings, and child support

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65 *Lu v Huang* [2016] NZHC 2311. See also *Thaller v Trotter* [2016[NZHC 1508 where the court considered whether it could proportion the increase in value between the trustees on the one hand and the party on the other. Ultimately it declined to do so on the facts. In *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71 at [89], Wylie J noted that under s 44(2) where improvements have been made to property disposed of by the transferee, the Court should consider whether it is appropriate to allow that person credit prior to making orders as to payment into court.

66 *Lu v Huang,* above n 66, at [216].

67 Memorandum of wishes: COA301.0067.

at the maximum level during Ms Bell's occupation of the Pt Chevalier property.[68] [Redacted].

31.3. [Redacted].

31.4. Regrettably, however, there was no reference at all to the interests of the children in the second Family Court decision.[69] The omission of reference to a mandatory consideration was an error of law, yet Judge Druce's approach was wrongly endorsed in the High Court and then upheld by the Court of Appeal.

31.5. [Redacted].

31.6. [Redacted].

31.7. The orders made by the Court of Appeal will see the property sold. The increase in value of the property since this matter was first before the Family Court in 2018 make that inevitable.[70] In that event, the children will lose their family home and will need to relocate which will not be in the vicinity of their familiar environment and/or close to the children's present schooling. [Redacted]. The Trustees will have no ability to provide for the children's needs as discretionary beneficiaries through income or assets. Their interests as final beneficiaries of the Trust will be removed. They will lose their legacy. The losses to the children are serious and permanent.

31.8. The appellants sought to rely on the mandatory provision contained within s 26 and the operation of s 26A in terms of the Court's exercise of the remedial provisions under s 44.

31.9. The Court of Appeal's peremptory rejection of these arguments appeared to be based solely on their assessment that there was no particular evidence on the likelihood of the need for the sale of the home, or, indeed on the issue of "undue hardship" under those provisions more generally.[71]

31.10. The Court of Appeal similarly rejected Mr Sutton's arguments in respect of the court's failure to exercise its remedial discretion, again on the ground that there was no evidential basis to do so.[72]

31.11. But those contentions were wrong.

31.12. There was ample evidence before the Court of Mr Sutton's financial impecuniosity. Mr Sutton was, at all times, an employee with no other recourse to income or assets.[73] His financial position had worsened over the course of the proceedings as a result of [redacted] and the COVID-19 pandemic.[74] The difficulties in Mr

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68 See COA201.0146 at [19] and [25].

69 [Redacted].

70 The current CV for the property as at 1 June 2021 is $2,235,000.

71 Judgment under appeal, above n 2, at [107]. COA101.0218.

72 At [110]. COA101.0219.

73 His salary was recorded originally in the range of $110,000 to $120,000. COA101.0032 at [14]. Then reducing to $97,000. COA301.0196 at [12].

74 COA201.0154 at [23] to [28].

Sutton's financial position was noted by the Family Court in declining Ms Bell's application for interim spousal maintenance,[75] and emphasised again by Mr Sutton in his evidence in support of his application to defer implementation of the High Court decision.[76]

31.13. Mr Sutton's evidence was that in the event of the sale of the property neither he nor the Trust would not be in a position to purchase a similar home in Auckland.[77]

31.14. Despite being the applicant in the Family Court proceedings, Ms Bell failed to produce any valuation evidence as to the then market value of the Point Chevalier property. As a result, the Court received Mr Sutton's production of a RV and desktop valuation which provided an accepted valuation at $1.45 million.[78] In an alternative to his defence of s 44(1), Mr Sutton sought to be credited with his initial contribution of $209,000. This sum represented, at that stage, a significant proportion of the then equity in the property.[79] In addition he sought to postpone vesting of Ms Bell's share until [redacted] at which stage the loss to the children of their then family home, would have less impact.

31.15. Walker J, in granting leave to appeal, recorded the difficulties in Mr Sutton's position and the impact on the children.[80]

31.16. [Redacted].

31.17. Yet inexplicably, Walker J found that the above factors did not reach the undue hardship threshold required before s 26A was engaged.

31.18. The Court of Appeal was wrong to endorse this restrictive approach.

SECTION 44(4) DISCRETION

32. The second appellant submitted it had received the property in good faith and for valuable consideration. As such the Court was invited to consider a number of factors in exercising its discretion under s 44(4) to provide relief to the appellants. These factors included:

    (a) the interests of the children and, for these particular children (in their particular circumstances), the need for them to preserve their family home.[81]

    (b) that there was no challenge to the fact that the Trust was properly managed with Trust records, minutes, and

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75 In *Bell v Sutton* [2020] NZFC 5114 at [31], Judge Fleming declined Ms Bell's application for interim spousal maintenance noting the length of time since separation, her failure to find employment despite her background in recruiting and that it was *far from clear* that Mr Sutton could meet her monthly claim. COA301.0193.

76 COA201.0207 at [10] to [12].

77 COA201.0161 at [22].

78 COA302.0369. This evidence appeared to have been overlooked by Walker J.

79 The home was valued at $1.45 million, with a mortgage debt of $552,996.62.

80 Leave judgment, above n 64, at [8] to [12]. COA101.0177.

81 [Redacted].

resolutions. Ms Bell was not only aware of the Trust plan but actively supported and indeed instigated it.[82]

(c) that Mr Sutton's own relationship property interests had been retrospectively prejudiced by the unwinding of the Trust.[83]

(d) that Ms Bell had actively concealed evidence.

(e) that Ms Bell's financial position has come about because of her unexplained refusal to find employment to support herself.[84] [Redacted]. It has also meant she has maintained a grant of legal aid.

(f) that delay has prejudiced the Appellants. The High Court accepted that much of the delay between separation and hearing arose from Ms Bell's application to apply for orders out of time.[85] Furthermore had Ms Bell produced the relevant emails at the hearing before Judge Clarkson in 2018 the delay between that hearing and this appeal would have been significantly reduced.

32.1 Yet the Court of Appeal recorded the appellants as seeking that the Court should exercise its discretion to ringfence Mr Sutton's initial contribution and postpone vesting, focussing only on the effect on the children were the house to be sold and Ms Bell's knowledge of the impact of transferring Pt Chevalier to Trust. Both were given no weight.[86] While the Court referred to the critical February 2004 email, it appeared to exonerate Ms Bell of having actively misled the Family Court,[87] finding that although she was in effect "*agreeing to contract out"*, she did not then receive legal advice and sign a s 21 agreement.[88]

32.2 The Court similarly rejected the Appellants' case that Ms Bell had concealed evidence, deferring to the finding in the High Court that there were "*alternative explanations*".[89] That finding was not however consistent with the accepted evidence, this being extensively canvassed at the hearing before Fitzgerald J.[90] Furthermore this was contrary to public policy. Ms Bell failed to comply with either an order for discovery or a notice to produce, despite the well accepted onus on a spouse in relationship property

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82 High Court Judgment, above n 6, at [100(e) and (f)]. COA101.0162. The Court of Appeal's own finding was that, with Ms Bell's apparent blessing, Mr Sutton did not make the disposition maliciously. See Judgment under appeal, above n 2, at [98]. COA101.0216.

83 Second Family Court Judgment, above n 4, at [80]. COA101.0050.

84 Leave judgment, above n 64, at [15]. COA 101.0178.

85 At [31]. COA101.0181.

86 Judgment under appeal, above n 2, at [108]. COA 101.0218.

87 High Court judgment, above n 6, at [73], where Ms Bell's lack of credibility on this issue was noted by Walker J. COA 101.0153.

88 Judgment under appeal, above n 2, at [97]. COA 101.0215.

89 At [109]. COA101.0218.

90 High Court decision allowing new evidence: *Sutton v Bell* [2020] NZHC 327. COA101.0115.

proceedings to provide disclosure.[91] Walker J later noted that in support of the application for leave to appeal one of the unusual features of this case included "*the prospect that Ms Bell may have been responsible for concealment of the new evidence and the inability to resolve this question on appeal".*[92]

32.3 Having sought relief on the basis of the many factors outlined above, the appellants went further. They invited the court at first instance to refuse entirely to make an order in favour of Ms Bell taking into account the equities of the whole situation but most importantly the devastating impact on the children of the Trust assets being lost to them.

CONCLUSION

33 Yet in the end, after years of litigation, no relief at all was granted and the children are left facing homelessness. That is contrary to both the terms and purpose of s 26.

Dated at Auckland this 3rd day of June 2022

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J Billington QC / Lynda Kearns QC
Counsel for the Appellants

91 *Dixon v Kingsley* [2015] NZHC 2044, [2015] NZFLR 1012. See also *Biggs v Biggs* [2020] NZCA 231.

92 Leave decision, above n 64, at [33(f)]. COA101.0182.

APPENDIX: Chronology

Date	Event
17 July 2003	Parties meet.
February / March 2004	Ms Bell moves into Mr Sutton's home which is shared with other flatmates.
September 2004	Parties attend Auckland Home Show and win a prize of attendance at Hoffmann Law.
24 September 2004	Meeting with James Shearer regarding establishment of Trust.
9 November 2004	Todd Sutton Trust settled.
29 November 2004	Pt Chevalier home sold to Todd Sutton Trust.
29 November 2004	Mr Sutton signs memorandum of wishes.
December/ January 2005	Parties go on holiday, conceive first child, and request remaining flatmate to leave.
17 September 2005	First child born.
26 February 2009	Second child born.
1 September 2012	Parties separate.
3 April 2017	[Redacted].
24 July 2017	Ms Bell files application for leave to bring relationship property proceedings out of time.
4 December 2017	[Redacted] and discharge of Ms Bell's occupation order.
9 January 2018	Ms Bell vacates Trust property removing all chattels including Mr Sutton's computer and bank statements.
29 July 2018	First Family Court decision. Judge Clarkson determines de facto relationship commenced February/March 2004, separation occurred on 1 September 2012; and grants Ms Bell leave to appeal out of time.
17 July 2019	Second Family Court decision. Judge Druce grants Ms Bell's s 44 claim. Relationship property orders made and ss 18B and 18C orders made. Both parties appeal.

28 February 2020	Fitzgerald J grants leave to bring appeal out of time and introduce new evidence.
3 July 2020	High Court Judgment. Walker J upholds appeal in respect of first decision, declines appeal in respect of second decision and cross appeal.
11 August 2020	Leave Judgment: Walker J grants leave to bring second appeal.
2 December 2021	Judgment under appeal. Court of Appeal dismisses appeal and upholds lower court orders.
14 April 2022	Leave to appeal to Supreme Court granted.
2 August 2022	Supreme Court hearing.