Unequal Sharing of Relationship Property

Is it "repugnant to justice" to divide your property equally?

The general rule in New Zealand is that on separation, relationship property is shared equally. One of the key principles of the Property (Relationships) Act is that all forms of contribution to the relationship are treated as equal. There are a few key exceptions. Under section 13 of the Property (Relationships) Act ("the PRA"), if the Court considers that there are extraordinary circumstances that make equal sharing of property repugnant to justice, the share of each spouse or partner in that property is to be determined in accordance with the contribution of each spouse to the marriage or of each de facto partner to the de facto relationship.

"Extraordinary circumstances" and "repugnant to justice": When do those words apply?

Martin v Martin [1979] 1 NZLR 97 (CA) has been a leading case as to the way the legal principles in section 13 of the PRA work. In that case, the Court of Appeal said *"extraordinary circumstances imposes a stringent test, particularly when it is recognised that such matters as the provision of the matrimonial home by one spouse or by gift to that spouse are not in themselves extraordinary circumstances. Moreover, it is repugnancy to justice giving full weight to the scheme and objectives of the legislation that must be established…the legislature intended to impose a rigorous test allowing very limited scope for unequal sharing of the matrimonial home and the family chattels…"* [1]

14 years later the Court of Appeal in *Joseph v Johanson* (1993) 10 FRNZ 302, Richardson J held that *"in determining whether the circumstances are truly extraordinary… that is not to make an assessment against some kind of marriage norm, but rather to consider whether tested against the whole range of marriages the particular circumstances are to be characterised as extraordinary… It is not extraordinary for one spouse to provide the family home and family chattels or for there to be substantial disproportion in financial contributions… In considering whether the circumstances are extraordinary it is also crucial not to devalue the intangible benefits of love, friendship, companionship, loyalty and support which may be of overwhelming importance. And full weight must be given to the diversity of marriages and the great range of circumstances within marriages. But in extreme conditions various features of a particular marriage may constitute extraordinary circumstances."* [2] *Richardson J also observed that the cases where the circumstances of the marriages can fairly be characterised as extraordinary are likely to be "few and far between"*.

Kidd v Russell

Kidd v Russell [2018] NZHC 3032 is a recent High Court case which deals with section 13. Ms Russell and Mr Kidd separated after 6 years of de facto relationship. The Family Court held that equal sharing of the relationship property would be repugnant to justice or completely unfair pursuant to section 13 of the PRA. The High Court dismissed Mr Kidd's appeal and held that the Family Court Judge made no error in reaching Her Honour's decision.

In *Kidd v Russell*, Ms Russell had owned a home in Waitara ("the Waitara home") well before the beginning of the parties' relationship. The Waitara home was purchased by Ms Russell at $200,000 and the Court acknowledged that Ms Russell's parents' cash contribution towards the purchase of the Waitara home of $50,000 was a loan not a gift. The nature of the advance was well documented by the solicitor acting for Ms Russell at the time of the purchase. Mr Kidd moved into the Waitara home in November 2010. Throughout the relationship Ms Russell and Mr Kidd lived in the Waitara home. They separated about six years later in 2016. The Waitara home was clearly the family home pursuant to the PRA.

In the Family Court, the Judge analysed the facts and held the combination of factors led her to the conclusion that the relationship was extraordinary. The Judge in the Family Court considered equal sharing of the relationship property would be repugnant to justice or completely unfair and ordered the 70:30 division of the net proceeds of sale of the Waitara home after repayment of $50,000 to Ms Russell's parents. Ms Russell was to receive the 70% of the net proceeds and Mr Kidd was to receive the 30% of the net proceeds of sale.

Justice Grice heard the appeal in the High Court and found that the Judge in the Family Court made no error in reaching her decision that there should be unequal sharing in favour of Ms Russell. The Family Court Judge's analysis of the facts included that:

- The relationship was approximately 5 years 10 months duration. (A marriage of less than three years is considered to be a *"marriage of short duration"* under the PRA where the equal sharing presumption does not apply.)
- They have both been previously married and were middle aged when they entered the relationship. Ms Russell was 48 and Mr Kidd almost 50.
- There were no children of the relationship.
- Ms Russell had owned the family home prior to the relationship commencement with an equity of $151,000.
- The equity represented the fruits of Ms Russell's life endeavours.
- Her employment during the relationship was low income. Mr Kidd earned considerably more.
- Mr Kidd was convicted of fraud and was paying reparation.
- Mr Kidd bought his tools, some furniture and a motor vehicle to the relationship. These were depreciating assets.
- During their relationship they acquired no relationship property together.
- The house was the security for joint borrowings. Both parties contributed to the outgoings.
- Because of Mr Kidd's income, they were able to borrow from the TSB for motor vehicles and renovations.
- For the first three years of the relationship Mr Kidd lived in the property contributing to the outgoings but otherwise rent free.
- For two years and nine months during the relationship, Ms Russell did not work and was financially supported by Mr Kidd.
- Mr Kidd's income was used for holidays which were relatively modest.
- The relationship lasted for approximately 15% of each party's adult life.

Considering the principles in the Court of Appeal decisions of *Martin v Martin* and *Joseph v Johanson*, the circumstances in *Kidd v Russell* may not appear to be extraordinary. It was not extraordinary that Ms Russell provided the family home and it was not extraordinary that Ms Russell did not work for two years during the relationship. While recognising the test of whether extraordinary circumstances make equal sharing repugnant to justice was a stringently difficult test to overcome, the Family Court Judge in *Kidd v Russell* indicated that *"it was never designed to be an impossible one"*. Justice Grice in High Court commented that the Family Court Judge correctly noted *"whether extraordinary circumstances exist is a factual question. Whether they are repugnant to justice is a value judgment and she posed the question as whether equal sharing of relationship property is completely unfair".* It is interesting to note that the test applied in *Kidd v Russell* was whether equal sharing of relationship property is *"repugnant to justice or completely unfair".*

The phrase *"completely unfair"* was discussed in earlier High Court decisions. In *Bowden v Bowden* [2016] NZHC 1201, Ms Bowden appealed the Family Court decision and one of the grounds for her appeal was that the Family Court failed to appreciate the high statutory threshold as held repeatedly over the years by the Court of Appeal. It was her argument that the Family Court's reliance on a statement by High Court Judge Woolford J in *Venter v Trenberth* [2015] NZHC 545, [2015] NZFLR 571 that the statutory test, posed the question of whether equal sharing of relationship property would be *"completely unfair"* was to reset the threshold at a much lower level than consistently required by the Court of Appeal. Justice Mander in *Bowden v Bowden* disagreed.

Conclusion

The recent High Court approach has been that the question to ask is, whether equal sharing of relationship property would be “repugnant to justice” or “completely unfair”. The statutory test in section 13 was never designed to be an impossible one to overcome. However the section 13 analysis should always be weighed very carefully against the principles of the PRA that “all forms of contribution to the marriage partnership…are treated as equal”. Court rulings that there should be unequal sharing will rarely succeed, but they are not unattainable.

[1] Martin v Martin [1979] 1 NZLR 97 (CA) at 111 (page 8 of Richardson J’s dictum)

[2] Joseph v Johanson (1993) 10 FRNZ 302 (CA) at 307

Article by Catharina Chung, Morgan Coakle | cchung@morgancoakle.co.nz