Case in Brief: Preston v Pre

PRESTON v PRESTON [2020] NZCA 679 | 21 December 2020

By Melt Strydom

Introduction

The recently released Court of Appeal decision in *Preston v Preston* represents the culmination of nearly four years of relationship property litigation, first commenced as proceedings in the Family Court that were subsequently transferred to the High Court, which issued a 235-page judgment. The sole relief granted in the High Court, which came 4 years after separation, was an equalising payment of $15,903 – to be paid by Mrs Preston. Having had most of her claims dismissed, Mrs Preston was also required to pay costs and disbursements of $137,233.

Mrs Preston appealed to the Court of Appeal but was in large part unsuccessful.

President Kós wrote: *this case is everything relationship property litigation should not be*, and counsel during the High Court proceedings observed: *…the matter has eaten its head off*.

Background

Mr Preston, owned a contracting company Eastern Bay Thrusting Ltd (**EBTL**). He settled the Grant Preston Family Trust (**GPFT**) in 2004, with his two children from a previous marriage as final beneficiaries. This was all done three years prior to meeting Mrs Preston in 2007.

In 2005, GPFT purchased a section in The Fairway, Whakatāne and a home on the site was completed in 2007. In November 2008, Mr Preston transferred 99 of his 100 shares in EBTL to GPFT for $160,000. Mr and Mrs Preston began a de facto relationship in 2009 and were married in December 2010.

In 2010, Mr Preston executed a deed adding the following classes of beneficiary to the GPFT: *any wife or widow for the time being of the Settlor* and *any person who is living or has lived with the Settlor of the opposite sex on a domestic basis in such a manner as if they were legally married to each other. although they may not be so married*.

The couple bought a holiday home in Pauanui in 2012 which was settled in the name of GPFT. Mrs Preston settled her own family trust, the Huntbos Family Trust (**HFT**), in 2014. Also in 2014, the holiday home was resettled in the names of both GPFT and HFT as tenants in common in equal shares and the two trusts entered into a property sharing agreement.

The parties separated in September 2015, after five years together. Mrs Preston occupied the Pauanui property and the HFT gave notice in November 2015 that it was exercising its option to purchase the property. In March 2016, the HFT sent a sale and purchase agreement to the GPFT at a purchase price of $315,000, based on a registered valuation. Settlement would have occurred in April 2016. Unfortunately, the parties did not reach agreement on the price.

The relationship property litigation that followed, which included Mr and Mrs Preston as well as their respective trusts, generated three separate proceedings in the High Court, which were all eventually dismissed.

Mrs Preston appealed the judgment and asked the Court of Appeal to determine three issues:

1. Whether the February 2010 deed adding a class of beneficiaries in Mr Preston's trust (GPFT) resulted in a nuptial settlement under section 182 of the Family Proceedings Act 1980 (**FPA**) (which conveys a discretion on the Court to look into relationship property agreements if it deems it necessary), and whether the High Court erred in exercising its discretion under that provision when it declined to award relief to Mrs Preston;

2. Whether the High Court erred in declining to award Mrs Preston a share in the increase in value of Mr Preston's separate property,

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being his one share that he held in EBTL, under section 9A of the Property (Relationships) Act 1976 (**PRA**). Section 9A(2) of the PRA concerns increases in the value to separate property belonging to one spouse, which is attributable to the actions of the other spouse. The relevant increase in value may then itself be treated as relationship property; and

3. Whether the High Court made a mistake in not allowing Mrs Preston's trust (HBT) to purchase the Pauanui property for $337,000.

Decision by the Court of Appeal

Issue 1: The exercise of section 182 FPA discretion

The High Court Judge decided that the February 2010 deed amending the GPFT deed of trust was a nuptial settlement for purposes of section 182 but refused to exercise her discretion.

The Court of Appeal agreed with the High Court, that the February 2010 deed was a nuptial settlement for the purposes of section 182 (following *Clayton v Clayton*[1]). The 2010 deed was an arrangement made in contemplation of marriage, which made some form of continuing provision for Mrs Preston in her capacity as a spouse.

The High Court Judge did not err in exercising her discretion under section 182 to not award relief to Mrs Preston. Section 182 has a relatively modest remit. It is not a mechanism to equalise property interests overall. As the Supreme Court said in *Ward v Ward,*[2] it is *not underpinned by any entitlement to or presumption of equal sharing. The court's task is not to produce the outcome that would have applied if the relationship property had not gone into a trust.*

The original objects of the GPFT (Mr Preston's children) remained the fundamental raison d'être for the GPFT, all the GPFT assets were acquired by Mr Preston well ahead of the relationship, were vested in the GPFT by Mr Preston before the *de facto* relationship with Mrs Preston began, and were not contributed by, or to, her. It was therefore a case altogether unlike *Ward* or *Clayton* where relationship property shifted after marriage into a trust. Mr Preston gained no unfair benefit here.

1 *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590 at [33] – [34] made it clear that discretionary family trusts that created mere expectations on the part of the discretionary beneficiaries can be nuptial settlements for section 182 purposes.
2 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [30].

Issue 2: The exercise of section 9A PRA

The separate property in question was Mr Preston's one share in his company, EBTL. The Court of Appeal concluded that the gross increase in value of that during the relationship was so small it didn't warrant appellate re-examination and the High Court was correct in dismissing the claim.

Issue 3: The Pauanui property

The property sharing agreement provided a pre-emptive buy-out right. It was not in dispute that HFT exercised that right in November 2015.

The Court of Appeal found that the High Court made an error in concluding there had been no breach of the property sharing agreement. HFT, having triggered the right to purchase the property in November 2015, was therefore entitled to purchase the property at the price agreed (or should have been agreed) of $337,000, which was its value in 2016 when the transaction should have been settled. It was now valued at $477,500. The HFT was entitled to complete the purchase of the property at Pauanui at a price of $337,000,

Conclusion

This case is a salutary example of how litigation may not provide the fastest or best outcome for all parties in such disputes.

About the author

Melt is a South African barrister and legal advisor with NZDRC's Knowledge Management team. A qualified arbitrator, Melt has over 12 years employment law experience in both South Africa and New Zealand and six years as an international contracts advisor for an American publishing company.