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S18B - POST SEPARATION CONTRIBUTIONS/OCCUPATION RENTAL

Upon a relationship separation it is common that parties have joint outgoings. This could include a mortgage loan registered over the family home, hire purchase commitments, credit card commitments and other household obligations. Clearly these obligations have been undertaken by both parties during the course of the marriage or relationship. However upon separation when the communication channels more often than not come to an end the ongoing payment of these commitments become problematic.

Usually one party leaves the family home and undertakes additional costs. That party will incur removal costs, rent, purchase of furniture and household effects because usually the jointly owned items remain in the family home. More often than not the children remain with the party in the family home and there is also a child support assessment. Where there are joint financial commitments of the marriage or relationship together with new expenses undertaken by the other party this all can cause a great deal of stress.

There is no provision in the Property (Relationships) Act 1976 ("the Act") which puts in place a mechanism to deal with this situation on an immediate basis. There is just no black and white mathematical solution to assist parties through the interim period until relationship property issues are resolved.

The Act does give the Family Court a discretion to compensate a party who has done anything that would have been a contribution to the marriage or relationship if it had not ended (S18B). I do wish to emphasise the word "discretion". The Court retains a discretion to deal with each individual circumstances as it sees fit. Therefore it is very difficult to give a party accurate legal advice in terms of how the Judge on the day will apply that discretion. When one party incurs rental costs and also meets the commitments on the family home then there is an above reasonable chance that the Court will exercise its discretion to

compensate that party for meeting the expenses of both households.

S2G of the Act also grants to the Court a discretion to order occupation rental. This covers the situation where both parties capital are tied up in the family home and there is a lengthy period before a relationship property division takes place. Clearly the party in occupation of the family home has had the benefit of possession of the other party's 50% share of the capital. Again we need to reiterate that this is a discretion which the Court will exercise after looking at the circumstances in each individual case. It is not an absolute right that occupation rental will be granted to the non resident party.

His Honour Judge Boshier in *Fischbach v Bonnar* [2002] NZFLR 705 states:

"I do not believe that either party should benefit nor should be prejudiced"

This approach has also been adopted by the High Court in *Monks v Monks* [2006] NZFLR 161.

In essence the Court will use its discretion to ensure an equalisation takes place in respect of both the benefits/and contributions made post separation.

The difficulty however for the lawyer of course in advising clients is that it is not a case of getting out a calculator and working out the answer. At all times it is a discretion left to the Court to carry out an evaluation exercise of the individual case and make a decision accordingly.

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