PUBLICATION PROHIBITED SAVE IN ACCORDANCE WITH SECTION 35A PROPERTY (RELATIONSHIPS) ACT 1976.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-00903

IN THE MATTER OF	the Property (Relationships) Act 1976
BETWEEN	X Appellant
AND	X First Respondent
AND	TRUSTEES OF THE X FAMILY TRUST Second Respondent

Hearing: 30 June 2006

Counsel: A C M Fisher for Auckland Women Lawyers' Association Inc
A E Hinton QC for Appellant
M J Southwick QC for First Respondent
A F Grant for Second Respondent
R F von Keisenberg for Children

Judgment: 4 July 2006

JUDGMENT OF HEATH J

Solicitors:
Davenports Harbour, Albany
Gubb Mitchell Crawshaw, Auckland
Morgan Coakle, Auckland
Counsel:
A C M Fisher, Auckland
A E Hinton QC, Auckland
M J Southwick QC, Auckland
R F von Keisenberg, Auckland
A F Grant, Auckland

The application

[1] The Auckland Women Lawyers' Association Inc (AWLA) seek leave to intervene on an appeal from a judgment of the Family Court in relationship property proceedings involving Mr and Mrs X. Mrs X is the appellant.

[2] Mr X opposes the application. Mrs X abides the decision of the Court, as does Ms von Kaisenberg on behalf of the children. Mr Grant, on behalf of the trustees of the X Family Trust, while abiding the decision of the Court, stressed, on behalf of the trustees, the importance of maintaining the hearing date allocated for the appeal in late July 2006.

Background to the application

[3] On 28 January 2006, Judge Clarkson, in the Family Court at Auckland, delivered judgment in the relationship property proceedings. A substantial amount of property was in issue. The central issue before the Court involved the economic disparity provisions of s15 of the Property (Relationships) Act 1976 (the Act).

[4] Section 15 of the Act provides:

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage, civil union or de facto relationship ends, the income and living standards of 1 spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects of the division of functions within the marriage, civil union or de facto relationship while the parties were living together.
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> (2) In determining whether or not to make an order under this section, the Court may have regard to—
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> > (a) the likely earning capacity of each spouse or partner:
> >
> > (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:

(c) any other relevant circumstances.

(3) If this section applies, the Court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

[5] The experienced Family Court Judge described the evidence on the economic disparity issue as “the most extensive and sophisticated” that had been adduced before her.

[6] Judge Clarkson took the view that, for the purpose of s15(1) of the Act, Mrs X had failed to establish a significant disparity in the standard of living likely to be enjoyed by each of the parties post separation. Thus, Her Honour found that a jurisdictional precondition to the making of an order under s15 had not been established.

[7] Alternatively, the Judge held that any significant disparity that might have existed was not caused by the division of functions within the marriage, holding that Mrs X made a conscious choice not to re-enter the workforce or to seek additional qualifications while the marriage subsisted. Judge Clarkson said:

> [147] … It has to be shown that the major cause for her not [re-entering the workforce or seeking qualifications] was the division of functions within the marriage. I am not satisfied that, by the time of separation, this was the case. It seems to be that some years prior to separation, for example when the youngest child was well settled into full-time schooling, the wife could have re-entered the workforce or re-training on a part-time basis. That she chose not to do so is not a matter for adverse comment but is significant in establishing a causal nexus, as one is required to do in terms of s15. I firmly reject the submission that because a state of affairs is such that it must necessarily be regarded as causative of any disadvantage or that it cannot be further examined without detracting from the purposes of s15.

[8] One of the points to be aired on appeal is whether the Judge was right to hold that it was necessary to embark upon an inquiry into the reasons for the respective roles undertaken by each spouse at the time of separation.

[9] The appeal is scheduled for hearing in this Court on 26 and 27 July 2006. Although counsel for Mrs X sought a hearing before a Full Court, that request was declined by Winkelmann J on 11 April 2006. Her Honour said:

> [6] The next matter which was the subject of some contention in this conference was whether or not a Full Court is required to deal with this appeal. In support of a request that there be a Full Court, Miss Crawshaw for the appellant says that the proceeding has been one of some public interest in that it has been the subject of media coverage. She also says that it is the most significant s15 case that has been before the Courts and that other s15 matters have been previously dealt with by a Full Court. However, I am not satisfied that these matters justify a Full Court. It was not submitted to me that the appeal raises any novel points. Nor is it the case that it will result in a final disposition of the matters at issue. There being a right of appeal (with leave) to the Court of Appeal I therefore direct that the appeal be heard in the usual course and before a single High Court Judge.

The proposals for intervention

[10] There are two issues on which AWLA seeks to be heard:

a) Was the Family Court correct to inquire into the reasons for economic disparity?

b) If the Family Court were right to hold that an inquiry into the reasons for disparity was required, what factors are relevant to that inquiry?

[11] Part of AWLA's constitutional mandate is to work for "the reform of the law and the administration of the law as it affects women and children". Ms Fisher reminded me that AWLA had, previously, been given intervener status on important issues involving relationship property litigation: eg *Z v Z (No. 2)* [1997] 2 NZLR 258 (CA). Ms Fisher's position was that no duplication of effort would result at hearing because submissions to be made on behalf of AWLA were to be made independently of the parties and would provide a different perspective for the Court to consider when making its decision on the interpretation of s15.

[12] In addition, Ms Fisher emphasised that economic disparity issues are of general public importance. She submitted that the particular issue raised in this case had not yet been determined at appellate level and that this appeal provided an

opportunity for this Court to articulate the correct approach to be taken in future economic disparity cases.

[13] AWLA has fashioned conditions on which it proposes to make submissions at the hearing of the appeal. Those conditions appear to have been based on those set out in a judgment of Master Beaudoin in *Canadian Blood Services v Freeman* (Superior Court of Ontario, 02-CV-20980, 4 November 2004).

[14] AWLA does not seek to have any evidence released to it. It does not intend to make submissions on the application of s15 to the facts of the case. To the extent it is necessary to refer to the exercise of the Court's discretion under s15, AWLA intends to confine its factual references to those set out in the Family Court judgment. It proposes to take all reasonable steps to ensure its submissions do not duplicate submissions made by existing parties. Finally, it seeks only a limited role: at the hearing; no objection is taken to a restriction being placed on the time during which its counsel would address the Court orally, a period of 30 minutes having been suggested.

[15] Ms Southwick QC, on behalf of Mr X, opposes the application. In an affidavit in opposition to the application Mr X identified the following concerns:

a) The intervention of an interest group into proceedings of an essentially personal nature to him.

b) The potential for significant delay if intervention were permitted.

c) The additional cost to Mr X likely to be imposed by the need to respond to AWLA submissions which, having regard to the conditions sought to be imposed, will be in addition to those made to be in support of the appeal.

d) A perception that AWLA, as a "women's organisation" seek to promote the cause of Mrs X to his detriment.

[16] The last point made by Mr X indicates his view that the proposed intervener may not be impartial. To meet that concern, Ms Fisher emphasised that, despite the way in which its mandate is expressed, the concerns of AWLA in fact reflected the position of primary caregivers, whether male or female.

[17] For my part, I accept AWLA's proposed intervention reflects a genuine view, held by its membership, that the issues are of importance to those to whom its mandate extends. Nevertheless, I recognise and understand Mr X's perception. On any view, the submissions AWLA proposes to make at the hearing could only support the position to be taken by Mrs X on appeal.

Applicable principles

[18] There is an undoubted jurisdiction for this Court to grant leave for an interested party to intervene in proceedings before the Court. Exercise of the jurisdiction enables the Court to obtain assistance from a non party in order to improve the quality of information available to the Court on wider issues than the parties may wish to address. In granting intervener status, the Court must endeavour to ensure that the parties will not be prejudiced by the intervention.

[19] Generally speaking, leave to intervene will be granted more readily in the Court of Appeal and the Supreme Court, though there are cases involving interveners in this Court: eg *Zaoui v Attorney-General*, High Court Auckland, CIV 2003-404-5872, 28 November 2003, Williams J) and *Hosking v Runting* (High Court, Auckland, CP527/02, 11 February 2003, Randerson J). In *Zaoui* the Human Rights Commission was granted leave to intervene on issues involving the jurisdiction of the Inspector-General of Intelligence and Security. In *Hosking*, ACP Media Ltd and the Commonwealth Press Union were granted leave in a case raising the possibility of a tort of invasion of privacy.

[20] Cases in which leave to intervene has been granted in the Court of Appeal include *Drew v Attorney-General* [2001] 2 NZLR 428 (the New Zealand Council for Civil Liberties in a case involving judicial review of orders made in prison disciplinary proceedings), *Hosking v Runting* [2005] 1 NZLR 1 (the Commissioner

for Children, the Commonwealth Press Union (NZ) and ACP Media Ltd, on an appeal from Randerson J's substantive judgment), *Lai v* Chamberlains [2005] 3 NZLR 921 (the New Zealand Law Society and the New Zealand Bar Association, in an appeal dealing with barristerial immunity) and Z *v Z (No. 2)* itself.

[21] In *Z v Z* leave to intervene was granted, though as *amici curiae,* to AWLA, Families Apart Require Equality Inc and Fathers' Rights and Equality Exchange. In addition, the Solicitor-General was appointed as *amicus curiae.*

[22] In the Supreme Court, leave to intervene has been granted in favour of the New Zealand Council of Trade Unions and Business New Zealand in an appeal raising issues about the interpretation of s6 of the Employment Relations Act 2000: *Bryson v Three Foot Six Ltd* (SC, CIV24/04, 14 and 16 March 2005, Blanchard J). In addition, both the New Zealand Law Society and the New Zealand Bar Association retained their status as interveners on the *Lai v Chamberlains* appeal to the Supreme Court, on which judgment is yet to be delivered.

[23] An example of a case in which leave to intervene was refused is *D v C [Intervention]* (2001) 15 PRNZ 474 (CA). In that case AWLA sought to intervene and make submissions at the hearing of an appeal on a question of law under s120(4) of the Child Support Act 1991.

[24] In declining leave, Gault J, delivering the judgment of the Court said, at 475-476:

> [4] Although not in affidavit form as suggested in *Drew v A-G* (2001) 15 PRNZ 1, the written submissions prepared by Ms Duffy QC supported by her oral argument conveyed how the applicant Association considers the Court may be assisted by submissions presented on its behalf. No attempt has been made to disguise the fact that the Association seeks to support the principle identified in the judgment under appeal. Support for a proportionality principle rests on what is said to be the reality that women are still the greater proportion of custodial parents and have disproportionately lower income. Accordingly, the principle is seen to advance the position of women and consequently of children in their custody.
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> [5] The written submissions outline how that viewpoint will be advanced before the Court as follows:

> "The AWLA can draw the Court's attention to the wider social ramifications of the issue on appeal, the issues which underlie it and the impact these have on all women and children, whereas the parties are likely to bring a more restricted focus to the appeal. Its role as *amicus* would be of benefit to the public.
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> "The AWLA could provide the Court with an insight into the social aspects of child support and how child support issues are dealt with in other jurisdictions. It is in a unique position to be able to provide the Court with an overview on the international recognition given to preserving children's material quality of life, wherever that is possible, through the imposition of legal obligations to pay child support. How other jurisdictions cope with the disparity of income of separated parents and the impact this can have on child support would assist the Court in determining whether or not the adoption of a principle of proportionality is, in principle, consistent with the provision of child support under the New Zealand legislation."

> [6] We were referred to two previous instances in which the Auckland Women Lawyers' Association was accorded the opportunity of making submissions to this Court. They were in *Ruka v DSW* [1997] 1 NZLR 154; (1996) 14 FRNZ 622; [1996] NZFLR 913 and *Z v Z (No 2)* [1997] 2 NZLR 258; (1996) 15 FRNZ 88; (1997) NZFLR 241.
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> [7] There is no suggestion that on the argument of the appeal the arguments on each side of the question of law stated will not be fully and competently advanced by counsel for the respective parties. The case involves essentially issues of statutory interpretation and is unlikely to lead to broad questions of policy of the kind raised in the two previous decisions in which the Association was given leave to make submissions.
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> [8] Accordingly, we have not been convinced of the need to expand representation before the Court in this matter and we consider that any points which the Association may wish to advance before the Court can be presented through counsel for the respondent.
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> [9] There is a further point of concern arising from the gender emphasis in the proposed intervention. It is that the Court would (as it did in Z v Z) then have a concern to ensure a balance and a perception of fairness to the appellant. That would necessitate consideration of the appointment of *amicus curiae* to rectify any perceived imbalance. The case does not warrant that additional complexity.

[25] The various cases in which intervener status has been granted can all be seen as ones where development of the law was likely. The proposed interveners each had special expertise to assist the Court on wider public policy issues to which counsel for the parties may not have referred.

[26] The grant of leave, in such cases, recognises the need for the Court to be adequately informed about the consequences of public policy choices available to it,

while acknowledging that the parties may have no private interest in addressing those issues specifically.

[27] In cases where one particular intervener might not have been seen to be impartial by one of the parties, the Courts have taken trouble to appoint either an *amicus curiae* who can make submissions to the Court independently, or at least, to appoint an intervener with a contrary policy perspective. Both *Z v Z (No. 2)* and *Bryson v Three Foot Six Ltd* can be seen as examples of that type of approach.

[28] On that issue, the Court of Appeal's decision in *D v C [Intervention]* is instructive: the grounds on which the Court of Appeal declined leave in that case included the fact that the argument turned partly on the perception that intervention might be perceived as favouring one party (see paras [4] and [9]).

Analysis of completing submissions

[29] The starting point is the role of this Court when exercising appellate jurisdiction from decisions of the Family Court under the Act.

[30] Until the 2001 amendments to the Act, this Court and the Family Court had concurrent jurisdiction in what were then called matrimonial property cases. Relationship property proceedings are now exclusively within the jurisdiction of the Family Court at first instance, subject to any order removing a particular proceeding to this Court.

[31] Therefore, this Court now exercises a first tier appellate function, both reviewing Family Court judgments on an "error-correction" basis and providing guidance to Family Court Judges on the way in which the Act ought to be interpreted.

[32] That change in appellate function means that, on new issues of statutory interpretation, the Family Court is more likely to be applying decisions of this Court than the Court of Appeal or the Supreme Court. That change in the nature of the appellate function could increase the number of appeals on which this Court sits with

more than one Judge or considers whether additional assistance is required, either from *amicus* or an intervener.

[33] On a first tier appeal, both questions of fact and law will ordinarily be canvassed. Indeed, in the present case, it is clear that there are issues of fact in dispute, most significantly whether the extent of economic disparity went beyond that found by the Judge.

[34] Ms Hinton QC, for Mrs X, will be submitting on appeal that the Judge under-estimated the extent of the actual disparity. On the other hand, Ms Southwick, for Mr X, will be submitting that the Judge overstated its extent. Leave has been granted for additional evidence to be given on appeal. In those circumstances, it is conceivable, depending on the view of the facts taken by this Court, that the issue on which AWLA wishes to be heard may not be one with which the Court need deal on appeal.

[35] Once the High Court has given judgment on an appeal under the Act, a disappointed party may appeal, with leave, to the Court of Appeal from which, in appropriate cases, a further appeal may be allowed, with leave of the Supreme Court. If there were concurrent findings of fact in the Courts below, neither the Court of Appeal nor the Supreme Court would be likely to embark upon a consideration of disputed facts.

[36] To date there have been three decisions of the Court of Appeal given in relation to s15. They are *Nation v Nation* [2005] 3 NZLR 46 (CA), *Harrison v Harrison* [2005] 2 NZLR 349 and *M v B* (CA13/05, 22 March 2005). The first of those three judgments was given by a Bench of five Judges.

[37] While it is true that none of those decisions directly addresses the points raised by AWLA, that is the nature of the way in which appellate Courts consider questions of interpretation in new statutes. Often, for good reason, appellate Courts will go no further than is necessary for the purpose of a particular case.

[38] In this particular case the following factors militate against the grant of leave to intervene:

a) Although the submissions raised by AWLA are relevant to the appeal, they may or may not need to be determined once relevant factual findings have been made. There is a risk that parties to the appeal, particularly Mr X, may be put to unnecessary expense in preparing for the appeal by responding to submissions which, ultimately, do not need to be addressed and which have not been specifically raised by the appellant,

b) Like *D v C [Intervention]*, this is a case involving statutory interpretation. While the stated purposes of the Act will, undoubtedly, aid interpretation, broader policy considerations do not arise in this case in the same way they have arisen in others.

c) To the extent to which there is congruence between the positions taken by Mrs X and AWLA, there is no reason why the points raised by AWLA (perhaps after some consultation between counsel) cannot adequately be advanced by Senior Counsel instructed for Mrs X, Ms Hinton QC.

d) In the absence of appointment of *amicus curiae* or the grant of leave to an interest group with counter-veiling interests, the ability for AWLA to present submissions which can only assist Mrs X would, undoubtedly, instil a perception of partiality in Mr X. It is preferable that understandable perceptions of that type be avoided where practicable.

e) In the circumstances of this particular case, the appropriate time to consider whether an *amicus* should be appointed, or leave to intervene granted will be at any second or third tier appeal when the questions of law fall to be determined on the basis of settled factual findings. I

emphasise, for the avoidance of doubt, that I am not encouraging any party to take this proceeding beyond this Court.

Result

[39] The application for leave to intervene is dismissed.

[40] I make no order as to costs. In taking that view, I recognise the genuine concerns of AWLA. However, that organisation will need to bear in mind observations made in *D v C [Intervention]* and in this judgment in determining whether to seek leave to intervene in other cases.

P R Heath J

Delivered at 11.00am on 4 July 2006