IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.236/74

IN THE MATTER OF The Matrimonial Property Act 1963

BETWEEN [redacted] EDWARDS
of Wellington, Sales Manager
Applicant

NO

A N D [redacted] EDWARDS
of [redacted],
Wellington, Married Woman
Respondent

306

Hearing: 1 May 1975

Counsel: G.C. Kent for Applicant
J.A.L. Gibson for Respondent

Judgment: 23/6/75

JUDGMENT OF O'REGAN J.

Cross-applications for orders pursuant to s.5 of the Matrimonial Property Act 1973.

The parties were married on 23 October 1970. Each had been married previously. The wife had a dependant son aged 11 and the husband two daughters aged 17 and 13.

On 17 November 1970, the husband purchased a property situate at and known as Number [redacted], Wellington, for $18,000. He paid for it with $11,800 from his own resources and $6,200 provided by the wife. Contemporaneously with the purchase of the property, he settled it as a joint family home.

The nature of the payment made by the wife is a matter in dispute. The wife now contends that her $6,200 was a contribution by her to the property in dispute. In a

colloquial sense, it was. In my view, however, the transaction was clearly a loan. In essence, it was no different from a loan from a third person. The husband gave her an I.O.U. for the amount and since the original advance, has repaid $700. The I.O.U. has been lost but it was confirmed by Mr Gibson from the Bar that it was given. In her affidavit, the wife, after referring to "$6,200 I put into the property" goes on to say:-

> "He has not made repayments to me for quite some time, the last repayment being, from memory, early 1971."

Such use of the words "repayment" and "repayments" is inconsonant with the $6,200 being a contribution to the purchase price of the property. It is consonant with its payment being a loan. Furthermore, the actual repayment of $700 of it is likewise inconsonant with any understanding between the parties that the $6,200 was a contribution by the wife to the purchase price. In my view, such repayment points to the amount being a loan by the wife to the husband.

The loan, however, was free of interest. Had the husband borrowed the money elsewhere he would have incurred interest charges to the order of 7½% to 8%. Alternatively, had the wife invested the money, it could well have earned her a return of the same order. I think that in making the advance to the husband free of interest, she has made a contribution to the property in dispute to the extent of such interest. Indeed, Mr Kent conceded such to be the case. I do not know at what dates the partial repayments were made and accordingly am not in a position to calculate the actual return that would have been obtained on the money were it invested. I assess, however, that it would have been to the order of $1,850.

The marriage does not appear to have been ever free of difficulties and tensions. The wife had discussed with the husband the question of his elder daughter's living away from the home prior to the marriage and that it was agreed that she should. She says she was of the view from her earlier association with that daughter, that she would be unable to get on with her. The elder daughter did not live permanently in the home but on two occasions during the currency of the marriage she did stay because of her ill-health. The husband agrees that it was never intended that the elder daughter should reside permanently in the home but he anticipated that she would be welcome to stay on temporary visits and entitled to visit. The conduct of the parties is outside the purview of this inquiry and I content myself by saying that the visit of and the temporary stays of the elder daughter, caused friction and upsets in the marriage.

The younger daughter left the matrimonial home in March 1974. It had been arranged that she would stay with her mother for a period of some three weeks after the latter's discharge from hospital after she had undergone surgery. Whilst she was away, the wife put all the husband's belongings in the daughter's room and removed the daughter's possessions from it. The younger daughter did not return to the home.

Relationships between the parties themselves and the wife and the yonger daughter had deteriorated before the latter left the home. Towards the end of 1973, sexual relationships between the parties ceased. About this time, the wife ceased both cooking meals for the husband and doing his laundry. When she took these steps, she handed the younger daughter half of the housekeeping allowance and told her that

thereafter she would be expected to look after her father and herself. The husband subsequently took this division of the housekeeping at its face value and thereafter paid the wife only half the amount previously provided, namely $12.50 instead of $25.00. Assuming $25.00 to have been a proper amount, this seems to have been a reasonable division as the wife had herself and her son to provide for and the husband, himself and his younger daughter. The wife complains that $12.50 was insufficient for the needs of herself and her son and that as a consequence she had to draw on her own resources to supplement it. This could well be so as the purchasing of provisions for two separate groups would, in the nature of things, cost more than purchasing provisions for one group of four people. The wife asserts that the costs to which she was put over and above the allowance were contributions by her money payments. I am not disposed to accept that submission. First, she seems to me to have been the author of her own wrong in the matter and secondly, the amount of or the extent of such contributions (if any) is not established.

From the beginning of the marriage, until - on the husband's evidence, December 1971 - on the wife's evidence, December 1973 - the husband provided $20 p.w. for housekeeping. On one or other of the latter dates it was increased to $25 p.w.. The husband was cross-examined before me and affirmed that the increase was made in December 1971. He was not asked to comment on the wife's evidence to the contrary. The wife did not give evidence before me and accordingly I did not have the opportunity to make any assessment of her credibility other than, of course, the rather ill-defined impression that can be spelt from her affidavits. The husband conveyed to me the impression that he was a man of truth

and - all in all - I accept his evidence that the increase was made in 1971. I think, however, that $25 was an inadequate amount for the needs of four persons and this I say notwithstanding the husband's evidence that he supplemented it on occasions both in cash and in kind. The wife had private means and was in employment for a part of the time and I am satisfied that she herself supplemented the allowance as occasion warranted and I am disposed to think that during the period from December 1971 to the end of 1973, she made contributions in this manner.

The wife deposes that she helped the husband paint the roof of the house in 1971 and that she, herself, later painted the interior of the kitchen, the basement and her son's bedroom, in which she also laid a carpet.

The wife originally sought (inter alia) an order that she be granted exclusive possession of the property. She does not now seek that. She has left the home and has accommodation for herself and her son elsewhere. She now seeks an order for payment to her of her share of the property.

The making of an order in such form in respect of a joint family home was considered by the Court of Appeal in E. v. E. 1971 N.Z.L.R. 859 where North P., at p.880, held that the Court lacked jurisdiction to order the cancellation of the settlement. The learned President said that all that can be done in such a case is to direct payment of the amount assessed as the share of one of the parties and to make it a condition that such party, on receipt of such amount, join with the other in an application to the District Land Registrar requesting cancellation of the certificate of registration. However, that was before the enactment of the Joint Family Homes Amendment Act 1974, s.7 (2) of which provides for the repeal of the old

and the substitution of a new s.11, subs.(2) of which is as follows:-

> "Where the husband and wife on whom property is settled under this Act are both living and have not previously ceased to be the legal and beneficial owners of the property, the property shall, upon the cancellation of the settlement, vest in the husband and wife as tenants in common in equal shares without transfer or conveyance......"

The new s.11 (4) however, so far as it is applicable to this case, provides:-

> "Notwithstanding subsection (2) of this section, if, upon the cancellation of a settlement as to any property, -
>
> (a) The husband and wife on whom the property was settled are both living and have not previously ceased to be the legal and beneficial owners of the property; and
>
> (b) Only the husband or the wife was the settlor of the property; or
>
> (c) ......
>
> (d) A notice of consent in a form prescribed by regulations made under this Act is signed by both the husband and the wife -
>
> the property shall, without transfer or conveyance......revest in the settlor......"

The regulations referred to in s.11 (4) (d) were made on 28 January 1975 (S.R. 1975/12) and the notice of consent referred to is contained in the Second Schedule to such and is labelled "Form 9".

These provisions render it necessary to attach a further condition to an order for a cash payment in

satisfaction of the share of one party in a joint family home, viz., that the payee join with the other in executing a consent in Form 9 to the property revesting in the party who was sole owner prior to the settlement. I propose adopting this course.

I hold that the wife has made "contributions" to the property in dispute by services in the home, first in the full and proper discharge of her duties as a wife from the inception of the marriage until the end of 1973 - on that there was no dispute - and to a much lesser degree thereafter; in the work she did over and above her housekeeping duties and "otherwise" in providing the interest free advance to the husband for the financing of the purchase. I find that she has made no contribution in "money payments".

There was originally a difference in the valuations made by two public valuers but before the hearing, they conferred and agreed that the fair market value of the property and the fitted chattels, "including fitted vinyl, drapes, curtains, venetian blinds, light fittings and underfloor electrical heating, etc.", was $33,000. Making allowance for the loan to the husband of now $5,500, the present equity in the property is $27,500.

I think that the contributions made by the wife warrant my assessing her share of the property to be $4,500. I direct that in return for payment of that amount she execute and deliver to the husband a form of application to the District Land Registrar for cancellation of settlement and a consent to the revesting of the property in Form 9 as set out in the Second Schedle of the Joint Family Homes Regulations 1965 Amendment No.1 (S.R. 1975/12).

The repayment of the balance of the amount she advanced to the husband at the time of his purchase of the property does not, in my opinion, come within the ambit of this case. I take it, however, from what was said during the argument, that such will present no further difficulty.

I order that the husband pay the wife 100 dollars costs and her disbursements (including the valuation fee).

<u>Solicitors for Applicant</u>: Messrs Buddle, Anderson, Kent and Company, Wellington

<u>Solicitors for Respondent</u>: Messrs Stacey, Smith, Gibson and Holmes, Wellington