IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 156/75

No Special Consideration

NO.

149

BETWEEN : [redacted] ELVIN of [redacted]

Applicant

A N D : [redacted] ELVIN of [redacted]

Respondent

Hearing: 25 March 1976

Counsel: Collings for Applicant.
Ludbrook for Respondent

Judgment: 25 March 1976

(ORAL) JUDGMENT OF PERRY, J.

These parties were married for nine years, and after periods of living overseas returned to New Zealand and rented flats or similar premises for a certain period. They eventually purchased their own home at [redacted]. Undoubtedly that purchase was made possible by the fact that the husband had received a legacy which I accept was of one thousand dollars, and he had wisely put that into a section which he purchased on time payment and on which he made subsequent payments. On the purchase of the home in dispute, that was financed by raising a Housing Corporation mortgage and a second mortgage, but the second mortgage was in fact protected to a certain extent by the section which the husband had bought, and the payments from the section which was later sold on time payment were applied in reduction of the second mortgage. I accept the fact that both parties have been extremely hard working and thrifty people.

The present position today is that the husband has not been content merely to draw his [redacted] salary, but for a number of years has undertaken secondary employment as well, and his earnings from that other source have been quite considerable.

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The wife too has done what she could towards the acquisition of this home. As soon as she was able, she took outside employment which naturally had to be more limited than that of the husband because of the ties of the children. At one time she was taking one of the children to work with her. I regard her as a normal thrifty wife who has done everything she could also towards the home.

It is accepted today that the property is worth $21,000 and that the mortgages now stand at $7,300. That figure was higher at the time of the separation in two respects, namely the first mortgage was then $6700 whereas today it is $6100. The second mortgage was then $3200. Today it is $1200. Looking at the figures, one can readily adjust them in respect of the $2000 paid off the second mortgage the amount coming from the section and Mr Ludbrook rightly concedes that that should be done to the husband's credit. He resists any adjustment to the figures in respect of the first mortgage for the reason that the husband remained in occupation for some two years after the separation. For most of that time he had people sharing his living expenses and he does not admit having received any monetary benefit otherwise from them, so he says that that figure should not be reduced, but the mortgages should be taken at a combined figure of $7900.

One other matter is in dispute between the parties, and that is the value of any improvements effected to the property by the husband since the separation. The husband estimates that figure at $3,000 but accepts that he has been unable to support that today, the reason being he said he was lulled into an acceptance of that figure by the failure of the wife in the affidavits filed to challenge that amount. Part of that sum must be considered as maintenance of the property because it was expended in the way of repapering some of the rooms, and although it has been expended it is difficult to treat that as a capital item because it will inevitably need to be replaced.

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On earnings, it would seem that the wife's earnings have been about 6.5% of the total earnings of both parties, and if one looks at financial contributions of course that is at least a figure that the Court must take into account. There is also the fact that she was a good wife for a period of nine years, she brought her children up well and ran a good home. Credit must be given to her for that. With respect to the Court of Appeal, recent decisions have left the law in a rather unsatisfactory state. These decisions stress that the fact that the property has been placed in the joint names is a strong factor to be taken into account, but the decisions do not go to the stage of saying that of itself should represent 50%.

My feeling is that if they had thought that the very fact that it was placed in the joint names should entitle the wife to 50% they would have said so, and I myself would not regard that factor as one automatically entitling the wife to 50%. It is well known that a reason a property is placed in the joint names or created a joint family home is often to give protection in the event of death of the other spouse and often because it is a requirement of the Housing Corporation. Now then, it is true that one cannot judge these matters on a purely arithmetical calculation. There can never be, because the wife's contribution in the way of services can never be assessed mathematically, and the Court of Appeal in other decisions have simply expressed it by way of percentage.

Mr Collings asked me to give the husband credit for $2000 paid off the second mortgage. Mr Ludbrook agrees that that would be proper. That at least gives us a starting point. I have to consider the fact that some improvements have been made to the property in the way of a bar-b-que area but I wonder whether anyone paying for the property, or buying the property, would pay a great deal more for it because of that. It may be that it is one of those things that are nice to have around the

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property but which do not represent a great capital increase. It makes it more attractive but does not necessarily add to its value. I think it is right too that I should remember that the husband has remained in occupation of the property for some two years and the wife has not received any benefit from that except in the way that he has reduced the first mortgage by almost $600. $600 represents the reduction over three years, but for a portion of that time at least he was in sole occupation

Both counsel have reached a figure of $11,700 without taking the question of improvements into account. Mr Collings suggests $1700 should be allowed for that, bringing the figure down to $10,000. He says the wife should receive some 25% to 33% of that but not more than $4000 altogether.

Mr Ludbrook starts with the figure of $11,700 and asks for a division of that into two, leaving a figure of $5850. He asks also for a share of the fund which represents the surplus of income over disbursements while the property has been let. That figure now stands at $750. I think if I take Mr Ludbrook's figure in respect of the property itself as a starting point at $5850 but at the same time recognise the husband's greater contribution to the property I would then fix a figure of $4750 and that is the amount that I would order the husband to pay to the wife.

As regards the fund, I think a rough calculation of that would be say four tenths and that would represent a figure of $300 to the wife and should be added to the figure of $4750. I will leave it to counsel to draw a proper order. I think the husband should be given the opportunity to re-finance the property but with a limited time only. The wife should not be required to stand out on her interest in the property for too long.

While the rents continue to come in, she will be entitled to four tenths of any surplus. As time goes on this will represent

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some return to her on the money she has in the property. I would fix the time as six months as counsel have suggested.

My figure is $4750 plus $300 as at this date, and four tenths of the surplus in the future until the wife receives her money.

As to costs, both parties have succeeded, and as far as the Court is concerned each party has received an order. The husband gets the property, the wife gets the sum. No order for costs.

McParl J

Solicitors for Applicant: McElroy, Duncan & Preddle, AUCKLAND.

Solicitors for Respondent: P.M. Joyce, AUCKLAND.

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