RECEIPT [illegible]

IN THE SUPREME COURT OF NEW ZEALAND
ROTORUA REGISTRY

M. No. 12/73

IN THE MATTER of the Matrimonial Property Act 1963

BETWEEN [redacted] STEWART of Whakatane, Married Woman

Applicant

A N D [redacted] STEWART of 11 Mitirerau Street, Whakatane, Clerk

Respondent

Hearing: 18 October 1977

Judgment: 8 December 1977

Counsel: Cecilie Rushton for Applicant
T.S. Richardson for Respondent

JUDGMENT OF QUILLIAM J.

This is an application brought under the Matrimonial Property Act 1963 and heard under the Matrimonial Property Act 1976. I refer to the parties as the husband and the wife.

The parties were married on 19 December 1949 and there have been three children of the marriage, one of whom is still dependent.

The matrimonial home was built at Ohope in 1952 on a one acre section of land given to the husband by his family. Subsequently he inherited another acre adjoining the matrimonial home and all the land was then used by the family. The parties separated on 23 December 1972 and entered into a written separation agreement on 2 March 1973. The wife's application originally related only to the matrimonial home but after the passing of the new Act this was enlarged to include other matters as well. Counsel have now been able to isolate the three matters remaining in dispute. The first concerns the second acre of land referred to; the second concerns some clothing disposed of by the husband; and the

third concerns the husband's superannuation. I deal with these in turn.

It was agreed that the matrimonial home was erected in 1952 on a one acre piece of land received by the husband as a gift. After the death of the husband's father on 3 April 1958 the adjoining one acre was partitioned out of a family holding of Maori land and transferred to the husband in part settlement of his inheritance from his father. Before any title could issue in respect of either piece of land a partition order of the Maori Land Court was necessary and such an order was made on 9 June 1960. This dealt with both pieces of land together and partitioned them to the husband as a single block of land. Following this a certificate of title was issued showing the total two acres as a single holding. After the separation of the parties the husband sold the land and dwelling for $20,000 and the nett proceeds of sale are now held in an interest-bearing bank account. It is conceded on the husband's behalf that the wife is entitled to one half of so much of the proceeds of sale as relate to the matrimonial home. It is contended, however, that the second acre of land does not form part of the matrimonial home and that such part of the proceeds of sale as relate to that land should be deducted. If this is done then the further question arises as to whether that part of the proceeds is separate property of the husband or is matrimonial property.

The expression "matrimonial home" is defined in s. 2 of the Act as follows:-

> " 'Matrimonial home' -
> (a) Means the dwellinghouse that is used habitually or from time to time by the husband and the wife or either of them as the only or principal family residence, together with any land, buildings, or improvements appurtenant to any such dwellinghouse and used wholly or principally for the purposes of the household; and
> (b) Includes a joint family home: "

The first question therefore is whether the second acre is land appurtenant to the dwellinghouse and used wholly or principally for the purposes of the household. The Shorter Oxford Dictionary gives the principal meanings of appurtenant as, "belonging to a property or right; appurtaining as if by right to; appropriate to". The question of whether the second acre belonged to the first or appurtained to it as if by right is mainly a question of degree. A single acre of land will normally be ample as an appurtenance to a dwelling. The real test, I think, is to be found in the second part of the definition, that is, as to whether it was used wholly or principally for the purposes of the household.

It was argued for the husband that some assistance is derived from the fact that, following the partition of the land, the husband made a status declaration under the provisions of the Maori Affairs Act, the effect of which was to convert the land from Maori land to European land. It was said that but for this s. 6 of the Matrimonial Property Act would have taken the land out of the provisions of that Act and prevented the wife from having any claim in respect of it. I am not sure that the result would have been quite as conclusive as that, but in any event this is not, I think, a matter which can affect the way in which the words of the Matrimonial Property Act should be interpreted. It was also argued that it was possible to draw upon the principles of equity in order to determine what comprises the matrimonial home. It was acknowledged that s. 4 of the Act excludes the principles of equity and that it was not possible to establish an equitable principle outside the scope of the Act. It was contended, however, that it was still possible to apply the principles of equity to the interpretation of the Act itself. In support of this it was said that the definition in s. 2 of "owner" incorporates a recognition that equity may still apply to matters under the Act. That definition is as follows:-

> " 'Owner', in respect of any property, means the person who, apart from this Act, is by virtue of any enactment or rule of common law or equity the beneficial owner of that property; and 'to own' has a corresponding meaning. "

All this means is that the Act has left the definition of "owner" to be determined by reference to principles existing outside the scope of the Act. Section 4 (1) starts with the words "except as otherwise expressly provided in this Act....". The definition of "owner" is an example of something "otherwise expressly provided". The definition of "matrimonial home" is not such a case.

I return to the question of whether the second acre was used wholly or principally for the purposes of the household. It was argued that the fact that the whole of the land, the two acres, was partitioned off together and was then incorporated in one title is an indication that the whole of it was intended to be included in the matrimonial home. I do not think this conclusion can properly be drawn. The two pieces of land were separately conveyed to the husband and I think it is probably no more than a requirement of the District Land Registrar that they should ultimately have been ammalgamated into a single title. I suspect that the same result would have followed if the second piece of land had been 100 acres rather than one acre, and in such event it could certainly not have been said that the total area had to be regarded as the matrimonial home.

More assistance is, however, derived from a consideration of the use to which the second acre was put. I think there is no doubt from a reading of the affidavits that the whole of the land was used as part of the home. This emerges perhaps most clearly from the affidavit of the husband who says that it was not until after the second acre was acquired that there were lawns of any consequence. This must mean that the lawns which are generally associated with the normal domestic activities of a household were not con-

fined to the immediate vicinity of the dwelling but extended for some distance. In the ordinary course one might think that a single acre of land was more than enough for the average household but this does not exclude a family from extending its domestic environs over a larger area. Plainly I think this is what happened here. Certainly there is no suggestion in the evidence that any part of this two acres was used for any purpose other than that of the household. There is no indication of any business or commercial use. There would, of course, need to come a point at which the very magnitude of the area involved meant that it had gone beyond what could be regarded as a use for household purposes but I do not think that could be said here. I accordingly find that the second acre formed part of the matrimonial home.

The second matter in issue concerns some clothing which was left at the matrimonial home after the wife left and which the husband later destroyed. Two main questions arise. The first is as to whether the clothing was matrimonial property and the second concerns the value of what was destroyed and the consequences now of its destruction.

The clothing in question is said by the wife to have involved a substantial quantity of her own winter clothing and also other things belonging to the children. The wife's evidence was that in January 1971 she and the children were thrown out of the house by the husband. They lived in Whakatane for a time and there was then a reconciliation. The final separation took place in December 1972. Shortly after the first parting the daughter S[redacted] went back to the matrimonial home to collect their belongings. The husband told her it was the last chance to take their things because otherwise he would burn them. S[redacted] filled up the car and returned to her mother's flat. Her mother thought the husband's threat was not a serious one and told

her to take the things back as there was no room to store them in the flat. S[redacted] did so and as her father was not there she left them on the verandah with a note asking him to put them in the caravan. It seems he did so and there they remained until after the parties had finally separated at the end of 1972. It was some time later that he cleaned out the caravan. By then the clothing had been there for two years or more and he says it was mildewed and valueless. He therefore burned it. There is a sharp conflict of evidence here which I am really unable to resolve. I have not seen the parties give evidence. I suspect that as is usual in such matters the truth probably lies somewhere between the two versions. It is certainly the case that the husband has been shown on the affidavits to have been less than truthful on a number of matters. On the other hand his account of the clothing having remained in the caravan for a long time and then having been found to be damaged seems to be at least a possibility. If the clothing was of any real value to the wife it is not clear why she found no use for it over a period of years and made no effort to retrieve it.

On behalf of the husband it was argued that clothing is not really something which is contemplated by the Matrimonial Property Act at all, but is more akin to items of maintenance and should be regarded in that way. This does not seem to me to be correct. Having regard to the general scheme of the Act and to the very wide definition in it of "property" I think that clothing must be regarded as included. I think it is probably within the definition of "family chattels" as being chattels which are articles of household or family use or amenity. In the present case, however, I do not think that the matter requires determination. The wife has provided a list of the articles which she says were involved and has made an estimate of $1,000 as the total value of them. This includes a number of things said to have

belonged to the children. In view of the uncertainty surrounding the whole matter and particularly of the fact that the clothing had been allowed to remain unclaimed for a long time, I do not feel able to say, even on a broad basis, that a figure can now be placed on it as representing the wife's loss. If there was any which still had a value and ought not to have been destroyed then I find it hard to accept that the value could have been significant. I am not prepared to make any order in respect of the clothing.

The remaining question relates to the husband's superannuation. He was employed by the Whakatane Board Mills Ltd and was due to retire at the age of 60. He was then employed by New Zealand Forest Products Ltd and an arrangement was made whereby his matured superannuation entitlement was invested in the superannuation scheme of the latter company. It was common ground that the value of his superannuation fund at the date of separation was $5,340 and that this fund was matrimonial property. Since the date of separation the husband has made further contributions totalling $76 and the fund has increased because of the addition of interest. Again two questions arise. The first is the basis upon which the value of the fund should be arrived at and the second is the way in which the fund should be divided.

Section 2 (2) of the Act provides that the value of any property to which an application relates shall, subject to ss. 12 and 21 (which do not apply here), be its value as at the date of hearing unless the Court in its discretion otherwise decides. It was acknowledged for the wife that the husband should have credit for the contributions made by him after the separation. Subject to this, however, there is, I think, no doubt that the fund for division now should be the fund as it existed at the date of hearing, i.e. as augmented by interest. This sum can no doubt be calculated by counsel,

but it will be the total fund as at the date of hearing reduced by the contributions of $76 and by the interest attributable to that sum.

The division of this sum between the parties is governed by s. 15 of the Act. It is to be divided equally unless the contribution of one spouse to the matrimonial partnership is clearly greater than that of the other. It was argued for the husband that his contribution was indeed clearly greater. In this regard it is necessary to consider each of the matters referred to in s. 18.

The first is the care of any child of the marriage. This was a marriage of some 23 years duration. There were three children and the task of caring for them and bringing them up can be assumed to have fallen primarily on the wife. Certainly there is nothing in the evidence to suggest the contrary. The wife's contribution in this regard will therefore have been greater than the husband's.

The second is the management of the household and the performance of household duties. Again I did not understand it to be disputed that the wife's contribution must have been the dominant one. The third is the provision of money including the earning of income. The husband's contribution here was plainly the greater but the wife was in employment at various times for periods totalling nearly half the duration of the marriage. There is a dispute as to the extent to which she paid for household expenses but plainly she made more than a nominal contribution in this way.

The fourth matter is the acquisition or creation of matrimonial property including the payment of money for that purpose. In this regard considerable stress was laid on the husband's behalf on the fact that he had contributed through gifts and inheritance from his family the two acres of land. This was undoubtedly, in the result, a valuable contribution although the actual value of the land at the time was apparently not large. As against this the wife received a gift of £100

from her family, half of which she gave to the husband.

The fifth and sixth matters concern the payment of money and performance of services in respect of the matrimonial property. It seems that both worked hard on the matrimonial home and assisted to improve it. No doubt the husband's earnings provided the main source of payments for the mortgage and other outgoings but the wife certainly seems to have made her contribution. The seventh matter is the foregoing of a higher standard of living than would otherwise have been available. The wife says something to this effect in her affidavits but it does not seem to me to be a major factor. The final consideration in s. 18 seems to have little, if any, application here.

Looking at these matters together, and remembering the provisions of s. 18 (2) that there shall be no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature, it does not seem to me that the contribution of either party is clearly greater than that of the other. There may well be a disparity but I do not think it was a substantial one. I therefore consider the superannuation fund should be divided equally between the parties.

I accordingly summarise my findings as follows:-

1. The second acre of land formed part of the matrimonial home and the total nett proceeds of sale of the property will require to be divided equally between them.

2. I make no order in respect of destroyed clothing.

3. The superannuation fund as it existed at the date of hearing, reduced by $76 and by the interest attributable to that sum, is to be divided between the parties equally.

On the subject of costs I understood it to be agreed that the practice followed in the Auckland and Rotorua

districts of not awarding costs on matrimonial property applications should apply, but it was argued for the wife that she should have her costs on the interim injunction proceedings which have resulted in the proceeds of sale of the matrimonial home being held in a bank account pending the outcome of these proceedings. My own inclination would have been to allow the wife her costs on the substantive proceedings but in any event I think she is entitled to have them on the injunction proceedings. It was said for the husband that those proceedings were never really necessary but I think it was a reasonable action on the wife's part. She will accordingly have her costs of $50 on those proceedings and also the disbursements relating to them.

Solicitors: Urquhart, Roe & Partners, ROTORUA, for Applicant

Osborne, Handley, Gray & Richardson, WHAKATANE, for Respondent