

N.I.L.R.

Special
Consideration

IN THE MATTER of the Matrimonial
Property Act, 1976

A N D

IN THE MATTER of an application

BETWEEN : SYME
(formerly WILSON) of
Blenheim, Married Woman

Appellant

A N D : WILSON of
Blenheim, Retired

Respondent

Hearing: 12 October 1978

Counsel: Mr Macnab for Appellant
Mr Drylie for Respondent.

Judgment: 24 November 1978

JUDGMENT OF PERRY, J.

This is an appeal by the former wife whom I will call "the wife" against a decision of the Magistrate on an application made by the former husband whom I will call "the husband" for various orders pursuant to the provisions of the Matrimonial Property Act 1976. The husband asked the Magistrate

- a) to vest the ownership of the former matrimonial home situated at _____ Street Blenheim in such shares as the Court deemed just
- b) to vest the ownership of the family chattels in such shares as the Court deemed just
- c) to determine what other property held now or previously by either of the parties is or was matrimonial property and to divide such matrimonial property in such shares as the Court deemed just
- d) to direct the payment to the husband in cash of such share as the Court might find him entitled to receive
- e) to make such order or further orders as the Court thinks fit.

The learned Magistrate was requested to decide the matter on the affidavits filed and the written submissions of counsel which had also been filed.

Before setting out the learned Magistrate's decision and the grounds of appeal, I repeat the facts found by the learned Magistrate:

1. The parties were married on the day of April 1939 at Blenheim.
2. Three children were born all of whom are now adult and form no part in these proceedings.
3. That a separation order was made in the Magistrate Court at Blenheim on July 1975
4. On October 1977 a decree nisi was made and a Decree Absolute followed on December 1977 in the Supreme Court at Blenheim.
5. That on December 1977 the defendant married Syme.
6. The applicant is now aged and the defendant is aged years.
7. The applicant retired in 1969 when he was employed by the Marlborough County Council.

The applicant says that at the time of the marriage he was employed by the Marlborough County Council as a blacksmith earning \$32.00 per month. The defendant was not working. They had few assets. The defendant does not contest this. She cannot remember the amount of the wages, but says they were very small. Both parties agree that they had few assets. The applicant says he had \$200 in cash. The defendant says she had \$100 in cash and "a good supply of blankets, linen and similar items."

I find that the parties brought an equal contribution with them to the marriage. They lived in rented accommodation in Blenheim.

I summarise his findings on some further facts, namely that after war service the husband recommenced employment with the Marlborough County Council and continued with the Council on a low wage throughout the whole of his working life. When he retired the husband received the age benefit and a small monthly superannuation from the Council. At the time the application came before the learned Magistrate he was in receipt

of National Superannuation. He now has the tenancy of a pensioner flat in Blenheim.

The wife worked from 1960 until the husband retired. In both cases all their earnings were used for the home their keep and their family. The facts found by the learned Magistrate show that after the purchase and sale of various sections, the parties bought the matrimonial home in Street for \$5200 in May 1956, raising a mortgage of \$3400 which was eventually repaid on the February 1971. The parties continued to reside in this home until the date of the separation order when the wife continued on, the husband leaving the property. It was in the wife's name and she sold it in 1977 for \$29,000 which included \$2500 for chattels but \$20,000 of the purchase money was left on first mortgage. The wife accepted that this property was the matrimonial home and subject to division within the provisions of the Matrimonial Property Act but the shares were in dispute and also the date at which the valuation should be made. The Magistrate found at this stage that the funds of both parties were used to acquire the various properties and to service the mortgages thereon. He said that the matter would have been of a simple nature but for certain exceptional happenings which had occurred.

These exceptional circumstances commenced with the gift to the wife in 1971 by her sister of an Art Union ticket for her birthday. The lottery was drawn in November 1971 and the ticket won the first prize of \$24,000. The Magistrate accepted the wife's account of what she did with these proceeds.

1. She made gifts amounting to \$2900 including a gift of \$1,000 to the husband.
2. She expended approximately \$3,000 on bringing a daughter and the daughters children back from

3. She purchased a house property at _____ in the _____ for \$6,000 and expended approximately \$5,000 on improvements to this property
4. She purchased a boat for \$2,000
5. She purchased a _____ car for \$3500
6. She expended approximately \$5,000 on improvements to the matrimonial home at _____ Street.

The _____ property was thereafter used as a holiday home by both of them. They both worked on it doing painting and maintenance although there was some dispute as to the amount of work done by the husband. Nevertheless, the learned Magistrate found it was used as a family property and that the boat was also used as a family chattel. The boat was eventually sold because they were not capable of looking after it. The _____ motor car was used exclusively by the wife for her own use. The property, the boat and the car, were all purchased in the sole name of the wife. The property was retained for only two years and was sold on the _____ February 1974 for \$18,500. The net proceeds received by the wife amounted to \$17,500. The boat was sold for \$1300. From these proceeds the wife purchased a car for the husband, costing \$750, a ring for herself at \$2,000 and the balance of \$14,000 was used to purchase bonus bonds by the wife in her own name. That _____ remained the position until the date of the separation namely July 1975.

The learned Magistrate held that these assets were all matrimonial property by virtue of provisions of S.8(e) of the Act. In addition the following assets owned by the husband were deemed to be matrimonial property, namely

- a) the motor car given by the wife to the husband costing \$750
- b) his superannuation fund and _____
- c) some cash in the bank.

In addition to this there existed also the matrimonial home and the family chattels. The parties apparently accepted that

the chattels had been divided equally and no order was required in respect of them. Also the husband accepted that the Cortina car was not a family chattel for the purpose of the case. The learned Magistrate therefore ruled that all motor vehicles had been equally divided at the date of separation and formed no further part of the case.

However, another exceptional circumstance arose. On the July 1975, five days after the separation, the investment of the bonus bonds won a further \$15,000 bringing the total to \$29,000. The wife being in possession of the matrimonial home then spent in excess of \$8,000 on it and purchased new furniture. She gave the applicant a washing machine and refrigerator. The learned Magistrate found that the bonus bond gain of \$15,000 was also matrimonial property being caught by S.8(f) of the Act. Although the wife had expended this considerable sum on the Grady Street property she sold it (in September 1977) for \$29,000 which included \$2500 for chattels. The valuation of the property at the date of the separation was \$17,700 but the Government valuation at October 1977 was \$24,700, so that the sale price in September 1977 was after excluding family chattels some \$2,000 in excess of the Government valuation.

The Magistrate then found that the assets of the wife were

1. The proceeds of sale of the matrimonial home consisting of \$9,000 in cash and \$20,000 being the first mortgage over the same. A total of \$29,000
2. Bonus bonds of \$9,500
3. A deposit of \$4,000 with Broadlands
4. Car and furniture and personal effects
5. \$200 in a bank account

He ruled that of these assets the following were matrimonial property

- A. the proceeds of the house including the mortgage (\$29,000 less the chattels which he excluded \$2500) \$26,500

B. Bonus bonds \$9,500

C. Broadlands deposit \$4,000

a total of \$40,000. He considered that there were "extraordinary circumstances" which would justify an unequal division of the proceeds of the matrimonial home and accordingly allowed the wife a refund in full of the sum of \$8,000 expended by her on the home after the separation. He also excluded the sum of \$2,000 being the ring purchased by the defendant and which she retains. From the sum of \$40,000 he directed that there should be deducted \$10,000 leaving a balance of \$30,000 which he held was matrimonial property and he divided this \$30,000 into equal shares. He directed that the wife was entitled to one half share of the present value of the husband's superannuation fund and left it to counsel to calculate what that was worth. He directed that the husband was to take in satisfaction of his share one half of the mortgage namely \$10,000 and after deducting the wife's share in the husband's superannuation fund when ascertained the balance was to be paid to him in cash.

The wife now contends:

1. THAT the Lottery Ticket and the proceeds thereof, apart from monies expended on renovations to the matrimonial home at _____, are the wife's separate property pursuant to Section 10(1) of the Matrimonial Property Act, 1976.

2. THAT if this submission be not upheld then the wife's contributions are clearly greater than the husband's.

3. THAT on account of the approximately \$8,000.00 spent by the wife prior to coming into force of the Matrimonial Property Act, 1976, following the date of separation, the matrimonial home at _____ Street should be valued at the date of separation rather than the date of hearing.

The husband supports the Magistrate's reasons for holding that the Art Union prize of \$24,000 became matrimonial property but in addition contends as an alternative approach that it is caught by S.10(1) because when expended on the property there was then an intermingling with matrimonial property and it lost its identity as separate property if it

was in fact separate property before the purchase of the property. Even more so he said because of the learned Magistrate's findings that it was used as a beach house by both.

The bonus bonds gain of \$15,000 he contends would also become matrimonial property. Consequently when the wife expended \$8,000 on the Street property she was expending matrimonial property and not her own separate money and consequently she was not entitled to any credit in the ultimate division of the sale price. The position was similar with the purchase of the ring. There should be, he said, an equal division of all property. Further he resisted that part of the order requiring the husband to accept one half of the moneys left on mortgage as part of his share contending that if the wife made such an arrangement she should accept the consequences of that, and that the husband now being years old he should have his share in cash.

The fundamental issue before the learned Magistrate (and again before me) is whether the Ngakuta Bay property was or became matrimonial property. The learned Magistrate held

"The ticket was a gift and is separate property by virtue of S.10 of the Act. The winnings are not a gift but are property acquired out of separate property"

Thus the winnings are separate property under S.9(2) I so hold. At this stage the provisions of S.8(e) or S.9(6) cannot possibly apply"

He then discusses and makes findings on the disposal of the sum of \$24,000 and in the manner I have previously set out, and continues

"Clearly the improvements to the matrimonial home come within S.11 of the Act and will be dealt with later in this Judgment. I must now turn to S.8(e) and S.9(6) concerning the property and the car."

He discusses and recites clauses 8(e) 9(6) of the Act and paragraphs 411 and 412 of "The Matrimonial Property Act 1976" by Fisher and concludes:

"The question of the property falls to be determined under Section 8(e). This section covers two situations. The first of these deals with post nuptual acquired property in general. The second deals with post nuptual acquired property from pre nuptual separate property where the former is acquired for the common use and benefit of the husband and wife. We are not concerned with the second situation in this case.

In the first situation under Section 8(e) an asset acquired after marriage becomes matrimonial property unless it is excluded by the provisions of Sections 9(3), 9(4), 9(5), or under Section 10. In the present case the Ngakuta Bay property, the boat and the car were purchased out of the separate property of the defendant. Because Section 9(2) is expressly made subject to Section 8(e) these assets are not preserved as separate property by Section 9(2). I find that these assets therefore are within the provisions of matrimonial property as defined in Section 8(e)."

Despite his careful analysis of the sections and the difficulties they pose I find myself with respect to him unable to agree with his approach to the problem.

I do agree that initially the prize of \$24,000 became the wife's separate property. Although the gift by the sister was, as it were, just a piece of paper, it was more than that. It was a special type of piece of paper in that it carried with it the potential to win a prize. And that potential was fulfilled to its maximum when she received what I imagine was the first prize of \$24,000. So that sum in my view became separate property. That does not mean that the sister gave her \$24,000. What the sister gave was this ticket with its potential. But that does not matter. It frequently happens that a gift of a piece of property, whether real or personal, turns out to be more valuable than at the time it is given. That does not mean that the enhanced value is due to the marriage partnership, which is the basis of matrimonial property. It is the intrinsic or potential value of the gift itself.

I think S.10 creates what might be called a code of law applying to those specific items of property there described.

They are

property acquired by succession

property acquired by survivorship

Property acquired as a beneficiary under a trust

property acquired by gift from a third person. These I will call "S.10(1) property". The acquisition of these is clearly not due to the marriage partnership. Consequently the Act declares that these are not matrimonial property. In that case, they are separate property because that is defined by S.9(1) as "all property of either spouse which is not matrimonial property" So also does property acquired out of it remain separate property. And it retains its character of separate property if it is disposed of.

This is because of the provisions of S.9(2) which (with certain reservations which I will deal with later) enacts that

"All property acquired out of separate property and the proceeds of any disposition of separate property shall be separate property".

However the Act contemplates that the protection afforded by S.10 may be lost if the owner of that separate property acquired as described in S.10 deals with it in certain ways.

The first is if the recipient allows it or the proceeds of its disposition with his or her express or implied consent to become so intermingled with other matrimonial property that it is unreasonable or impracticable to regard it or its proceeds as being separate property S.10(1)

That is a warning to such a recipient and one can well understand why this should be so. It is because of the difficulties which would result if one had to "unmix" the mixture which the recipient has participated in making.

Next if by its nature it becomes the matrimonial home or a family chattel or if the proceeds of its disposed are invested in a matrimonial home or in family chattels then it also loses its identity as separate property. Both these terms are specially defined by S.2. It is sufficient to say that a matrimonial home is the only or principal family residence used habitually as such and family chattels are the chattels used similarly for the family.

It is because of the special characteristics of these assets that the Legislature again provides that if the gift of the use of its proceeds for the acquisition of those assets becomes of that nature then it loses its character as separate property.

These would seem to be the only ways in which S.10(1) property can lose its identity as separate property. I think the reason S.9(6) (which is a subsection providing how separate property generally can lose its identity as such and become matrimonial property) commences with the words "subject to section 10 of this Act", is to emphasise that S.10 is a code dealing with that special type of property which I have called S.10(1) property and that the provisions of S.9(6) which deal with separate property in general have no application to S.10(1) property.

And that I think is why also S.8(3) (which deals generally with property acquired after the marriage and during the marriage partnership or alternatively acquired before the marriage but for the purpose of the marriage partnership) is also made subject to S.10 of the Act. It is again to ensure that S.10(1) property does not become matrimonial property and retains its character of separate property except in the ways set out in that section itself.

Applying this view of the law to the facts then I am of the view that when part of the proceeds of the prize was invested into the purchase of the property and later a further part viz. \$5,000 was expended in its improvement by a contractor Mr Murray, those moneys so used and that property so purchased and improved did not lose its identity as separate property under S.10 because

(a) it was or they were not intermingled with other matrimonial property S.10(1).

(b) The property did not become the "matrimonial home". It was not used as their "only or principal family residence" S.10(3)

The part of the proceeds invested in the boat (and

consequently the boat itself) did however lose its identity as separate property and became matrimonial property under S.10(3) because the boat became a family chattel in that it was used "wholly or principally for family purposes". S.2.

So also would have been the part invested in the Cortina car (and consequently the car itself) if it had been used "wholly or principally for family purposes". But the learned Magistrate's judgment records:

"It is accepted that the motor car was used exclusively by the defendant for her own use and so it did not become a "family chattel".

Had this been all that had happened then I would have regarded the property or its proceeds on its sale later and the car as the wife's separate property, but the boat and its proceeds viz. \$1300 as a family chattel and consequently as matrimonial property.

But it was not all that happened. Both the husband and the wife as the Magistrate records "worked on it (the property) doing painting and maintenance". He adds that there was some dispute as to the amount of such work.

When this occurs the Act provides a way in which a spouse who works on and helps to increase the value of the other spouse's separate property does not lose all benefit from his or her labours because that separate property remains that otherspouse's separate property.

That the Act does by S.9(3) which provides

"Subject to subsection (6) of this section, any increase in the value of separate property, and any income or gains derived from such property, shall be separate property unless the increase in value or the income or gains (as the case may be) were attributable wholly or in part-

(a) To actions of the other spouse; or
(b) To the application of matrimonial property, - in either of which events the increase in value or the income or gains (as the case may be) shall be matrimonial property."

The learned Magistrate has found as a fact that the husband did labour on this Ngakuta Bay property. It was sold for a net \$17,500 after two years ownership and after the wife had expended \$11,000 of her separate property on its purchase and its part improvement by the contractor. And so there was an

increase in value of this wife's separate property attributable "wholly or in part" to the actions of the husband. And in that event the Act declares that the increase in value attributable to the husband's actions shall be matrimonial property. This could not exceed \$6500 because that was the total increase but might not be all of that as some of that increase could be the result of a normal increase of the value of the wife's separate property due to inflation.

When then the wife received the net proceeds of the property \$17,500 and the proceeds of the boat \$1300 a total of \$18,800, that part of it being first the increase in value of the property attributable in whole or in part to the husband's actions and next \$1300 being the proceeds of the sale of a family chattel, the boat, became matrimonial property and the balance remained her separate property. Not more than \$7800 could be matrimonial property and not less than \$11,000 would be the wife's separate property.

The wife was entitled to do as she pleased with her separate property. She purchased a car for the husband at a cost of \$750. That became his separate property under S.10(2). And she purchased a ring for herself. That remained her separate property under S.10(1).

But when bonus bonds of \$14,000 were purchased out of the proceeds each separate bond was purchased out of a fund composed as to part (not exceeding \$7800) of what had become matrimonial property and as to the balance out of the wife's separate property.

The figures I have used are the figures found by the learned Magistrate but he qualifies the figure of \$17,500 for the net proceeds by the word "approximately". In a chart supplied by Mr O'Donnell the figure of \$17,500 being the proceeds of the sale of both the property and \$1300 for the boat a total of \$18,800 is mentioned, but only \$14,000 is brought down after the expenditure of \$750 on the husband's car and \$2,000 on the ring. I will refer to this later. Somewhere on the way \$1300 has been lost in the calculations.

I now turn to the subsequent events namely the separation

and the win of \$15,000 in the bonus bond ballot.

Now Section 2(2) and (3) provide:

"(2) For the purposes of this Act the value of any property to which an application under this Act relates shall, subject to sections 12 and 21 of this Act, be its value as at the date of the hearing, unless the Court in its discretion otherwise decides.

(3) For the purposes of this Act the share of a spouse in the matrimonial property shall, subject to section 21 of this Act, be determined as at the date on which the parties ceased to live together as husband and wife, or, if they have not ceased to live together as husband and wife, as at the date of the application to the Court."

The value of the bonds had increased by the date of hearing by \$15,000 because five days after the separation one of them (and a proportion of each one was matrimonial property and a proportion was separate property) won a cash prize of \$15,000 and so its nominal value of \$1 increased by that sum. As each bond represented a combination of funds in unequal proportions the prize of \$15,000 must also be regarded as belonging to the two funds in the same proportions. And so (if the Court does not exercise its discretion otherwise) the value is that enhanced value at the date of the hearing and there is a fund of \$29,000 part of which is matrimonial property and part is the separate property of the wife. This is to be divided between the parties first in accordance with the Court's view as to what proportion is matrimonial property and which is the wife's separate property and next in accordance with the Court's view as to how the matrimonial property proportion is to be divided between the parties.

Matrimonial property is distributable according to its nature. If it consists of a matrimonial home or the family chattels (and apart from the provisions of Ss.13 and 14) there is to be an equal sharing.

But other matrimonial property (and the proportion of the bonus bonds and their proceeds found to be matrimonial property as such are also by S.15(1) to be shared equally between the spouses,

"unless his or her contribution to the marriage partnership has clearly been greater than that of the other spouse".

Accordingly the division of that part of the \$29,000 fund which can be regarded as matrimonial property is not so certain as if it were the matrimonial home or family chattels.

However the other matter in dispute between the parties is the distribution of the proceeds of the sale of the matrimonial home. The parties having separated on July 1975 the husband vacated the property and initially went to board while the wife remained on. It would seem that at least some of the then family chattels were given to the husband but that the wife virtually re-furnished. She also spent \$8,000 on improving the property. A little over two years later she sold it privately including the refurnishings valued at \$2500 for \$29,000 or \$26,500 without the furnishings.

A valuation of the property was made in May 1977 by a firm of valuers on the instructions of the solicitors for the wife. It described the then condition of the dwelling as being considerably different from that existing at July 1975 and lists the work done since then at an expenditure of in excess of \$8,000. Their valuation at July 1975 was \$17,700 including a land value of \$7350. And at May 1977 it was \$23,500 including a land value of \$8650. This represents an increase in land value of \$1300. The valuers report says

"Original structure was simple, construction work plan and finish ordinary. We envisage that at July 1975 home was of no great appeal".

With the discretion allowed by S.2(2) and having regard to the fact that the whole of the expenditure of \$8,000 was after the separation and came from the wife's separate property I would fix the value of the property at the date of separation viz. May 1975, but with an increase of \$1300 being the increase of land value not attributable to the wife's expenditure but due to two years of inflation. The husband's

share would then be \$9,500.

There remains the division of the other matrimonial property namely that share of the ultimate bonus bonds figure which represents other matrimonial property. I have previously set out the way in which a part of the fund of \$29,000 became matrimonial property and pointed to an apparent discrepancy in the figures. There are other difficulties. While the Act enacts that the increase in value to separate property (the Ngakuta Bay property) becomes matrimonial property there is nothing to show how much of the increase in value of \$6500 was due to the actions of the parties, and how much was due to inflation in values (which would remain the wife's separate property) or to the fact that the expenditure by the wife of \$5,000 on improving it might well have added more than that to its value by converting it into an attractive beach property. These problems are magnified when one more than doubles the figures due to the bonus bonds prize. I would emphasise that the increase in value of the wife's separate property due to the husband's actions i.e. his labour, does not become his property. It becomes matrimonial property due for division under S.15. I think that a payment of \$5500 to the husband out of the combined fund would be a proper division under S.15(1) of the Act (having regard to all the considerations there mentioned) of that part of the fund which can be properly regarded as matrimonial property under S.9(3) and its value at the date of the hearing.

My ultimate figure of \$15,000 i.e. \$9500 and \$5500 is the same as that reached by the learned Magistrate but I have proceeded on a different view of the law and a different approach.

Against this figure of \$15,000 must be set off the one half share of the value of the husband's superannuation. I think it proper that this be valued at the date of hearing (as so determined by the learned Magistrate) The husband has no doubt drawn it up until that date, and its value at the date of the

hearing will be less than at the date of separation but the Court has a discretion under S.2(2) and I would exercise my discretion in this way bearing in mind that the wife had the use of the matrimonial home for two years and two months after the separation.

The purchasers apparently paid \$9,000 in cash and \$20,000 was left on mortgage. To require the husband to take half of this \$20,000 as part of his share is I think unfair to the husband as it was the wife's decision to sell on these terms and the sale price included her chattels and her separate property of \$8,000 expended on the property. I think the husband should receive in cash a half share of the \$9,000 paid in cash and also cash for the \$5500 I have awarded him out of the other matrimonial property.

This cash figure should be diminished by the value of the wife's half share of the value at the date of hearing of this superannuation. The ultimate balance due to him must come out of the mortgage or unpaid purchase money on the matrimonial home.

Each party is to bear his or her own costs.

Clifford Perry J

Solicitors for Appellant: Wisheart, Macnab & Partners, BLENHEIM

Solicitors for Respondent: Wain & Drylie, BLENHEIM.