

3 M.P.C. 54

IN THE MATTER of the Matrimonial
Property Act 1976

BETWEEN

JOAN HELEN FOTHERGILL
of Wanganui, Married
Woman

Applicant

AND

DARYL LEONARD ENGLAND
of Papamoa, Branch
Manager

Respondent

Hearing: 26 March 1980

Counsel: F.F. Latham for Applicant
J.L. Saunders for Defendant

Judgment: Reserved decision delivered 23/1/80

JUDGMENT OF GREIG J.

The parties are divorced and remarried but for convenience I will call them the wife and husband.

The hearing was limited to the wife's application in respect of the husband's property which I will describe as the Papamoa property. It had been previously agreed that the matrimonial chattels were no longer in issue and that a Ford Escort car and a caravan should be transferred to the wife.

The husband and wife first met in March 1962 and thereupon entered into a de facto relationship. At that stage the husband already owned the Papamoa property which was then little more than a beach cottage and the wife owned a property in Nelson.

In about October 1962 a house in Anzac Parade, Wanganui was purchased in the name of the husband. The wife contributed most, if not all the cash contribution required to purchase the house but the husband provided some labour and cash in some renovation and repair of that house. In March 1971 the parties were married. In February 1972 the Wanganui house was sold and the husband moved to Papamoa. On the sale of the house at Wanganui the nett proceeds were divided between the husband and wife. There is a dispute as to that division. Whatever may be the position there was not a precisely equal division of the proceeds.

It appears that from about April 1972 there were marital difficulties between the husband and wife. They did live together from time to time thereafter but they finally separated in November 1974.

In essence, the wife claims that the Papamoa property was the matrimonial home and that she is therefore entitled to one half of it. The husband on the other hand claims that the Papamoa property was never the matrimonial home and was, and remains, his separate property.

It is to be noted that the Papamoa property was converted from a beach cottage to a residence between 1971 and the date of separation. That property is now settled as a joint family home on the husband and his present wife.

The first question that arises in this matter is the duration of the marriage. The marriage in form lasted 3 years and 8 months but it is clear that the husband and wife did not live together for the whole of that period.

Section 13 (3) of the Matrimonial Property

Act 1976 defines a marriage of short duration as a marriage in which the spouses have lived together as husband and wife for a period of less than 3 years. Reconciliation periods for not more than 3 months may be excluded from the computation. This definition requires the Court in a case such as this to consider the details of the period of marriage. It is not sufficient that the marriage in form has continued for the requisite period. It is necessary to enquire whether during that marriage period the parties have lived together as husband and wife for at least 3 years. In any such enquiry it may be necessary to give consideration to the quality of the periods during which the parties lived together. If there are periods during which there is a form of cohabitation but not in the true sense of marriage then these periods may have to be disregarded.

There is of course some difficulty in any case in ascertaining even over a period of 3 years and 8 months the details of cohabitation of the husband and wife. There was in this case dispute as to that but the husband in the evidence before me was able to refer to diaries which he had kept which while not conclusive as to the whole period do provide a more reliable basis for the husband's evidence than the mere recollection of the wife. It appeared to me that the husband's diary was not a complete record of their married life but was rather a noting of some particular events which left unexplained gaps during which the husband and wife were at least visiting each other from time to time.

I have concluded that there were some 26 months of the marriage during which the parties lived together as

husband and wife. That comprises the period from the marriage on 24 March 1971 to April 1972, the visit to Australia between September 1973 and January 1974 and the period from April 1974 to November 1974 when they separated. Clearly, during those periods and particularly the latter period the parties were not happily married but I do not consider that during those later periods the marriage was merely a shell. During those 26 months the parties shared both bed and board living together as man and wife in spite of the strains and upsets which occurred during these periods.

The remaining 18 months comprise 3 periods in which the parties appear to have lived separately. Between May and December 1972 during which the wife spent some little time in hospital they lived separately but there were some reconciliatory meetings which appear to have been unsuccessful. In that period the wife in September commenced correspondence for separation. Between January and August 1973 the parties again appeared to have lived separately but there were again periods of reconciliation which appear to have been more frequent than in the previous 8 months in 1972 but were not of any length. The final period was a period between February and March 1974 immediately after they returned from the trip to Australia. There appears to have been no attempt at reconciliation in that time and indeed the parties were through their solicitors, in correspondence as to divorce proceedings.

It seems clear that in the 16 month period of separation and occasional reconciliation there was no cohabitation in excess of 3 months. Even if I include the periods of reconciliation and discount the evidence given

by the husband supported by his diaries I find it impossible to draw from the 16 month period sufficient cohabitation as man and wife to add 10 months to the 26 month period of cohabitation to make a total of 3 years. In the circumstances therefore I must find that this was a marriage of short duration.

Even if this marriage were to be treated as a marriage of 3 years and 8 months I would, having regard to all the circumstances, consider it just to treat it as a marriage of short duration.

It was urged upon me that in consideration of that alternative under s.13 (3) I should have regard to the period of de facto marriage as part of the circumstances. The sub-section however limits the Court to the circumstances of the marriage and that of course began on 24 March 1971. It is not open to me to take into account the circumstances of the parties before the marriage on this head. In any event even if I gave regard to the period of de facto marriage it is clear that de jure marriage was short in period, was marked with particular strain and upset and was broken with lengthy periods of separation and two instances of formal correspondence aimed at terminating the marriage.

Having found this is a marriage of short duration and the Papamoa property being owned wholly by the husband at the date of marriage in 1971 the share of each spouse must be determined in accordance with the contribution of each to the marriage partnership.

The Papamoa property was the matrimonial home. The period of eight months between April and November 1974 in which the parties lived together there is, in my view, sufficient itself to make that the matrimonial home. During that period the property was used habitually by the husband and wife as the only family residence. It is clear however that during the marriage there were other periods in which the house was used from time to time as the only family residence. There can be little doubt therefore that this became the matrimonial home. It is therefore matrimonial property which falls to be divided by the contributions of the parties.

The contributions of the wife to the marriage partnership included her contribution to the house at Anzac Parade, Wanganui. That of course was brought formally into the marriage by the husband it being in his name but her cash contribution to that was made before the marriage. That must be treated as a contribution by her to the marriage. During the marriage the wife contributed cash since the parties appear to have shared expenses and she contributed at least during the periods of cohabitation such ordinary wifely contributions as the management of the household and the performance of household duties. The husband on the other hand has contributed the Papamoa property, has provided his share of expenses and has undertaken both in cash and labour work of renovation and improvement to the Anzac Parade property and the Papamoa property. Both the parties received back monies from the sale of the Anzac Parade house. There is a dispute on that as to the sum of \$2,000 and I am unable on the evidence to resolve that. The wife stoutly denies that she received that sum and the husband equally stoutly affirms that she did. He produced

a bank statement which shows a debit of \$2,000.00 at the relevant time but that, in my view is equivocal. What is clear however is that in spite of her contributions to the marriage partnership the wife has been left with little but cash whereas the husband has been enabled to retain an asset which has increased in value by way of inflation.

Considerable reference was made in the affidavits and in the evidence as to the misconduct of the husband and the wife. There clearly was misconduct on the part of the wife during the marriage but it has not in my view significantly affected the expenditure or value of the matrimonial property and in particular, the Papamoa property. Indeed it has had no effect at all on the value of that property.

I have carefully considered all the circumstances of this marriage and the relevant contributions to the marriage partnership of the spouses. I think that the proper amount in recognition of the wife's entitlement taking into account the car and the caravan is the sum of \$5,000.00.

I order therefore that the Escort car, FJ 2980 and the caravan, 2270S be vested in the name of the wife and that the husband pay to her the sum of \$5,000.00. That sum is to be paid on or before 1st September 1980 without interest. I make no order as to costs.

W. J. I.

Solicitors for Applicant: Armstrong Barton & Co.

Solicitor for Respondent: J.L. Saunders