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M.72/79

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

BETWEEN PATRICIA MARY EMMERSON of Palmerston North, Married Woman

Applicant

AND MAXWELL DUNCAN MALCOLM EMMERSON of 175 Bartholemew Road, Levin, Retired Manufacturer

Respondent

Hearing: 8, 16 May 1980; 20, 27 November 1980
8 March 1981

Counsel: T.A. de Cleene for Applicant
C.J. Walshaw for Respondent

Judgment: 8 October 1981

JUDGMENT OF O'REGAN J.

The matrimonial home

Shortly after the hearing on 16 May 1980, the parties agreed that the erstwhile matrimonial home be vested in the respondent subject to his paying the applicant $18,463.00 which, it was agreed, was half of the nett value thereof. An order in that behalf has already been sealed and, so I am informed by counsel, the respondent has paid the applicant that amount.

The family chattels

In her initial affidavit the applicant allowed that at the time she left the matrimonial home she took four kitchen chairs. The defendant has averred that, in addition, she took with her utensils, crockery,

glasses and bedding. Both parties were cross-examined on their affidavits but no attempt was made to advance the resolution of this conflict of evidence. I hold it proved that she took only the four chairs upon which arbitrarily, I place a value of $40.

The chattels left in the home were valued at $2284. That valuation has been accepted by both. I declare the four chairs the property of the applicant and the chattels in the home the property of the respondent. As the parties agreed to share equally the matrimonial home, these chattels must also be so shared. The foregoing orders are subject to the respondent allowing in account or paying the applicant $1122.

At the time of separation, the respondent owned a commercial property situate at 56A Winchester Street, Levin. With the concurrence of the applicant the property has been sold and the proceeds invested pending the giving of this judgment. The nett proceeds of the sale were $22027.89. It is agreed that this property was matrimonial property. Other matrimonial property of the respondent and the agreed worth or quantum of the same are :

Investments	$ 17,490.00
Northern Building Society shares	2,594.00
Savings accounts	1,775.00
	$ 21,859.00

It is agreed that the following items of property of the wife are matrimonial property. Their stated worth is also agreed upon.

Post Office Savings Bank	2664.79
C.M.L. Life Policy	700.00
Northern Building Society shares	3362.00
Bonus Bonds	500.00
	$ 7226.79

Other property owned by the wife is :

House property - 97 Manawatu Street, Palmerston North purchased on 21 November 1978 for	$ 35,000.00
Two flat property, New Plymouth -	Value not disclosed
Mortgage from Kuthy, the principal sum owing thereunder at date of separation being	$ 16,500.00

The latter two items of property were acquired by succession from the estate of William Henry Brown, to which reference will again be made later in this judgment. Section 10 applies. They were separate property.

The Manawatu Street property was acquired after the parties separated. It was financed by the borrowing of $20,000 and by the raising by way of sub-mortgage of the Kuthy mortgage the sum of $10,000. The balance of $7000 came from distributions from the estate of Brown made in August and October 1978. It is the separate property of the applicant s 9(4). Mr Walshaw submitted that it was just in the circumstances that the property should be treated as matrimonial property. He did not offer any reason why I should so do. I myself do not see any and I decline the request.

Motorcars

When the parties separated the applicant owned a Cortina 2000 motorcar and the defendant a van. The applicant in her first affidavit stated that the value of both vehicles was $1600. The defendant has not taken issue with that. There was no suggestion from either party that these vehicles were not used wholly or principally for family purposes. The respondent allowed that he had sold his van since the separation and that he had purchased a car for which he paid "about four and a half thousand". When taxed as to the source of the moneys he said :

> " A bit of dealing. Bought the car, sold a car; bought a car sold a car and now I've got this one. Nothing for me to sell 15 - 20 pigs at a time from a friend of mine. I've done a bit of dealing. "

Mr de Cleene did not pursue the matter further in his cross-examination but later submitted that this evidence disclosed that the respondent had a sum of $3000 which he had not theretofore disclosed. I do not think that the sparse facts warrant that conclusion. I rather think that my proper course is to treat his present vehicle as property acquired by him whilst he and the applicant were not living together as husband and wife and thus separate property. I do not know whether the applicant still owns the Cortina 2000 vehicle. In case she does an order is made vesting it in her.

Shares in Levin Softgoods Limited

This company no longer trades. It owns, however, some investments. The actual capital structure was not disclosed in the papers. The applicant owns 40% of the shares and the respondent 60%. The shares of each are matrimonial property.

The applicant's interest in the estate of William Henry Brown

William Henry Brown, an uncle of the applicant, by will dated 2 September 1965 bequeathed personal chattels to his mother and an annuity of $400 during her lifetime. The residue of the estate was left to the applicant. The date of his death is not disclosed, but it would appear to have been in 1967. The trustees did not exercise their power of appropriating assets or investments to serve the annuity and retained all the assets until after the death

of the annuitant. The annuitant died in May 1978. The applicant deposed that she received no income until 1971. The estate accounts for the years ending 31 March 1978 and 1979 show that her income from the estate in those years was $1652.68 and $2254.03 respectively. Her actual income in earlier years is not disclosed. However, the respondent has acknowledged that it was substantial. - "Approximately $1000 a year" he said.

During the currency of the marriage the parties and their children went on several trips to Australia and the Pacific Islands. The number was not disclosed but the respondent said that they were away every two to two and a half years. He allowed that much of the income the applicant received from the estate was used to pay for these trips. Apparently the gross amounts were so used because the respondent, ruefully, stated that he paid the tax which the income attracted. The overseas travel was part and parcel of their family life style and in providing for it with the estate income the applicant made a not insubstantial contribution to the marriage partnership.

The respondent has allowed that the applicant's interest in the estate was not matrimonial property. He lays claim, however, for allowances by way of credit under s 9(3), s 17(1) and s 18(1)(f) (ll). He has expressly stated that he relies on the same facts in support of these items of claim. He said in his first affidavit that for some three or four months after the death of the testator he travelled to New Plymouth (where the assets were) every week and thereafter about twice a year. These trips, he said, were at his own expense up until the last two or three years of the marriage when the expenses were paid by the trustees. He said

that on one occasion when the estate had liquidity problems he loaned "a small amount of money which was paid back when rents were received." He said also that he checked on progress of repair works and endeavoured to trace tools and other equipment of the testator but without success; that he endeavoured to trace a new engine which had been purchased by the testator. This, he said, involved many trips (but in a later affidavit reduced to two), to Auckland; that the engine was duly located and sold by him on behalf of the estate; that he himself paid freight, storage and insurance in respect of the engine. He deposed also that he sold a motor vehicle on behalf of the estate.

The applicant joins issue with the respondent on these matters. She says that he made but two trips from Levin to New Plymouth but allows that they called at New Plymouth on other occasions so that they could inspect the estate properties. With reference to the engine, she agrees that it was sold by the respondent but said that he retained the proceeds, $1000. The respondent, in a later affidavit, agreed that $1000 was the sale price but stated that he accounted to the applicant who applied the money towards the cost of a family holiday in the Pacific Islands.

He avers that he arranged the sale of an estate property to one Kuthy, a tenant. He said that prior attempts by estate agents to sell the property had been fruitless. As a result of his efforts, he avers, the estate was saved a land agent's commission.

When the respondent gave evidence before me I did not take a good impression of him as a witness. That impression receives confirmation from his affidavits.

In his first affidavit he swore that for some three or four months after the death of applicant's uncle he travelled to New Plymouth every weekend. After the applicant joined issue with this averment, the respondent in his second affidavit blandly and without explanation stated :

> " I accept that I was not in New Plymouth every week-end. However I was there several week-ends after the death of the late William Henry Brown. "

Where there is a conflict in the evidence of the parties, I accept the evidence of the applicant who, in my view, was a reliable and truthful witness.

Mr de Cleene submitted that at the times these various activities of the respondent allegedly took place, the property in respect of which the services were said to be rendered was not the property of the applicant. Rather, he submitted, it was the property of the trustees. At those times, however, the applicant had an equitable interest in the estate and that, as distinct from the individual assets of the estate, was her separate property, the value of which could be enhanced or sustained by actions of the respondent in respect of the individual assets.

With regard to s 9(3) none of the actions referred to by the respondent, save perhaps the sale of the estate property to the tenant, has been shown to have occasioned any increase in the value of the applicant's interest in the estate. The sale of the property, it was submitted, had saved the estate a commission and thereby increased tanto quanto its value. That could well be but there is no evidence as to the amount involved; no evidence as to the relation between the sale price and the valuation which respondent avers was contemporaneously obtained. In a word, there is no evidence that his intervention occasioned an enhancement in value of the appellant's interest in the estate. Likewise, there is no evidence to support the contention that the applicant's interest in the estate was sustained by the actions of the respondent. (s 17(1)(b)). I will deal with the submission as to s 18(1)(f)(11) when I deal with contributions of the spouses to the marriage partnership.

Mr Walshaw submitted that the contributions of the respondent to the marriage partnership were clearly greater than that of the applicant and that their respective shares in the property, other than the matrimonial home and the family chattels, should be determined in accordance with s 15(2) of the Act.

The parties were respectively 34 and 40 years of age when they married in December 1960. For each it was a second marriage. The marriage subsisted, in fact, for 17 years. There were two children of the union, born respectively on 11 May 1962 and 3 May 1965. In the earlier years of the marriage the household included a son of the respondent by his first marriage. He was then 14. He went to work and began paying board when he was 17. He remained

a member of the household for a number of years.

At the time of the marriage the respondent was employed as a textile engineer. He was of modest means but in short order after the marriage he set up his own business as a softgoods manufacturer. He commenced operations with six machinists but in due time he was employing a staff of 100. He worked hard and prospered. Within a short time he had built the matrimonial home. He was always a good provider. He provided an ample housekeeping allowance and had the respondent paid an allowance from the business.

The applicant had capital to the order of $1000 when she married. She worked until shortly before the birth of the first child. For some eight years of the marriage she had a not insubstantial private income, much of which, so the respondent has acknowledged, was spent on overseas travel by the family. She did, however, amass savings from that source which were to the order of $6000 when she left the matrimonial home.

The respondent, particularly in his viva voce evidence, was less than complimentary of the applicant as a mother caring for her children and as a housewife in the performance of her household duties. In the end, however, Mr Walshaw acknowledged that she made the "usual contributions towards the care of the children of the marriage." While the defendant was critical of her management of the home and performance of household duties he did not give instances of dereliction of such duties.

With reference to paragraphs (c) and (d) of subs (1) of s 18, save for the applicant's contributions from her private income already referred to, the

provision of money and the earning of income for the purposes of the marriage partnership and the acquisition of matrimonial property was by the respondent alone. I do not think paragraph (e) of the subsection is of application. With regard to paragraph (f) the respondent claims that he performed services in respect of the applicant's separate property. I have referred to such claims earlier in this judgment. I accept that to a limited degree the respondent did interest himself in the affairs of the estate but I consider his activities were minimal. Mr Walshaw has allowed that paragraph (g) is of no application and neither party made any submission as to the application of paragraph (h) of the subsection.

Section 15(1) ordains that the division of matrimonial property to which the subsection applies shall be in equal shares "unless his or her contribution to the marriage partnership has clearly been greater than that of the other spouse". The question for decision is whether the respondent, seeking as he does to displace the norm has established that his contribution to the marriage partnership has clearly been greater than that of the applicant. And he is confronted by the hurdle that s 18(2) presents :

> " There shall be no presumption that a contribution of a monetary nature (whether under subsection 1(c) of this section or otherwise) is of greater value than a contribution of a non-monetary nature. "

In my view, the respondent has not discharged the onus upon him. His submissions, in my view, are mutatis mutandis as Woodhouse P said of the arguments advanced in Barton v Barton 1979 1 N.Z.L.R. 130, 133 :

> " . . . . based upon a basic misconception of the policy of the new Act. They are designed to answer the wrong question. The issue . . . . is not who provided the household income or the money for the farm or which of them played a greater part in developing it. All this is directed to the contributions not to the marriage partnership but to matrimonial property. "

The affected property in my view must be shared equally.

It is not possible to make precise orders as to the vesting of all the matrimonial property because the details of the respondent's investments and saving accounts have not been provided. I make, however the following orders :

1. One half of the shareholding of each of the parties in Levin Softgoods Limited is vested in the other of them.

2. The proceeds of the sale of the Winchester Street property and the accrued interest therein be divided equally.

3. The applicant's life policy, her Post Office Savings account, her Northern Building Society shares and bonus bonds hereafter to be the sole property of the applicant subject to her allowing the respondent in account the sum of $3613.40.

4. Subject to paragraph 5 hereof the respondent's investments, Northern Building Society shares and savings accounts be his sole property subject to his allowing the applicant in account the sum of $10,929.50.

5. The balance in account due to the applicant pursuant to paragraphs 2, 3 and 4 above and in respect of the matrimonial chattels be paid within 14 days of the date of judgment.

If a formal order is required vesting the actual investments and savings accounts of the respondent in him an agreed list of the same should be filed.

There will be no order as to costs.

Solicitors for the Applicant : Loughnan de Cleene & Co (Palmerston North)

Solicitors for the Respondent : Rowe McBride & Partners (Palmerston North)