

N2LR

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Special
Consideration

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IN THE MATTER of the Matrimonial Property
Act 1976

BETWEEN SHYRON ANNE FOLEY of
Townsville, Queensland,
Australia, Married Woman
Applicant

A N D PATRICK LEONARD FOLEY of
Auckland, in New Zealand,
Carpenter

Respondent

Hearing: 28th May, 1981.

Counsel: Collis for Respondent in support.
Robinson for Applicant to oppose.

Judgment: 28th May, 1981.

ORAL JUDGMENT OF SPEIGHT, J.

The matrimonial property involved in this case was almost exclusively the family home at Ropata Avenue, Point England. The matter was originally set down before me two years' ago. On that occasion, viz. on the 26th July, 1979, Mr. Robinson appeared on behalf of the Applicant wife and Mr. Collis on behalf of the Respondent husband. They had settled the matter and a consent order was made in terms of a written memorandum then filed as follows:-

- " 1. Matrimonial home at 20 Ropata Avenue to be sold forthwith at a price of not less than \$35,000.00 or such lesser sum as the parties agree upon.
2. Proceeds from sale to be applied FIRSTLY in payment of costs of and incidental to sale, SECONDLY in payment of the balance required to complete purchase of matrimonial home from Housing Corporation, THIRDLY in payment to the respondent of all instalments of principal in reduction of purchase price since applicant finally left home and FINALLY nett proceeds divided equally.

3. Respondent to have right of exclusive occupation until sale subject to Respondent paying all outgoings.
4. Leave reserved to either party to apply on 7 days notice for any further orders or directions which may be necessary. "

Subsequently it transpired that it had not been possible to sell the house by private treaty at the sum of \$35,000 nor at any lower agreed price. Consequently a variation was made on the 9th May, 1980, for a sale by auction to be conducted by the Registrar at a price of not less than \$28,750. Auction was postponed for one month to enable either party to secure a better sale, if possible, and the net proceeds were then directed to be divided equally as in accordance with the original order, after, of course, the deduction of the additional expenses involved.

There have been continuous delays over this matter due to the strife between the parties. On the 28th April, 1981, by consent an order was made by Barker, J. postponing the sale as Mr. Collis, on behalf of the husband, wished to apply for a variation of the original order and a special fixture was being obtained to argue a jurisdictional point arising from such application. Accordingly the auction was postponed.

To-day counsel have appeared before me, Mr. Collis in support of a motion for orders varying the original consent order of the 26th July, 1979, and re-determining the respective shares of the Applicant, and, further, an order settling matrimonial property on the children and such further or other order as the Court thought just. The affidavits in support show that in the very considerable time which has passed since the original order the Respondent husband has remained in possession, as he was permitted to do under that order, and claims to have spent \$5,000 or more on improvements, and claims that there should be an adjustment for these in his favour. Further, there has been

alleged non-compliance with access orders under the quite separate proceedings under the Matrimonial Proceedings Act wherein Mr. Justice Vautier had awarded custody of the children to the wife, with permission to take them to Australia but with provisions as to their return to this country for access purposes. It is alleged that these orders have not been complied with and that the husband wished the matrimonial property order to be adjusted so as to put some bargaining power in his hands to compel compliance on the question of access.

The question mainly before me to-day has been whether or not this Court has any power to vary the distribution as claimed by the husband. Mr. Collis, counsel on his behalf, recognises the difficulty created by the Act. Section 33 (1) gives the Court power to make "such other orders and give such directions" as may be necessary or expedient to give effect or better effect to any order made under the provisions of Sections 25 to 32. Section 25, it will be noted, is the primary section whereby the Court gets its jurisdiction to make orders concerning the respective shares in matrimonial property. Sections 26 to 32 relate to ancillary powers relating to the protection of children's interests, occupation orders, tenancies, hire purchase agreements, insurance policies, superannuation, rates and variation of maintenance orders. Section 33, sub-section (2), enables the Court at any time to extend, vary, cancel or discharge any order made under the provisions of Sections 26 to 32. In my mind the combined effect of these two sub-sections is fatal to Mr. Collis' application to vary the initial order as to distribution of matrimonial property.

Finality is one of the principles striven for by this legislation, except where changing circumstances are allowed to be recognised as undoubtedly appropriate in the subsidiary matters relating to children, tenancy, etc. Mr. Collis has suggested that the proceeds of sale could be put in trust with income therefrom

to be paid to the children for a given number of years or applied in facilitating access by returning them to New Zealand - but such an order would be a variation of a Section 25 order which the Act obviously does not permit.

However, Mr. Robinson concedes that the husband is entitled to be recompensed for the amounts by which the principal sum under the mortgage has been reduced by the husband since the original order, and also, though less enthusiastically, concedes that there is some justice in a claim made that the husband has increased the value of the property since the order. In my view Section 34 enables the Court to cope with subsequent changes in circumstance in so far as it can be said that provision would have been made for these had they been contemplated at the time of the order and provided no attack is made on the original Section 25 order. Mr. Collis' subsequent application in my view enables this sort of relief. Had it been known at the time of the original order that future improvements leading to increase in value would be made at the husband's sole expense, and that there would be further reductions of principal before the sale, and had it been known how long the sale would be postponed, then allowance for such payments would have been allowed as additional deductions from the price realised on sale, and this would not do violence to the original Section 25 order of equal division of net proceeds. Accordingly the sale is to proceed but I make a supplementary order under Section 34 that there be no final distribution until the parties have agreed by way of valuation report or otherwise or the Court has determined on evidence what allowance by way of increased valuation is properly attributable to the subsequent improvements and, of course, repayments of principal. Pending such determination the proceeds of sale are to be held by the Registrar or in Mr. Collis' Trust Account to await such determination.

On the question of access, I have no jurisdiction

in this matter which was a separate consideration and, unlike Section 34, or indeed Sections 32 and 33 (2), are not within the jurisdiction of this file.

Solicitors:

Robinson & Morgan-Coakle, Auckland, for Appellant.

Shenkin, Ryan & Collis, Auckland, for Respondent.