

No Special
Consideration

4 MPC

IN THE MATTER of the Matrimonial
Property Act 1976

BETWEEN EILEEN LILLY MAY
MILLANTA of Wellington,
Married Woman
Applicant

A N D ALFRED GARY MICHAEL
MILLANTA of Wellington,
Assistant Engineer
Respondent

D. No. 440/79
IN DIVORCE

BETWEEN ALFRED GARY MICHAEL
MILLANTA of Wellington,
Assistant Engineer
Petitioner

A N D EILEEN LILLY MAY
MILLANTA of Wellington,
Married Woman
Respondent

Hearing: 9 July 1981
Counsel: R.D. Guy for Applicant
J.R. Billington for Respondent
Judgment: 31 July 1981

JUDGMENT OF QUILLIAM J

For convenience I refer to the parties as the
husband and the wife.

Two applications have been filed by the wife. The
first is for an order for periodic maintenance and the second
for orders in respect of matrimonial property.

The parties were married on 14 November 1953 and
there were five children of the marriage, the youngest of whom
is now 17 years of age. The parties ceased living together
in September 1976 and on 1 June 1977 entered into a written
separation agreement. A decree absolute in divorce was made
on 9 July 1980. The husband is now 51 years of age and the
wife 48.

I deal first with the matrimonial property application. It is unnecessary to set out the history of the marriage or any other details because there are only two matters unresolved between the parties and they require little explanation. The first concerns whether the husband is entitled to credit for payments made in reduction of the mortgage on the matrimonial home between the date of separation and the date of its sale. The second concerns the husband's superannuation entitlement.

At the date of separation the matrimonial home was subject to a mortgage under which there remained owing the principal sum of \$3,152.76. The property was sold on 30 May 1980 and the principal then repaid was \$2,255.27. In the intervening period the difference of \$897.49 had been repaid by the husband and he seeks an order that this amount be refunded to him out of the nett proceeds of sale before division of the balance equally between the parties.

Section 2 (2) of the Matrimonial Property Act 1976 provides:

" 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. "

This subsection has been the subject of lengthy consideration by the Court of Appeal in Meikle v Meikle [1979] 1 NZLR 137 and Castle v Castle [1980] 1 NZLR 14. It is unnecessary to embark on any detailed analysis of those cases. It is perhaps sufficient to say that it is now established that the discretion given to the Court by s 2 (2) is unfettered and may be used in order to achieve justice between the parties and particularly with regard to the efforts of one or other spouse after the date of separation. There are cases where the discretion has been exercised so as to allow the value to be determined at a date prior to the hearing date in order to take account of improvements to the property which have

enhanced its value. By analogy with these it seems proper, in the present case, to determine the equity in the matrimonial home as at the date of separation. The payments made by the husband in reduction of the mortgage after that date were made out of his separate property and there appears to be no reason why it should be thought that these payments were made on behalf of both husband and wife. I conclude, in the exercise of my discretion, that the payments of \$897.49 made in reduction of the mortgage between separation and sale should be allowed out of the nett proceeds of sale and the balance of those proceeds then divided equally between them.

With regard to superannuation, the amount of the husband's contributions to the superannuation scheme operated by his employer at the date of separation was \$1,115.14. The contributions of his employer at the same date totalled \$2,919.00. The husband acknowledged that he should pay to the wife one-half of his own contributions. On behalf of the wife it was claimed that she was entitled to one-half of the total of the contributions of the husband and the employer together with some allowance for interest on that sum on the assumption that the contributions are likely to have been earning interest.

Section 8 (i) of the Act includes, under the definition of matrimonial property:

" Any pension, benefit, or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage. "

The question here is to determine what is the right to which the husband is or may become entitled in the firm's superannuation scheme? There is evidence as to the respective contributions of the husband and his employer but no evidence at all as to the terms of the scheme or the conditions upon

which the husband will become entitled to payment. One can assume that once the husband has fulfilled whatever the conditions of the scheme may be he will be entitled to payment upon the basis of the joint contributions no doubt increased by reason of the investment of the fund. What happens, however, if the conditions of the scheme are not fulfilled is a matter of speculation. All that I can safely assume is that the husband is likely to be entitled to a refund of his own contributions. Although the husband has said he intends to remain in his present employment it cannot be said that he is now or will definitely in the future become entitled to any particular benefit or right under the scheme. In these circumstances I consider I can only say that the entitlement of the husband is the amount of his own contributions.

Upon the application under the Matrimonial Property Act I therefore find:

1. That the husband is entitled to payment of the sum of \$897.49 out of the nett proceeds of sale of the matrimonial home and that the balance of those proceeds are to be divided between the parties equally.
2. That the husband's superannuation entitlement of \$1,115.14 is to be divided between the parties equally.

The application as to maintenance is made under s 40 of the Matrimonial Proceedings Act 1963 and is to be determined in accordance with the considerations set out in s 43 of that Act.

The first consideration is the ability of the wife to support herself. Her health is not good and a medical report suggests that it is unlikely she could, at present, find suitable employment. This is partly due to emotional and nervous factors and it is possible she could overcome them to some degree at least. She has undertaken to try and get work and it will obviously be to her advantage if she can do so. At the present time, however, I must conclude that the

wife does not have the ability to support herself. She has submitted a budget of weekly expenditure amounting to \$68.15 and this seems modest enough. She also has debts totalling over \$3,100. These represent sums she has had to borrow for day to day expenditure.

The next consideration concerns the means and responsibilities of the husband. He is employed as an assistant engineer and his normal weekly earnings are \$142.00. This, however, excludes overtime which is available to him each alternate week. Upon average that would increase his weekly earnings by about \$12 making a total of \$154. He lists his weekly expenditure at \$113.50. It is apparent that he has a surplus of income over expenditure and he acknowledges that this has enabled him to build up a balance in his current account. At present that balance, from this source, amounts to about \$1,000. It is therefore clear that he is in a position to make maintenance payments of some kind.

The other considerations referred to in s 43 have no application in this case except for the question of other general circumstances which may be relevant. In that regard attention must be paid to the capital sum each will have upon distribution of the proceeds of sale of the house. As a result of the order I have already made the wife will receive just over \$12,350. She has not indicated any intention to apply that sum towards the purchase of a home and as she already has a small flat one assumes she will remain in that. She will, however, be obliged to repay the money she has borrowed and she will then have available a balance of about \$9,100. If she were to invest that to reasonable advantage it would only produce her about \$25 per week so she is still left with a substantial deficit.

In the end the real question is as to what the husband can reasonably afford to pay. His apparent surplus of income is about \$40 per week, but it would not be realistic to require him to pay the whole of that surplus to the wife. In all the circumstances of the case I do not think he can, at present, be expected to pay more than \$25 per week.

The only question remaining is whether the order for maintenance should be for a limited period only. This was suggested on behalf of the husband in case it should appear that the making of an order dissuaded the wife from pursuing her efforts to find employment. I have already said that I think it will be in her own interests to find employment if she can and I hope she will do so. I am, however, reluctant to make an order limited in the way suggested. It will, I think, be better if I reserve leave to have the matter reconsidered if it should appear that the wife has failed to make suitable efforts to find employment or to take employment reasonably available to her.

There will accordingly be an order for payment of maintenance by the husband of \$25 per week with leave reserved to him as I have indicated.

The wife is entitled to her costs which I fix at \$120 and disbursements.

Solicitors: Perry, Wylie, Pope & Page, WELLINGTON, for
Applicant
Stacey, Smith, Holmes & Billington, WELLINGTON,
for Respondent