IN THE HIGH COURT OF NEW ZEALAND 14/J
AUCKLAND REGISTRY M. No. 1556/83

N2LR

No Special Consideration

461

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN HOUGHTON

Appellant

A N D HOUGHTON

Respondent

Hearing: 11th April, 1984.

Counsel: R. N. Burnes for Appellant.
Mrs. K. M. Franken for Respondent.

Judgment: 19 April 1984

JUDGMENT OF TOMPKINS, J.

The Appellant has appealed against the judgment of the District Court at Auckland delivered on the 20th October, 1983. The Respondent was awarded a half interest in the Appellant's interest in a house property situated at Ngake Street, Orakei.

Whether the Respondent is entitled to share in the Appellant's interest in the Orakei house is the only matter at issue. All other matrimonial property issues were settled between the parties by a deed of matrimonial property settlement dated the 12th May, 1983. The wife's claim to an interest in the Orakei house was expressly excluded from the deed.

The parties married on the January, 1966. The Respondent then had a daughter born on the August, 1965.

They lived in rented accommodation until in 1979

they purchased a house at Onehunga for $24,000, paying a deposit of $1,000 and borrowing the balance required.

On the 31st May, 1980, the Appellant's father died. Pursuant to the terms of his will the Appellant and his brother became the owners as tenants-in-common in equal shares of the Orakei house, which had been the father's house. By a deed dated 6th June, 1980, and made between the Appellant and his brother, they set out the terms upon which the house was held by them as trustees for each of them as tenants-in-common in equal shares. Pursuant to that deed the Appellant and Respondent commenced to live in the Orakei house in November, 1980. The Onehunga house was sold for $24,000 (the same price as was paid for it), so that after payment of commission and costs there was a loss.

The parties separated in January, 1982.

The learned Family Court Judge held that the Respondent was entitled to a half share in the Appellant's share of the Orakei house. It is not entirely clear to me from his judgment the grounds upon which he came to that conclusion. He held that the house was the matrimonial home. He seemed, for that reason only, to have concluded that the Appellant's half interest in the house was matrimonial property to be divided between the parties. He did not consider the significance of the fact that, since the Appellant owned only a half interest, the Court cannot make the normal order under s.11(1)(a) of the Matrimonial Property Act, 1976, that each spouse should share equally in the matrimonial home. No reference was made to s.11(3). He did not accept a submission made on behalf of the Appellant that if the Appellant's interest in the Orakei house were matrimonial property there should be an unequal sharing of that interest in favour of the Appellant.

Since the hearing in the court below, the Appellant and his brother have, with the consent of the Respondent, entered into an agreement to sell the Orakei house. The sale is due to be settled at the end of May. Once that occurs the deed of trust no longer is relevant, and in particular need no longer inhibit any order that the court might otherwise make.

The Orakei house was, at the time of the separation and had been for the preceding 14 months, the matrimonial home as defined in s.2 of the Act. That definition reads:-

> " 'Matrimonial home' means the dwellinghouse that is used habitually or from time to time by the husband and the wife or either of them as the only or principal family residence, together with any land, buildings or improvements appurtenant to any such dwellinghouse, and used wholly or principally for the purposes of the household. "

The Appellant's interest in the Orakei house is within the definition of "property" contained in s.1 of the Act. That definition includes any estate or interest in any real property.

The Appellant's interest in the Orakei house was property acquired by succession. It is therefore, pursuant to s.10(1) of the Act, not matrimonial property unless the intermingling provision in subs.(1) applies or unless it is the matrimonial home.

Although Mrs. Franken, for the Respondent, submitted that there had been intermingling, I do not accept that submission. On the facts it is in my view perfectly clear that the Appellant's interest in the Orakei house remains separate and identifiable from the other matrimonial property owned by the parties.

Subs.(3) of s.10 reads:-

" (3) Notwithstanding subss.(1) and (2) of this section, and s.9(4) of this Act, both the matrimonial home and the family chattels shall be matrimonial property unless designated separate property by an agreement made in accordance with s.21 of this Act. "

Although the subsection refers only to "the matrimonial home" and not to any estate or interest in the matrimonial home, I do not consider that that prevents s.10(3) operating in the present case. The Act clearly envisages that a dwellinghouse will be a matrimonial home even though the parties either own no estate or interest in it, or own an estate or interest in only part of it. The definition of matrimonial home makes it clear that the only essential requirement for a dwellinghouse to be within the definition is its use as the only or principal family residence. Therefore the Orakei house is to be regarded as matrimonial property, subject to the provisions of the Act.

I do not consider that this is a situation to which s.11(1)(a) can be applied. It reads:-

" 11.(1) Subject to the provisions of this section, upon the division of the matrimonial property each spouse shall share equally in

(a) the matrimonial home; and

(b) the family chattels. "

By providing that each spouse shall share equally in the matrimonial home, it, in my view, envisages that the whole of the matrimonial home is available to be so shared. The subsection does not deal with the case where there is only available for division a share in the matrimonial home. Had that been intended to be embraced by the subsection, paragraph (a) would have referred to

" the matrimonial home or any estate or interest therin. "

The application of this subsection in somewhat similar circumstances was considered by Holland, J. in Vazey v. Vazey (1979) 3 M.P.C. 187. The wife had become the owner of a motel complex as tenant-in-common in equal shares with her sister pursuant to her mother's will. The issue was whether the husband was entitled to share in the value of the flat in which the parties had lived and which had thereby become the matrimonial home. The learned Judge considered that although it may be necessary for a finding to be made that neither spouse owned the home before compensation can be awarded under s.11(3)(b) of the Act, it may not be necessary to apply such a narrow interpretation when considering the primary provisions of the section contained in subs.(1)(a). He concluded that because the wife owned a half share of the property in which the matrimonial home is included, and that half share must be of considerably more value than the total value of the matrimonial home, it was possible to give effect to the provisions of s.11(1)(a) and provide for the equal sharing of the equity in the matrimonial home. That approach cannot be adopted in the present case since the Appellant's interest in the Orakei house is not part of any larger and more valuable asset. For these reasons I do not consider that subs.(1)(a) can be applied in this case.

It was the Respondent's contention that she was entitled to share in the Appellant's interest in the Orakei house because of s.11(3). That sub-section provides:-

" (3) Where -

(a) subs.(2) of this section does not apply; and

(b) either -

(i) there is no matrimonial home; or

(ii) the matrimonial home is not owned by the husband or the wife or both of them -

> the court shall award each spouse an equal share in such part of the matrimonial property as it thinks just in order to compensate for the absence of an interest in the matrimonial home. "

In Brown v. Brown (1982) 5 M.P.C. 7, Greig, J. was concerned with a house on a farm. The farm was owned by the husband and his brother, who had farmed in partnership since before the marriage. The wife sought to apply s.12 relating to homesteads, but Greig, J. held that that section did not apply because it does so only when the homestead is owned by the husband or the wife and it is not so owned when the husband was a tenant-in-common of an undivided but equal share of the property.

Mr. Burnes, for the Appellant, referred to that case in support of his submission that the Orakei house was not matrimonial property to which s.11 could be applied because here too the house was not owned by the husband or the wife, and it cannot be regarded as so owned when the Appellant was a tenant-in-common of an undivided but equal share of the property. However, I do not consider that Brown's case assists in the present circumstances. It was decided on an application of s.12. That section contains no provision equivalent to s.11(3).

In my view s.11(3) fits precisely the circumstances of the present case. Subs.(2) does not apply. There was a matrimonial home. That matrimonial home was not owned by the Appellant or the Respondent. Therefore the court (subject only to s.14) should award each spouse an equal share in matrimonial property in order to compensate for the absence of an interest in the matrimonial home. Because of s.10(3) the matrimonial home is to be regarded as matrimonial property. In my view that, in the present circumstance, means that the Appellant's half interest in the Orakei house is to be regarded as matrimonial property.

So by awarding each spouse an equal share in that interest the court can compensate for the absence of an interest in the matrimonial home. For these reasons I consider that the learned Family Court Judge was correct in deciding that the Appellant's interest in the Orakei house fell to be divided between the parties.

Mr. Burnes, for the Appellant, then submitted that s.14 should apply. It was his contention that there were extraordinary circumstances that rendered repugnant to justice the equal sharing of the Appellant's half interest in the Orakei house. The facts to which he pointed in support of that contention were the relatively short period of occupation (14 months), the fact that the house was the family home of the Appellant's family, that there had been no significant contribution by the wife to the Orakei house, and generally the sequence of the events that had occurred.

The learned Family Court Judge had considered these elements. He concluded that there were no exceptional circumstances that would warrant an unequal distribution.

I agree with that conclusion. The parties had sold their previous matrimonial home in order to live in the Orakei house, although their stay together there was not long, nor was it fleeting. There does not seem to me to be anything exceptional about a spouse receiving an interest in a house property by will and both then deciding to live in it as the matrimonial home. The Act as a whole clearly contemplates that except in the most exceptional circumstances the parties should share equally in the matrimonial home. It also contemplates that a matrimonial home shall be matrimonial property to which that equal sharing applies even where the matrimonial home (or in my view the interest in it) was acquired by succession. Therefore the fact that the house was the family home of the

Appellant's family, and that the Appellant's interest was acquired by succession, cannot be regarded without much more as exceptional circumstances. The other factors referred to - a short period of occupation and the absence of significant contribution by the wife - do not result in

> " those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare. " (Martin v. Martin (1979) 1 N.Z.L.R. 97, Woodhouse, J. at 102.)

In my opinion, therefore, the learned Family Court Judge was correct when he awarded the Respondent an amount equivalent to one-half of the Appellant's interest in the Orakei house, that amount to be assessed by valuing the property as at the date of hearing, the 8th August, 1983. He ordered that the division should take place at the expiration of the term of the deed. This will now occur when the sale of the house is completed. The Respondent will then be entitled to payment out of the proceeds of the sale. Nor do I see any reason to disturb the order that the learned Family Court Judge made that the amount payable to the wife should bear interest at 11% from the date of hearing to the date of payment.

The appeal is dismissed. The Respondent is entitled to costs which I fix at $300, plus disbursements to be fixed by the Registrar.

Solicitors:

Burnes, Burnet & Co., Auckland, for Appellant.

Nicholson, Gribbin & Co., Auckland, for Respondent.