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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.439/83

BETWEEN K

Appellant

1608

A N D K

Respondent

Hearing: 10 December 1984

Counsel: E.T. Higgins for Appellant
T.M. Abbott and Miss Catriona E. Maclennan for Respondent

Judgment: 10 December 1984

ORAL JUDGMENT OF HOLLAND, J.

This is an appeal from a decision of the Family Court Division of the District Court given in August 1983 in which the appellant wife was the applicant. I am able to give an oral judgment because I have had the opportunity of reading all the evidence and the lengthy judgment of the Family Court Judge taking indeed 72 pages, but more importantly because the issues on appeal are much narrower than those before the Family Court.

The only matter for determination by this Court on appeal is whether the Family Court Judge was correct in holding under section 15 of the Matrimonial Property Act 1976 that the contributions of the spouses to the matrimonial partnership were not equal and that the contribution of the husband was clearly greater than that of the wife to the extent that the matrimonial property

other than the matrimonial home and family chattels should be divided 60% to the husband and 40% to the wife.

As was emphasised in Maw v Maw (1981) 1 N.Z.L.R. 25, this is an appeal against the exercise of a discretion. I do not wish to repeat in this judgment what was said by Richardson J. on this topic under the paragraphs which he numbered (1) to (4) appearing in page 31 of the reported judgment. Notwithstanding that it is an appeal against a discretion, this Court will interfere if it is satisfied that the discretion has been exercised on a wrong principle or if as is submitted in this case the facts cannot support the findings on which the exercise of the discretion is based.

I propose to deal with the matter briefly. It is not because it is unimportant, but I do not regard the circumstance as likely to be repeated very often and the issue is one of fact and will not be of much assistance in this field of law.

The evidence was all by affidavit. There are conflicts in those affidavits. Counsel for the husband served notice on the wife's solicitors that he wished to cross-examine the wife on her affidavit. The wife was not present at the hearing. The situation is covered by Rule 310 of the District Courts Rules 1948. On the Court being satisfied that notice had been served requiring the party to be cross-examined, counsel for the wife was not able without the leave of the Judge to be entitled to raise the affidavit as evidence. It does not appear that this specific rule was considered in detail. Counsel for the wife tells me that the wife did not wish to appear in New Zealand because of what from an examination of the papers appears to be a mistaken view as to what

might happen in respect of the custody of the children. Counsel appeared before the District Court Judge and then said that if an adverse view was to be taken of the wife's evidence because she was not available for cross-examination then he would seek an adjournment. That was an endeavour to bargain with the Court which was a procedure one hopes would not be repeated very often. It was for the wife to obtain advice as to the consequences of her not appearing and then to take those consequences. However, the District Court Judge did not take the Draconian step of refusing to accept her affidavit. He read it and has allowed it to be evidence.

With respect to the conclusion of the District Court Judge, I doubt if having decided to admit the affidavit as evidence he was then entitled to say, on that ground alone, that where it conflicted with the evidence of the husband he did not believe the wife. If he reached that conclusion solely because the wife was not available for cross-examination then his conclusion was unjustified. It might appear from reading some passages in his judgment that his conclusion in resolving issues of credibility between the husband and the wife was influenced in this regard. That, however, was not the sole position. The husband was there to be cross-examined. Counsel for the wife chose not to cross-examine the husband. In those circumstances it is difficult for counsel to make the submission that the evidence of the husband and other witnesses who were not cross-examined was not to be believed. I do not wish it to be thought that I am suggesting that there should be cross-examination of witnesses in every matrimonial property application. Far from it. These proceedings are much better dealt with on affidavits. But where, as here, there were material

disputes as to contributions the ordinary rules should prevail and that is that when there is an ability to cross-examine and it is declined the evidence must normally be deemed to be accepted. I am here not laying down any hard and fast rules in this field of the Family Court, but because of this situation I am satisfied that the Family Court Judge was entitled to hold as he did that in all questions of conflict between the evidence for the husband and the wife he preferred the evidence of the husband, not because the wife had refused to appear, but because there had been an opportunity of cross-examining the husband and his witnesses and it had been declined.

I am not sure that I would inevitably have reached the same conclusion as the Family Court Judge. I rather suspect from my reading of the affidavits that the criticisms by the husband are exaggerated. They are clearly bitter. On an appeal, however, no grounds exist in which I should substitute my view for that of the District Court Judge, particularly where I am satisfied that in principle the District Court Judge was justified in believing the husband when he was not cross-examined. On that basis it has been clearly established that the husband not only contributed more than might be expected from the father and husband as a provider but also in assisting the wife in the upbringing of the six children to a greater extent than could be expected from a man working as hard as this man did.

This was a long marriage and there were six children. The wife certainly has to have substantial credits in that regard. But the husband has demonstrated that the wife could have done considerably more than in fact was done. At the

commencement of the marriage partnership the husband and the wife had only assets of nominal value. The District Court Judge has found that the financial assets of the marriage partnership at its conclusion were worth just over $200,000. The wife is entitled to 50% of the nett value of the matrimonial home, a sum in excess of $90,000, together with half the family chattels and boat. It is only to the remaining matrimonial property of approximately $100,000 that the unequal division applies and I am satisfied in the circumstances that no ground exists for my interfering with the decision that has been made in the District Court in that regard. The value of the matrimonial home and family chattels is not relevant to this issue but demonstrates that all that is between the parties is approximately $10,000.

The other matter on appeal relates to the award of costs of $600 to the husband at the expense of the wife. That award was made because after the hearing counsel for the husband indicated to the Court that an offer of settlement had been made which would have been more beneficial to the wife than the order which she obtained. The District Court Judge has reached the view that the matter should have been settled and that the wife was at fault in not settling. It is usual in matters of this kind for costs to b borne by each party. But the principles are becoming clearer and clearer as to the manner in which this Act will be interpreted by the Court. There may be many occasions when it is unjust to award costs, but likewise there may be many when it is just. In this case no open offer was made so it is not in any way related to a payment into Court but again the issue of costs is a discretionary matter and it cannot possibly be argued that the wrongful rejection of an

offer by way of settlement is not an appropriate matter for a Judge to take into account in relation to costs. Whether he regards the matter as sufficiently important in the circumstances to penalise a party in costs will generally be for him. But again I am not satisfied that it has been demonstrated that he has acted wrongly in principle, nor that the facts will not justify the conclusion which he has reached.

The appeal is accordingly dismissed. I was minded because it is possible that another Judge might have reached a different view from that of the Family Court Judge, to recognise that by not awarding costs to the respondent on the appeal. On further consideration I am satisfied that that decision would be wrong. The appellant has brought her appeal and failed. Not only that but there was a motion to dismiss the appeal for want of prosecution which was argued and although it was dismissed, costs were reserved. There then followed a reasonably speedy fixture. It is also much clearer that a successful respondent is likely to receive an award for costs on appeal than a successful applicant in the first instance. There will be an order that the appellant pay the respondent $300 and disbursements in respect of the appeal by way of costs together with any necessary disbursements.

A D Holland J.