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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.702/84

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BETWEEN P WILSON

Appellant

A N D S WILSON

Respondent

Hearing: 1 March 1985

Counsel: P.M. James for Appellant
K.J. Jones for Respondent

Judgment: 18 APR 1985

JUDGMENT OF HARDIE BOYS J

Mr Wilson appeals against the Family Court Judge's refusal to order his wife to pay a lump sum for the future maintenance of their two children, who are in his custody, and against his decision that the rate at which his wife should contribute to their future maintenance should be \$20 per week each; Mr Wilson contending for at least \$25. Mrs Wilson, who has filed no formal cross-appeal, has asked through her counsel that if there is to be an order for the payment of a lump sum, there should be a re-assessment of her entitlement under the Matrimonial Property Act.

The parties were married on _____ and the two children, both sons, were born on _____

The matrimonial home was a jointly owned property at 24 _____

Christchurch, which was subject to a mortgage to the Housing Corporation. The parties separated pursuant to an agreement dated 16 February 1982. By that agreement the husband was given custody of the two children and the wife agreed to pay him maintenance for each of them at the rate of \$10 per week. It was further agreed that the parties were entitled to share equally in the home, which was to be valued "for the purpose of determining the respective shares therein". The wife agreed to leave her share owing for a period of up to two years or until the earlier sale of the property; and the husband agreed to pay her interest at the rate of 16% on the value of her share until it was paid to her. The wife was proposing to go for two years to Guernsey in the Channel Islands from where her family had originally come and where she still had relations. It was agreed that until the house was sold she would not pay anything on account of maintenance, but that the moneys payable would accrue. When the house was sold, the maintenance that had accrued was to be paid to the husband in a lump sum out of her share of the proceeds of sale. It is not entirely clear whether the original intention was that the house should in any event be sold at the end of the two year period or only if the husband then failed to buy out the wife's share, but nothing turns on that for present purposes.

The wife left for Guernsey soon after the agreement was signed and for the next two years there was very little communication from her either to the husband or to the children. They remained in the property for about a year but the husband found it increasingly difficult to cope

with his work as well as his domestic responsibilities and as a result arranged a transfer to Dobson on the West Coast where he obtained rental accommodation next door to his place of employment and so was able to manage much more easily. Without consulting the wife, he let the Christchurch house, for \$60 a week, a figure considerably under the market rental. In February 1984 Mrs Wilson returned briefly to New Zealand and travelled to Dobson but there seems to have been some kind of altercation and she left Dobson almost immediately and returned to Guernsey within a few days having seen the two boys for only a short time. It seems that she proposes to remain in Guernsey where she has previously had employment as a nurse, although a letter produced at the hearing indicated that she was at the time of its writing out of work. How permanent that was likely to be is not known.

The husband does not wish the property to be sold and is now in a position to pay out his wife's share. Fearing, however, that her lack of communication with the family in the past and the fact that she was out of work are indications that she is unlikely to pay maintenance in the future, he applied to the Family Court for maintenance to be fixed for the future and for it to be paid in one lump sum by way of deduction from what he is required to pay his wife for her share in the house. His request was that maintenance be increased to \$25 per week and that the lump sum to be awarded should be \$13,450. This is the total that would be paid for each boy at the rate of \$25 a week if payments continued until each attains the age of 16 years.

Section 76(1)(c) of the Family Proceedings Act 1980 empowers the Court to order payment of a lump sum towards the future maintenance of a child and subs (3) enables that lump sum to be made payable at a future date or by instalments or on such terms and conditions as the Court thinks fit. It is obviously a power which would be exercised with some caution because the uncertainties of life mean that an injustice could well be done. Under earlier legislation it was authoritatively held that maintenance orders should normally be periodic in form and that lump sum payments should be directed only where the circumstances sufficiently established that there should be a departure from the normal practice: Long v Long [1973] 1 NZLR 379, 386. The few reported cases deal with circumstances where the wife has a particular requirement for a lump sum: e.g. in order to effect repairs to her home (Lindsay v Lindsay [1972] NZLR 184); or to purchase a motorcar and a property of her own (Robertson v Robertson [1977] 1 NZLR 273, [1978] 2 NZLR 84). A similar approach was taken in England and an interesting example of its application is the decision of the Court of Appeal in Brett v Brett [1969] 1 All ER 1007, where it was held that a lump sum should be ordered to deal with a husband who had very substantial assets, but a very modest income and where there was a risk that some of his assets might be removed from the jurisdiction. Whilst all these cases dealt with a husband's obligation to maintain his wife, the general principle, I think, is equally applicable to a parent's obligation to maintain a child and to the provisions of the Family Proceedings Act. Nowadays, in most cases, there will be a further factor, namely the Matrimonial Property Act,

the intent of which is to enable spouses to realise upon their respective interests in the assets of a marriage now ended, so that each may go his or her separate way and start life anew. As a result of this Act, the circumstances in which a lump sum order in favour of a wife may be appropriate will be very limited indeed, whilst an order in favour of children, although governed by different considerations, may nonetheless amount to an undesirable clog on fulfilment of the objective of the statute. This is demonstrated in this case, where the amount claimed as a lump sum represents some 40% of the sum payable to the wife in accordance with the terms of the agreement.

The only justification for a lump sum payment here is that the wife may fail to pay periodic maintenance. What is being sought is really security for payment, by requiring payment in advance. There is however no reason to suppose that the wife will default. Certainly she did not take a great interest in the children for two years after the separation but she did return to this country and endeavoured to see them. There is really no basis at all for assuming that she will fail to discharge her obligations towards them in the future. But if she does fail, enquiries which I asked counsel to undertake show that enforcement proceedings can be taken against her pursuant to the provisions of ss 147 to 149 of the Family Proceedings Act. Her present whereabouts are readily ascertainable, and although she could no doubt move elsewhere, that risk would be involved even if she were at present living in New Zealand. Moreover the future holds too many variables for payment in advance to be a proper order to make. No present need for a lump sum payment has been made

out. If in the future the wife defaults in her obligations, the husband has his remedies. I therefore agree with the District Court Judge that a lump sum order ought not to be made.

The second part of the appeal relies first on s 72(1) of the Act which states that each parent of a child is liable to maintain the child, and secondly on the Judge's findings that Mrs Wilson's earning capacity is not greatly different from that of her husband, and that the cost of maintaining the children is \$50 per week each. In these circumstances Mr James contended that the Judge ought to have ordered the wife to pay half the cost of maintaining the children, namely \$25 per week each. The Judge did not indicate why his findings did not lead him to make such an order.

Mr Jones pointed out that the Judge had made an error in comparing the earning capacity of the parties. He took the husband's salary to be \$14,559, whilst it is clear from the evidence that that was just his basic rate and that he was earning considerably in excess: approximately \$20,000 in the tax year immediately before. In addition he had cheap accommodation in Dobson and the rent from the matrimonial home. There was no detail about the wife's circumstances and in concluding that the parties' earning capacities were not greatly different the Judge had to make an assumption. The assumption was based on the wife's nursing qualifications and on the fact that she could receive income from the investment of her share in the matrimonial home. I agree with Mr James that it was incumbent on her to place sufficient information before the Court to enable a proper finding to be made. But on the other hand the Judge's finding was clearly incorrect.

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Thus the basis of Mr James' submission that the maintenance obligation should be shared cannot be sustained. Although this appeal is by way of rehearing it is still incumbent on the appellant to satisfy the Court that the decision appealed from was wrong. In all the circumstances I am not so satisfied.

In view of these conclusions I am not required to consider the matrimonial property question raised by Mr Jones.

The appeal is dismissed with costs of \$50 to the wife.

A handwritten signature in cursive script, appearing to read "C. L. Jones", is written in dark ink on the right side of the page.

Solicitors:

Saunders & Co, CHRISTCHURCH, for Appellant
White Fox & Jones, CHRISTCHURCH, for Respondent.