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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M64/84

832

BETWEEN

J. E. RODERICK

Appellant

AND

SOCIAL SECURITY
COMMISSION

Respondent

reported
3 NZFLR 8

Hearing: 13 July 1984

Counsel: G.W.
Mr Halse for Appellant
Miss Shine for Commission
Linda

Judgment: 13 July 1984

ORAL JUDGMENT OF HILLYER J

~~This is an appeal by John Emanuel Roderick (the appellant) against a decision given in the District Court at Auckland by District Court Judge Taylor. Under that decision the learned District Court Judge dismissed an application by the appellant for an order upholding an objection under s. 27 P of The Social Security Act, 1964.~~

S 27P

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It is in effect an appeal against a determination by the respondent, that the appellant must make a contribution of \$34 per week to the maintenance of his children under what is known as the liable parent scheme. Such amount would be paid to the respondent.

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The appellant is the father of two children, and having separated from his wife in September 1979, entered into a matrimonial property agreement dated 6 October 1981. By that agreement, virtually the whole of the matrimonial assets were passed to the wife. In particular the

matrimonial home, said to be worth at least \$50,000 in which there was an equity of at least \$30,000, and the family chattels were given to the wife absolutely. She also received Building Society shares, bank accounts and life assurance policies which were of small value. In addition however, she received all the shares held by the parties in a business known as Merrick Motor Cycles Ltd. These shares were subsequently sold for an amount of \$25,000. The husband retained assets of the order of \$1000.

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— No specific mention is made in the matrimonial property agreement of the children, but they were at that time in the custody of the wife, and in evidence the appellant said that the matrimonial property was given to the wife, because she had taken on the commitment of looking after the children.

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— In the normal course of events the wife would have been entitled to a 50%¹/₁₀₀ percent share in the matrimonial property. It would seem therefore as though she obtained something over \$25,000 more than she was strictly entitled to. The appellant has said that this was because she had the children, and that is not contradicted. It is further an understandable although commendable gesture on the husband's part. I accept that that was the case.

para
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— It is not alleged before me that the husband is unable to work, although there was some suggestion of medical problems.

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— Mr Halse for the appellant puts his case on s¹_{27P(b)(iii)} of The Social Security Act 1964, which reads:

Spt #

(1)
omitted

(B)

(E)

"An objection to a contribution may be made on all or any of the following grounds ...
"(iii) The the liable parent has already provided for the maintenance of the children whether by way of settlement of

Spt # _____ property, lump sum maintenance or otherwise; "

para indent — The contribution that is referred to is the contribution assessed by the Social Security Commission under S 27N of The Social Security Act 1964 which provides that:

Spt # (B) "Having determined the liable parent's gross earnings, the Commission shall calculate the contribution to be paid by the liable parent in accordance with the provisions of the Act." of ... this Act."

Spt # para indent — I am advised from the bar that if a wife is unable to earn her own living because she has to look after children, she obtains a domestic purposes benefit. That benefit is only paid where a solo parent has custody of at least one child, and is not earning more than a specified amount, at the present time \$1200 per annum approximately. It may be increased if there is more than one child.

para indent — On behalf of the respondent Miss Shine acknowledges that the matrimonial property agreement was generous to the wife, but she says it was not a provision of maintenance for the children. There is no reference to the children in the agreement, and she pointed to two cases decided in the Family Court Hadcroft v Social Security Commission (1981) / ^{1 NZ Fam Rep 89} ~~1 NZFLR 89~~ and Andrell v Social Security Commission Butterworths Family Law Service ~~FLN (2-D) 53~~ FLN-S3 (2d).

para indent — In Hadcroft's case His Honour Judge Monaghan held that a matrimonial property settlement under The Matrimonial Property Act 1976, was a matter between the husband and wife. An objection under The Social Security Act 1964 concerned the liable parent and the Commission. He expressed reluctance at the decision he had to make, but decided that the matrimonial property agreement in that case was not such that it could be considered to be a provision of maintenance for the children.

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In the same way in Andrell's case, District Court Judge
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Headifern followed Hadcroft's case, and said :

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(A)

"If it is going to be argued that a provision of a home amounts to a provision for maintenance of children, there is nothing that stops the wife or mother, as the case may be, of forthwith selling that home and not replacing it. That would mean that she would deprive these children of a home, and she would also, if the present argument is correct, provide them with a source of maintenance. The father could then say 'Oh, but the settlement of the home on the wife or the mother provided maintenance for the children and I am no longer liable.' It only needs a moment's reflection to see what an absurd result such situations would constitute."

(B)

"I take the view that the matrimonial property settlement provides a division of assets and capital between husband and wife as absolute owners thereof, and under no circumstances, in my judgment, can the provisions of The Matrimonial Property Act be read to construe a settlement under that Act as provision for maintenance of the children by way of settlement of property, lump sum maintenance or otherwise. I do not consider that any section of the Matrimonial Property Act creates such a situation."

Spt #

para indent

With all respect to the learned District Court Judge, in my view such an attitude overlooks the realities of the situation. In this case the appellant has handed over his share in the matrimonial property assets to his wife because she had custody of the children, and because in his view she would be maintaining them.

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A sum of \$25,000 at 15¹/₁₀ percent per annum would provide an amount of \$72 per week. That in my view is adequate provision for maintenance of the children, having regard to the assessment made by the respondent of \$34 per week. If the wife were to sell the matrimonial home or dissipate the \$25,000, she would in effect be doing away with a provision made by the husband, which was intended to recognise the liability that he had to his children. I think that his agreement that the whole of the matrimonial home and the substantial cash sum should go to the wife,

comes within the spirit of § 27P(b)(iii) and amounts to the provision of maintenance for his children. He could have given his share of the matrimonial assets to an independent trustee to hold for the children. That would, in my view, have been provision of maintenance for them. I do not think it would be fair to hold that because he has given that share to his wife, because she has custody of the children, he has failed to maintain them.

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I would not like it thought that whenever a husband makes a generous matrimonial property settlement on his wife he is exempt from contribution under the liable parent's scheme. Each case must depend on its own facts. All I am saying is that in this case, appellant has made such a contribution that he should not have to contribute further to the maintenance of his children.

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I therefore allow the appeal, and pursuant to § 27S(2) of the Social Security Act, direct the Commission to review the contribution on the basis that the appellant is not liable in law to maintain the children.

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Mr Halse for the appellant submits that under § 27W of The Social Security Act, an order as to costs should be made. He indicates that the matter is of some public importance, in that many husbands make generous matrimonial property settlements with their wives, because the wives are going to have custody of the children, and the wives then maintain them. The matter has been carefully prepared and argued and in the circumstances I ~~allow costs in the sum of \$300 against the respondent.~~ There is no order for costs in the Lower Court.

P.G. Hillyer J
P.G. Hillyer J.

Solicitors:
Foy & Halse for appellant (Anckled)
Meredith, Connell for respondent (Anckled)
+ Co.