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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO.M.403/83

IN THE MATTER of the Matrimonial Property Act 1976

A N D

IN THE MATTER of an Application for an Order that a former Matrimonial Home be sold

BETWEEN D TILLEY

Appellant

A N D P TILLEY

Respondent

Hearing: 14 March 1984

Counsel: A.M. McIntosh for Appellant
J.A. Callaghan for Respondent

Judgment: 29 MAR 1984

JUDGMENT OF COOK J

The appellant, to whom I shall refer as the husband, had made application to the District Court in respect of matrimonial property of which the principal item is the matrimonial home. While the points on appeal include reference to the fact that the learned District Court Judge held that the household chattels were equally divided and submitted that there was no evidence to that effect and while, for the wife, it was suggested that the wrong figure had been taken for the amount received upon the sale of a caravan, neither point was pressed. Should the wife be in possession of more than a half share of the chattels, the husband may have derived some advantage

in respect of the caravan.

The real matter at issue is the allowance, if any, which should be made in the wife's favour when setting a value upon the matrimonial home by reason of a failure on the part of the husband to maintain the home over the years since the separation.

The couple separated in 1974. At about that time an order was made in the Magistrate's Court in respect of the home, worded as follows:-

> "By consent there will be an order granting to the applicant exclusive occupation of 430 Linwood Avenue free of all outgoings such as mortgage repayments, rates and maintenance."

It appears that, following a contested hearing, a further order was made whereby the husband was required to pay, by way of maintenance for his wife, two daughters and a son, a total of $43 per week. No doubt the existing order in respect of the home and the husband's likely financial commitments under that order were taken into account. According to Mr Callaghan, counsel for the wife, the Magistrate had commented at the time:-

> "Maintenance takes into account his (the husband's) responsibilities for the home but if he does not pay those outgoings then the applicant (the wife) can forthwith bring an application to increase the maintenance."

So far as the payment of the weekly maintenance, the mortgage repayments, rates and insurances are concerned, the husband complied with his obligations, but it seems that he did nothing towards maintaining the home.

In July 1982 the property was valued at $32,500, but a later valuation dated 18th July 1983 placed a lower figure upon it; $31,000, excluding chattels. The report states that, since the

earlier valuation was made, the residential property market had deteriorated due to the lack of suitable finance and the general economic conditions. In a separate report, made in December 1982, the same valuer listed items of outstanding maintenance which he stated would cost in all $9,420, as an approximate estimate, to make good. When giving evidence in the District Court, he stressed the need for painting and the fact that a considerable area of rot existed on the south wall. Overall, he allowed a sum of $6,000 as representing the reduction in value because of the outstanding maintenance, while confirming that, if the dwelling was to be completely decorated inside and out, the rotted wood replaced and other work done, the estimate of the cost previously given was still valid. He accepted that an item of floor subsidence, although included in his list of work to be done, had nothing to do with general preventive maintenance.

In addition, the wife included in one of her affidavits a list of work which she had carried out, or had had performed, with details of costs which, in some cases, appear to be actual expenditure but in others, certainly in the case of painting, are no more than an estimate of what it would have cost if the work had been done professionally. The total, including a figure mentioned in evidence, comes to $1,820.

The District Court Judge discussed the evidence on this aspect of the application and said:-

> "...it is quite clear from the comments in those valuations that the property is in a substantial state of disrepair at the present time. Mr Cummings is of the view that the deferred maintenance would cost $9420 to update and that if this work were done the value of the house on the market would be $37,000. However, when I examine the list of items in respect of which maintenance expenditure is required, I find that the list includes the sum of $2000 for repairs to the bathroom and $1500 for floor subsidence. I am of the view that these items are more in the nature of structural alterations and would not have been intended to be paid by Mr Tilley by

> the Judge who made the order. If a request had been made to Mr Tilley to pay these costs, he would have been able to apply to the Court for a review of the order and in all probability he would not have been held to be responsible for such items. I therefore propose to delete these items from the list of expenditure thus reducing outstanding maintenance to $5920."

He then stated he proposed to deal with the matter on the basis that the market value of the house is $37,000, with the husband being responsible for deferred maintenance of $5,920. He referred to the repairs effected by the wife in the sum of $1,765 together with the further $55.00 spent since the affidavit was sworn. He concluded that the husband would have to credit the wife with the total sum of $7,740 for the repairs either done, or then outstanding, in respect of the house.

For the appellant, Mr McIntosh submits that the original order whereby the wife was entitled to occupy the house free of any responsibility for maintenance was vague in its terms; that there was little direct or indirect contact between the parties between the date of separation and the date of hearing and few requests made to the husband that maintenance work be carried out. Further, that an item of $3,500 for interior decoration listed in the valuer's report should be viewed in the same manner as the District Court Judge viewed the bathroom repairs and the floor subsidence, on the grounds that the wife had had exclusive possession of the home since 1974, that no request was made by the wife for such work to be done and that, as the home was built in the 1940's, it would by now require renovation that went beyond ordinary maintenance and care. On the other hand, Mr Callaghan, for the wife, submits that there was nothing vague about the order and that it was clearly understood at the time.

Mr McIntosh also stressed that the husband had had to stand out of his capital for all these years but, as a matter which would have been taken into account in deciding what order should be made upon the application for maintenance in the District Court, I do not think that is relevant now, despite the fact that there will be

many cases when one party or the other, having had to forego the use of his or her share of the capital, is entitled to have that fact taken into account. For what it is worth, one notes that the husband has had the income from the investments which he owned at the time of separation.

While the original order did not impose a positive duty upon the husband to maintain the property, by implication that obligation did rest with him and it seems to have been accepted that the effect of the order was to make it his responsibility. The word "maintenance" is certainly not a precise term. Standing alone, it is somewhat vague and to determine the meaning to be given to it one must give consideration to the context, including all the circumstances, in which it is used. Mr Callaghan suggested that, in the present context, it means the normal sort of work a home owner would do about his own place. I think that gives a correct indication of what was intended. In the case of a husband having to make provision for a wife from whom he has separated and for his children in part by the provision of a home, I think it means the day to day repairs that require to be done about the place to keep it in reasonable order and the basic maintenance work that is necessary to preserve the fabric of the building and of other improvements on the property; I do not think it is intended that the property should be in immaculate order at all times, nor that it includes work involving large items of expenditure that would substantially increase the burden of the order for the time-being and might well justify a variation, if application were made. The District Court Judge acted correctly in not including in the deferred maintenance the sum of $2,000 for repairs to the bathroom and $1,500 for floor subsidence and in saying that they were more of the nature of structural alterations and would not have been intended to be paid by the husband under the order.

That it is proper to make allowance for the failure of the husband to maintain and for work done by the wife which was his responsibility is clear. As stated in Meikle v. Meikle [1979] 1

N.Z.L.R. 137 (Cooke J. at 154):-

> "There appears to be nothing contrary to that scheme, or to the philosophy of the marriage partnership on which it is based, in using s 2(2) to adjust disparities arising after the marriage has broken down. The justification for this use of the subsection is first that it confers a discretion in terms unfettered; and secondly that one class of case in which the discretion can be used effectively to achieve justice is found where to take full hearing date value between the parties would be to allow one party to benefit unfairly from the post-separation efforts of the other.
> ....
> The best that the Court can do is to make some reasonable allowance to compensate a spouse who, after the breakdown of the marriage, has done more than her (or his) share in preserving the property or improving it."

By the same token, as I see it, allowance may be made to compensate a spouse for a reduction in the value of matrimonial property since the separation, below what it otherwise should have been, at the time of the hearing, stemming from failure on the part of the other.

The question is what is the proper allowance to make in the present case. The fact that the wife bore no responsibility for maintaining the house and that the responsibility lay with the husband was a factor in determining the payment the husband should make for his wife and children. While it is recognised that matrimonial property and maintenance matters can be closely linked (Meikle v. Meikle at 154), the application before the District Court Judge was in respect of matrimonial property and involved a determination of how the present value of thé matrimonial home should be shared between the parties. To my mind, this involves a consideration of the actual market value, at the time of the hearing, how much of that value stems from the contribution of the wife beyond the obligation placed upon her by the District Court, and how much greater the value would have been had the husband made the contribution required of him; not a calculation of what was spent on

the one hand and what should have been on the other. It is known that, if the house were in a state of good order and repair, the market value should be of the order of $37,000. That appears to be on the basis that the full amount of $9,420 estimated by the valuer were now spent on it. As mentioned, the District Court Judge considered that, of that sum, the husband could not have been expected to have spent a total of $3,500 for repairs to the bathroom and for floor subsidence. It is not known at what figure the valuer would have set the market value had he taken that into account. I would say further that it must be questionable, even if the husband had fulfilled his obligations in a reasonable way, whether one could expect the house now to be in the condition that it would be if $3,500 for renovations inside and out were spent on it.

From the other point of view, I doubt if it is reasonable to say that the wife should receive a credit for the full amount claimed, a sum which includes, in particular, the estimate of what the painting would have cost had it been done professionally. Similarly, the full cost of the work in the kitchen. At the same time it should not be overlooked that, over the years, she has had to live in a home which has not been maintained in a reasonable state of repair.

One can only look at the matter broadly and try to assess what is reasonable in the circumstances. On the basis that the property is now worth $31,000, I think it proper to take as a fair allowance a figure of $6,000 overall (say $1,000 for the wife's contribution and $5,000 for the husband's failure to maintain.) If the property were sold at $31,000 this would mean that an even division would produce $15,500 for either party, but of that amount the husband's share must be reduced by $3,000 and the wife's increased by the like amount.

It is to be borne in mind that on a final settlement, as stated in the judgment, the wife is entitled to a credit of $2,910. The order made in the District Court permitted the wife to purchase

the property for a net amount of $7,900 and granted her six months from 10th August 1983 in which to raise finance. I allow the appeal by increasing the mount of $7,900 to $9,590, and extending the time by two calendar months from the date of this judgment.

The leave reserved to apply continues in force.

Solicitors
Raymond, Donnelly & Co., Christchurch, for Appellant
B.J. Drake & McGillivray, Christchurch, for Respondent.