

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

M. No. 165/77

1435

IN THE MATTER of the Matrimonial  
Property Act 1976BETWEEN G WATTS  
of  
Newlands, Married Woman  
ApplicantA N D A WATTS of  
Auckland,  
Truck Driver  
RespondentHearing: 25 October 1984Counsel: Helen Croft for Applicant  
Elizabeth Dawe for RespondentJudgment: 5 November 1984

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JUDGMENT OF QUILLIAM J

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Although the parties are now divorced it is convenient to refer to them as the husband and the wife.

The parties were married on 1959 and there have been two children of the marriage who are now aged and years. Neither party had any assets at the time of marriage and they lived for some years with the wife's parents. Finally, towards the end of 1969, the matrimonial home was purchased. Neither party was able to make any cash contribution. The purchase price was \$10,800. This was met by a State Advances Corporation loan

of \$7,742 and a loan from the wife's father of \$2,653. That left a balance of \$403 and it is not clear how that was paid.

The parties and their children occupied the matrimonial home until July 1974 when the husband left. On 10 December 1974 an interim maintenance order was made ex parte in the Magistrate's Court for payment by the husband of \$40 per week. That order was never served on the husband and from the time he left the home he made no payments of maintenance for the wife or the children. Disobedience proceedings were eventually taken against him but the fact that the order has never been served on him meant that no order of imprisonment could be made. The matter of maintenance has finally been resolved by an order of the Family Court. That order determined that arrears of maintenance of \$2,720 were owing to the wife and \$2,250 to the Consolidated Account. The parties are agreed that the amount owing to the wife is to be allowed to her by deduction from the husband's share in the matrimonial home and an arrangement has been made for the payment by instalments of the amount owing to the Consolidated Account. There was also an order for payment of arrears of \$91 in respect of the younger child and this sum has been paid.

In April 1975 the wife petitioned for divorce on the ground of the husband's adultery but the petition was later amended to allege desertion. A decree nisi was granted on that ground on 18 February 1977 and this was duly made absolute.

The older child of the marriage left the matrimonial home when she was about 20 years of age and no longer resides with her mother. The younger child became pregnant when she was 16 and both she and her child continue to reside in the matrimonial home.

The present proceedings were commenced by the wife on 7 April 1977. She was unable to find the husband in order to effect service and an order was made for substituted service on 15 July 1977. It was then thought the husband had gone to Australia. That was evidently not the case and there has been some criticism by the husband of the wife's efforts to locate him at that time. There seems little doubt, however, that he had done nothing to enable her to find him readily and there was a reasonable basis for her belief that he had gone to Australia.

The order for substituted service having been complied with, the motion was brought on for hearing before O'Regan J on 23 November 1977. There was no appearance of the husband and the wife elected not to proceed with a full hearing. An interim order was made giving her the right of occupation of the matrimonial home and the application was in other respects adjourned sine die. By the time it was brought on for hearing again the husband's address was known and he has filed an affidavit in answer to those of the wife. Any question regarding chattels has been resolved and the only matter now requiring determination concerns the respective shares of the parties in the matrimonial home. The wife concedes that as at the date of separation the parties should share equally and seeks an order for equal sharing as at that date. The husband asks for an order for equal sharing as at the date of hearing and, if the wife is unable to purchase his share, for an order for sale. The matter is accordingly one as to the way in which s 2 (2) of the Matrimonial Property Act 1976 is to be applied.

At the date of separation the value of the matrimonial home was \$19,750 and there was a balance of principal owing to the Housing Corporation of \$6,415 as well as the loan from the wife's father of \$2,653. The equity at that time was accordingly \$10,682. Since then all payments

in respect of the home have been made by the wife. She has paid rates totalling \$2,324, insurance premiums of \$1,520, mortgage payments (including principal and interest) of \$5,374, and repairs, maintenance and improvements totalling \$4,490. The value of the property at the date of hearing was \$52,000. The balance owing under the mortgage is approximately \$5,000 and there also remains owing the loan from the wife's father of \$2,653. The present equity is therefore about \$44,300.

Section 2 (2) of the Act provides that the value of any property shall be "its value as at the date of hearing ... unless that Court ... in its ... discretion otherwise decides." It is clear from the decision of the Court of Appeal in Meikle v Meikle [1979] 1 NZLR 137 that the Court is given a wide discretion in order to achieve a result which is just in the circumstances. There have been a number of cases decided under s 2 (2) but each has depended very much on its own facts and so a limited assistance only can be derived from a consideration of those cases.

On behalf of the wife it is argued that the substantially increased value of the home since the date of separation is due only in part to inflation but that a material factor is the effort made by the wife, without any assistance from the husband either by cash contributions or moral support, to maintain and improve the condition of the property. It is accordingly said that the husband ought not to be able to share in that increase in value. For the husband it is contended that any such preservation and improvement of the property can be adequately compensated for by an allowance of any expense incurred by the wife and that this would leave the increase due to inflation to be shared by the parties equally.

It is necessary to consider the reasons for the long delay which has occurred since the date of separation. The wife acted reasonably promptly in issuing her proceedings. This was not done until nearly three years after the separation but it followed fairly soon after the divorce and certainly within the limitation period prescribed by the Act. She then, however, chose not to seek any final orders and let the proceedings lie dormant for some seven years. Her explanation was that it was at about the time of the original hearing that her younger daughter had become pregnant and as that daughter and the grandchild were to continue living with her any question of sale of the house did not arise. She therefore left matters as they were. This may have been an understandable attitude but I do not consider it can be regarded as a sufficient explanation for seeking now to exclude the husband from the benefits of the increase in value. The wife had the remedy in her own hands. She could have sought an order seven years ago and one assumes that if she had done so the likelihood is that the respective shares would have been determined at the date of separation. I do not consider she is entitled now to expect to achieve the same result.

The position is not, however, one-sided. It was always open to the husband to seek determination and payment of his share and he chose not to do so. He explains this on the basis that he was aware that the younger daughter and her child were living in the matrimonial home and he accepted that the home ought not, for that reason, to be sold at that time. The fact that he did not pay any maintenance over the whole of this period is explained, in part, by the fact that he was never served with the maintenance order and that as he knew his wife was working he thought there was no obligation on him to maintain her. He must, however, have been aware that he would have an obligation to pay maintenance for the children and he made no effort to do so. The resulting burden on the wife was the greater. Notwithstanding that burden she managed not

only to maintain the property but, in a modest way, to improve it.

In the result I consider that the husband ought to be entitled to share in the inflated value of the property but that the wife should be allowed full recognition of her efforts in preserving and improving the asset and for having had to do so at the same time as having the sole responsibility for the children. I therefore conclude that the value of the matrimonial home is to be determined at the date of hearing, namely, \$52,000. From this value is to be deducted all payments made by the wife since the date of separation. I have not overlooked the fact that by making an allowance to the wife for payments of regular outgoings such as rates, insurances and maintenance, the effect is that she will have occupied the home rent free for about ten years. I consider this to be a reasonable situation in view of the husband's desertion and withdrawal of all support, both financial and moral, over that period.

Upon the basis of the figures supplied to me the method of division will be as follows:

Value of Property		\$52,000
Less Mortgage, approximately	\$ 5,000	
Loan	2,653	
	<u>        </u>	7,653
Equity		<u>44,347</u>
Less Payments by wife:		
Rates	\$ 2,324	
Insurance	1,520	
Mortgage payments	5,374	
Maintenance and Improvements	4,490	
	<u>        </u>	13,708
		<u>\$30,639</u>

The husband's half-share is accordingly \$15,319.50. I should mention, however, that the figure I have used for the balance now owing on the mortgage is approximate only. No doubt counsel will obtain the correct figure and adjust the calculation I have made accordingly. From the husband's half-share, as so ascertained, there will need to be deducted the agreed sum of \$2,720 for arrears of maintenance. This will mean that the husband will be entitled to payment of approximately \$12,600.

There remains the question of how the husband's share is to be met. I assume that if possible the wife will wish to try and raise that amount and so purchase the husband's interest in the property. She should be allowed a reasonable time in which to try and do that. I consider that in the circumstances a period of four months would be appropriate.

I therefore defer making any formal order at this stage although I shall be prepared to do so upon being requested by either counsel. I also reserve leave to apply further in case the wife should be unable to buy the husband's interest and the question of an order for sale needs to be considered. I do not anticipate, however, that there should be any further application for four months or until the wife sooner concedes that she is unable to raise the necessary finance.

There will be no order as to costs.

Solicitors: Jeffries Partners, WELLINGTON, for Applicant  
E.A. Dawe, HAMILTON, for Respondent

