IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.188/84

IN THE MATTER OF The Matrimonial Property Act 1976

A N D

IN THE MATTER OF An Application for Occupation Orders

BETWEEN SHIRLEY ANN PRICE
of 33 Tongariro Street, Hamilton, Married Woman
Appellant

A N D DEREK PRICE
of Hamilton, Fork Lift Driver
Respondent

Hearing: 6 November 1984

Counsel: J.P. Geoghegan for Appellant
R.M. Sprott for Respondent

Judgment: 27.11.84

JUDGMENT OF GALLEN J.

The appellant and the respondent commenced living apart in October 1982. The appellant moved to rental accommodation. In May 1983, they entered into a conditional agreement for the sale of the matrimonial home at 33 Tongariro Street, Hamilton to a Mr and Mrs Amohanga for $48,000. Pending fulfilment of the conditions, the purchasers

were actually given occupation. On 3 August 1983, the appellant and the respondent entered into a separation agreement. They were separately and independently advised and all requirements of the Act relating to the completion of such agreements were complied with. The separation agreement, in so far as it dealt with matrimonial property, provided for the sale of the matrimonial home with equal division of the proceeds of sale.

By November 1983, it became apparent that the purchasers were unable to proceed with the purchase of the house property and the purchasers continued to live in the house on a rental basis. On 8 January 1984, the purchasers gave up occupation and the appellant and her daughter of whom she had custody, moved back into the house where they have remained ever since.

On 6 March 1984, the appellant applied to the Family Court for an Occupation Order. Clearly she could not succeed with such an application unless she was first able to get round the provisions of the separation agreement and she sought an order pursuant to s.21 (8) of the Matrimonial Property Act that that agreement should be declared void. The basis of her application in that regard was that under the provisions of s.10 (d) and (e), the agreement had become unfair or unreasonable in the light of her own changing circumstances. The application was opposed by the respondent who sought an order for sale. He in the meantime, had entered into a contract to purchase another house for himself and his de facto wife and had incurred responsibilities in connection

with this contract. He maintained that on the basis of the position he found himself in, it would be unjust to him if the property were not sold.

The appellant after separation, resided in a rented property in Masons Avenue. When that property was placed on the market and it became apparent that she would require alternative accommodation, she made the move back to the matrimonial home. As I understand her contentions, the appellant does not maintain that the agreement was unfair or unreasonable at the time it was made, but says that her circumstances have so changed that it has become unreasonable and unjust in the light of those circumstances. In making that contention, she relies upon a number of factors.

The first of these is related to her health. In 1981, as a result of a congenital hip condition, she required an operation to her hip which disabled her for some period. Since the signing of the separation agreement, she has discovered that it is necessary for her to have a second operation of a similar nature. In evidence, she stated that she did not know of the need for that operation at the time she signed the separation. It has now become clear that she will be able to have this operation some time before the end of this year and as a result of it, she is likely to be disabled for a period. She also contends that her financial situation is such that she has been unable to purchase her husband's share in the matrimonial home which is what she

would prefer to do. Although she has made some efforts in this regard, her low income has meant that she has not been considered as an acceptable borrower by the rather limited lenders in the market since she made the decision to attempt to purchase. Finally, she is concerned over the position of her daughter of whom she has custody. Her daughter Carroll, is coming to the end of her intermediate schooling and is about to commence High School. The appellant contends that it is desirable that she should have some stability during her high school years; that she is happy in the family home and that it is undesirable that she should now be required to leave it. Finally, she maintains that it is important to her to have a house which is big enough to enable her to have her son who is in the custody of the respondent, to stay from time to time.

The extent of the discretion which is available to the Court and the way in which that discretion should be exercised has been considered by the Court of Appeal in the two decisions of Aldridge v. Aldridge 1983 N.Z.L.R. 576 and Docherty v. Docherty 1983 N.Z.L.R. 586. Those decisions emphasise the width of the discretion. They also put some stress on the constraints on an appellate review of a discretionary decision. In most cases where an agreement comes up for consideration, a disparity in the results of that agreement having regard to the statutory basis for division, provides a starting point for consideration. That is not the case here where the parties accepted equality.

The learned District Court Judge, in the exercise of his discretion carefully considered the matters that were placed before him. He did not consider that the requirement of an additional operation was a decisive factor because he considered that it should have been apparent to the appellant before signing the agreement that this possibility existed. The evidence indicates that the appellant stated categorically that she was not aware of this possibility at the time the agreement was signed. In a preliminary decision, I refused permission for the appellant to adduce further evidence to support her contention in this regard. My reasons for that decision have been set out elsewhere, but it is clear from the decision of the learned District Court Judge that he did not regard that particular conclusion as decisive because he went on to say that he had reached the conclusion he had even if there had been a change of circumstances for the appellant.

I think it is important to emphasise that the other matters relied upon by the appellant were all matters which have not significantly changed since the execution of the agreement. Her ability to meet a financial commitment is no worse now than it was then and while money may have been difficult to obtain during the period of the stringent controls which were in force, those controls no longer exist. Effectively, the financial argument raised by the appellant depends on her inability to meet the commitments which would be imposed upon her and while one must have some sympathy for her in this regard, this condition is the same as it was when

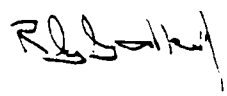
she entered into the agreement. As far as her daughter and her son are concerned - and particularly her daughter - the same considerations apply and it was contended for the respondent that in any event it is the intention of the appellant to ensure that her daughter attends a particular High School which is some considerable distance from the family home. Under those circumstances, one would have thought that it would be possible to continue attending that school even if other areas in Hamilton had to be considered as a place of residence.

The learned District Court Judge was also concerned by what he regarded as a prejudice that the respondent would suffer because of the commitments that he had entered into. He accepted that those commitments were effectively entered into before the agreement was signed and also that the respondent had been less than frank over the financial position of his de facto wife in the contribution that she made to the household. He considered that balancing the equities, he was not prepared to say that the agreement should be declared void as being unjust, or that it had become unfair or unreasonable in the light of any change of circumstances. The only matter of significance upon which the appellant can rely is the necessity for her to undergo an operation, but there is nothing in the evidence or the submissions to relate that particular fact to any special circumstance requiring the matrimonial home to be available to the appellant, except

perhaps on a temporary basis. Certainly, for a period she will require accommodation which can meet the particular needs which her disability will impose upon her, but the evidence suggests that once she has got through the initial period, this will not be an essential factor in respect of any property in which she resides, nor is there anything in the evidence which makes the premises essential to meet that need.

All in all, while as I have said one cannot but have some sympathy for the appellant, I do not think there is any factor which would justify my interfering with the discretion exercised by the learned District Court Judge.

There is however, one matter which gives me concern. The time taken to obtain a fixture and for delivery of this judgment, has meant that the end of the year is approaching and the impending operation of the applicant combined with the holiday period, may well make it impossible for her to obtain suitable accommodation for herself and her daughter immediately. Under those circumstances, I consider it would be not unreasonable for her to have the right to occupy the matrimonial home until 1 February 1985 and I am prepared to make that interim occupation order on that basis. Subject to that, the appeal is dismissed.



Solicitors for Appellant: Messrs Chatwin, Martin and Company, Hamilton

Solicitors for Respondent: Messrs Evans, Bailey and Company, Hamilton