

IN THE MATTER of Section 39 of the
Matrimonial Property
Act, 1976

BETWEEN

FORD

APPELLANT

A N D

FORD

RESPONDENT

Judgment: 18 JUL 1984
Hearing: ~~25 May 1984~~ - 6 JUL 1984
Counsel: R.J. Collis for Appellant
L. Renneberg for Respondent

JUDGMENT OF CASEY J.

On 11th March 1983 His Honour Judge Mahoney delivered a reserved judgment in Mr Ford's application under the Matrimonial Property Act, ordering an equal division of property and the sale of the matrimonial home at Glenfield, subject to his having eight weeks to buy it. He dismissed Mrs Ford's claim to an interest in the superannuation he received from the Navy, from which he had retired about eighteen months after their marriage in 1974. She has appealed. It is clear that there can be no argument over the superannuation, and the issue narrows down to the order for sale of the former matrimonial home.

This was a marriage of comparatively short duration. They separated in September 1980 although they had been virtually living their own lives in the same house since May 1978 and their child J was born on of that year. Separation and custody orders in Mrs Ford's favour were made in February 1982 and she has continued to reside in the house with the child, who is subject to asthma and at the time of the District Court hearing he required hospitalisation from time to

time. Mrs Ford has put in a further affidavit in support of this appeal which I have accepted, and it discloses that J is now at school doing well, and evidently his asthma is under control through regular medication.

Mr Ford is paying maintenance under the liable parent scheme. He left for Australia in 1982 and has been living there ever since. He is in his mid-40's and Mrs Ford is some years younger and lives principally on her Social Welfare benefit. At the time of the hearing in October 1982 this was \$202 per fortnight and she was then receiving \$50 a week from a boarder. She has not been in paid employment since the separation although she engages in social work and has fostered children from time to time for the Department.

The Judge recognised a general need under the Act to safeguard the welfare of the child by keeping the home, but he emphasised the general policy that the parties to a broken marriage should be able to take their share and use it to build a new future for themselves. He noted that Mr Ford left practically everything in the house when he went to Australia, although this is disputed in the affidavit that Mrs Ford has put before me. He referred to the valuation of the house then at \$61,000 excluding drapes and floor coverings, and said that Mrs Ford would receive about \$25,000 for her equity on a sale, but she claimed this would not be enough to enable her to buy another property. He said "Even if that were the case I do not believe that the child's interest in the particular circumstances I have outlined override the general principal that the parties as quickly as possible should be able to extract their capital from the marriage and make a fresh start." He felt that any further delay in the sale of the home would be unfair to the husband and it was time for both of them to make a fresh start.

Since that judgment the Matrimonial Property Act has been amended by the insertion of a new section 28A requiring the Court to have "particular regard to the need to provide a home for any minor dependant child of the marriage and all

other relevant circumstances", in deciding whether to make orders for occupation of the matrimonial home. It was submitted by the Appellant that the learned Judge did not pay sufficient regard to J 's welfare under the provisions of the Act as it then stood, let alone under the more stringent requirements of the amendment. Counsel suggested that it would be appropriate to let her remain in occupation until J had finished primary school in another five or six years before directing sale of the house and division of the proceeds.

In view of the time which has elapsed since the hearing in October 1982 I thought it appropriate to obtain a further valuation together with some information about suitable alternative accommodation available to Mrs Ford. I did not see it as essential that she should remain in the Glenfield locality although, for obvious reasons, if she could find somewhere else in that area it would be to the advantage of herself and her child who has just started school. Counsel have now supplied me with further information including the fact that the present market value of the house is in the vicinity of \$78,000, with a suggestion that an asking price be slightly higher. After allowing for agent's expenses this would produce an equity in excess of \$30,000 for Mrs Ford. Details of twelve properties on the North Shore which she has inspected since the hearing before me of 25th May range from \$43,000 to \$76,500 with the mean apparently about \$55,000. Not all of them are suitable but it demonstrates that what could be regarded as adequate housing is not beyond her means with a capital sum of this size now at her disposal, although she may have to make a sustained effort and possibly have to wait some time before finding a suitable property.

The factor which impresses me is the amount of capital she will have in hand when this property is sold. Even if it is not enough to buy a home it is certainly sufficient to give her the assurance of suitable rented accommodation in the meantime, and with that security J will certainly not be deprived of an adequate home. The requirements of s.28A do not override every other consideration, and the Judge was quite correct in his description of the overall policy of the

Act as enabling the parties to draw a line across the past and make a fresh start as soon as possible after their marriage has ended.

I accept that it may be placing an unfair burden on Mrs Ford if she is required to use capital to pay for rented accommodation in order to meet J 's requirements when she might not be disposed to do the same for herself. However, this is a fact of life in these situations - recognised, of course, by the Social Welfare benefit she receives to bridge the gap in maintenance between her needs and her husband's liability.

Against this background I see no reason in s.28A to delay the sale of the house property to the extent suggested by Mrs Ford's Counsel. However, I am prepared to take account of the realities in finding alternative accommodation, particularly at this time of restricted loan availability. I confirm the sale of the house and equal division of the net proceeds, but she will have the right to remain in occupation for six months from the date of this judgment, subject to her meeting the mortgage instalments and other outgoings. Needless to say if she is able to move earlier into other accommodation then the house is to be sold as soon as practicable after she vacates. To that extent the appeal is allowed. I make no order for costs but direct that the fee for the valuations be shared equally between the parties. Leave is reserved to either of them to apply to the District Court for any further order or directions to give effect to this judgment.

Solicitors:

Morgan-Coakle Ryan & Collis, Auckland, for Appellant
L. Renneberg, Auckland, for Respondent

M. G. Casey J.