27/11

NZLR

X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.830/83

BETWEEN F EUSTON of Auckland, Driver

1453

APPELLANT

AND B EUSTON of Auckland, Married Woman

RESPONDENT

Hearing: 31 October 1984

Counsel: R.J. Collis for Appellant
M.G.P. Knapp for Respondent
D. Brown for Child

Judgment: 31 October, 1984

ORAL JUDGMENT OF VAUTIER, J.

This is an appeal against a decision given in the District Court at Auckland by District Court Judge Mrs S.R. Cartwright on 7 June, 1983 in relation to a question arising concerning the division of matrimonial property pursuant to the provision of the Matrimonial Property Act 1976. The appeal is brought by the husband against this decision which was a judgment given supplementary to a previous decision in which orders were made in respect of division of matrimonial property between the husband and the wife but with a reservation as to the actual division

of the proceeds of sale of the matrimonial home pending submissions regarding and further consideration of the position of a child of the marriage.

The situation presented to the District Court here, as is shown by the judgment, is that these parties had the misfortune to have a child who suffers from Down's Syndrome. At the time of the hearing the child in question was aged 20, he is now I am informed aged 21. The judgment shows that the Judge accepted the evidence of the respondent as to the mental age of the child in question being that of a child aged about eight. She also referred to the fact that it is commonly expected that a child born with Down's Syndrome will rarely, if ever, attain adult intelligence or skills and, further, that the child could not be expected to be responsible for his own care or accommodation. The evidence, as the judgment shows, further disclosed that the respondent was fully accepting the responsibility of the future care of this child and wished to provide a home for herself and the child to the extent that she could do so by means of the moneys which she would obtain from the division of the matrimonial property. None of these matters is in any way in dispute in this appeal.

The Judge in the District Court applied s.26(1) of the Act and made an order settling a portion of the husband's share in the nett proceeds of the sale of the

matrimonial home to be held in trust on behalf of the child in question. The order as drawn up and sealed in the District Court is in the following terms:

> "On the sale of the former matrimonial home at Weatherly Road, Torbay, the respondent, B EUSTON is to receive one half of the net proceeds of sale. The applicant, F EUSTON is to receive one-third of the net proceeds of sale and the balance of one-sixth of the net proceeds of sale is to be held by the Public Trustee in trust for M EUSTON, that Trust to be terminated in the event either of (a) the death of M EUSTON of (b) that M EUSTON fails to reside in the home occupied by his mother and himself for a continual period of 3 months.
>
> On the termination of the trust for either of the above reasons, the proceeds are to be paid to the applicant."

Although Mr Collis in arguing that the Judge erred in making any order pursuant to s.26(1), accepted that this child must be regarded as a "dependent child of the marriage" within the meaning of s.26(1) of the Act, he adverted to the fact that he is not now and was not at the time of the judgment a child in the sense that term is used in relation to other legislation in the field of family law, e.g. the Guardianship Act or the Family Proceedings Act. These matters are indeed traversed in the judgment in question but no question arises as to the correctness of the conclusion reached by the Judge in the District Court that there was jurisdiction in terms of s.26(1) of the Act to make some order in favour of the child in question in terms of that section. Section 26(1) it should be noted reads as follows:

> "Regards for interests of children - (1) The Court shall, in proceedings under this Act, have regard to the interests of any minor or dependent children of the marriage, and may if it considers it just make an order settling the matrimonial property or any part thereof for the benefit of the children of the marriage or of any of them, and reserving such interest (if any) of the husband or the wife or both in the property as the Court considers just."

Mr Collis drew attention to the long title of the Act and referred to the primary purpose of the Act as being to make provision for the early final division of the matrimonial property of the matrimonial partnership between the spouses when the marriage comes to an end. It is of course, however, as he mentioned, to be noted that the long title in itself makes specific reference to the necessity in so doing to take account of the "interest of any children of the marriage".

The situation here is that the child in question is and was at the time of the judgment in receipt of a benefit pursuant to the provisions of the Social Security Act. The benefit is referred to as being in the sum of $188 per fortnight. The Judge commented that he, however, had no other means out of which he could assist the respondent as regards the matter of the provision of accommodation and that that matter would accordingly be the respondent's responsibility. This, Mr Collis accepted, to be the position but he submitted that in view of the amount of the benefit the child in question could not be said to be economically dependent although he could

be said to be dependent in a broader sense so far as such matters as accommodation and of course care and attention. Mr Collis pointed out that the word "dependent" is not defined in the Act. I would conclude, however, that construing this word in its ordinary English meaning as must be done this child must clearly be regarded as coming within the meaning of that term.

Reference was made in support of the appeal to a number of previous decisions of this Court in relation to division of matrimonial property. There was cited the decision of C. v. C. [1978] MPC 1 44, a judgment of Barker, J. where a sum of $1,000 was settled on each of the four children of the marriage, this sum being provided out of the mother's entitlement, she being a person who was a patient in a psychiatric hospital. The facts are of course so different that I do not think much assistance is provided either way by a consideration of that particular judgment.

In the next case referred to, Godfrey v. Godfrey [1978] MPC 1 90, a decision of Jeffries, J., no order was made settling property on children but this was simply a case of infant children and, as Mr Knapp has pointed out, the case must be viewed in the light of its own facts, the Judge expressly finding, as is noted on p.93, that on the evidence and from his observations of the wife in the witnessbox he was satisfied that she appreciated the trust

which was being reposed in her with regard to the provision of accommodation for the children and their care in the future and it was said that it was for those reasons that the Judge did not propose to exercise the powers available to him under s.26(1). Again, I think that case provides no guide to the present situation.

Coming closer certainly to the facts of this case is the case of Smith v. Smith [1978] MPC 1 194, Perry, J. where there was an epileptic child of the marriage and the Court did not make any order in terms of s.26(1). What appears to have influenced the Judge in that case, however, is the fact that the amount which would be available from the distribution would be no more than was sufficient to provide each of the parties with a home. It is not possible, of course, to know to what extent the Judge there took into account his own assessment of the parties and the likelihood of proper provision being made by them to safeguard the interests of the daughter who was subject to this disability.

In a further decision, Rhodes v. Rhodes [1979] MPC 2, 160, Casey, J. did proceed to examine and express certain views concerning the interpretation which should be placed upon s.26(1) of the Act and he said:

> "This is expressed in wide terms, and raises the initial question of whether the children have any proprietary rights of their own in the matrimonial property analagous to that of their

> parents. I am satisfied that the word 'interests' is not intended to confer such a right; when one contrasts the detailed way in which the Act deals with the ascertainment and assessment of spouses' rights, it seems unlikely that Parliament intended in this peremptory fashion to bypass the existing channels whereby children succeed to their parents' property. The long title to the Act speaks of providing for 'a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce ... while taking account of the interests of any children of the marriage ..." The intention to be gathered is that the Court must have regard to how minor or dependent children may be affected by any property division between their parents, but no independent proprietary rights are conferred upon them. Jeffries, J. held in Madden v. Madden [1978] MPC 134 that 'it is ancillary provision, and not meant to affect the sharing under ss.11 and 15'. (P.135. With respect this may be stating the position too narrowly. The section is of obvious relevance in dealing with the occupancy of a matrimonial home for dependent children, or in preserving an improvident parent's share of property for their needs, or in protecting their existing beneficial interest in matrimonial property e.g. in this case land which might be matrimonial property is the subject of a trust for the children, but the parties have already excluded it. I think s.26(1) requires a consideration of the welfare and interest of the children in the light of the property division between husband and wife, to ensure their financial protection during minority or dependency."

The case of Madden v. Madden which is there referred to is certainly another decision in which no provision was made in terms of the section in question but I am in agreement with the view which Casey, J. has expressed that the comment made as to the section in question not being "meant to affect the sharing under ss.11 and 15" must be regarded as stating the position too narrowly. If the Court does exercise the express jurisdiction which is

conferred by s.26(1) that must of course have an effect on the actual sharing which is ordered.

With great respect also, however, I find myself unable to accept fully all that is said in the passage which I have quoted from the judgment in Rhodes v. Rhodes (supra). The word "interests" where it appears in s.26(1) is clearly in my view directed simply to the question of the welfare of the children referred to and the word "welfare" could, I think, be substituted for it without doing any violence to the clear meaning and intention of the provision. It is not in my view a question of deciding whether the phrase "shall have regard to the interests" is intended or not intended to confer some proprietary right. The rights which the children in the category referred to obtain pursuant to s.26 are expressly spelt out in the language which the Legislature has used. The Court is given a discretion to make an order settling the matrimonial property or any part thereof for their benefit and those clear words in my view mean exactly what they say. It may well be, I fully accept, that in the majority of cases it will not be appropriate for the Court to act in terms of s.26(1). The Courts can ordinarily rely upon the fact that children, unless there are some very special circumstances, are brought up by one or other of the parents and the Court can rely upon the parental sense of responsibility reinforced, of course, by the various provisions of the law relating to the maintenance of

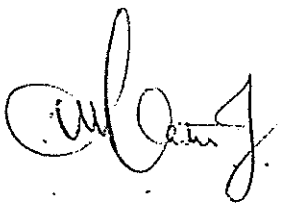
children and there is no necessity therefore, as is said in some of the cases to which I have referred, for any order for settlement of property to be made in terms of s.26(1) and such orders may in many circumstances be quite inappropriate because of the rigidity which they would create as regards future dealings with the property by the spouses themselves.

It is to be noted as again Mr Knapp pointed out that Rhodes v. Rhodes is a case where it would be likely to be clearly regarded as inappropriate for any particular order to be made having regard to the fact that there was there a sum of $140,000 made available to the wife on the division of the property. In the present case, however, the Judge in the District Court, having seen and heard the parties and obtained the matrimonial history for the purposes of making the orders in terms of the Act for the provision of matrimonial property has deemed it a case where the discretion should be exercised. It is indeed a wide discretion which is conferrred and in these circumstances it would be necessary for me to conclude that there was some wrongful exercise of the discretion before I could set the decision aside or substitute some other order. It appears to me that this indeed is an appropriate case for the making of an order pursuant to s.26(1) as the Judge herself decided it was. There is the situation here that the amount which the respondent obtains from the division is clearly, as the Judge

concluded, not a sum which will enable her very easily to provide alternative accommodation for herself and the child and the position in that regard could be much better safeguarded by an order of the kind which was in fact made. The situation has been obviously worked out very carefully by the Judge taking into account all the factors and I am in full agreement with the reasoning and the conclusions which are reached. The question of the safeguarding of the interests of the appellant in the event of the trust fund being no longer required for the purposes contemplated by s.26(1) is, I think, satisfactorily provided for by the moneys in question being directed to be paid to the Public Trustee with the directions which are referred to in the judgment.

The appeal must accordingly be dismissed.

As regards the question of costs Mr Collis has submitted that the normal course of not awarding costs should be followed. I think that that is so in the ordinary case where the matter is being dealt with at first instance. This, however, is an appeal and falls, therefore, in my view into a different category. In the circumstances it is just, I think, that there should be an order as to costs in favour of the respondent. I allow the sum of $150 costs to the respondent against the appellant.



SOLICITORS:

Morgan-Coakle Ryan & Collis, Auckland, for Appellant

Johnston Prichard Fee & Partners, Auckland, for Respondent