214

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.286/83

250

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN

GRAINGER

Applicant

A N D

GRAINGER

Defendant

Hearing: 1 March 1984

Counsel: D.H. Hicks for Applicant
W.F. Morgan for Defendant

Judgment: 7 MAR 1984

JUDGMENT OF COOK J.

The parties, who were married on 23rd September 1978, have been living apart since 30th December 1982 and the wife now seeks orders in respect of matrimonial property. Since the separation, the husband has occupied the matrimonial home and the wife and the one child of the marriage (now aged 2) have lived with the wife's mother.

It is accepted that there should be an equal division and it has been agreed in principle that the matrimonial home should be sold: the terms upon which this is to be done have still to be resolved and, in case agreement cannot be reached, it is requested that leave be reserved for either party to apply on three days notice. The chattels are to be valued and brought into account.

Five matters are left for decision by the Court.

(1) The first relates to the occupation of the matrimonial home by the husband for a period of approximately 14 months and certain payments he made during that time. The husband claims - and it is not disputed - that, since the date of separation, he has met outgoings which include:

(a) Five quarterly reductions of mortgage principal, a total of $1,000;

(b) Instalments of hire purchase in respect of a three-piece lounge suite totalling $1221.16.

He asks that he be given credit for these sums, but the wife points to the fact that he has had exclusive use of the home during the period mentioned and that some value must be placed upon that.
Two valuations have been made of the matrimonial home and from these it appears that the property, including certain chattels, has a market value of between $50,.000 and $60,000. At the time of separation, the mortgage stood at $18,000 but, as mentioned, has been reduced by $1,000. There may also be an unsecured loan to the husband's father of $2,000. Apart from the repayment of principal mentioned, the husband has paid the rates and insurance premiums and has maintained the house and the garden. It appears that the principal repayments have come from money earned after the separation.
The only cash in his name, referred to in the affidavits, at the time of the separation is the sum of $859.42 in a savings bank account and details of payments from that sum totalling $483.62 are given in the husband's second affidavit; they do not include anything in reduction of the mortgage debt. The reduction of principal will be fully reflected in the amount available on a final settlement and the husband should receive credit for the amount he has paid.

I think a similar view must be taken of the hire purchase payments on the lounge suite, but with certain qualifications; one monthly instalment of $124 was paid from the money which was matrimonial property, as mentioned above, so that amount should be deducted. In addition, he has had the use of the furniture and there will inevitably have been some wear and tear. It is not known what portion of the total paid represents interest, or how the payments made will be reflected in a valuation as at the time of the hearing. No precise calculation can be made, but I consider it would be proper if he received credit for the sum of $750 (or the present value of the suite, should it by any chance be less than that sum).

On the other hand, some allowance must be made in favour of the wife in respect of the husband's occupancy of the home. The equity, of which she is entitled to half, appears to be at least $30,000 after making allowance for the mortgage repayments. In theory, she has stood out of a capital sum of $15,000 or more, over the period of time in question. This could readily have earned in excess of $1,500 and I consider that would be a proper sum to bring into account to her credit on the final accounting.

Accordingly, I find that, on a division of the net proceeds of the matrimonial home, a net figure of $500 be first paid to the wife before the balance is divided between them and, upon a valuation of the chattels for the purpose of an equal division, the husband should be allowed the credit mentioned above.

(2) The second point relates to two policies of assurance on the life of the husband, which, at the date of separation, had surrender values of $892 and $780 respectively. It appears that these policies were taken out by his father when the husband was an infant and subsequently transferred to him by way of gift before the marriage. During the marriage he had made certain premium payments on each policy. The wife claims that, to the extent of the surrender value, each policy constitutes matrimonial property, which the husband claims that they are separate property, except to the extent of any increase in value which is attributable, wholly or in part, to the application of matrimonial property; in other words, he concedes that Section 9(3) has application.

Section 8(g) includes within the definition of matrimonial property:-

> "Any policy of assurance taken out by one spouse on his or her own life or the life of the other spouse, whether for his or her benefit or the benefit of the other spouse (not being a policy that was fully paid up at the time of the marriage and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the asssured or on the occurrence of a specified event or otherwise;"

Decided cases in which reference is made to such policies are discussed in Peterson v. Peterson (1980) 3 MPC 133 by Somers J. where the question at issue was whether certain policies, which had been taken out by the husband prior to his marriage on his own life for his own benefit, constituted matrimonial property or whether, as submitted for the husband in that case, the policies, having been taken out before marriage, were not matrimonial property but separate property, the value of that separate property having increased during the marriage by the application of matrimonial property so that such increase only and no more was to be taken into account. In Pinching (1978) 1 MPC 161, Jeffries J. had found:-

> "Item 5 of the assurance policies I think is decided by the meaning of s.8(g) of the Act. The three assurance policies were taken out by the defendant in 1946, 1955 and 1961 respectively which was long before the marriage. I think the clear intention was to include all such policies taken out before, or after marriage, by either spouse, as matrimonial property, if premiums are to be paid during the course of the marriage which is the case here. The asssurance policies, in my view, are matrimonial property."

With this conclusion, Somers J. agreed. While I readily accept the correctness of that decision, that does not resolve the present question, unless it can be said that the policies in question were taken out by the husband.

Here the husband became the owner of the policy by virtue of the gift from his father; as it was taken out in his infancy, it is to be presumed that the father paid the premiums over a number of years. It was submitted for the wife that the expression

"taken out" used in the section should be given a broad interpretation, broad enough to include the meaning "acquired" by the spouse. I would have difficulty in construing it in that manner, however, certainly on the facts of this case. In the Shorter O.E.D the particular definition of "take out", which would seem applicable to the words as used in relation to the issue of a policy of assurance, is - "to apply for and obtain (a licence etc.) from the proper authority". This requires a positive step on the part of the person seeking life assurance. To my mind, it is different from the passive receipt of a policy by way of gift. I would say, also, that, as a variation from the basic concept that assets acquired prior to the marriage are separate property and those acquired during it matrimonial, it is not a situation where one should strive for an interpretation which goes beyond the meaning.

I must hold that the policies as such are not matrimonial property, but that by virtue of Section 9(3), whatever increase in value may be attributable to the application of matrimonial property does constitute such property.

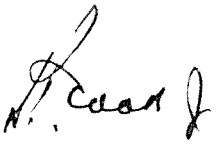
(3) Included in moneys which may be said to have been matrimonial property at the time of separation is a sum of $320 (according to the wife), or $420 (according to the husband), paid to her by him and a further sum of $438.62 withdrawn from the savings bank by the husband for his own purposes. As to the former, the wife states that it had all been spent on Christmas presents and household expenses and, in the case of the latter, except the sum of $124 already referred to, applied in payment of an instalment due on the furniture, the husband says that it has been applied in a similar manner. Consequently nothing remains for division and no asset can be said to have taken the place of the moneys mentioned.

(4) The husband claims that an "eternity ring", which he purchased and gave to his wife, is matrimonial property on the grounds that it was used for the benefit of both the husband and the wife (Section 10(2)). What form of eternity ring of that nature is intended to symbolise I do not know, but I am unable to see that there is any merit in the suggestion that a ring of that type is in a different class from other forms of jewellery. Clearly it is the wife's separate property.

(5) Finally the husband claims that a wall unit, carpet and linoleum were purchased by the wife and installed in her mother's home on the understanding that these items were to be returned when the applicant's mother had no further use for them. The wife says that she made the payments from her own earnings and, that there was no understanding that the items would be returned. The matter was not pressed. If a finding is necessary, the articles mentioned do not constitute matrimonial property.

Findings are made as above. Leave is reserved to either party to apply on three days notice for any formal orders that may be necessary and, generally, in

respect of any question which may arise, including costs and the question of the terms upon which the house is to be sold.



Solicitors:

Rhodes & Co., Christchurch, for Applicant
H.W. Thompson & Morgan, Christchurch, for Defendant.