NZLR.

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IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.No.39/81

IN THE MATTER of the Matrimonial Property Act 1976

1592

BETWEEN GREGORY of Whangarei, Married Woman

Applicant

AND GREGORY of Whangarei, General Hand

Respondent

Hearing: 1 November, 1984.

Counsel: P.I. Treston for Applicant
A.J. Twaddle for Respondent

Judgment: 1 November, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This is an application for the making of further orders by this Court in implementation of a judgment of the Court given on 22 July, 1982 making an order as to division of matrimonial property in terms of the Matrimonial Property Act 1976. The applicant was the former wife of the respondent; she is now Burns.

The matter originally came before this Court in the form of a notice of motion by the applicant seeking an order pursuant to s.21(8) of the Matrimonial Property Act declaring void an agreement which had been entered into between the parties. As the judgment given by me on 22 July, 1982

records, the situation with the application, however, was that the parties were in agreement that in the event of the agreement which the parties themselves had entered into being declared void the Court should proceed to make an order as to the disposition of the only item of matrimonial property in dispute between the parties, that being the former matrimonial home. In the judgment referred to it was found that it would be unjust to give effect to the agreement which the parties had entered into; it was accordingly declared void and an order was made in terms of s.25(1)(a) of the Act determining that the applicant was entitled to a half share in the property in question. The situation in relation to the application to have the agreement declared void was that the applicant said in her evidence that she had entered into the agreement under which she was to forego any share in the property thinking that it would be in the best interests of the children who were at that time still infants that she should do so. She indeed went further than this in that in relation to the question of the division of the matrimonial property in the event of her application to have the agreement set aside being successful, she stated that she wished to obtain a half share of the property not for herself but so that it could be vested in trust for the benefit of the children. It is for this reason that in my judgment, after making the order declaring the applicant to be entitled to a half share of the property, I went on to say this:

> "For the reasons to which I have already adverted, I am doubtful whether s.26 can properly be applied in the way that the applicant seeks so as to enable an order to be made settling a half share of this property on the children. The applicant having in

> terms of this judgment been adjudged to be entitled to a half share in the property, she can proceed to execute a deed of trust in favour of the children in respect of her interest. A suitable draft deed could be submitted to the Court for approval. I, in any case, indicated to counsel during the course of the hearing that in the event of the application succeeding I would require to have submitted to me some properly drawn form of settlement incorporating all the provisions which would be deemed necessary by a prudent conveyancer for the creation of a trust or settlement of this kind."

The last sentence of that paragraph is something said with reference to a comment which I made in the course of the hearing as to it clearly being necessary if any trust for the benefit of the children was to be created (in the event of my deciding that the agreement should be set aside), it would clearly be necessary for the terms of such a trust to be very carefully worked out. I had then in mind, of course, that it was being suggested that the provisions of s.26(1) of the Act as to the making of orders settling the matrimonial property or some part thereof for the benefit of the children of the marriage be applied. By the time I came to give judgment however, as is apparent, I had come to the conclusion that it would be inappropriate to make any such order as was suggested in terms of s.26(1). It is for that reason that the suggestion was put forward by me in the judgment that the applicant, if she wished, could herself settle the half share of the property which she obtained in terms of my judgment upon the children and the Court to facilitate any such course of action would be prepared to consider and approve the form of the deed. I accept fully Mr Treston's submission that there is clearly here no obligation placed upon the applicant by the terms of the judgment to create any trust or take any particular action

at all with regard to the half share of the property to which she is by this judgment adjudged to be entitled. The order of the Court has been drawn up and sealed simply adjudging in terms of s.25(1)(a) that the applicant is entitled to a half share of the property in question. She accordingly now has a vested interest in terms of that judgment and Mr Twaddle did not indeed attempt to argue that the Court could in any way modify the terms of the order nor indeed has any application of course been made for the Court to consider doing so. In my view there would be no power vested in me at this stage to vary the terms of the judgment given in any way as regards the vesting of a half share of the property in the applicant.

It is suggested on behalf of the respondent, however, that there is some unfairness in the fact that the applicant today, by her motion to the Court, is seeking simply an order for the sale of the property and the equal division of the proceeds. That submission has to be considered in the light of the subsequent history of the matter. Following the giving of judgment on 22 July, 1982 notice of appeal was lodged on behalf of the respondent on 4 October, 1982. Prior to this being done, however, the applicant's solicitor had in fact submitted to the respondent's solicitor a proposed form of a deed of trust to give effect to what the applicant had had in mind and spoken of at the time of the hearing before me in July. This is confirmed by the terms of a letter of 20 August, 1982. The deed thus proposed, however, was not proceeded with because of the appeal lodged, as I have mentioned. That appeal, however, was ultimately abandoned on 6 October, 1983 and the applicant now takes the

view that the creation of a trust in the way that she had earlier envisaged is no longer appropriate. The children are now in employment and self-supporting and they are not in any way in the position in which they were in at the time of the hearing in July, 1982.

I am unable to conclude that this change of attitude on the part of the applicant can be in reality said to create any unfairness. The situation at the hearing was simply this: The effect of the applicant's evidence was, as I have earlier indicated, that she had been influenced in entering into an agreement in the form which she did by a consideration for the children and what would be in their best interests. The course that she was taking at the hearing of putting it forward that she simply wished to obtain her share in order to vest this in the children was no more than consistent with the statement which she was making as to her attitude at the time of the making of the agreement. That of course was the important element, or an element of some relevance at all events, to be taken into account by the Court in deciding whether or not the agreement could be set aside. It is really, however, speculative to suggest that the agreement might not have been set aside if this factor had not been brought forward because of course there may well have been some other factor of relevance which took its place. The important thing, however, in my view is, as I have indicated, that it was not the decision to create the trust which was of importance, it was what was in the applicant's mind at the time when she entered into the agreement that was of importance. As to this aspect, also, I must

say that I cannot see that there could be any unfairness arising now for the reason that Mr Treston mentions, that of course it is not a factor which was going to affect the respondent's share in the property in any event. Moreover, even if contrary to my conclusion there was some unfairness in the situation there would in my view be nothing that could be done about it at this stage because of the factor to which I have already referred, that this applicant now has clearly a vested right in a half share of the property and the Court has no control over that situation, the judgment in question not being able to be impeached in any way at the present time. It is accordingly not possible in my view to accede to the respondent's proposal that the matter should now be dealt with on the basis of the applicant's share being dealt with in the way that he suggests. The applicant is in my view clearly entitled to an order for the sale of the property and a division of the proceeds. There is now no circumstance pertaining which would justify the Court in postponing that sale. The clearly evidenced objective of this legislation is that when a marriage partnership comes to an end the Court should deal with the matter in the way which is best calculated to enable each of the parties to the marriage to obtain their share of the matrimonial assets so that they may make a fresh start. Mr Treston referred to some of the authorities evidencing the Court's acceptance of that position. I refer to McKinstry v. McKinstry [1980] 4 MPC 138, Churchill v. Churchill [1980] 5 MPC 15, 16, Cooper v. Cooper [1980] 3 MPC 38. There is now, of course, not present the factor most commonly operative to justify a suspension of sale, that is that it is done in the

interests of preserving a home for the children. The position as revealed by the evidence today is that neither of the children are living in the house and indeed neither is the husband. The question, therefore, is as to the terms of the order which should now be made, the applicant having been obliged by the refusal of the respondent to agree to a sale, to come to this Court to seek an order in that regard.

It is submitted on behalf of the respondent that in the event of the Court ordering a sale the matter should be dealt with on the basis of the share to which the applicant is entitled being fixed on the basis of the value of the property at the time of the agreement to separate, in other words it is suggested that the Court should invoke the discretion conferred upon it by s.2(2) of the Act. Mr Twaddle submits that there are two reasons why this should be done, the first that there was a delay on the part of the applicant in instituting proceedings and, secondly, that it is now financially more difficult for the husband to purchase a half share of the equity in the house by reason of the increases in value which have occurred in the meantime.

As regards the factor of delay, he relies upon the comment made in the course of the judgment that the applicant could have been more diligent than she was in pressing to have her claim advanced to the point wherein it could be brought before the Court. The situation in that regard, however, as I note, was not completely straightforward in that it could not be said just how much delay

was attributable to the solicitor or solicitors involved and how much could be attributed to the applicant herself and of course how much might be attributed to the fact that at this time particularly there was a good deal of difficulty in obtaining fixtures for the hearing of cases of this kind because of the pressure of work in the Courts, particularly cases of this kind. I have considered this aspect and do not think that there can here be said to be a sufficient justification for the Court departing from the normal course which, as is said in the Court of Appeal in the case of Jorna v. Jorna [1982] 1 NZLR 507, is that the date of hearing is in a general way and in the absence of particular circumstances the date which will best produce a just result. It has to be remembered here that the respondent has had the benefit of occupation of the property throughout the whole period and that the applicant herself has lost the benefit of applying her share towards the acquisition of other real property and she accordingly will be faced with levels of property values as now pertaining instead of the levels which existed at the time when the agreement was entered into. The order must accordingly be upon the ordinary basis.

It is, however, conceded on behalf of the applicant that the respondent should be entitled to a credit in respect of the capital payments which he has made, being the payments made in reduction of the mortgage to the Housing Corporation. For the respondent it is submitted that he should receive not only credit for these capital payments but that he should also, if the applicant is to have a share of the home at current value, be reimbursed in respect of the rates and

fire insurance premiums from 14 August, 1978 which is the date to which the respondent himself refers in his second affidavit in opposition to the making of the order today, as being the date from which payments to the Housing Corporation have been made as set forth in his affidavit. Mr Twaddle further points out that there will be additional payments to be made between now and the time when the property is sold.

As regards the allowance in respect of the capital repayments the applicant, it must be noted, qualifies her concession as to this by claiming that she should be entitled to half the rent which the applicant has received for the letting of the property between the time of the separation and the present time. The evidence, however, has left the situation unclear as to the extent to which the property has been occupied by the applicant himself or one of the children and the extent to which it has either been let or, as the respondent admitted in his affidavit today, simply made available to other persons to occupy without charge. As regards this latter aspect, of course, the respondent must take any detriment arising from that situation upon himself. He clearly did not have any authority to let the property be occupied rent free so far as the applicant is concerned.

I think in view of the time which has elapsed it is of importance that the matters between these parties be now finally resolved as Mr. Treston submits. The factor of any increase in the amount of the payments to the Housing Corporation in respect of the principal of the mortgage

either before 14 August, 1978 or from the date of this hearing forward, can be justly and properly dealt with by taking into account, as a justifiable set-off in favour of the applicant of some allowance even though the amount cannot be quantified, because of the inadequacy of the evidence for the factor that the respondent has clearly received rents, a portion of which should be credited to the applicant.

I accordingly make an order that the former matrimonial home of the parties situated and known as No. 9 Panorama Drive, Whangarei, be sold by being offered for sale forthwith at the price of $55,000 in accordance with the valuation of Mr Algie dated 31 October, 1984 and otherwise on the usual terms upon which residential properties are offered for sale in the Whangarei district. The nett proceeds of the sale are ordered to be applied in payment, first, of the amount of $893 to the respondent which sum is to be treated as covering all contributions made by him of a capital nature to the property since the separation and up to the date of sale and the balance is to be divided equally between the parties. In the event of a sale not being effected within four months from the date of this judgment the property is to be sold by public auction and the nett proceeds of sale applied in the same manner.

With regard to the question of costs there is, I think, some merit in the submission made on behalf of the respondent that the actions of the applicant in proceeding first on the basis of a setting up of a trust for the

children and then deciding against that course have contributed at least in a small measure to the fact that this present application to the Court has been necessary. In any event it is not an uncommon incident with an order of this nature for the parties to go back to the Court and seek implementation and in the circumstances there will be no order as to costs.

SOLICITORS:

Marsden Woods Inskip & Smith, Whangarei, for Applicant.
Thomson Wilson Fidler & Heenan, Whangarei, for Respondent.