IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 603/86

BETWEEN HARRISON

Appellant

A N D HARRISON

Respondent

Hearing 27th October 1987

Counsel Appellant in person
P. M. Molloy for respondent

Judgment 27th October 1987

ORAL JUDGMENT OF TOMPKINS J

The appellant has appealed against a judgment of Judge Cartwright delivered in the Family Court at Henderson on 19th June 1986 and in particular against that part of the judgment that found that an inheritance had become matrimonial property pursuant to s 10(3) of the Matrimonial Property Act 1976.

The parties were married on 1962. In January 1982 the appellant received $16,500 being an inheritance from the estate of his late mother. The full amount of that inheritance was, on 25th January 1982, paid into a term deposit account at the Bank of New Zealand in the joint names of the appellant and the respondent. The term of that deposit having expired, the full amount of the inheritance was, on 26th April 1982, paid into

a savings account at the Bank of New Zealand also in the joint names of the appellant and the respondent. It is the correctness of the Judge's conclusion relating to that inheritance to which this appeal relates.

In December 1981 the parties purchased a home at [redacted] near Dargaville. Part of the purchase price was met by a mortgage from the Bank of New Zealand. This house property was jointly owned by the appellant and the respondent and was their matrimonial home. On 14th May 1982 the Bank of New Zealand mortgage which then stood at $17,000.12 was repaid from the joint savings account or in effect repaid from the proceeds of the appellant's inheritance. The appellant and the respondent separated in December 1983. The issue of the appropriate division of matrimonial property has been the subject matter of proceedings in the Family Court culminating with the hearing that took place on 19th June 1986. The appellant was, at that hearing and in the previous hearings and negotiations, represented by counsel. On that day consent orders were made in respect of all the items of matrimonial property other than the proceeds of the inheritance. That was the subject matter of detailed submissions. The facts as I have recited them, were agreed. The Judge concluded, as I have indicated, that the inheritance became matrimonial property pursuant to s 10(3) of the Act. Alternatively, she concluded that the inheritance had become matrimonial property, it having been so intermingled with other

matrimonial property that it was unreasonable or impracticable to regard it as separate property pursuant to s 10(1).

In this Court the appellant appeared on his own behalf. He submitted that the Judge's decision was wrong on the grounds that the respondent did not contribute to the proceeds of this inheritance. He submitted that it was not so intermingled that it cannot be defined. He expressed his belief that the money was rightfully his.

This issue falls to be determined by the proper application of these facts to the relevant parts of s 10(1) and (3), which are

> "10. **Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift** - (1) Property being -
> (a) Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person; or
> (b) The proceeds of any disposition of property to which paragraph (a) of this subsection applies; or
> (c) Property acquired out of property to which paragraph (a) of this subsection applies, -
> shall not be matrimonial property unless, with the express or implied consent of the spouse who received it, the property or the proceeds of any disposition of it have been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property...
> (3) Notwithstanding subsections (1) and (2) of this section and section 9(4) of this Act, both the matrimonial home and the family chattels shall be matrimonial property unless designated separate property by an agreement made in accordance with section 21 of this Act."

The appellant not being represented by counsel at the hearing of this appeal I have not had the benefit of detailed

legal submissions in support of his primary contention that the inheritance should be regarded as matrimonial property. The practical consequence of his submission, as he accepted, is that the $16,500 should be paid to him out of the proceeds of the sale of the matrimonial home, the balance of those proceeds then being divided equally between the appellant and the respondent.

Mr Molloy submitted in this Court, as he did in the Family Court, that the issue should be determined by the application of s 10(3). It is his submission that when the proceeds of the inheritance was used to repay the Bank of New Zealand mortgage it was in effect being used in the acquisition of the matrimonial home, and that as s 10(3) is to take effect notwithstanding subs(1) of s 10, then the matrimonial home shall be matrimonial property unless, as was not the case here, it be designated separate property by a s 21 agreement.

The Judge, in reaching the conclusion that she did, accepted this submission. I am satisfied that she was correct in doing so. The inheritance, when it was received, was pursuant to s 10(1)(a) separate property. Disregarding for the moment the effect of it then being paid into the bank account in the joint names of the appellant and the respondent, it, in my view, ceased to be separate property when it was used to repay the mortgage on the matrimonial home. I see no significant difference, nor did the appellant, between using such separate property to purchase a matrimonial home, and using such separate property to repay the

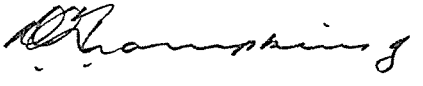
mortgage on a matrimonial home. In both cases the separate property is being used to acquire the matrimonial home. The fallacy in the appellant's approach is, in my view, clear when the consequences of his submission are considered. As I have indicated, the effect was that in the manner I have described, the proceeds of the sale of the matrimonial home would be divided unequally. This is clearly contrary to the express provisions of the Act. For that consequence to be correct there would, in my view, need to be clear unequivocal statutory provisions to that effect. There are not.

For these reasons I am satisfied that the conclusion reached in the Family Court was correct and the appeal is dismissed. This conclusion makes it unnecessary for me to consider whether, in any event, the inheritance had become intermingled with other matrimonial property within the meaning of s 10(1).

I should mention one further matter. In his submissions before me the appellant raised an issue concerning certain policies of insurance that he said were taken out by him before he met the respondent. Included in the consent orders made on 19th June 1986 were orders to the effect that the surrender value of the appellant's insurance policies should be divided equally. The appellant now questions the correctness of that approach because the insurance policies were taken out pre marriage. Quite apart from the fact that that would not prevent the surrender value of the policies being properly regarded as matrimonial property, it clearly is not an issue that can be

raised on this appeal, it having been the subject of an order made by consent when the appellant was separately represented.

The respondent is entitled to costs on the hearing of this appeal which I fix at $250.



Solicitors

P. M. Molloy Esq., New Lynn for respondent