NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.665/86

IN THE MATTER of the Matrimonial Property Act

LOW PRIORITY

BETWEEN: EVANS

stralia,

Appellant

A N D: EVANS
of
married

Respondent

Hearing: 16 March 1987

Oral Judgment: 16 March 1987

Counsel: N Keys for Appellant
G Bogiatto for Respondent

[ORAL] JUDGMENT OF HENRY, J.

This is an appeal against orders for maintenance made against the Appellant under the Family Proceedings Act 1980 in the District Court at Henderson on 10 July 1986. They are in respect of two children of the marriage of the parties - a daughter who was born in 1971 and a son who was born in 1972. The parties separated in December 1978 with custody of the two children being left with the Respondent mother. She has since remarried. The Appellant, for his part, left New Zealand shortly after separation to take up residence in Australia and has been in what appears to be a stable de facto relationship with another woman.

since or shortly after his move to Australia. The present proceedings were commenced in July of 1984.

At the conclusion of the hearing in the District Court, orders for maintenance were made - first in respect of past maintenance in the lump sum of $9000.00, and secondly, in respect of future maintenance at the rate of $10.00 per week for each child, those payments to commence from 10 January 1988. In addition a lump sum for future maintenance at $1560.00 was ordered, which is in effect payment at the rate of $20.00 per week in total for the period down to the commencing date of the periodic maintenance order.

The appeal was brought initially in respect of future maintenance as well as against the order for past maintenance, but as regards future maintenance it was not pursued, and that is now not in question. The judgment discloses that there was a matrimonial home owned by the parties. That has now been sold and the proceeds which are presently held on Appellant's behalf pending determination of these maintenance proceedings total some $12,000.00 together with a further sum which would have accrued by way of interest, that now being held to his credit in his solicitor's trust account. As I understand it the Respondent has received her proceeds of sale of that property.

In his judgment the District Court Judge appears to have taken a figure of $40.00 per week total as being the proper contribution which Appellant should have made during the period of separation from early 1979 through until the hearing in mid-1986. Taking a period of 390 weeks, he has capitalised that to a figure of $15,600.00 and deducted a sum of approximately $4600.00 representing mortgage payments made by Appellant after separation in reduction of the mortgage over the matrimonial home. He has deducted a further sum of $2000.00 for financial contributions of one sort or another made by Appellant during the relevant period, and thus reached a final overall figure of $9000.00 for past maintenance.

In the course of his judgment, the District Court Judge said, at p.5 :

> "Given the availability of funds at this time out of which an order could be made, it would seem to me that an appropriate approach would be to calculate a proper contribution by way of Mr Evans towards the children's support at say $40.00 weekly in total. It may well have been more than that. the fact that over the time since he left he may not always have been able to pay that figure does not seem to me to be conclusive in the matter of past maintenance. At this time the Court is entitled to look at what a rasonable contribution would have been had Mr Evans been in a position to make it. He now is in a position to make it because he has funds available to him. The Court is not required simply to make some calculation for past maintenance on the basis of what he actually had, and particularly so when what he actually had or had available to him was severely depleted through an election by him to take other responsibilities on at the expense of his existing one."

With respect to the District Court Judge, I think he has erred in adopting the approach therein set out. Section 76 (1) (c) of the Family Proceedings Act 1980 is the empowering provision whereby the Court can direct payment of a lump sum towards the past maintenance of a child. The calculation of maintenance, be it past or future, must then be determined in accordance with s.72 of the Act. Subsections (2) and (3) of that section set out the factors to which the Court shall have regard in making this assessment. It appears that the District Court Judge did not have regard to those factors and it seems to me that in assessing them on an issue of past maintenance the Court must look at what a particular parent's situation was during the period in question. It is not sufficient simply to look at what is a parent's present financial situation. Here, we have an assessment, which is not under challenge, that the appropriate figure for maintenance now to be allocated as against the Appellant is one of $10.00 per week per child. I can see no basis upon which a liability for a sum in excess of that for the period between 1979 and 1986 should be made. It is true that Appellant now has available to him funds from the sale of a matrimonial home, and their existence can no doubt be taken into account as a factor. But in doing that, the Court must also have due regard to the purposes of the Matrimonial Property Act 1976 and its requirement for a division of proceeds as between the parties to the marriage. The overlying philosophy behind that Act is that there should, wherever reasonably

possible, be a factual division in appropriate shares as between the spouses so that they each become vested with an appropriate capital share.

In my judgment the only sensible inference to be made from the findings made in the Court below and from the evidence disclosed in the notes of evidence is that the starting figure for maintenance should be one of $10.00 per week per child or, in round figures, $1000.00 per annum.

The next relevant question is the extent to which liability for that amount should now be back-dated. It is relevant to note that the Respondent did not see fit to institute these proceedings until July of 1984, there apparently being no demand for maintenance made on the Appellant prior to that date. I am advised that earlier proceedings were issued but never served. Regard also has to be had to the capital payment made by the Appellant in reduction of the mortgage on the matrimonial home, but it would probably be unfair to allow that in the full sum of $4600.00 earlier referred to. Appellant himself obtains the benefit of the increase in equity resulting from that payment by reason of his entitlement to a half-share of the ultimate net proceeds of sale. Accordingly, in my view the appropriate figure to be brought into account for that factor would be one of approximately $2000.00. It is also appropriate to bring into account the financial contributions

which were made over the period and which were assessed in the Court below as being of the order of $2000.00.

Bearing in mind those factors, I have reached the conclusion that it would be proper for this Court now to substitute its view as to what is an appropriate overall lump sum rather than taking the alternative course of sending it back for review. Looked at overall, and bearing firmly in mind the matters urged on me, particularly by Mr Bogiatto, as to the responsibility of the father in this case and the responsibilities which have been assumed by the mother during the period during which maintenance was not received, I hold that the proper figure for past maintenance should be fixed at $4,500.00.

Accordingly the appeal will be allowed, the order for past maintenance of the sum of $9000.00 will be quashed and in lieu thereof a figure of $4,500.00 substituted.

In the circumstances there will be no order as to costs.

16 March 1987

J S HENRY J.

Solicitors:

Davenports, AUCKLAND, for appellant
Grove Darlow & Partners, AUCKLAND, for respondent