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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

[redacted]

CP No 21/87

BETWEEN MERLE ANNE EDWARDS of Hastings, Home-Aid

Plaintiff

A N D ANTHONY VINCENT PREWETT of Hastings, Manager

Defendant

Date of Hearing: 25, 26, October 1988

Counsel: A P Walsh for Plaintiff
H R Grayson for Defendant

Date of Judgment: 27 October 1988

ORAL JUDGMENT OF McGECHAN J

This is a claim by a former de facto wife against a former de facto husband for a beneficial interest in a dwelling house in which both previously lived. While the house was purchased from funds which were entirely his and came to be registered in his name alone, she asserts contributions direct and indirect and claims a declaration of beneficial interest under implied or constructive trusts. Claims based on express agreement or express trust or under resulting trust were not pursued at least under those labels. She also alleges an agreement to marry and a share in the house pursuant to s 8 of the Domestic Actions Act 1975 following termination of that alleged agreement. Her claims are in all respects denied by him.

I deal first with some background facts. I deal with these somewhat briefly as this is one of those matters where ultimately it is in the best interests of all not to go into undue and acrimonious detail.

He was born in about 1941 and she in about 1945. Both it seems had previous marriages and both had children from those marriages. They met in September or October of 1980. She at the time was living alone on the domestic purposes benefit with perhaps some part-time work and was not well off financially. He was the manager of a local timber firm and while having no doubt the usual problems following from a marriage break up was rather better placed at least income wise. Soon afterwards in December of 1980 they started to live together as man and wife. At first that was in her rented flat. His former matrimonial home was, it seems, in the process of settlement and sale. As matters developed she went off the domestic purposes benefit and took a number of small part-time jobs. He paid, or soon came to pay, the rent on the flat and telephone and power and perhaps other similar accounts. They kept separate accounts sharing living expenses. No doubt given their respective incomes his contribution to those ongoing living expenses was greater than hers. She states that she gave up plans to train as a nurse to become part of this household arrangement and that from then on she paid all her money into household purposes. In June of 1981, which was only some six months later, his matrimonial property settlement came through leaving him it seems with some $23,000.00 or thereabouts in hand. He looked for a house. He was well placed to do so from his employment and contacts. She was involved in the ultimate choice also. I have no doubt that he was interested to see whether she would be prepared to live in the house but I will accept that at that stage he kept the ultimate decision as one for himself. Be that as it may he bought 415 St Aubyn St in his own name alone. The purchase price was $41,500.00 including chattels of some $3,000.00

financed by cash from him of some $22,500.00 plus mortgages and personal loan finance. As I have said he provided all the money. She was not involved in that aspect even by way of guarantee. His previous matrimonial property had been jointly owned. I do not know the position in relation to any previous matrimonial property owned by her. The house needed some upgrading. That was known to them both at the time of purchase. She provided the furniture for the house except for a bedroom suite which he purchased at about the time occupation was taken. His evidence was to the effect that around the time that bedroom suite was put in the house there was some discussion between them clarifying the future ownership of the property along the lines of his saying that something should be sorted out to avoid future problems, in response to which she was alleged to have said that she was coming in with nothing and would go out with nothing. It may have been that something was said by him. He would have been aware at the time of the possible repercussions of the matrimonial property legislation. She is clear that she recalls no such conversation. I am satisfied that if something was said there was no agreement or understanding reached at that time and any undertones which may have been created fast faded away as time passed. They moved in and lived together in the property together with her then six year old daughter, for almost the next five years to April 1986. Over that period certain upgrading was carried out. This included the removal of a partition wall between the dining room and the lounge, construction of pantries in the kitchen, a shower in the laundry, some interior and exterior painting and gardening and fencing work. There may indeed have been other associated items. He was a tradesman carpenter and had access through employment to discounted materials. He was also on a good salary. I have no doubt that he provided most of the skilled work and most if not all of the direct financial input to the work done. However, she was not simply idle or non-contributory. She was working part-time and for the last

two years or thereabouts for a reasonable weekly sum of some $150.00 per week gross towards the end from the Public Trustee caring for an elderly gentleman since deceased. She did all the housework. She also did some direct work on the property in relation to its upgrading to the best of her time and ability. She would not have had a great deal of time given other duties. It is the boring manual work which is useful in an overall job although not necessarily skilled. It included interior cleaning preparatory to painting, stripping of wallpaper on a house which had a nine foot stud, and in places numerous layers of old paper, removal of debris including concrete, lending a hand in the sense of holding items and being an extra pair of hands to assist with the tradesman's work, some interior painting and some assistance with exterior painting although the extent of the last is a matter in sharp dispute. Also some work in the garden and grounds. Much of the first few items may have been done in the early years but it was ever an ongoing process.

While this was going on there were certain other happenings. On an uncertain date, perhaps early 1982, he made a purported holograph will. It was written out in lay terms but in substance it provided the property was left to her unless she left or remarried or took up a new de facto relationship, in which case it was to be sold and she would receive one-quarter share in conjunction with his daughters. That handwritten document, which contains deletions and insertions, was not signed. His evidence was he referred it to his solicitor who said he should think again. It may nevertheless furnish some recognition of a moral obligation in the event of his death as at that period. In October 1984 he had an illness variously described as a heart attack and as a viral infection and was nursed for some little time afterwards. This may have given him some feelings of mortality. In July of 1985 an incident occurred in relation to which the evidence is in sharp conflict. On his version he made a proposal of marriage to her

which she laughed off. On her version whatever he said was simply a joke which indeed she did laugh off. There is also evidence as to a later incident in Havelock North a little while afterwards in front of others in which on his version he repeated a proposal which she spurned, saying she wished to keep her independence, and which on her view so far as in evidence was again simply a joke. The other persons concerned did not give evidence.

In late 1985 or early 1986 there were apparently prospects of a promotion for him involving a move to Auckland. There is evidence that at that stage he talked of selling the house and moving to Auckland and marriage if he got the job. Things went astray early in 1986 and in early April 1986 after he had been in Auckland over the Easter period there was a final break down. She left the home at his request. It is not necessary for me to go into details as to the cause of the break down on which the evidence in any event differs. Both since have married. He lives in the house still with his new wife and some children. She now has some financial resources including as it happens a reasonably substantial bequest from the elderly gentleman she looked after to whom I have referred. The government valuation of the house as at 1 July 1988 was $70,000.00. That quite possibly exceeds its value as at April 1986 and it is to be noted that he has carried out further work in the property since April 1986. It is subject to a mortgage which as at April 1986 was some $9,000.00 and currently is about $5,000.00.

I turn now to an observation as to credibility before dealing with the more specific facts bearing on this case. I am satisfied this is a case where both he and she have told me the truth as they remember it and now see it. Both impressed me as honest in that sense. I do not think either has endeavoured to mislead the Court. Unfortunately, but perhaps naturally, neither sees the matter objectively. She considers that she

has been exploited and there are undertones of real hurt and bitterness. He clearly, and I accept sincerely, feels that he gave her a roof and security and companionship for quite some years and owes her nothing and I detect a resentment at the claim now made. Neither is to be blamed for such perceptions. They are very human but it follows that I must discount the view on what has happened in the past as given by each and take particular notice of what has happened rather than what is now said.

I turn first to the claim based on agreement to marry under s 8 of the Domestic Actions Act. There is it appears no direct authority upon the meaning of the phrase "agreement to marry" in s 8. It may be that it should be read in the light of s 5 which abolished the old action for breach of promise. For my purposes I simply read it in ordinary meaning, an "agreement to marry" accepting of course that such agreements now have diminished legal effect in the light of the Act. The onus rests upon her to establish there was such an agreement. I prefer to start from certain objective facts. Each had come out of the trauma of a previous break up. Initially he was still bound by his previous marriage and that lasted for a year or so. Neither would have been in a hurry to rush into another marriage. They lived together for some five years. In that time there was no engagement ring purchased. An eternity ring was purchased but the circumstances are equivocal being as much perhaps an indulgence on his part as the bond which she would have it be. Nor is there any satisfactory evidence particularly of an independent nature as to his use of the name or title financee. There were no external signs of any actual formal agreement. I then look albeit with some caution at the evidence on each of the topic. He accepts that there was a possibility, which at times was put as high as a likelihood, they would marry in the future and she certainly considered they would marry some day. There was an expectation they would marry. However, even on her evidence it needed more than a

mere expectation. It needed an announcement such as she endeavoured to procure in conjunction with a family twenty-first party but without success as he shyed off or it needed some formal proposal and acceptance as one would expect from the gentleman she acknowledged him to be. Neither of those things happened. It is ironic that on his version of the events of July 1985 he may have made a proposal which she perhaps mistakenly declined but I do not need to make a final determination on that. The expectation of marriage is not established as maturing into the formal agreement.

I come then to the alternative claim under implied or constructive trust. I approach this matter in terms of the observations of Cooke P in Pasi v Kamana [1986] 1 NZLR 603:

> "I suspect that the different approaches in the cases are largely a matter of words. The New Zealand Courts are not here concerned with statutory rights, such as those existing in a marriage partnership between husband and wife under the Matrimonial Property Act 1976. We have no such statute as has been enacted in New South Wales, the De Facto Relationsips Act 1984. Whether New Zealand needs one is debatable; it is a field in which perhaps justice may be better achieved in the end by proceeding cautiously on a case by case basis. Be that as it may, at present our in quiry must focus on whether there has been a sufficient direct or indirect contribution by one de facto partner to a specific property - usually the home - to carry an interest in it.
>
> In conducting that inquiry I respectfully doubt whether there is any significant difference between the deemed, imputed or inferred common intention spoken of by Lord Reid and Lord Diplock (and now by the English Court of Appeal in Grant v Edwards) and the unust enrichment concept used by the Supreme Court of Canada. Unconscionability, constructive or equitable fraud, Lord Denning's 'justice and good conscience' and 'in all fairness': at bottom in this context thse are probably different formulae for the same idea. As indicated in Hayward v Giordani, I think that we are all driving in the same direction. One way of putting the test is to ask whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the

> property. If, but only if, the answer is Yes, the Court should decide on an appropriate interest - not necessarily a half - by way of constructive trust, as indicated in Gissing v Gissing."

and also in Oliver v Bradley [1987] 4 NZFLR 449, 451:

> "The parties intended an equal sharing if the marriage eventuated but did not expressly address their minds to their rights if it did not. In that event, however, a reasonable person in the shoes of the plaintiff would undoubtedly have understood that his contribution and efforts would result in an interest in the property. Likewise a reasonable person in the shoes of the defendant would have had to acknowledge such a legitimate expectation - as indeed her counsel accepts. The share is not necessarily one half: it may be greater or less and should represent a fair apportionment of the contributions and efforts on both sides."

Numerous other authorities were cited to me. Some are before the authorities just mentioned and perhaps tend to strain unduly towards implication of "phantoms of common intention" (Cooke J in Hayward v Giordani [1983] NZLR 140, 145). Others naturally depend to some extent on their own facts as all these cases in the end tend to do. I will not prolong this judgment by drawing comparisons and distinctions. In the end it is a question of principle and fact.

There are three questions. First, were there direct or indirect contributions to the house concerned. Second, in the words of the learned President, what would a reasonable person in the shoes of the claimant have understood as to his or her efforts naturally resulting in an interest in the property and, correspondingly, the like understanding of the other side. Thirdly, if there is an interest what is appropriate quantum?

As to contributions I am satisfied there were some contributions to the property by her indirect and direct. Proceeding from the least to the greatest, dealing first with

indirect matters. First there was the provision of money for the household which freed his funds correspondingly for expenditure on the house. I think her contribution in this respect was slight. She had little money to spare. He was better placed. Second there was the provision of money for purchases for the house. There was talk of toilet fittings, curtains and the like. Again I think her contribution here overall was slight. Third there was her housekeeping by which I mean the usual cooking, washing, cleaning and caring. She was a good housekeeper. I have no doubt this freed him to earn money and perhaps for present purposes more importantly to have time to carry out the upgrading work which he did. This contribution was small but was not insignificant. It is very easy, particularly for men, to under-estimate the value of such matters until from time to time they have to look after themselves.

The next matter is one of direct contribution. I am satisfied that she did provide labour in relation to the upgrading of the house. I also think without being critical in this respect that he has rather under-rated what she did. From a tradesman's point of view it may not seem very much but in absolute terms it was no small matter. There was the stripping of the wallpaper, the washing, the debris removal, the other manual drudgery which does significantly help in the completion of renovation work. It was small by comparison with his efforts but to call it small does not mean it was nonexistent or insignificant.

That brings me to the second question as to whether reasonable persons in the shoes so to speak would have regarded such matters as carrying an entitlement to interest in the house. This is not to be approached in a vacuum. What occurred was against a background expectation and I use the word deliberately, that some day they would be likely to marry. The

property then of course would be co-owned by law if not otherwise. Hard work was put into that property. It was not mere tidy up or routine maintenance to be expected of a guest or housekeeper but hard work ultimately reflected in value. Appearances can be very relevant to ultimate value sometimes more so than with other more significant work from a structural viewpoint. If the marriage plans fell through would she get nothing and would he have a windfall gain from all she had done? Reasonable persons applying the stated test would say very emphatically no. It would be unjust. The response of such persons in the circumstances would be that she should get something by way of an interest in the property. It may be small but she should have it.

Which brings me to the third question of quantum. Given such an interest is established, at what level? Here it is necessary to keep firmly in mind the proportions of the contributions of all sorts into the property by both. While she did enough to obtain an interest she did far less than he did. She is not to be blamed for that. It is simply a reflection of the circumstances. Quantifying as a proportion the value of what she did in the end is very much a jury style assessment. It is not capable of precise mathematics. He suggested in evidence the worth of her effort was perhaps 2%. His counsel suggested a maximum of 5%. Both those percentages with respect are dismissive as insignificant. I think her contribution was significant but at the lower end of the significant category. Translating that into percentage terms I assess and fix her beneficial interest at 10% with the inevitable corollary that his was 90%. Counsel were agreed and sensible in this case that such percentage should be stated as a money sum rather than left as an interest in property. No-one is looking to sell the house up. On that basis there will be judgment for her as plaintiff as follows. I take the value of the property in July 1988 at $70,000.00. From that I deduct an allowance for inflation from April 1986 to date and

also for improvements since April 1986 at say $5,000.00. That figure is quite simply an arbitrary allowance being the best I can do on what is before me to reduce any injustice. That leaves a balance of $65,000.00. From that I deduct the mortgage outstanding as at April 1986 of $9,000.00 leaving a residue of $56,000.00. It is against that $56,000.00 the 10% factor will be applied producing judgment for the plaintiff in the sum of $5,600.00. The plaintiff should have interest on that sum which having been effectively in his use and not in hers from a date which I will take as 30 April 1986 through to this date at the statutory rate of 11% per annum simple. It is clear that he should have some time to arrange payment without unnecessary disruption to his new household, particularly as she is not in immediate and desperate need of the money. However, this cannot go along indefinitely. It has done enough personal damage already. Accordingly execution on that judgment including interest and costs will be stayed for a period of six months from today without prejudice to her right if she wishes to register a charging order meantime. The judgment of course bears interest by statute at the continuing rate of 11% per annum simple from today.

The plaintiff is legally aided. In all the circumstances of this case I do not consider it one where an order for costs would be appropriate quite irrespective of whether the plaintiff is legally aided or not.

R A McGechan J

Solicitors: Bate Hallett & Partners, Hastings for Plaintiff
Kelly McNeil & Co, Hastings for Defendant

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NAPIER REGISTRY

CP No 21/87

BETWEEN MERLE ANNE EDWARDS of Hastings, Home-Aid

Plaintiff

A N D ANTHONY VINCENT PREWETT of Hastings, Manager

Defendant

ORAL JUDGMENT OF McGECHAN J
