IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY 4/10 A.P. No.86/91

1916

UNDER the Family Proceedings Act 1980 and the Matrimonial Property Act 1976

BETWEEN G EWING

Appellant

A N D J EWING

Respondent

Hearing: 11 September 1991

Counsel: D.H. Hicks for Appellant
G.H. Nation for Respondent

Judgment: 19 SEP 1991

JUDGMENT OF TIPPING, J.

This appeal and cross appeal from a decision of the Family Court raise three issues. The first concerns the amount awarded by the learned Judge for the weekly maintenance of three children. The second issue relates to the amount awarded for past maintenance. The third point, which arises on the cross appeal, concerns whether the Judge inadvertently double credited the husband with part of the mortgage reductions made by him between the date of separation and the date of hearing.

The parties, to whom I shall refer as Mr and Mrs Ewing, were married on 1979. Their three children are S born on 1980, S born on 1981 and M born on 1983. The parties separated in 1988. Mrs Ewing remained in the former matrimonial home with the three children. Judge Bisphan heard the case in February 1991 and delivered a reserved judgment on 19 March 1991. He ordered Mr Ewing to pay the sum of $85.00 per week for each child and past maintenance in the sum of $9,000.00 which sum he charged on Mr Ewing's share of the former matrimonial home. Mr Ewing contends on this appeal that the weekly figure for each child is too high and that there should have been no order at all for past maintenance.

Both parties, as is customary, presented budgets of income and expenditure. The learned Judge criticised Mr Ewing's expenditure figures in certain respects. Mr Hicks prepared for the purposes of the appeal an amended budget in which he adjusted Mr Ewing's expenditure in an attempt to take account of the Judge's criticisms. The end result of this exercise was that even after the adjustments Mr Ewing contends that he cannot realistically afford the sum of $255.00 per week, which is the total of the maintenance orders made in favour of his children.

Mr Ewing is effectively self employed. He is a shareholder in a company which operates an investment consulting business. The learned Judge had before him

various income figures for Mr Ewing and came to the view, after having considered them, that it was reasonable to assess Mr Ewing's income for the then current year at $90,000.00 per annum before tax. The material before the learned Judge amply justified that assessment. Mr Ewing's adjusted expenditure plus the amount of the maintenance order were said to exceed his gross income as per the Judge's assessment by nearly $2,000.00. Mr Ewing's new partner herself has an income of almost $40,000.00 per annum and thus she is for present purposes entirely self supporting along with her son and daughter.

I do not propose to go into the items of expenditure on Mr Ewing's budget one by one or to discuss the amount of the reductions made to reflect the Judge's criticisms item by item. As the Judge mentioned in his judgment, following the completion of a matrimonial property settlement between the parties, wherein Mrs Ewing bought out Mr Ewing's interest in the former matrimonial home, Mr Ewing will no longer be burdened with the mortgage payments on the former matrimonial home and cash will be available to him whereby he can substantially reduce the indebtedness on his new home. The advantage to Mr Ewing in cash flow terms approaches $15,000.00 per annum, which in itself is more than enough to cover the annual amount payable in respect of his children's maintenance in terms of the orders against which he is appealing. I am accordingly satisfied beyond any doubt even before

other issues canvassed are considered that Mr Ewing can reasonably afford payments at $85.00 per week, assuming such payments are necessary to satisfy the reasonable needs of the children.

The subject of maintenance of children is dealt with in s.72 of the Family Proceedings Act 1980. It is there provided that in determining the amount payable by a parent for the maintenance of a child the Court shall have regard to all relevant circumstances affecting the welfare of the child including (a) the reasonable needs of the child; and (b) the manner in which the child is being educated or trained, and the expectations of each parent as to the child's education or training. It is further provided that in determining the amount that is payable by a parent for the maintenance of a child the Court shall also have regard to the following circumstances: (a) the means, including the potential earning capacity, of each parent: (b) the reasonable needs of each parent: (c) the fact that either parent is supporting any other person: (d) the contribution (whether in the form of oversight, services, money payments, or otherwise) of either parent in respect of the care of that or any other child of the marriage: (e) the financial and other responsibilities of each parent. There are other considerations mentioned which do not apply in the present case.

While the Judge below did not expressly tabulate these matters and refer to them item by item I

am satisfied that in essence he considered all relevant matters. Mrs Ewing had produced a budget for the children which demonstrated that their reasonable expenses amounted to about $123.00 per week in the case of each child. This budget was set out in terms of the criteria required in the Family Court. The Judge recorded that Mrs Ewing had given evidence that the figures were based more or less on actual expenditure. He indicated that this could not be so because Mrs Ewing had simply not had sufficient income to enable her to incur that level of expenditure. He recorded that her budget was to a degree a reflection of what Mrs Ewing would like to be able to spend on the children. Nevertheless His Honour said that the figures produced by Mrs Ewing were by and large acceptable to the Court. By that I understand him to have meant that the figures did not go beyond what were necessary to satisfy the reasonable needs of the children. Mr Nation pointed out that in reaching her figures Mrs Ewing had not brought to account anything in relation to the housing of the children because in the period between separation and date of hearing Mr Ewing had been paying the mortgage on the former matrimonial home.

It is correct that in Mrs Ewing's calculations, while there are accommodation costs such as insurance, rates and repairs and maintenance which are brought to account, there is nothing for mortgage interest or rent. As Mr Nation submitted, if one adds

in a reasonable figure under that head a further $25.00 per child might well be added to the budget. There was evidence that if Mrs Ewing raised a mortgage involving a principal sum of $50,000.00 her weekly payments would come to nearly $150.00 per week. If half of that was ascribed to the children that would amount to about $75.00 per week or the sum of $25.00 per child already mentioned. Indeed it appeared probable, if not inevitable, that Mrs Ewing would have to raise a mortgage at least as high as $50,000.00 either to buy out her husband or rehouse herself and the children at a reasonable level. If one therefore adds the accommodation expenses for the children to the figures which the Judge described as broadly acceptable one reaches a figure approaching $150.00 per week per child.

In the light of the figures and the evidence that does not seem to me in the present case to be an unreasonable starting figure. It can immediately be seen that the learned Judge's order of $85.00 per week per child requires Mr Ewing to pay only a little over half the reasonable needs of the children so assessed. As earlier observed I am far from satisfied that payments at the level of $85.00 per week per child are beyond the reasonable means of Mr Ewing. I shall deal with the point in more detail when I discuss past maintenance but I am also far from satisfied that Mr Ewing has shown that Mrs Ewing's attitude over the sale of the former matrimonial home was unreasonable.

Mr Hicks submitted that the learned Judge had not given sufficient weight to the uncertainty pertaining to Mr Ewing's income both as to quantum and timing of receipt. I see nothing whatever to criticise in the learned Judge's approach to this point. He seems to have fixed a probable gross income for the Appellant at a realistic level on the evidence and I cannot see anything in the timing point. While there may be some delay for Mr Ewing in receiving this year's income that is matched by the fact that logically he will be receiving last year's income during the present year. It was also submitted that the learned Judge had failed to give adequate weight to the extent and value of the practical care undertaken by Mr Ewing. Mr Hicks was thereby referring to the occasions on which Mr Ewing had access to the children.

It is self evident that Mrs Ewing is contributing more from a purely time point of view to the upbringing of the children. No criticism is implied of Mr Ewing by this comment but in reality his input in a non financial way is of necessity less than hers. It seems to me that by ordering Mr Ewing to pay not much more than half of the children's reasonable needs in monetary terms, as earlier assessed, the learned Judge was fully reflecting Mr Ewing's contributions of a non monetary kind. Even if Mr Ewing's monetary contribution had been higher as a percentage, i.e. against a base of $123.00 per child per week rather than $150.00 per child per week, I

would still have been of the view that the learned Judge had adequately reflected Mr Ewing's non monetary contributions when compared with those of Mrs Ewing.

Reverting for a moment to s.72 of the Family Proceedings Act 1980 the foregoing discussion translates the reasonable needs of the children as best one can into monetary terms. I agree with Mr Nation's point that the primary focus of the section is a direction to the Court to have regard to the welfare of the child in all relevant aspects. There is no suggestion that the children are being educated in an improper manner or in a way which is higher or more costly than is reasonable to fulfil the expectations of the parents. The Court is also bound to have regard to the means, including the potential earning capacity of each parent. Mrs Ewing is going back to work and her income will not exceed $20,000.00 or thereabouts. Mr Ewing's income is very much greater. While I should not be thought to be encouraging this course, if it transpires that Mr Ewing's income in any particular year substantially falls short of the assessment made by the Judge then he will have his right to apply for an appropriate variation.

It is my view that Mr Ewing's reasonable needs will be capable of being more than adequately met after he has paid the necessary maintenance for his children. He is not supporting any other person because his new partner and her two children are, in the light of her income, capable of supporting

themselves. The various contributions of the parents to the care of the children have already been mentioned. By dint of circumstances Mrs Ewing's oversight is, both in terms of time and generally, greater than that of Mr Ewing and so are her services to the children. Mr Ewing's money payments are greater than those of Mrs Ewing but that reflects his substantially higher income and the absence of any responsibility to any other persons.

Before parting with this aspect of the case I wish to state quite clearly that in my view this Court should not interfere with a quantum of maintenance assessment made in the Family Court unless strong reasons are shown. The Family Court Judges have built up over the years considerable experience in assessments of the present kind. For myself I would only be prepared to interfere if I were persuaded that there was some significant error of principle (not suggested in this case) or the amount ordered was clearly either too high or too low. An assessment of this kind is ultimately a matter of discretion after having brought to account all the circumstances of the case against the statutory criteria.

The classic considerations for interference on appeal with a discretionary assessment apply:

(i) error of principle

(ii) taking account of some irrelevant consideration

(iii) failing to take account of some relevant consideration

(iv) plainly wrong.

See for example May v. May (1982) 1 N.Z.F.L.R. 165 C.A. Reference can also usefully be made to Pay v.Pay [1968] N.Z.L.R. 140, 147 C.A. per Turner, J. who spoke of the need to show that the Judge below had "erred in principle, or else that his assessment is so far from that at which this Court would have arrived as to warrant interference with the decision in the Court below as one plainly wrong."

Mr Hicks submitted that $85.00 per week for each of the three children, who were at the relevant time aged 10, 9 and 7, was excessive. Against the circumstances of this case that proposition is in my view untenable and this aspect of the appeal cannot succeed.

I turn now to the question of past maintenance. The learned Judge approached this topic in the following way. The period for which past maintenance was sought was from January 1989 to December 1990, a little under two years. He set out the basis upon which Mrs Ewing had suggested past maintenance should be calculated and then indicated that he proposed to deal with the matter in a slightly different way. He said that for the first 50 weeks the maintenance payable by Mr Ewing ought to have been at the rate of $75.00 per week per child and for the

second period of 50 weeks at $80.00 per week per child. He said that by reason of Mr Ewing's contribution of his share of the home together with his payments of the interest on the mortgage over the home, he proposed to allow him a discount of half the figure that would otherwise have been awarded. He therefore took the first 50 weeks at $37.50 per child and the second period at $40.00 per child which came to a total of $11,625.00. He then deducted the sum of $2,666.00 which forms the subject matter of the third issue, thus reaching in round figures a past maintenance figure of $9,000.00.

Mr Hicks in submitting that nothing should have been awarded for past maintenance attacked the Judge's approach basically in three ways. He suggested that the Judge had failed to take sufficient account of Mr Ewing's access contributions, a point similar to that raised under periodic maintenance. He submitted that the Judge had under estimated Mr Ewing's contribution in allowing Mrs Ewing to remain in occupation of the former matrimonial home. Thirdly he submitted that Mr Ewing's contribution by meeting the mortgage payments had not been allowed for sufficiently. Mr Hicks analysed the actual cost to Mr Ewing during the two years from separation to date of hearing by adding together the mortgage payments, the actual order for past maintenance and the lost interest on Mr Ewing's half share in the capital sum represented by the matrimonial home. By that means Mr Hicks sought

to demonstrate that the cost of these three items to Mr Ewing had been of the order of $43,000.00. It is at this point that I return to the question of whether Mrs Ewing acted unreasonably in relation to the matrimonial home and her occupancy of it.

Mr Nation pointed out that Mrs Ewing had been willing some time before the hearing to contemplate either a sale of the matrimonial home or buying her husband out when she knew what amount she was going to be getting for maintenance. The husband's proposals on the maintenance front do not seem to have been particularly realistic. During the course of evidence he offered $33.00 per week per child which on any view of it was far too low. I do not think that Mrs Ewing can be criticised for sitting tight in the interests of both herself and the children until such time as the maintenance position became clarified either by an acceptable agreement or by order of the Family Court. If Mr Ewing had made a realistic maintenance proposal and in the face of it Mrs Ewing had refused to contemplate either selling the house or buying him out that may have been another matter.

Once must not overlook in this case that the questions of a matrimonial property settlement and maintenance were substantially interwoven. The parties were able to resolve their matrimonial property dispute but were unable to settle the quantum of maintenance. While Mrs Ewing may not ultimately have been able to retain the matrimonial home she did in my view have a

good case for remaining in occupation until these interwoven matters were resolved. Section 28A of the Matrimonial Property Act 1976 is relevant in this connection providing as it does that when dealing with occupation orders and their duration the Court is to have particular regard to the need to provide a home for any minor dependant children of the marriage. Similar in concept is s.32 which requires the maintenance position to be considered when dealing with a matrimonial property question. Although it is generally desirable to have the question of the matrimonial home resolved promptly in the interests of both parties, I cannot see the delay which has taken place here as being either great or unjustified. The clean break principle is important: see Fisher paragraph 17.47, Haldane [1981] 1 N.Z.L.R. 554 C.A. and Doak v. Turner [1981] 1 N.Z.L.R. 18 C.A. But it should not be relentlessly pursued at the expense of the reasonable needs of the children for stability and security in a time of change and the giving of a reasonable time to parties to consider their alternatives.

Mr Hicks submitted that it was Mrs Ewing's choice to "lock in" Mr Ewing's capital. I do not consider that to be a fair way of looking at the matter. In the absence of reasonable certainty on the maintenance front I do not see why Mrs Ewing should have been required to vacate the home with the children not knowing what she could afford by way of a

replacement. The moral of this case is perhaps that if people in Mr Ewing's position want quick access to their capital which is locked up in the matrimonial home it behoves them in return to be realistic about their maintenance proposals.

In view of the true costs of maintaining the children during the period with which past maintenance is concerned I do not think for a moment that the learned Judge was unfair to Mr Ewing in taking his starting point at $75.00 per week and $80.00 per week for each child in respect of the two periods and then cutting that figure in half to account for the contributions which Mr Ewing was in fact making during that period. Although the cost to Mr Ewing in having his share of the matrimonial home used for the housing of the children is a factor it should not be overlooked that there was a similar cost to Mrs Ewing, albeit that she had the benefit of housing herself but more expensively than if she did not have the children with her. I cannot see any force in the proposition that the learned Judge has failed adequately to weigh Mr Ewing's access contributions or indeed his contributions of other kinds. In all the circumstances I am far from satisfied that the learned Judge's approach to past maintenance or the figure at which he ultimately arrived was erroneous or unfair to Mr Ewing.

There was some discussion in the judgment below and in argument of the decisions in Clemens v. Clemens (1986) 4 N.Z.F.L.R. 433 and Rangihaeata v. Ell

(1987) 4 N.Z.F.L.R. 476 and in the unreported case of Climo v. Climo (Palmerston North 8/5/87). The point relates to the extent to which one spouse makes a contribution to the maintenance of children by their occupation of his or her half share of the former matrimonial home. With respect I consider the suggested differences between the Judges to be more apparent than real. In my view the position can be put quite simply in this way. The provision of the non custodial spouse's half share in the home is a contribution to the children's maintenance; whether it is a sufficient contribution will depend on all the circumstances of the case.

This brings me to the third aspect of the case, Mrs Ewing's cross appeal. This point relates to the fact that the learned Judge reduced the sum for past maintenance by $2,666.00 in respect of capital reductions made by Mr Ewing on the mortgage between the date of separation and the date of hearing. Mr Nation submits on Mrs Ewing's behalf that by deducting the whole sum rather than half, Mr Ewing has been given a double benefit. I am of the view that this point is valid. The parties were liable for the mortgage in equal shares. Therefore if Mr Ewing paid an amount off the mortgage Mrs Ewing would owe him half that payment in order to achieve equality unless of course there were any compensating payments by her in reduction of the principal, which in this case there were not. The

point can be exemplified arithmetically in the following way.

Let us assume that the matrimonial home was worth at the date of separation $100,000.00 and that the principal sum of the mortgage stood at that time at $18,559.00 which appears from the figures to be the actual sum in this case. On the assumed value of $100,000.00 the equity at date of separation would have been $81,441.00. If the property had been sold at that date the parties would have been entitled to $40,720.50 each. At the date of hearing we will assume that the value of the property remained the same, i.e. $100,000.00, but by this time the mortgage had been reduced by $2,666.00 giving an equity of $84,107.00. On that hypothesis the parties, if the property had then been sold, would each have been entitled to $42,053.50. Mrs Ewing's share would thus have increased by $1,333.00 at the expense of payments made entirely by Mr Ewing. Putting it another way Mrs Ewing would thus have received $1,333.00 more by dint of something to which she had not contributed. She would therefore have been obliged to pay Mr Ewing $1,333.00 by way of equality.

By taking $2,666.00 off the starting figure for past maintenance the learned Judge has thereby inadvertently double credited Mr Ewing in the sum of $1,333.00 as the arithmetic just set out by way of example and the statement of principle which introduced it shows. Mrs Ewing should compensate Mr Ewing for

half of the capital reductions made by him because he was always responsible for the other half anyway. The learned Judge's approach of crediting Mr Ewing with the full sum of $2,666.00 in effect gives Mr Ewing the benefit of his half of the capital reduction twice.

The past maintenance figure of $11,625.00 should therefore in my judgment have been reduced not by $2,666.00 but by $1,333.00. For this reason the total set out in the middle of page 3 of the judgment of 25 June 1991 should be altered from $80,246.00 to $78,954.00. I have exemplified the matter by means of a notional sale of the matrimonial home to a third party but in my view the same approach should apply in principle to a transaction between the parties. In a nutshell it is my view that Mrs Ewing was obliged to credit Mr Ewing not with the full amount of the capital reductions but only for her half share, he being obliged to carry his half share in any event.

The appeal accordingly fails and the cross appeal succeeds. The formal orders which I make are these:-

1. The appeal is dismissed.
2. The cross appeal is allowed with the effect mentioned earlier in this judgment.
3. The Appellant is to pay the Respondent for her costs of and incidental to the appeal and the cross appeal the sum of $750.00 plus disbursements to be fixed in the case of disagreement by the Registrar.