

**PUBLICATION PROHIBITED SAVE IN ACCORDANCE WITH SECTION
35A PROPERTY (RELATIONSHIPS) ACT 1976**

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

CIV 2009-419-0566

UNDER THE PROPERTY (RELATIONSHIPS)
ACT 1976

BETWEEN DMO
Appellant

AND HAS
Respondent

Hearing: (on the papers)

Counsel: E J Hudson for Appellant
A B Foster for Respondent

Judgment: 6 November 2009

JUDGMENT (NO. 2) OF HEATH J

*This judgment was delivered by me on 6 November 2009 at 10.00am pursuant to Rule 11.5 of the
High Court Rules*

Registrar/Deputy Registrar

Solicitors:

Kit Clews, PO Box 19133, Hamilton
Foster & Milroy, PO Box 207, Hamilton

Counsel:

E Hudson, PO Box 19252, Hamilton

Introduction

[1] In a judgment delivered on 14 August 2009, I indicated an intention to allow Ms O's appeal and to set aside orders made in the Family Court. I expressed a preference to give counsel the opportunity to consider the terms of my judgment and to agree (or make submissions) on specific orders that ought to be made.

[2] Originally, I had intended that the appeal be re-listed before me on 19 August 2009. However, following a request from counsel, that hearing was vacated and submissions were made, in writing, on outstanding issues.

[3] I have now received remaining submissions. Counsel have confirmed that I may resolve outstanding issues on the papers.

[4] There are two issues for my determination:

- a) The amount of a money judgment that should be ordered to be paid by Ms O to Mr S.
- b) Costs.

The amount for which judgment should be entered

[5] Mr Hudson, for Ms O, submits that, based on a separation date of January 2003, the maximum amount payable by Ms O to Mr S in respect of his share in relationship property is \$111,463. He submits that she should pay \$110,000, within three months.

[6] Mr Foster, for Mr S, submits that the appropriate figure is \$121,463.40. The difference between counsel arises primarily from an adjustment proposed by Mr Hudson to an allowance made by the Family Court to reflect Ms O's role in caring for the children. Mr Foster submits that any payment should be made within one month.

[7] At para [58] of my earlier judgment, I said:

[58] As at 2003, the mortgage debt stood at \$107,600. As at the date of hearing it was agreed to be \$65,759. That means a credit must be given in favour of Ms O in the sum of \$41,841. *In addition, the post separation contribution assessment by Judge Brown, in relation to Ms O's role in caring for the children, should stand. That was fixed at \$10,000.* (my emphasis)

The adjusted allowance proposed by Mr Hudson is \$20,000. That upward adjustment is inconsistent with para [58] of my judgment of 14 August 2009.

[8] Having regard to my conclusion that the credit given by the Family Court should stand, I accept that the basis of calculation put forward by Mr Foster is appropriate. That means that judgment will be entered in favour of Mr S in the sum of \$121,463.50.

Costs

[9] Mr Hudson seeks costs on behalf of Ms O, as a successful appellant. Mr Foster submits that because Mr S succeeded on the unequal sharing ground advanced by Ms O, he should receive costs in his favour.

[10] Mr Foster also advises me that Mr S is on legal aid for the appeal.

[11] Because Mr S is legally aided, I have rejected Mr Hudson's submission that the credit in respect of the children should be increased by \$10,000, and Ms O failed on a significant ground of appeal, I determine that costs should lie where they fall.

Result

[12] The appeal is allowed. The orders made in the Family Court are set aside. Ms O is ordered to pay to Mr S the sum of \$121,463.00 in satisfaction of his relationship property entitlement. That amount shall be paid on or before 29 January 2010. If the amount has not been paid by that date, application may be made

to the Family Court for orders requiring the property to be sold or some similar ancillary order.

[13] No order as to costs.

[14] I thank counsel for their assistance.

Delivered at 10.00am on 6 November 2009

P R Heath J