FAMILY LAW

Disposition of Matrimonial Property

E. v. *E.* [1971] N.Z.L.R. 859 was a revolutionary case as far as the Matrimonial Property Act 1963 is concerned and provided the first occasion for the New Zealand Court of Appeal to consider the application of s.5 of that Act, beyond the area of the matrimonial home. The interpretation placed on the Act by the majority of the Court warrants a detailed examination. It should be noted at the outset, however, that the Court of Appeal has given leave for the case to go on appeal to the Privy Council.

The case concerned an application by the wife expressly made under the Matrimonial Property Act that there be vested in her such portion of the assets of the husband as the Court thought just and equitable. The husband made a cross application under the Matrimonial Property Act requesting that registration of the family home as a joint family home be cancelled and that ownership be vested in him.

The crucial question to be decided was whether the compensatory return for possible contributions in "money payments, services, prudent management or otherwise howsoever" was to arise only in reference to, and to be related to particular identifiable property, or whether it was intended by the words "notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property" that something in the nature of a general claim to an equity should arise, ranging over the asset generally and capable of being expressed by the Court in terms of an order to pay a sum of money.

The parties were married in 1947 and had two daughters. In 1968 the husband was granted a decree absolute on the ground of the wife's adultery. At the time of the marriage the husband possessed $12,300 assets, and the wife had none. During the marriage the husband had owned two businesses which were sold in 1967, and he had prospered. From 1950 onwards the husband bought and sold a number of house properties and in 1964 set up a discretionary trust for the benefit of his wife and two daughters. Both parties had been for a number of trips and the wife had been given, in addition to $3,000 worth of jewellery, a house and a car.

The wife founded her claim on the contribution made by her in assisting in one of her husband's businesses in the early stages, and in re-decorating some of the house properties and carrying out normal wifely duties.

The trial judge, Tompkins J. found as fact that the wife had been an economic and good housewife and mother, and by her prudent management had helped her husband in every possible way to acquire the assets which he had. The Judge dealt with the application by looking at the matrimonial home, then the rest of the matrimonial property, and ordered the husband to pay the single assessment of $13,750 plus $150 costs to the wife within three months. Upon such payment the registration of the joint family home was to be cancelled.

On appeal the husband made three submissions, namely, that there was no jurisdiction to order a money payment; that notwithstanding section 6A of the Act the court might on the ground of the applicant's wrongful conduct, refuse an order altogether; and that the wife had already received far more than a just share of the matrimonial property

and the Judge wrongly exercised his discretion in that jewellery and furnishings she had taken and her interest in the family trust were left out of account.

Wild C.J. (dissenting) found the difference in the order the wife sought vesting assets in her and the order she obtained for monetary payment was purely a procedural matter. He stated:

> I think that if in any case that arises under s.5 the nature and scope of the application and circumstances are such that an order of that kind is appropriate then there is jurisdiction to make it . . . .
> The powers of the Judge . . . are stated in s.5(2)(3) and (6), and the matters to be considered are stated in s.6. The order must of course be "with respect to the property in dispute" but within that limitation the scope available is wide indeed. The word "property", which must take some colour from the title of the Act, is defined in s.2 as including "real and personal property and any estate or interest in any property real or personal . . . ". The Judge is empowered to make "such order as he thinks fit". (*ibid.*, 862, 864).

Wild C.J. then approved Macarthur's judgment in *Burgess* v. *Burgess* [1968] N.Z.L.R. 65, where the whole situation was looked at, then a just and proper distribution made. Wild C.J. said the order must be made "with respect to the property in dispute" but dissented from the majority view that s.5 is directed solely to the determination of disputes about "particular pieces of property" and that the judge is obliged in every case to consider "each item of property separately". He said that no such restrictive language appeared in the section. From a practical point of view it would be impossible to examine each item of the property in dispute in turn and decide upon respective contributions made to it, for example, the wife's contribution to the family car, or the husband's to the sewing machine. If this was done the "Judge might lose sight of the wood for trees and be unconsciously diverted from his ultimate duty to make between the parties the order that 'appears just'." (*op. cit.*, 865).

The judges were unanimous in rejecting the husband's second submission that the order should have been altogether on the grounds of the wife's wrongful conduct, as being contrary to the intention of the legislature.

North P. and Turner J. found Tompkins J. had no jurisdiction to direct the appellant pay the respondent $13,750. They were of the opinion that a claim by a husband or wife could only succeed when it adheres to a particular piece of property and presumably the contributions had to be associated with the building of that particular property. Thus they interpreted the powers in s.5(1) as doing no more than empowering the court on any question of title to property or of disposition of property to make such order as may be just *with respect to the property in dispute*. They found also that the court had no jurisdiction to make an order cancelling a certificate of registration for the matrimonial home on the request of one only of the parties to the settlement.

North P. in his judgment, pointed out the facts, the values of the properties and the history of actual accumulation of the assets. He looked at the background to the legislation, at the wife's restricted powers in dealing with realty at common law and then the Married Women's Property Acts, 1908 and 1952. He dealt with the provisions of Part 8 of the Matrimonial Proceedings Act 1963 and summarised the areas of conflict with the Matrimonial Property Act. He pointed out that s.58(5) of the Matrimonial Proceedings Act allows all or part of the proceeds from the sale of the matrimonial home to be diverted to the

children of the marriage. Conduct of the parties is not specifically mentioned but it would probably be the only occasion when the need to divert property to the children would arise. This was what was done in *Pay* v. *Pay* [1968] N.Z.L.R. 140. Notwithstanding that, s.6A of the Matrimonial Property Act states that wrongful conduct is generally irrelevant, therefore one might question why Parliament had not amended the Matrimonial Proceedings Act to make conduct irrelevant there, since if a client is guilty of adultery and she applies under the Matrimonial Proceedings Act the children and not her, will get most of the property.

While s.58(1) of the Matrimonial Proceedings Act 1963 enables the court to direct that one party pay to the other such sum as the court thinks fair and reasonable in return for the contribution made by that party to the matrimonial home, no such provision is contained in s.5 of the Matrimonial Property Act 1963. It seems that if the legislature intended the judge to have power under that Act to make such an order, a provision to the effect would have been included among the four particular kinds of orders referred to in s.5(2).

A further criticism relates to sections 58(1) and 59(1) of the Matrimonial Proceedings Act which require the court to be satisfied that both parties have made a "substantial contribution" to the matrimonial home. North P. points out that the Matrimonial Property Act does no more than speak of "the respective contributions of husband and wife", which he finds "an untidy variation".

North P. in allowing the appeal was clearly of the opinion that a global order could not be made. He did not favour the "community of surplus principle", and so set out to make a new assessment of the whole position. He was of the opinion that conduct was not relevant to the question of the Matrimonial home, but that the intention of the parties registering the home as a joint family home had to be considered. He then ordered that the parties be jointly vested as tenants-in-common in equal shares, giving the husband the right to occupy it as long as he lived. The only money the wife should receive was $250 costs, taking into account what she had received in trips and jewellery and the fact that if she had not committed adultery she would have received $1400 per annum from the family trust.

Turner J. also looked at the inconsistencies between the two Acts, regarded the pieces of property separately, and arrived at the same end result as North P.

The respondent has been given leave to appeal to the Privy Council which hopefully will remedy the present unsatisfactory result. The case as it stands puts an extremely narrow interpretation on legislation which many had seen as requiring a liberal construction. Although North P. accepted that the respondent had been a good wife and mother and had made substantial contributions to the matrimonial home both to a small extent in money and to a large extent in services, his judgment appears to place the onus on her to show that she has made substantial contributions. In effect he appears to consider that the requirement of a "prudent housewife" is no longer sufficient.

The better approach, it is submitted, is that adopted in *Burgess* v. *Burgess* [1968] N.Z.L.R. 65, and *Hofman* v. *Hofman* [1965] N.Z.L.R. 795, where the entire circumstances were assessed and a just and proper distribution made. Greater regard might well be had to Woodhouse J.'s approach in the latter case, where the learned Judge was of the view that the intention of the legislature in making the Act was that legalistic

assessment of property rights of spouses should give way to the justice of the case:

> In my opinion [the Act] enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. (*ibid.*, 800).

In conclusion, it appears that irrespective of the finding of the Privy Council, Parliament might well consider amending the Matrimonial Property Act. Global orders should be permissible so that each and every property item will not have to be examined and orders made respectively.

The inconsistencies at present existing between the Matrimonial Property Act and Matrimonial Proceedings Act, outlined earlier, require removal so that the outcome will not be dependent upon which of the two Acts an application is briught under.

Ainsley Elliott

LAND LAW

Natural right of support

The question of whether a natural right of support extends to that which is artificially placed upon land was investigated in *Bognuda* v. *Upton and Shearer Ltd.* [1971] N.Z.L.R. 618. The plaintiff had erected a brick wall along his boundary in 1929. Forty years later the defendant contractors excavated a trench immediately adjacent to the wall. As a result of the excavation the wall collapsed and the removal of lateral support by the defendant was one of the grounds upon which the plaintiff claimed damages.

Engineering evidence was presented to show that without the weight of the wall the soil on the plaintiff's property would not have subsided and caused the wall to collapse. Quilliam J., applying the observations of Lord Selborne in *Dalton* v. *Angus* (1881) 6 App. Cas. 740, at 798, held that the support to those constructions which are placed artificially upon land does not exist as of right, and must be acquired by grant; usually the grant of an easement of support. Since no easement had been granted and the natural right of support did not extend to the wall, the defendant's motion for judgment succeeded.

In *Lotus Ltd.* v. *British Soda Co. Ltd.* [1971] 2 W.L.R. 7 the plaintiff's buildings were damaged as the result of wild brine pumping operations on neighbouring land. The wild brine (saturated brine resulting from the dissolution of rock salt by water) was pumped out from the substrata and replaced by water which provided inadequate support. Pennycuick V.C. held in the Chancery Division that the surface land had a right to be supported by the subjacent strata of minerals and whether the removal of the minerals was *in specie* or by the brine pumping method it would give rise to a cause of action.