

IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY

M. 90/84

BETWEEN

CLEMINSON

753

Appellant

A N D

CLEMINSON

Respondent

Hearing: 1 May 1985

Counsel: J.B. Robertson for Appellant  
C.S. Withnall for Respondent

Judgment: 10 May 1985

---

JUDGMENT OF HARDIE BOYS J.

---

This appeal requires determination first of the status for the purpose of the Matrimonial Property Act 1976 of a Frances Hodgkins painting, secondly of the appropriateness of an order attached to the wife's right of occupancy of the matrimonial home, and thirdly as to the status of a third mortgage of \$6,000.

The Painting

This was a gift made to the husband some 10 years before the separation by an elderly man he had befriended, and whom the wife too had come to know and helped to entertain. The husband's evidence was that he was given the painting, rather than a sum of money, because it would appreciate in value and be a valuable asset. It was displayed in pride of place in the family home, but was removed to safe storage when the family went away. Once it was loaned for an exhibition. It was obviously appreciated and enjoyed, and while the marriage lasted there was no talk of selling it, even when the husband's business venture failed and money had to be borrowed to satisfy creditors. The

2.

intention was that its value should be turned to account after 1988 when, on the expiration of copyright, prints could be made from it; and that it should eventually go to the son, the elder of the two children. Following the separation the husband took the painting with him, and in 1983 it was sold at auction for \$17,750 after payment of commission and expenses. However, counsel agree that nothing turns on the fact of sale.

The dispute is as to whether the painting is a "family chattel" as defined in s 2, and so to be shared equally between the parties notwithstanding that it was a gift to the husband alone: ss 8(b), 11(1)(b) and 10(3). Section 2 includes as family chattels "articles of household or family use or amenity or of household ornament". A painting plainly falls within that description; or perhaps it would be safer to say that a Frances Hodgkins painting certainly does. However paragraph (c) of the definition states that "family chattels" does not include "chattels used wholly or principally for business purposes, or money or securities for money"; and it is upon this provision, coupled with subs (4) of s 2, that the husband relies for his contention that the painting is not a family chattel. Sub-section (4) simply states that where the classification of property depends on the use to which it has been put, the use to be considered is that of the parties prior to their separation.

The District Court Judge concluded that because this painting "stood apart in the regard in which it was held" - and he was referring to its value, and the care taken for its safety - it was "not within the usual field of family chattels and that it should be regarded as separate property". On its face, this simply means that when an article coming within the description of a family chattel is given to one of the spouses, whether or not it becomes a family chattel depends on how valuable it is. With respect, that approach cannot be correct, for value is not one of the criteria set out in the statute. The statute is concerned partly with description and partly with use. However Mr Withnall submitted that what the Judge meant was that the use - or the principal use, for there may be more than one, and it is the principal use that is relevant - was as an investment rather than as an ornament, and so, he argued, the painting was either held for business purposes or as money or a security for money in terms of

3.

paragraph (c) of the definition.

Paragraph (c) does not of course refer to investments; It refers to chattels used wholly or principally for business purposes, and it refers to money or securities for money. The painting was not, when the parties separated, being used for business purposes. The husband was a sales representative for an investment company, the wife a seamstress. In 1988, it might have been the means of earning income, but even then I doubt that it could be said to become a business asset; however that is another matter. Nor was it money or a security for money. It was a painting, of great value as some domestic chattels can be, potentially of greater value, as many works of art, or antiques, may be, but a painting nevertheless. But that does not mean that as a work of art if it is not a business asset it must necessarily be an article of household ornament and so a family chattel. It may have some use other than those mentioned in the section. It may be a painting on semi-permanent loan to an art gallery, and be given by father to son whilst it remains there. It would not I think thereby become a family chattel; and for this reason, that it is not being used for household ornament. This example illustrates that the statutory definition is concerned with a combination of description and use. That point was made by Chilwell J in S v S (1978) 2 MPC 178, 182, where some trunks of items brought back by the husband's parents from China, and given to him, were held not to be personal chattels because they had always been kept locked away and had never been used as family chattels. Chilwell J described them as being in the nature of heirlooms, although I am not sure that that word has any special recognition in the Matrimonial Property Act. A chattel of the kind described in the section, but not used for the purpose described, is not a family chattel. But once a chattel corresponds with the description, of, for example, an article of household ornament, and is used as such, then in my view it becomes a family chattel: see Walker v Walker (1982) 5 MPC 172, 176, and also Chandulal v Chandulal (1981) 5 MPC 11, 14.

In this case, the painting was an article of household ornament and it was used as such, even though it may eventually have had other uses too. In my judgment it must be treated as a family chattel.

The Order as to Interest

The wife sought occupancy of the home until the end of 1986, by which time she hoped the daughter, the younger child, would have obtained both her school certificate and her university entrance examinations. The husband was prepared to allow occupancy until the end of 1985, when the daughter would have turned 16. He wished in the meantime to mortgage his share in the home so that he could buy another property for himself, but the wife would not agree to that because she said his previous record in money matters would make her fearful for her security. The Judge thought the children's interests required the longer period, but thought it proper to recompense the husband "for his funding out of the interest in the equity in the meantime". He said:

"To that end I order that there should be a valuation of the property and a calculation made of the husband's interest in the equity and that he should be entitled to have his share in the ultimate division increased by a sum calculated as being an appropriate annual interest on the value of the equity from the date of this judgment, until the date of settlement of the sale."

The Judge did not fix the interest rate.

This order was, I was informed, made on the Judge's own initiative. Counsel agreed that it meant that on sale the husband was to have half the realized equity, together with interest on half the present equity. Mr Robertson said that the effect was that the wife had to pay from her capital for the occupation right that was given to her solely for the sake of the children. It cast on her the full responsibility for housing the children. Both parties would have to wait for their money, and whilst both would share in any value

5.

increase resulting, yet her share would be diminished and his would be increased. It was certainly a novel course to adopt. Usually, the postponement of division is compensated by relief from outgoings and a share in any increased value. Mr Withnall supported it on the basis that the husband was continuing to pay maintenance - \$25 per week for each child - and that the wife was enabled to obtain not only accommodation for herself in return for quite low outgoings, but also her share in any increase in value, solely because the husband's capital was locked in. He drew attention to McKillop v McKillop (1980) 3 MPC 113, in which Casey J upheld an award of interest to the spouse out of possession, although the facts there were very different, for the husband, who had custody, had simply disposed of the matrimonial home and used the proceeds to assist in buying another property, and the interest was payable on the wife's share of those proceeds.

I have the difficulty in the present case of not knowing what the outgoings are, or whether the maintenance includes provision for the cost of accommodation. The only figures I have are Mr Robertson's calculations that if the interest rate is fixed at 9% or more, the interest will exceed the maintenance. It is thus impossible for me to determine whether in fact the wife is benefitting from the use of the husband's share. Similarly, there was no evidence before the Judge below. In these circumstances, I cannot see how the order can be justified. I was informed that the property was sold the day before the hearing of the appeal, and so there seems little point in pursuing any further enquiries that might have resulted in some other adjustment in the husband's favour, which could only be relatively small.

#### The Mortgage

This point was raised by way of cross-appeal. The husband was in partnership with one B. B absconded with the partnership assets, leaving partnership debts of \$11,200. The husband compromised with the creditors, who agreed to accept \$4,900 in full settlement from him. He could have paid them by selling the painting (they did not know

6.

about it) but chose instead to raise a mortgage, which the wife signed as one of the mortgagors. He obtained \$6,000, and paid \$4,951.79 to the creditors. The balance, he said, was used to pay "other expenses involved". Whatever that may mean, was not clarified. He paid the interest on the mortgage, which presumably was repaid when the house was sold. The Judge held that in accordance with the spirit of the Act he was entitled to look behind the joint nature of the debt that arose from the need for the wife to sign the mortgage, and to recognise the fact that the original debt was a personal one, notwithstanding that the compromise may have been for the benefit of the family.

There can be no doubt that the money secured by the mortgage was a debt incurred by the spouses jointly. They both borrowed the money from, and covenanted to repay it to, the mortgagee. The fact that they may have done so to advance the personal purposes of one of them does not affect the matter: cf. Quaid v Quaid (1979) 2 MPC 156. The Judge plainly thought this unjust, and I agree, but it cannot be permissible to go beyond the terms of the statute to remedy the injustice. In this case, I think the statute does provide the remedy, and the Judge has really arrived at the result the statute contemplates but without specific resort to the appropriate mechanism. I refer to subs (6) which enables a spouse to be compensated when a personal debt of the other spouse has been paid or satisfied out of the matrimonial property. The husband's debt of \$11,200, which I understood Mr Withnall to accept was a personal debt, has been satisfied by the payment of \$4,951.79, and this has come out of the matrimonial property by the charge given to the mortgagee and then by the repayment of the mortgage out of the proceeds of sale. The compromise was no doubt partly for the benefit of the family, but it did not create the debt, it extinguished it. It is thus not relevant. It may be noted that the position would have been the same had the mortgage not been raised and the painting sold instead.

Conclusion

The result is that the appeal and the cross-appeal are allowed. On the appeal, I declare that the Frances Hodgkins painting is matrimonial property, and I set aside the order for the payment of interest to the husband. On the cross-appeal, I hold that the mortgage debt was not a personal debt, and so it is deductible under s 20(5); but I order pursuant to s 20(6)(c) that out of his share of the proceeds of sale the husband pay the wife \$3,000.

A handwritten signature in dark ink, appearing to be 'J. H. J.', is written in a cursive style.Solicitors:

Ross Dowling Marquet & Griffin, DUNEDIN, for Appellant  
Milne Whyte & Co, DUNEDIN, for Respondent.

