IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

778

No Special Consideration

X

M. 414/80

5 MPC

IN THE MATTER of the Matrimonial Property Act, 1976

A N D

IN THE MATTER of an Application to determine a Matrimonial Property dispute

BETWEEN : MAURICE KIRAN CHANDULAL of Hamilton, Medical Practitioner

Applicant

A N D : JOAN LESLEY CHANDULAL of Auckland, Married Woman

Respondent

Hearing : 12th October 1981

Counsel : J.A. Faire for Applicant
W.J. Scotter for Respondent

Judgment : 5 November 1981

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JUDGMENT OF BISSON, J.

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The applicant was married to the respondent on the 10th day of January, 1959. There were 5 children of the marriage. The parties ceased living together following a separation order made in the Magistrate's Court in Hamilton on June 13th 1977. The parties entered into an agreement as to matrimonial property dated the first day of November 1979 under s.21 of the Matrimonial Property Act, 1976. By this agreement the parties reached a final settlement with regard to many items of matrimonial property including in particular the matrimonial home but they were unable to agree in respect of certain items which were recorded as

still being in dispute under paragraph 3 of the Agreement which reads as follows :

> "3. Items In Dispute
>
> The parties acknowledge that either may take such proceedings to obtain orders as to the status, ownership and division of two Lindauer portraits in the possession of the wife, two rings formerly in the possession of the husband, two porcelain figurines a section in Fiji registered in the husband's name and bonus bonds and all other cheque or savings accounts not specified in this agreement held to the credit of either thehusband or the wife and that the date for fixing the value of such items shall be the 31st March 1979 PROVIDED HOWEVER that any such proceedings must be initiated by either the husband or the wife within twelve months of the date of a Decree Absolute in divorce and failing the filing of any such proceedings each party shall be entitled to retain as his or her separate property any item in dispute which is in the possession or under the control of each as at that date."

These items in dispute have been referred to the Court on the application of the husband. Although the parties are now divorced it will be more convenient to still refer to them in this judgment as Husband and Wife. I shall deal with the items in dispute in the following order :

1. The husband's section of land in Fiji :

According to the evidence of the husband, his father had owned an area of land in Fiji which he subdivided so as to be able to gift one piece to each of his four children. In this way, the husband had become the owner of the land in question. It had in no way become so intermingled with other matrimonial property that it could no longer be regarded as separate property (see s.10(1)). Mr. Faire for the husband also submitted that the Act had no application to this land as it was immovable property not situated in New Zealand and therefore did not fall within s.7(1)(a) of the Act. Mr. Scotter for the wife accepted that the Fiji section was

separate property of the husband and I find accordingly.

2. Two Porcelain Figurines :

During the course of the hearing, it was agreed between the parties that these should be retained by the wife as her sole property, she giving up to the husband as his sole property a cigar box. I make orders accordingly.

3. Bank Accounts and Bonus Bonds :

No bonus bonds were referred to in the evidence and the only bank account which came to be considered was the cheque account of the wife with the Bank of New Zealand at Hamilton and which at the date of separation showed a credit of $441.51. It is to be noted that paragraph 3 of the agreement quoted above refers to "the date for fixing the value of such items shall be the 31st March 1979." There was no evidence as to the balance of this bank account on the 31st March 1979 but at the 5th February 1979 there was a credit balance of $666.14 which I was asked to treat as the balance at the 31st March 1979. Mr. Scotter for the wife submitted that the balance at the date of separation would be the appropriate figure to be divided equally. Normally that would be so as any increase after that date would be separate property under s.9(4) unless the Court considered otherwise. Mr. Faire for the husband submitted that by s.2(2) the value of any property was subject to s.21 and that the parties had agreed on the 31st March 1979 in paragraph 3 of their s.21 agreement. No submission was made by Mr. Scotter that it would be unjust under s.21(10) to give effect to the agreement and although the words "fixing the value of such items" are inept when relating to a bank account, I am satisfied that the agreement as to date included the bank account. Accordingly, the husband is entitled to $333.07 of the wife's bank credit and I order that she pay this amount to him. It appeared from the bank statements produced in evidence that the wife drew two cheques, one for $200.00 on 23 March 1977 and the other for $100.00 on 24 March 1977 and according to her

evidence she advanced this money to her son Brendan. As it had not been repaid on the date the parties separated it is an asset which was not disclosed at the date the property agreement was entered into. It was agreed that the Court should deal with it as an item in dispute. According to the wife, this $300.00 was the balance of some $3,300.00 which she had received by way of inheritance from the deceased estates of her mother and father. According to her evidence $3,000.00 was advanced by her to her husband and this figure is accounted for in the division of assets agreed upon. I see no reason to doubt that this loan of $300.00 came from that source and being property acquired by the wife by succession the loan is her separate property and I order accordingly. I do not regard the lodging of the money the wife received by succession in her only cheque account as being an intermingling of those monies with other matrimonial property. Hers was not a trading account to be viewed in accordance with commercial law. This was her personal account and she intended the money received from her deceased parents' estates to be and remain her separate property. I find that this loan of $300.00 made from separate property remains the separate property of the wife.

4. Two Rings Formerly in the Possession of the Husband :

According to the evidence, these two large dress rings had been given by the husband to the wife. By s.10(2) they would not be matrimonial property unless used for the benefit of both the husband and the wife and by s.2(1) they would not fall within the definition of family chattels. According to the evidence of the husband in his first affidavit the two rings were given by him to his sisters prior to the separation. The wife in her affidavit in reply claimed that the rings had been given by the husband to his sisters without her authority and certainly without her knowledge and as she desired that they eventually be given to the two daughters of the marriage she sought an order for their return. In a further affidavit sworn by the husband he stated that the wife had returned the two rings that he had previously given

to her by leaving them on his dressing table and saying "that she did not want them". He said the rings were returned to him many months before the separation and were given to his sisters well before the separation and that he had never been asked for their return and did not expect to be so asked as, according to his affidavit, the wife had made it quite clear to him that she did not want them and that she was returning them to him. He accordingly claimed that, as the rings were not owned by either his wife or himself at the time of the separation, they were not property to which the Act could relate. He repeated that many months before the separation the wife had returned the rings to him and made it quite clear that she did not want them or want to have anything more to do with them. It was accordingly a complete volt face on the part of the husband when called as a witness to be available for cross-examination, he said before being cross-examined that he wished to "clarify a statement" made in his second affidavit. His clarification was that the rings were merely found by him deposited on his dressing table and that there were no statements or explanation made at all by his wife for them being there and what her intentions were in placing them there. He did not explain how the passages he now retracted came to be in his sworn affidavit. Under cross-examination the husband said that as he had found the rings on his dressing table they had obviously been returned to him by his wife. At no time thereafter did the wife ask him where they were or request him to return them to her although the wife did say in her affidavit that at the time of the maintenance hearing when the husband was disputing payment of private schooling tuition fees for their daughter she had asked that the rings be sold if necessary to provide for her education and she would agree for her daughter's sake to such a course of action. Having found the rings on his dressing table the husband made no comment at the time to his wife because he said in evidence that at that stage there was a break-down in communications between them. He admitted that his wife had placed a box of french bathroom glassware on his dressing table which had presumably been returned to him but which he said she recovered subsequently. The wife was also made

available for cross-examination and with regard to the rings she did not agree that she had not had the rings for at least two years prior to the separation and said that she was under the impression that her husband had taken the rings to Fiji at approximately the time that she had filed her application for a separation order which was approximately the time that the case came to Court in June 1977. She agreed that at no time prior to the maintenance hearing in November 1978 had she asked her husband for these rings but she said she had made inquiries elsewhere as to what had become of them and had been told by a close friend of her husband's in confidence that he had given them to his sisters. This inquiry she stated was made a month or two or a few months after she had put the rings on her husband's dressing table and prior to the separation. Despite receiving that information, she did not make any complaint to her husband or demand of him for the rings to be returned to her. She said she did mention the matter to her solicitor but it was not referred to in correspondence but was raised, 17 months later, by her during the Court hearing. At the maintenance hearing the wife's suggestion that the rings could be sold was not pursued as a figure for maintenance was agreed upon whereupon a consent order was made. When I asked the wife why she had left the two rings on her husband's dressing table she said they were very large and ornate and he was in the habit of accusing her of many things and as she did not have any occasion to wear them she did not want the responsibility of them and she thought that she may be accused of doing something with them. She said that he had a safe at his surgery and she had no means of securing them and had already been to the police about a number of things that had been stolen and as a number of people came into the house working for her she did not want them accused if the rings disappeared. At a later stage of her evidence she said that the rings were bought partly as an investment. She agreed that there had been no discussion with her husband about the rings being left on his dressing table but she thought he would take them and put them somewhere safe. She said he kept them in his drawer for a while and it was when she saw they were no longer there that she made inquiries of what he had done with them because of the thefts that had taken place from the house. When asked if she was happy for the rings

to her by leaving them on his dressing table and saying "that she did not want them". He said the rings were returned to him many months before the separation and were given to his sisters well before the separation and that he had never been asked for their return and did not expect to be so asked as, according to his affidavit, the wife had made it quite clear to him that she did not want them and that she was returning them to him. He accordingly claimed that, as the rings were not owned by either his wife or himself at the time of the separation, they were not property to which the Act could relate. He repeated that many months before the separation the wife had returned the rings to him and made it quite clear that she did not want them or want to have anything more to do with them. It was accordingly a complete volt face on the part of the husband when called as a witness to be available for cross-examination, he said before being cross-examined that he wished to "clarify a statement" made in his second affidavit. His clarification was that the rings were merely found by him deposited on his dressing table and that there were no statements or explanation made at all by his wife for them being there and what her intentions were in placing them there. He did not explain how the passages he now retracted came to be in his sworn affidavit. Under cross-examination the husband said that as he had found the rings on his dressing table they had obviously been returned to him by his wife. At no time thereafter did the wife ask him where they were or request him to return them to her although the wife did say in her affidavit that at the time of the maintenance hearing when the husband was disputing payment of private schooling tuition fees for their daughter she had asked that the rings be sold if necessary to provide for her education and she would agree for her daughter's sake to such a course of action. Having found the rings on his dressing table the husband made no comment at the time to his wife because he said in evidence that at that stage there was a break-down in communications between them. He admitted that his wife had placed a box of french bathroom glassware on his dressing table which had presumably been returned to him but which he said she recovered subsequently. The wife was also made

to remain in his drawer she said she was not but as long as they were in his drawer and not in her drawer she did not feel responsible for them. When asked when she found the rings were no longer in his drawer why she had not asked him what had happened to them she replied "because I don't think he would have told me the truth." No indication was given as to the value of these rings but they were considered to be valuable with diamonds and other precious stones. The wife attached no sentimental value to them but considered they should be brought to account. Mr. Faire submitted that the husband was justified in believing that the wife had returned the rings to him or "abandoned the rings" as he put it in a general but not technical sense. Accordingly, he considered that they had been gifted by the wife back to her husband and that he was then entitled to give them to his sisters so that the wife had no claim upon him in respect of the rings and they were not in existence at the time of the separation and hence were not matrimonial property. Mr. Scotter questioned the credibility of the husband in view of his retraction of statements made in his affidavit and submitted that the evidence of the wife was to be preferred that she had simply left the rings with her husband for safekeeping. Mr. Scotter further submitted that as the rings had been purchased as an investment, they were matrimonial property. The dispute over these two rings is a difficult one to resolve. The change in the husband's evidence and the conduct of the wife are both mystifying. However, I am satisfied that the rings were originally a gift by husband to wife and were not an investment in the sense that they were used or to be for the benefit of both the husband and wife. They may have been an investment for the wife in that they would appreciate in value. By s.10(2) they were not matrimonial property and accordingly do not fall for further consideration under the Act. What has happened to them does not concern the Court in this jurisdiction as whether the wife gave the rings to her husband for safe-keeping or as a gift in neither event do they become matrimonial property. It is unfortunate that there was such a lack of communication between the parties that they

could not deal with such a simple matter as the safe custody or disposal of two rings in a way which would not have given rise to this dispute between them.

5. Two Lindauer Portraits :

The husband did not seek possession of these portraits which were of the wife's grandfather and uncle but sought payment for one half of their value on the basis that they were matrimonial property. He annexed to his first affidavit a photocopy of a handwritten certificate reading as follows :

> "To whomsoever it may concern
> this is to certify that in
> consideration for the sum of
> 35 pounds Mr. and Mrs. Kerin
> Chandulal are now the owners
> of my fathers portrait painted
> by Herr Lindauer, signed Martin
> A. Eccles."

According to the evidence, the wife's father, Mr. Martin Eccles had fixed the figure of 35 pounds to cover the cost of cleaning and transport of the painting. The other portrait was obtained at a later stage from the wife's father on payment to him of $60.00, again representing the cost of restoration. Both these amounts were paid by the husband to the wife's father. These two paintings were valued by Mr. Fairburn at $4,500.00 and $400.00 respectively, these valuations being accepted by both parties. According to the wife her grandfather's family were close friends and neighbours of the Lindauer family and accordingly a number of portraits of her family were painted by the well known artist and at the time of her grandfather's death those paintings were divided up among the four remaining children, her father receiving the painting of his father, one of those now in dispute. This painting is lifesize in a heavy oak frame and remained in the wife's father's possession until his retirement about 15 years ago. At the time of his retirement he and his wife moved to Ngongotaha, Lake Rotorua. The portrait was sent to an art gallery for cleaning and safe-keeping during the period of the move from one district to another and while their new home was being built. For

the several months that the painting was at the art gallery the wife deposes that her father discussed with her what should be done with it in view of the fact that he was nearing the end of his life span and that his new home was not really suitable in size and decor for the painting. There was also the problem of who should inherit the portrait, her father having five living children, three from his first marriage, the wife and her older sister from his second marriage. The wife says that her father's concern was first that the painting should be preserved, secondly that it should be appreciated, thirdly that it should be in a home where he could see it and fourthly that ownership should not be a source of dispute after his death and fifthly that if at all possible it should remain with a member of his family. With those intentions in mind, he was considering the possibility of gifting the painting to the Wellington Art Gallery or the Wellington Diocese of the Church of England, the wife's grandfather having been a Canon and holding a place in the missionary history of that church. At this time, the husband and wife were completing the building of their matrimonial home at 945 River Road Hamilton, it being a large home and in every way a suitable setting for such a fine portrait and a setting which at that time her brothers and sisters could not provide. After discussing the matter with her husband, the wife suggested to her father that rather than having the painting go outside the family and be displayed in the Wellington Art Gallery he should put it in "our possession" on the understanding that it should never be sold but remain in the care of that member of the family best able to maintain it and display it suitably. The father agreed to this course of action which she said was undertaken with the full knowledge and consent of her brothers and sisters. The husband thereupon paid the cost of cleaning and transporting the painting from the art gallery and her father "gave us the bill of ownership", which is the document already referred to, as evidence to the rest of the wife's family of his intentions should there be any dispute following his death. She said it was always understood by her and by her brothers and sisters that the painting would be held in

trust for the whole family and would be passed on to whoever could provide the best setting and care for it. As to the portrait of her uncle this had remained in the possession of a sister-in-law of her father after the death of the father's brother and there being no children of that marriage the portrait had no significance for her father's sister-in-law. Accordingly, she gave it to the wife's father who sought advice on restoration. As the cost was beyond his means, the husband paid the $60.00 involved and as a result the painting was fully restored and came into their possession, according to the wife :

> "Also on the same basis as the portrait of my grandfather."

At the time of the settlement of her parents' estates when for the first time the wife had some money of her own she deposed that she asked the husband to accept from her a refund of $120.00 as recompense for his outlay on the paintings (I assume $130.00 was intended.) . This was not because her husband had purchased the portraits from her father but because at that stage their marriage was already in difficulties and she was well aware that he wanted to retain as much of the property in any possible division of matrimonial property in the future. This payment he refused. In his affidavit in reply, the husband deposed that he was not a party to any of the alleged discussions between the wife and her father and had no specific knowledge of such discussions. He said that at no time did the wife's father put to him that he was to hold the paintings on trust for other members of his father-in-law's family and he considered that he and his wife were jointly the purchasers of the portrait concerned and that it therefore became matrimonial property. He also denied that the wife had made any offer to refund the sum of $120.00 to him. Under cross-examination by Mr. Scotter, the husband was asked why the late Mr. Martin Eccles allowed the painting to come to be displayed in his, the husband's, home in Hamilton and he replied that there were no specific reason offered to him other than that he thought he probably found that our home was suitable to house it, but this had not been stated to him. He agreed that it

could be better displayed there than in the home of any other member of the Eccles family. The transfer of the painting took place in 1967 and when asked to tell the Court what took place at the time, he said :

> "As far as I was personally concerned the discussions were brief and to the point that he was prepared to let us have the painting for the sum involved in the note and thats all there was to it."

He said there was no particular discussion about this as far as he was concerned as probably the discussions had been between his wife and her father. The husband was not sure of how long it was after receiving the first portrait that the second was received but he recalled that it had undergone restoration and that the payment of $60.00 was the figure fixed for it by the wife's father. The husband agreed that the paintings had received pride of place and were very much a talking point in his house and that the National Film Unit had spent some time photographing the portraits in the course of making a documentary film on the life of Lindauer. The husband also agreed in cross-examination that his wife's father had conveyed to him the thought that by signing the note he might help to avoid an argument after his death about ownership of his most cherished possession, the portrait by Lindauer of his own father. He said that when he received the note from his wife's father there was not any indication from him that he should hold the painting on some basis or other but he admitted that there could have been some such understanding between his wife and her father. The husband agreed that his wife wanted the paintings for sentimental reasons and that she wanted the paintings to remain in the family. It is to be noted that the husband did not seek possession of either painting but claimed to be entitled to a half share of their value. When the wife was cross-examined she did not accept her husband's statement that at no time did her father ever put to him that he was to hold the paintings on trust for other members of his family but when asked when such a discussion had taken place between her father and her husband as to the future ownership of the paintings she replied :

> "I don't believe any such discussion took place between my husband and my father but it took place between myself and my husband."

When asked when that discussion took place, she said :

> "When I put it to my husband that we should suggest to my father that the paintings come to us rather than go outside the family to an art gallery or the diocese."

It was made quite clear in cross-examination of the wife that there were the possibilities that her father either gave the painting of his father to the art gallery, the diocese, or to the wife and her husband and she confirmed that in fact he decided to take up her suggestion of giving it to them, upon payment of the sum of 35 pounds. In doing so he achieved the five objects already stated and to put the future ownership beyond doubt he wrote out and signed the certificate quoted above in favour of the husband and wife.

Mr. Scotter has submitted that the reality of the transaction was either the creation of a trust for the benefit of the next generation or a gift to his daughter. Mr. Scotter cited McIndoe v. McIndoe 1 MPC 133, a judgment of Jeffries, J. in which he treated an estate planning scheme by way of a sale of shares from father to son followed by a programme of annual gifts of forgiveness of the outstanding purchase money, as a gift not a sale and therefore separate property under s.10(1). He said, at p.134 :

> "For myself I do not think there is a conflict between the purpose and the scheme so as to challenge the purpose. I think it is clear the scheme is, and ought to be, the servant of the purpose. Within the context of this Act, which is to do justice between spouses at the end of their marriage, a court ought to look at, and make its decision on, the substance or purpose. I do not think it is forensic casuistry to say that Mr. J.L. McIndoe set out to make a gift by way of sale and purchase and a subsequent forgiveness of debt programme."

Mr. Scotter asked the Court to apply a similar approach in this case.

Mr. Faire submitted it was incongruous to suggest there was either a trust or a gift to the wife and distinguished the McIndoe case because here as the former owner's certificate clearly stated the painting became the property of both husband and wife not the property of the wife alone.

On the evidence which I have outlined I am unable to find that whatever the form the transaction took, a gift to the wife alone was intended. No doubt the payments totalling $130.00 bore no relation to the value of the paintings at the time, although no evidence of their then value was given. But to the extent that the paintings may have been sold at a gross undervalue so that the transaction was more of a gift than a sale, the inescapable fact is that the recipients of such generosity were the husband and wife and not the wife alone. The husband said, referring to his wife's father, "he was prepared to let us have the paintings" and the wife herself said that she had put it to her husband that the paintings should "come to us". I am satisfied that in those days of marital harmony the wife's father, as he stated in his note, intended that both the husband and wife should become the owners of his paintings and it was on that basis that the husband made the payments he did. Mr. Scotter did not advance legal argument that all the requirements for the creation of a trust were met. I must find on the evidence that a trust was not created. The wife's father decided the home of the husband and wife would be a suitable place to house the larger painting and it would in that way stay for the time being in the family instead of going to the Art Gallery or the Diocese. It would ultimately be a matter for the husband and wife to decide where it went next. His desire that there should not be a dispute as to the ownership of the painting after his death and his signing of the certificate indicate to me that the wife's father was content to see the ownership of the painting pass from him to the husband and wife. If he had intended to impose any fiduciary obligation on them it would have been a simple matter to have said so and it is significant that no member of the Eccles family has given evidence that any trust existed. It is also significant that the wife attempted to purchase her husband's interest in the paintings. Such an approach does not indicate that

she and her husband held the paintings as trustees.

Mr. Faire further submitted that as the paintings had adorned the matrimonial home of the husband and wife for some ten years they were family chattels within the meaning of s.2 of the Act. I accept that and so find. That being the case, the husband and wife are entitled to share equally in these family chattels by virtue of s.11(1)(b). While the wife through her father's generosity no doubt contributed more to the acquisition of these family chattels than did her husband, the application of s.14 of the Act was not suggested, rightly so in my view, because the Act does not approach the division of matrimonial property on an asset by asset basis but from the point of view of each party's contribution to the marriage partnership. Accordingly, although the wife may feel it is an injustice that she should have to pay her husband, who is not an art collector, some $2,450.00 to ensure portraits of her family forebears become her property, I can only suggest she look at the overall picture and have regard to those items of matrimonial property in which she receives a half share and in respect of which the husband may have made a greater contribution than she did on an asset by asset basis.

I order that the two Lindauer paintings be the sole property of the wife upon her payment to the husband of $2,450.00.

There will be no order as to costs.

G.E. Binnie J.