IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.381/74

IN THE MATTER of the Matrimonial Property Act 1963

AND

IN THE MATTER of an application by CLARICE AMANDA ESLER

BETWEEN CLARICE AMANDA ESLER

Applicant

AND TONY JAMES STACKHOUSE and JOHN EVEREST ENGLAND and JEAN ELSIE MARGARET McKAY as trustees and executors in the Estate of JAMES ESLER deceased

Respondents

112

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Hearing : February 5, 1975

Counsel : Erber for applicant
Matthews for respondents

Judgment : February , 1975

JUDGMENT OF SOMERS J.

This is an application by a widow under the Matrimonial Property Act 1963. The applicant is Clarice Amanda Esler, to whom I shall refer to as the wife. Her husband, James Esler, whom I shall call the deceased, died on 6 March 1974 leaving a will made 16 November 1973 and a codicil thereto made 17 January 1974; probate whereof was granted to the respondents on 29 March 1974.

The deceased left cash in possession amounting to $590; furniture and other personal chattels which were not valued and not itemised in the papers; and a house property free of encumbrances situate at 398 Linwood Avenue, Christchurch, and having a government valuation made 1 November 1969 and accepted for Estate Duty purposes of $5,200. A valuation of the property made by a registered valuer was put in at the hearing by consent.

This shows a market value at 6 March 1974 of $17,700 (excluding chattels) and at 31 January 1975 of $18,500.

The combined effect of the will and codicil is that the house property and deceased's furniture, furnishings and articles of household or personal use or ornament were given to his trustees to permit the wife to have the use of the same during her life subject to her paying outgoings on the property and keeping the same in reasonable order and condition with the provision that if the applicant is not able to comply with those conditions or so requests the property and furniture are to be sold and income of the invested proceedings paid to her. On the wife's death the property is to fall into residue. Subject to the interests of the wife the deceased gave a legacy of $2,000 to a niece, Agnes Esler, and the residue is in the events that have happened, held for the deceased's daughter, Mrs Jean Elsie Margaret Mackay.

The application seeks an order that the house property be vested in the applicant and the respondent trustees in such shares as the Court considers just, or in the alternative, for an order that the property be sold and the proceeds be divided in such shares as the Court thinks fit. An order is also sought vesting the remaining assets of the estate in the wife absolutely and for such further or other order in relation to matrimonial property as the Court thinks fit.

The deceased and his wife were married on 7 April 1954. The wife was then aged sixty-six (although shown on the marriage certificate as sixty-two). She was a widow. Her first husband had died in 1938; there were four children of that marriage and although it is not expressly so stated I think that all had left home by the date of the marriage. The deceased was aged sixty-three; he too had been married, his wife having died in March 1953. He had one child, namely Mrs Jean Mackay, the residuary beneficiary under his will.

At the date of the marriage the husband owned a house property at Halswell Avenue, Christchurch, which was almost new and which had been built by him in 1951/2. I have no evidence of its cost other than what can be extracted from Exhibit G to the affidavit of Mr Stackhouse, one of the respondents. This is a copy of the ledger card of the deceased's solicitors which indicates that at least £2,500 was spent on the new building to which there would have to be added the cost of the section. In June 1952 a mortgage was registered securing the sum of $500. Mrs Mackay has deposed that the deceased's house was fully furnished when he married. Mrs O'Callaghan, a daughter of the wife denies this. As Mrs Mackay was living there up until the marriage I accept her evidence. Mrs Mackay also deposes and I accept that she paid for some of the curtains and carpets in the home at Halswell.

The wife has deposed that she had, at the time of her marriage, "accumulated a great deal by way of personal belongings "and furniture as well as an aggregation of savings" and she sets out certain particular items she remembers. The uncertainty implicit in that statement is perhaps not surprising when it is recalled that the applicant is now aged eight-six years and is and has been for some time in imperfect health.

It is convenient now to set out a history of the marriage so far as property is concerned in substantially chronological form :

31 JULY 1957 - The balance of the State Advances mortgage was repaid. This amounted to a sum of £284.2.8. plus costs of £3.7.4. The solicitors' trust account entry under the name of the deceased records the receipt of this sum under the narration "by you". The wife has deposed as follows : "During the time we lived in the house in Halswell I gave my

"husband money to help him pay off the mortgage ... I can "recall paying my husband money from my savings account to "help him pay off this mortgage ... I helped to pay off the "mortgage which he had on his house in Halswell Road." It is also convenient to record at this point that up until the time he sold the Halswell property the deceased was in receipt of a pension which he supplemented by periods of work.

AUGUST 1960 - The deceased sold the property at Halswell Road for £4,900. In the same month the deceased bought a house property at Hornby for a total of £4,750. According to a letter written by the deceased's solicitors at the time the price included furniture valued at £1,750.

DECEMBER 1963 - The deceased sold the property at Hornby for £3,900 excluding chattels and bought a property at Temuka for £2,500. Mrs Mackay deposes that a number of articles of furniture bought with the Hornby property were removed to Temuka. As a result of these transactions the deceased ought to have had in hand £1,400 in cash, less costs and removal expenses.

It is convenient at this point to refer to a further statement by the applicant in paragraph 9(c) as follows :

> "Shortly after we moved to Temuka my husband decided to sell all or substantially all of the furniture which I had accumulated before marriage. I was upset at this action. However, the sale proceeded and my husband retained the proceeds. I do not know what he did with them."

JUNE/JULY 1970 - The deceased sold the Temuka property for £5,200 in July 1970, having the previous month bought for £6,750 the property at Linwood Avenue in issue in these proceedings. It was registered in his name. In order to complete that purchase he borrowed $500 on mortgage.

7 APRIL 1971 - The mortgage on the Linwood Avenue property was repaid. The amount involved was $492.92 and of this amount the wife contributed $360.

It remains to mention two other matters. First, the wife has deposed that at the time she married the deceased had a motor car "which was not fully paid off" and he asked her for and she paid him, the balance owing on the car. She was unable to recall the amount. There is no evidence to show what happened to the car, or if it was sold, to its proceeds of sale.

Secondly, it appears from the wife's evidence that for a period of eight years immediately preceding the death of the deceased, the pensions received by the deceased and his wife were, after the deductions each week of $10 for housekeeping, kept by the deceased in a box in his house. It was agreed that the amount received by the wife from the Social Security Department over that eight years was $5,573.77 and that a like amount was received by the husband, from the same source. It was also agreed between the parties that half of the weekly housekeeping money could be attributed to the wife's monies so that the nett amount paid into the common pool by her over the period was $3,493. The cash in possession of the deceased at the date of his death amounting to $590 comprised the contents of the box at his death.

There was evidence of certain improvements and expenditure about the Linwood Avenue Property. This included the purchase and installation of a Juno space heater at a cost of $400, the erection of a concrete fence and gates on the front of the property; an iron fence along one side; and an extension to the garage (from the valuer's report this appears to have converted it into a garage and workshop). The valuers report also refers to a new lounge carpet.

It was conceded by Mr Matthews that there was no other source of the monies expended on those matters than the pooled pension fund. There was no evidence of cost save in respect of the heater and no evidence of any particular increment in the value of the property attributable to those items.

The applicant's first claim relates to the furniture. No list of furniture was provided, the only evidence about the ownership of the furniture is that provided by the applicant who in paragraph 11 of her affidavit makes the following assertion :

> "I have $122-42 in cash and the following chattels in the home belong to me namely a fireside chair, a fireside companion set, a television set, ornaments, a willow pattern teaset, crockery, ornaments in the china cabinet in the lounge, a chiming clock, a transistor radio, a wringer, a teapot, a frying pan, all saucepans, linen and some of the bedding and blankets."

Although this is not of great probative value I think, in the present case, I may accept it. Accordingly I make an order that the furniture and furnishings referred to in paragraph 11 of the wife's affidavit but excluding ornaments (other than those in the cabinet), bedding and blankets, are the property of the applicant to which she is entitled in possession. I cannot make an order about the items I have excepted by reason of the uncertainty in description. I should be sorry to think that the parties cannot adjust those items themselves.

The second claim relates to the cash in the box amounting to $590. The evidence satisfies me that this is the residue of monies contributed by both parties in equal shares and accordingly I hold and declare that one half of that sum, namely $295 was the property of the wife. The respondents will, no doubt, account to her for that sum.

Finally, there is the claim to an interest in the house property. It seems to me a necessary consequence of the decision in E v E (1971) N.Z.L.R. 859, that the wife must be able to point to particular contributions to the property or to previous properties which can be traced to the one in issue.

It is also for the wife where necessary to assess the value of her contributions. I propose now to mention the several heads under which contribution was claimed.

(a) The payment of money toward the redemption of the mortgage on the Halswell Road property. I have no reason to doubt the evidence of the wife on this point and to the extent that she paid off the mortgage and the proceeds of sale of the property were used to purchase the next property she has no doubt made a contribution. But I cannot, I think, give any effect to it or bring it to account for it is wholly unquantified. Although the affidavit is not clear on the point I infer from the reference to "paying off" the mortgage that the amount contributed by the wife was a part of the final payment of $284.28.

(b) I have already referred to the evidence about contributions to a motor car. There being no evidence as to amount and no evidence that the monies eventually found their way into the purchase of the house I can give no effect to this either.

(c) I have also referred to the evidence about the sale of the wife's furniture. Again, I have no evidence that the proceeds of sale found their way into the house and no evidence of amount. I can give no weight to this item either as a direct or indirect contribution to any house property.

(d) It is clear, I think, that the expenditure on improvements to the Linwood Avenue house came from the joint monies of the husband and wife. I have already indicated that the only item of which the cost is known is the heater. It It may not be unreasonable to suppose that the carpet, fences, gate and garage extension, together could not have cost less than another $1,100 making a total with the heater of $1,500.

One half of that may fairly be attributible to the wife's contributions.

(e) Mr Erber urged me that apart from those specific matters it was to be inferred that the wife had made a contribution by reason of the fact that she had contributed something over $3,000 to the fund and part only was accounted for in the improvements mentioned and the cash in possession. On this footing he suggested that a large amount of other expenditure about the house must have been made from the pooled moneys. Once again there is plainly no quantification. There is evidence to show that the fund was readily used for expenditure on matters that from time to time were necessary, such as medical treatment. I do not think I can speculate on what sum, if any, from the furn formed a contribution to the house.

(f) The sum of $360 paid to release the mortgage.

(g) Finally, Mr Erber relied for contribution upon the wife's services and referred to the marriage of some twenty years. Under this head Mr Matthews quite properly commented that for a period the wife, who was old and frail, could be hardly said to have rendered services of a contributing kind. I accept this comment but I think I may also, in considering her performance of her wifely duty and services, bear in mind that she has made some contributions quite unspecified and which I propose to regard as modest in relation to the mortgage on the Halswell house and probably to some modest extent from the pooled fund. The Act, I think, distinguishes between money payments and other matters. The items I have referred to cannot be brought to account as money payments for the reasons I have mentioned. I think they may be considered however, as evidencing the character of the applicant and the manner in which she may be taken to have discharged her wifely duties and services.

Taking all the circumstances into account I think that the wife has made out a case for an interest in the home.

In my view her interest in the property at 398 Linwood Avenue, Christchurch, at the date of death of her husband, which I think is the relevant date was in a one-sixth undivided share.

I will hear counsel as to the precise form of order if this is necessary. I will also hear counsel on questions of costs if they cannot be agreed.

Solicitors :

Messrs Archer & Kinley, Solicitors, Christchurch, for applicant
Messrs Lane, Neave & Co., Solicitors, Christchurch, for respondents.