IN THE SUPREME COURT OF NEW ZEALAND M. 327/75

CHRISTCHURCH REGISTRY

No Special Consideration

NO.

448

IN THE MATTER of Section 5 of the Matrimonial Property Act 1963

BETWEEN [redacted] LORD of [redacted]

PLAINTIFF

A N D THE SAID [redacted] LORD, [redacted] LORD WINTER of [redacted] and [redacted] FRAZER of [redacted], as Executors and Trustees of the estate of the late [redacted] LORD

DEFENDANTS

- a n d -

A. 376/75

IN THE MATTER of the Estate of [redacted] LORD late of [redacted]

BETWEEN [redacted] LORD of Rangiora, Widow

PLAINTIFF

A N D THE SAID [redacted] LORD, [redacted] LORD WINTER of [redacted] and [redacted] FRAZER of [redacted], as Executors and Trustees of the estate of the late [redacted] LORD

DEFENDANTS

Hearing: 16th September 1976

Judgment: 14 OCT 1976

Counsel: Mr J.R. Milligan for Plaintiff
Mr L.M. O'Reilly for Defendants
Mr A.D. Holland for I.W.L. Winter personally
Mr A.F.W. Wilding for W.J.L. Winter

JUDGMENT OF CASEY J.

[redacted] Lord died on 29th September 1974 aged 76 and left a will dated 4th March 1974. In it he gave his wife an annuity of $3,000.00 (charged on his two farm properties)

together with the right to occupy the matrimonial home on one of them as her home, and a life interest in a house at [redacted] together with a legacy of $600.00. His nephew [redacted] Lord Winter received a life interest in the two farms with a gift over to certain of his children, and he received the residue of the estate absolutely, with substitutionary provisions that are of little concern in these proceedings. The Plaintiff widow brings an action under the Matrimonial Property Act 1963 for orders determining her interest in the matrimonial property and has also made a claim for further provisions under the Family Protection Act. By consent both matters were heard together, the claim under the Matrimonial Property Act first, this being the obvious course as, until her interest in the property was ascertained, a proper assessment of her need for maintenance and support could hardly be made.

Mrs Lord married the deceased in 1951 when he was 53 and she was 50. Neither had been previously married and there were no children, nor did he have any dependants within the meaning of the Family Protection Act. At the time of the marriage he had a farm as [redacted] of 104 acres which had previously belonged to his parents and he had purchased it at Government Valuation under his late father's will. He had two other farms, one at [redacted] of 160 acres and one at [redacted] of 180 acres, the former being bought in 1938 at £6.0.0. per acre and the latter at £26.0.0. per acre. They were used for sheep farming and cropping. There was a house on [redacted] which became the matrimonial home for the duration of their marriage.

The Plaintiff had some £1,500.0.0. in cash when they were married and deposed that the [redacted] farm house was in a very neglected condition when she moved into it. She gives the impression of her husband leading a spartan bachelor existence up till then, sparing little for the normal comforts or conveniences, and this is borne out by her description of the rather solitary life he continued to lead after marriage. They were frugal and hard working and the Plaintiff, by her industry

around the home, improved their living conditions and developed vegetable and flower gardens. She also did the sort of work around the farm expected of a wife in this situation. Her husband was a careful man with money and, although I am satisfied that she never wanted for necessities, Mrs Lord certainly did not have any luxuries nor indeed did she have many of the things most people would regard as commonplace in such a marriage where there was money to spare for them.

When her husband died Mrs Lord had $5,000.00 in the savings bank - mainly the result of her savings and what she brought into the marriage, and she then left the farm house to live in the [redacted] property, for which she bought the furniture. The deceased sold the [redacted] and [redacted] farms in 1967 and with the proceeds bought 470 acres at [redacted], close to [redacted]. From 1971 this block was leased to his nephew [redacted], who had also worked for him on the farms. At his death the assets consisted of the two farm properties at [redacted] and [redacted] and the house at [redacted], then collectively valued at $158,614.38. Cash and bank accounts totalled $69,746.98 and car, farm stock and plant came to $6,464.00 making the gross value $234,828.33. Revaluations in 1975 produced the following:-

[redacted] (Matrimonial home included in above value at $16,000.00)	$110,000.00
[redacted] (Including leasehold block)	$172,290.00
[redacted] house and land	$ 28,000.00
	$310,290.00

It will be seen that the estate is substantial, worth close to $380,000.00. Liabilities were about $500.00 and the duty involves some $30,000.00.

Mrs Lord claimed an interest in all these assets under the Matrimonial Property Act. At the outset Mr Milligan made a submission as to the ability of the Court to take relevant circumstances into account in determining the extent of a contribution (once it is established to some degree) in relation

to assets other than the matrimonial home. He appeared to rely on observations in earlier cases, as well as some comments by Wilson J. in Robinson v. Israel (an unreported decision (Auckland 28th May 1975 M. 681/74) and noted in 1975 Butterworths Current Law No. 880), as interpreting the judgment of McCarthy P. in Haldane v. Haldane (1975) 1 NZLR 672 at p.673, dealing with the necessity for an interest to be based on contributions by the applicant. The comments of the learned President in that case are clear and unambiguous, and there is no room for the gloss Mr Milligan seeks to place on them either by limiting their application to the matrimonial home, or by taking into account other relevant factors once a contribution has been established. In this respect the Matrimonial Property Act differs significantly from the approach to be taken under the Matrimonial Proceedings Act. His views were accepted by Richmond J. at p.681 and I am bound to follow that consensus of the majority of the Court of Appeal.

Mr Milligan also submitted that in dealing with assets other than the matrimonial home, I should regard Mrs Lord's efforts as contributing to the smooth operation of the farming business as a whole, regarding this as the asset in dispute rather than the specific items which form part of that business. But I must bear in mind the approach by McCarthy P. in Haldane's case (p.673) indicating that s.5(1) is directed solely to the determination of disputes regarding the identifiable items of real or personal property, which the Court must consider individually before making an order based on contribution. In this case, even adopting Mr Milligan's approach to the non-family assets, the assets of the farming business are substantially the two farm blocks and the small amount of plant and stock. Any contributions to that business may cover all its assets, but the Court is still obliged to look at each one individually and determine the relevancy and extent of the overall business contribution to that asset.

Mr Holland also made a general submission that the

Court is not bound to make an order, even though a spouse has made contributions to the property in dispute. Therefore, in the exercise of its discretion it should deal more strictly with claims by a surviving spouse against an estate than with disputes between living spouses, especially when the only basis of contribution (as in this case) is the wife's domestic and farming services. It seems clear that neither Mr nor Mrs Lord would have given much thought to the ultimate destination of the assets as they were being built up during the daily round of farming and domestic activities which contributed to them. In this situation I see no distinction between dissolution or death in terminating the marriage, when it comes to applying the principles laid down by the Act. The position might be different if, for example, both parties had clearly understood and accepted what was to happen to the property on the death of one; while perhaps falling short of a common intention under s.6(2) this might be a factor in determining what is a just award, in line with the observations of Richmond J. in Jones v. Jones (1975) 2 NZLR 346 at p.350. But this is not the case here, because Mrs Lord did not know anything about her husband's business or financial affairs and there is no evidence that she knew what he intended doing with the property.

I now deal with the individual assets:-

(i) Matrimonial Home:

At the date of the marriage this was a bachelor residence where Mr Lord ate and slept. His wife turned it into a comfortable - if frugal - home and during the 23 years of their life together she carried out her domestic duties to the standard expected of a wife in this situation. Although she made no cash contribution to the property, her services (regarded in the "more benevolent attitude", mentioned in Haldane v. Haldane as applicable to the matrimonial home) justify the one-third interest in that asset sought by Mr Milligan.

(ii) Farm Properties, Stock and Plant:

The [redacted] property and the two at [redacted] and [redacted] were bought by Mr Lord before the marriage and (according to Mr Fraser's affidavit which I accept) they were all

unencumbered by the time Mrs Lord came on the scene. When the two latter properties were s old in 1966 and part of [redacted] in 1968, they produced enough to buy [redacted] and leave a substantial surplus, which presumably is partly represented in the [redacted] house (purchased in 1973 and unencumbered) and in the bank balances. Accordingly there can be no question of Mrs Lord's work as a farmer's wife, with its consequent savings, assisting in the purchase or retention of these assets, nor helping to repay mortgages. Nor can it be of significance in the acquisition or retention of the small amount of plant and stock at the date of death. She did the usual work of a farm wife in these circumstances but (like the wife in Haldane v. Haldane) neither her efforts, nor the frugal standard of living she accepted, can in any real sense be looked upon as contributing to the farm properties, stock and plant. Mr Lord acquired the basis of these assets completely from his own resources before marriage and without her assistance.

(iii) Bank Accounts and [redacted] House:

Although I think Mrs Lord has no claim on the farm properties, different considerations apply to the bank balances accrued at death exceeding $69,000.00. It seems from the affidavits that Mr Lord was a "loner" and they had no social life, going no further than [redacted]. He was not lavish with money and while they had enough for the basic necessities, she spent largely her own money on clothing for herself, which came from interest on her savings. Very little was spent on the home. The farm produced a reasonable income, and the impression I get from the affidavits is that they could have spent rather more on their own comfort and enjoyment without difficulty. Their standard of living and expenditure was below that reasonably expected for a mature and childless couple in their position. While emphasising their frugal existence, Mrs Lord does not complai about it. She married when she was 50 and, having lived in the district, she must have known the sort of man he was and accepted his lifestyle. I reject any suggestion of hardship inflicted on her, but she must be given credit for accepting and adopting

her husband's way of life and attitude to money. She thereby brings herself within the comments of McCarthy P. at p.674 of Haldane v. Haldane, as a wife "who had deliberately accepted a reduction in her standard of living - and gone without - in order to make more money available for employment by the husband in his business activities with consequent growth in his assets." It could also be suggested that in adopting this lifestyle in addition to carrying out the duties of a working farmer's wife, she "assumed domestic responsibilities in some special or unusual way" which resulted in the freeing of assets to her husband. While such contributions are not reflected in the farm realty or stock, they certainly must have resulted in more cash being available in the bank accounts, and for the purchase of the [redacted] house.

Mr Holland submitted that a wife, whose frugality enabled a husband to build up cash savings apart from his business, could have no interest in them under the Matrimonial Property Act. This seems quite inconsistent with the principle stated by McCarthy P. in Haldane, even though he instanced the freeing of money for a husband's business as the result of such frugality. I am sure he did not intend to confine this approach to business assets alone. There is no doubt that if a wife contributes directly to a husband's savings she gets a share; why should she be deprived if her special efforts in other fields enable him to increase those savings?

The assessment of her interest in these assets can only be done on a very general way. The sale of the various farm properties up to 1968 produced $119,000.00, and [redacted] cost $72,500.00 (all in round figures). This left a surplus of $47,000.00 and the [redacted] house was bought for cash in January 1973. I do not know its price, but on the valuations a fair value at that time could be $27,000.00. To ascertain the value of the assets augmented by Mrs Lord's frugality as at the date of death, it seems appropriate to add the value of this house to the bank balances of say $70,000.00, making a total of $97,000.00. Of this $47,000.00 should be deducted as attributable to known

property sales, leaving $50,000.00. Both parties adopted a frugal way of life and their contributions should probably be looked on as equal in effecting these savings. But allowance must also be made for the normal savings they might have made from the farm income even if they had been spending it at a rate to be expected of a couple with a more normal attitude to money. Sales of stock etc. and not replaced may also have accounted for some of the savings. Looking at all these factors I think Mrs Lord should be awarded an interest to the extent of $17,500.00 altogether in these particular assets. This takes into account as well her contribution from the relatively minor assistance she gave to the running of the farm.

Her total interest should take the form of a cash payment, with the share of the matrimonial home ($5,300.00) being charged against the [redacted] property. No doubt Counsel can agree upon an appropriate form of order to provide for payment of a total sum of $22,800.00 from the various assets; otherwise I will reserve leave to apply for further directions as to the incidence of this payment.

I turn now to the Family Protection application which must be decided on the basis that Mrs Lord had $5,000.00 in savings and $22,800.00 interest in the matrimonial property. The estate is substantial, warranting the liberal approach indicated in Bosch v. Perpetual Trustee Company (1938) A.C. 463. It is a question of what is "proper" maintenance and support in all the circumstances, rather than merely "adequate" maintenance, and when the estate is a large one the Court is justified in making provision to meet contingencies which may have to be disregarded when the estate is small. Furthermore (as conceded by Mr Holland) there are no competing claims to be taken into account, as the deceased was under no duty - moral or otherwise - to consider his nephes and their families.

Mrs Lord had understandably found the former matrimonial home at [redacted] too large and isolated in her present circumstances. She is 75 and suffers from arthritis and may need household help in the future although she is managing

satisfactorily at present. But I think a wise and just Testator in the deceased's situation should have recognised that his widow would want to live in town, and presumably the [redacted] house was bought in anticipation of their retirement to that centre. She already has a life interest in this house, along with the right to occupy the [redacted] home which she does not want. By going to live in [redacted] she loses the income from letting that property, with no corresponding return from the farm home. This loss must be taken into account in determining the adequacy of the annuity of $3,000.00 left to her. She complains that this is not enough to keep her in a proper standard of comfort, having regard to the size of the estate, and notwithstanding the frugal way of life she had become accustomed to over the marriage. I agree with Mr Holland that the farm income is not great, having regard to the capital position of the estate; in 1973 the nett farming income was $4,371.00; in 1974 it was $7,063.00. Nevertheless, looking at the overall position and especially her likely need of assistance, the figure of $3,000.00 per annum from this estate can hardly be regarded as proper for Mrs Lord, in the absence of any competing claims. In this and earlier wills, the deceased appears to have concentrated on leaving her adequate maintenance, measured in rather the same frugal scale as governed his daily living. Mr Holland suggests that Mrs Lord can now earn an income from the capital sum she will acquire under the Matrimonial Property orders. This factor could be relevant in a smaller estate, but not here. There is plenty from which the Testator could fulfill his own moral obligations to provide for her proper maintenance and support, without expecting her to supplement it from her own comparatively modest means. Mrs Lord should have her annuity increased to $4,500.00per annum from the date of death.

Mr Milligan also sought a capital sum on Mrs Lord's behalf, as a fund to give her security. This was opposed by Mr Holland on two grounds - firstly that it was not the purpose of the Act to give such a claimant a capital sum (especially in the case of a widow of 75), because that really meant

augmenting her estate to the ultimate profit of her beneficiaries or next-of-kin. Secondly, he submitted that in the case of a large estate there was no need of any capital sum because it was big enough to provide, by means of annual payment (with power to increase them if necessary), for everything needed for proper maintenance and support. I accept the force in these submissions but they are inclined to oversimplify the position. In my view Mr Milligan is right when he suggests the appropriateness in these circumstances of some fund to act as a buffer, and tide her over any emergencies. The deceased should have provided this as part of his obligation to his widow from an estate of this size, notwithstanding her own assets and interest in the property which are small by comparison. I also take the view that she should have enough not only to tide her over emergencies, but also to give her some modest capital spending ability for e.g. holidays, or a car (which he did not give her under the will) or other amenities to add comfort to life at this age. Having regard to her age and life expectancy and the circumstances in which she lives, I think $7,500.00 would be appropriate under this heading, in substitution of the legacy of $600.00 left to her. Mrs Lord's assistance in building up her husband's estate has no place in her Family Protection claim, because all relevant matters have been taken into account and compensated for in the Matrimonial Property application.

She has also asked for the [redacted] property to go to her absolutely. I cannot agree with this; the life interest plus the annuity and lump sum, taken into account with her other assets, now provide her with proper maintenance and support. To go further would involve re-making the will - perhaps to do what might be reasonable, but not justified by the provisions of the Act. In dealing with this property, as with the award of a lump sum, the widow's age and normal life expectancy are major considerations. She is unlikely to have the same needs for long-term permanent residence or for ready access to capital as a woman, say, 20 years her junior.

As in the Matrimonial Property application, Counsel

should be able to agree on the incidence of the capital payment; if not, I reserve leave to apply, and I also reserve leave to the parties to apply for such further or other orders as may be necessary because of any change in the Plaintiff's circumstances or otherwise.

Counsel will please submit draft orders for approval. As both applications were heard together, and dealt with on the same affidavits, the costs will reflect this. I fix Mrs Lord's costs at $800.00, apportioned $500.00 to the Matrimonial Property application and $300.00 to the Family Protection action, in both instances (together with disbursements) to be paid from the estate. The Defendants presumably do not need an order for costs but I will fix these if requested. Mr Holland contested both claims on behalf of Mr I.W.L. Winter in his personal capacity and he is entitled to costs on the Family Protection application against the estate - though ultimately I suppose it will come out of Mr Winter's own pocket. Again, if he desires such costs to be fixed I will do so. I have in mind $250.00 for him, on the basis that Mr Winter is not entitled to costs on the Matrimonial Property claim. Mr Wilding appeared for Mr [redacted] Winter and his costs on the Family Protection action are fixed at $100.00 plus disbursements, to be paid by the estate.

J.R. Milligan, Christchurch
Brockett & Cameron , Christchurch
Wynn Williams & Co, Christchurch
A.F.W. Wilding, Christchurch