N2LR.

IN THE SUPREME COURT OF NEW ZEALAND
WHANGAREI REGISTRY

D.23/76

Special Consideration

BETWEEN [redacted] LICHTWARK of [redacted]

Petitioner

AND [redacted] LICHTWARK formerly of [redacted]

Respondent

436

Hearing: 9 and 13 August 1976

Judgment: 21 September 1976

Counsel: T.J. North for petitioner
P.J. Smith for Crown (as amicus curiae)

JUDGMENT OF MAHON J.

This is a petition under section 19 of the Matrimonial Proceedings Act 1963 for a declaration that one party to the marriage is dead and for a consequential decree of dissolution of that marriage. Applications of this kind are not frequently met with. The last reported decision is that of Beattie J. in Harris v. Harris (1970) N.Z.L.R. 804, in which case the learned Judge declined to make a decree as he was not satisfied that the burden of proof had been discharged.

Section 19 reads :

"19. (1) Any married person domiciled in New Zealand may present a petition to the Court alleging that reasonable grounds exist for supposing that the other party to the marriage is dead and praying to have it presumed that the other party is dead and to have the marriage dissolved.

(2) The Court, on being satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

> "19. (3) In any such proceedings, the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner, and that nothing has happened within that time to give the petitioner reason to believe that the other party was then living, shall be evidence that he is dead in the absence of proof to the contrary.
>
> (4) Unless the context otherwise requires, the provisions of this Act and of any other enactment, as far as they are applicable and with any necessary modifications, shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively."

The important part of the section for present purposes, and perhaps in most cases brought under this section, is subsection (3) which creates an evidential presumption in favour of the petitioner if there are proved in evidence the facts to which the subsection refers. Were it not for subsection (3) the terms of subsection (1) would compel the application of the common law principles relating to juridical presumption of death. The terms of subsection (3) however, considerably lighten the burden of a petitioner proceeding under section 19. It remains only to say before considering the facts of the present case that where a spouse is missing and thought to be dead a decree of presumption of death is necessary because otherwise a petitioner seeking to remarry could only do so without risking the sanctions of the criminal law if the other spouse in fact was dead. This procedure permits decree of dissolution to be made when in fact the other spouse may not be dead.

The petitioner in the present case was married to the respondent on [redacted] 1942. There are seven surviving children of the marriage. On or about 19 June 1968 when the respondent husband and his wife were running a [redacted] business at [redacted], Auckland, the respondent disappeared. There was a reason for

There had been some measure of disharmony between him and the petitioner and she had taken legal advice on the matter. She had been advised to take separation proceedings. The respondent became aware of this and a day or two before his disappearance made a guarded reference to one of his children to his impending departure. Since 19 June 1968 the petitioner has never seen her husband. Widespread enquiries were made and it was ascertained that the respondent disappeared in the company of a woman whose existence had been unknown to the petitioner. This woman had been living at [redacted] with her husband and four children. The youngest child of that marriage was aged two years in June 1968, and on a day which coincided with the disappearance of the respondent from [redacted], the lady in question placed her two-year-old child in the temporary care of a neighbour while she went off, as she said, to keep an appointment with a dentist. But she never returned from the supposed appointment and her husband has never seen her since.

It seems clear that the respondent and his companion travelled together to [redacted]. The Commonwealth Police in that country subsequently notified the petitioner as a result of her enquiries, that the respondent entered [redacted] under his own name on 1 July 1968, and was thought by his immigration papers to be proceeding to [redacted] to seek employment. No reference was made by the Commonwealth Police to the question whether the respondent was accompanied by a woman, but no specific inquiry had been made in that regard. I am satisfied on the evidence that he was in fact accompanied to [redacted] by the lady from [redacted].

Searches have been conducted by the petitioner throughout New Zealand and [redacted] for some news of her husband. Appropriate enquiries have been made from every possible source in New Zealand, enquiries have been made in [redacted] from hospital institutions, social welfare agencies, employment agencies, immigration authorities, State Police in various States and the Commonwealth Police. No trace of the respondent has been found. During the course of the hearing before me on 9 August 1976 a final enquiry was made by the Police from the husband of the lady who disappeared from [redacted], and as at this date he still has heard nothing from his wife since the day in 1968 when she left the two-year-old in the care of the neighbour and then disappeared. It was further proved at the hearing that the respondent has never been in touch with any one of his family which includes the petitioner and the seven children. Nor has he been in touch with his brothers and sisters. No one can be found who has heard of or from the respondent since 1968.

Under these circumstances the provisions of section 19 are plainly satisfied. In terms of sub-section (3) the respondent has been continuously absent from the petitioner for a period of over seven years and nothing has happened within that time to give the petitioner reason to believe that the respondent was then living. Consequently the evidentiary presumption applies and the facts adduced by the petitioner constitute evidence that the respondent is dead because there is no proof to the contrary. She is accordingly entitled to the decree which she seeks.

Mr Smith appeared on behalf of the Crown as amicus curiae at the hearing of the petition and said that as a consequence of his own enquiries and of Police enquiries he could offer no evidence in opposition to the petition. He did, however, ask the petitioner a pertinent question. He asked her why she had not proceeded by way of petition for divorce upon the ground of four years living apart. The petitioner replied that she desired a decree of presumption of death because she and the respondent at the time of his disappearance were the joint registered proprietors of the matrimonial home. It seemed from this answer that the petitioner believed that a decree of presumption of death under s.19 would suffice to vest the property in her by way of survivorship. Such a belief, reasonable though it may be, is erroneous. The common law presumption of death after a period of seven years requires something more than the proof necessary for a decree under s.19. In order to raise the common law presumption there must be an absence of acceptable affirmative evidence that the person supposedly deceased was alive at some time during the continuous period of seven years or more. Once that is shown then if the applicant can prove that there are persons who would be likely to have heard of him over that period and those persons have not heard of him, and that all due enquiries have been made appropriate to the circumstances, the common law presumption will be created: Chard v. Chard (1956) P. 259, Tristram & Coote's Probate Practice (24th edn.) page 349. But that presumption will be rebutted if there is another assignable and probable cause for the disappearance and the absence of news thereafter. In the present case the evidence as to the circumstances of the disappearance of the respondent leads to the inference that he is in fact alive. He was 48 years of age when he disappeared and the lady from [redacted] was evidently somewhat younger. There can be little doubt on the balance of probabilities that they are both living somewhere in the Commonwealth of [redacted], having

started a new life together under a different name. As will be apparent, the evidential presumption under subsection (3) is distinctly artificial. I am not here purporting to make any decision as to what the result might be if application were made for leave to swear death. I am only pointing out that on the evidence which I have heard, I doubt if such leave could be granted. As I say, the probabilities emerging from the evidence are that the respondent is alive. I also draw attention to the fact that a decree under section 19 is of no assistance in applying for an order for leave to swear death although the evidence given in support of that decree would necessarily form part of the proof: Tristram & Coote (supra) page 548.

Having regard to the whole of the evidence I accordingly decree presumption of the death of the respondent and I make a decree nisi to be moved absolute after the expiration of 6 weeks. Counsel for the Crown appeared in this matter by direction of the Court as amicus curiae and there will be an order that the petitioner pay the costs of the Crown in relation to these proceedings which I fix at $75.00 and disbursements.

Counsel:

Johnson Hooper & North, Whangarei, for petitioner

Marsden Woods, Inskip & Smith, Whangarei, for the Crown