

NZLR

No Special
Consideration

IN THE MATTER of the Matrimonial
Property Act 1963 and
its amendments.

BETWEEN : [REDACTED] FROST of
Auckland Widow
Applicant

A N D : [REDACTED] FROST
[REDACTED] as
Executor and Trustee
the Estate of [REDACTED]
[REDACTED] FRAC
deceased
Respondent

Hearing: 14 March 1979

Counsel: G. Hubble for Applicant
The Honourable J.N. Wilson Q.C. & J. Edwards
for Respondent as Executor and also as
Residuary Beneficiary
R. Bollard for Joyce Frances Clare Whale
M. Edwards for Benjamin and Kenyon, Step-children

Judgment: 22nd March 1979

JUDGMENT OF PERRY, J.

This application was brought under the Matrimonial Property Act 1963. The applicant is a widow and brought the proceedings against the executor and trustee of the estate of her late husband who had died on 10 August 1975.

This Act was repealed by the Matrimonial Property Act 1976 which came into force on 1 February 1977. And the immediate question I was asked to determine was whether the application should be determined under the 1963 Act or under the 1976 Act.

Mr Hubble for the widow contended that it should be determined under the 1976 Act because of s.55(3) of the Act which is as follows:

"Where proceedings have been filed under the Matrimonial Property Act 1963 or Part VIII of the Matrimonial Proceedings Act 1963 but the hearing of those proceedings has not commenced before the commencement of this Act, those proceedings shall be continued under this Act."

It is common ground that the hearing of these proceedings had not commenced before 1 February 1977.

Mr Wilson for the executor of the estate of the deceased

husband contended that they should be determined under the 1976 Act relying on s.57(4) of the 1976 Act. He was supported by Mr Dollard appearing for a step daughter of the deceased and who was a beneficiary under a trust directed by the husband's will to be set up by the executor out of a property owned by the deceased (not the matrimonial home)

Section 57(4) of the 1976 Act provides as follows:

"Nothing in this Act shall affect any right that a widow or widower has to bring proceedings under any enactment, whether that right arises before or after the commencement of this Act, and, for the purposes of section 5(1) of this Act and of any such proceedings, every enactment (including the Matrimonial Property Act 1963 and Part VIII of the Matrimonial Proceedings Act 1963) shall continue to operate and apply as if this Act had not been passed."

I am of the opinion that the latter contention is the correct one. A widow (and also a widower) had the right to bring proceedings under the 1963 Act because s.5 of that Act which gave jurisdiction to the Courts to determine property questions arising between husband and wife directed by s.5(7) that the terms "husband" and "wife" were to include their personal representatives. That right arose in the present circumstances before the commencement of the 1976 Act. Then the subsection declares that "for the purposes of s.5(1) of the 1976 Act and of any such proceedings (the emphasis is mine) every enactment (including the Matrimonial Property Act 1963 and Part VIII of the Matrimonial Proceedings Act 1963) shall continue to operate and apply as if this Act had not been passed (again the emphasis is mine)". I cannot imagine any words which could more clearly declare that the 1976 Act including of course its section 55(3) has no relevance to the present application, which must be determined under other enactments - in particular the 1963 Act.

The reason for the reference to s.5(1) of the 1976 Act in s.57(4) is because that section declares that nothing in the 1976 Act is to apply after the death of either spouse. There are two specific exceptions in subsections (2) and (3) which have no application here but there is a more general

and important exception "except as otherwise expressly provided in this Act."

It is "otherwise expressly provided in this Act" by s.57(4).

I regret that I am not able to concur fully in the Judgment of O'Regan J. in Huszak v. Huszak Wellington N. 205/73 but I have had the advantage (which he did not have) of having the point argued before me by counsel after full preparation.

I declare that the proceedings before me are to be determined under the 1963 Act and the costs of this present hearing will be determined at the substantive hearing of the application.

Blifford Perry J.

Solicitors:

R.F.V. Rutter for Applicant.

Edwarth Patel & Partners for Respondent.

Brookfield, Prendergast Schnauer & Smytheman for J.F.C. Whale

Dickson & Co., for M.L. Benjamin & I.A. Kenyon.