21/1/83 Appeal pending Appeal reported

IN THE HIGH COURT OF NEW ZEALAND A. 3/82

CHRISTCHURCH REGISTRY

19.

No Special Consideration

IN THE MATTER of the Family Protection Act 1955

- a n d -

IN THE MATTER of the Estate of HANS ALAN MAGSON late of Welburn, near Rakaia, Farmer, Deceased

BETWEEN MARIE MYNETTE MAGSON of Welburn, Widow

PLAINTIFF

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED and the said MARIE MYNETTE MAGSON executors of the Will of the said HANS ALAN MAGSON

DEFENDANTS

- a n d -

M. 9/82

IN THE MATTER of the Matrimonial Property Acts 1963 and 1976

- a n d -

IN THE MATTER of the Estate of HANS ALAN MAGSON late of Welburn, near Rakaia, Farmer, Deceased

BETWEEN MARIE MYNETTE MAGSON of Welburn, Widow

APPLICANT

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED and the said MARIE MYNETTE MAGSON executors of the Will of the said HANS ALAN MAGSON

RESPONDENTS

Judgment: 9/12/82

Hearing: 5 November 1982

Counsel: S.G. Erber for Plaintiff
J.N. Matson for Respondents
A.J. Forbes for all the daughters
J.L. Cameron for G.L. Magson

JUDGMENT OF CASEY J.

The Plaintiff is the widow of the late Hans Alan Magson who died on the 28th August 1974 and she seeks leave to bring proceedings out of time under the Family Protection Act 1955 and the Matrimonial Property Act 1963. Probate of his Will was granted to her and the New Zealand Insurance Company on 19th September 1974. These applications are made six years and four months after the expiry of the limitation period of twelve months from the grant of administration, prescribed in s.9(2)(b) and s.5A(2)(b) of the respective Acts. Each contains a proviso allowing an extension of time at the discretion of the Court, but this is not to be granted unless the application is made before the final distribution of the estate. Both applications are opposed by Mr G.L. Magson, the son of the deceased and the Applicant, on the ground that she is too late because the estate has been finally distributed; alternatively, he says that if the Court has jurisdiction it should not exercise its discretion in her favour.

The late Mr Magson was a farmer and was survived by six children, the other five of whom are daughters. Under his Will his widow received certain legacies and bequests, an annuity and the exclusive right to occupy the former home on the farm, with power to the Trustees to buy or build an alternative dwelling. On her death the estate was to be divided into two equal parts, the son Grant to have one and the other part to be divided among the five daughters. The Trustees were to offer Grant the right to purchase the farm at a price "equal to the fair value thereof" upon his attaining the age of 25. The executors are the New Zealand Insurance Company and the Applicant, Mrs Magson. There have been

serious differences between her and Grant, who turned 25 on 19th November 1981 and she was not prepared to offer the farm at the price or on the terms suggested by the Insurance Company, although I was informed by Counsel that she is now agreeable. She says he will not agree to the purchase of another house for her. He has been connected with the farm all his life, working there until he was asked to leave in 1975. He then leased it for a period and was later working for another lessee. Mrs Magson said that she contemplated taking action to protect her position over the past few years but hoped matters would be resolved when her son attained 25 and took over the farm. She concluded this was not going to happen and accordingly decided at this late stage to bring the proceedings.

On the other hand Mr Grant Magson feels his mother's action is simply taken to frustrate his intentions to buy the farm and he has in turn issued a Writ seeking her removal as a Trustee while the Insurance Company (with whom one can feel some sympathy) has taken out an Originating Summons seeking directions about the offer of the farm to Mr Magson and approval of the price. The affidavit by Mr Tillman, its Christchurch Trust Manager, discloses that all debts, legacies duty and the costs incidental to probate were paid by 30th June 1979 and the property comprised in specific bequests had been duly transferred. The only matter outstanding was the executor's commission which he said has not been paid, but was assessed by 28th May 1987 and the Company holds assets from which it could be paid on realisation if necessary. The estate does not have a surplus of ready cash and it is not its policy to realise assets to meet executor's commission at the time its duties are completed.

In considering the question of whether or not there has been a final distribution of the estate, I bear in mind the distinction between the Family Protection Act and the Matrimonial Property Act. Section 2(4) of the former states:-

> "For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased

> person who died after the 7th day of October 1939 (being the date of the passing of section 23 of the Statutes Amendment Act 1939), shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator after he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee."

As a result of this section no question of jurisdiction to entertain the application arises in the proceedings under the Family Protection Act, and the only issue is the Court's discretion to grant leave. However there is no corresponding "deeming" provision in the Matrimonial Property Act 1963 and jurisdiction is fairly in issue on that application. Section 5A(2)(b) of that Act provides that where an application is made after the death of one or both parties to a marriage it shall be made before the expiration of a period of twelve months "after the date of the grant in New Zealand of administration in the estate of the party to the marriage against whose estate the application is made." Subsection (3) then goes on:-

> "Notwithstanding anything in subsection (2) of this section, a Judge or the Magistrate's Court, as the case may be, may extend the time for making an application, after hearing the applicant and such other persons having an interest in the property that would be affected by the order as the Judge or Magistrate thinks necessary; and this power shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this section:
>
> Provided that no such extension shall be granted in any case where the application is made against the legal personal representatives of a deceased husband or wife, unless the application for extension is made before the final distribution of the estate..."

It goes on to provide that no distribution made before the personal representative received notice, or after it had lapsed, is to be disturbed. The proviso requiring the application to be made before final distribution is for all practical purposes in the same form as the corresponding

provision in s.9 of the Family Protection Act 1955 and s.6 of the Law Reform (Testamentary Promises) Act 1949.

In Public Trustee v. Kidd (1931) NZLR 1 and Re Donohue (1933) NZLR 477 - a judgment of the full Court - it was held that the corresponding words in the Family Protection Legislation meant that the estate was "finally distributed" at the point when the executors (who were also Trustees) have got it in and performed the duties of their office, thenceforth holding the residuary property vested in them as Trustees for the beneficiaries under the Will; the property then ceases to be part of the testator's estate. In 1977 the High Court of Australia took a different view of a similar expression in the New South Wales Legislation in Easterbrook v. Young (1977) 13 ALR 351, holding that the estate was not finally distributed until all the assets had been actually transferred. The matter was considered at length in the judgment of Somers J. in Lilley v. Public Trustee (1978) 2 NZLR 605, dealing with the Law Reform (Testamentary Promises) Act, and he surveyed the history of the sections at some length, reaching the conclusion that in spite of the otherwise compelling logic of Easterbrook, the New Zealand Courts were bound to accept the clear indication by Parliament, from the way it had dealt with this Legislation over the years, that "finally distributed" bore the meaning given to those words in Kidd's and Donohue's cases. Against that background Parliament passed the Matrimonial Property Act 1963 containing the same expression and while there was not the same history of amendment, it is difficult to escape the conclusion that it meant the words to have the same meaning there also.

The general rule of construction is that words in a Statute must be interpreted in their context in their natural and ordinary meaning by the Courts and not by Parliament. However, as Somers J. pointed out in Lilley's case, (adopting the words of Lord Simon of Glaisdale in Farrell v. Alexander (1977) AC 59, 91), "the intention of Parliament to endorse the previous New Zealand decisions has been so clearly demonstrated that the Court is pre-empted from an independent examination of the validity of those earlier interpretations." He was

dealing with the Law Reform (Testamentary Promises) Act and, as with the Family Protection Legislation, he was able to point to a history of amendments which clearly demonstrated a view of the words by the Legislature in the context of those particular Acts. The same cannot be said of the Matrimonial Property Act 1963, but it is significant that Parliament did not see fit to impose any qualification to the words in question to make it clear they were to bear an extended meaning, as it had done with the "deeming" provisions of the Family Protection Act, and with the proviso which was added and subsequently repealed in the Testamentary Promises Legislation. On the other hand, the Matrimonial Property Act may be regarded as a self-contained code dealing with its own subject-matter and with different rights from those conferred by the earlier Acts. Were I coming to these words for the first time in their context, unaffected by those earlier decisions in broadly similar fields (involving as they do claims against estates by families and others in a personal relationship with deceased) I would have little hesitation in following the view of the Australian High Court in Easterbrook's case. The words used are capable of the extended meaning there ascribed to them, which to my mind accords far better with the intention and philosophy of the Matrimonial Property Legislation. However, the past is inescapable and I cannot see how I can justify ignoring the meaning Parliament has so clearly demonstrated the words "final distribution" shall bear from the way it has dealt with them in the earlier Statutes. I therefore feel constrained to hold that in the Matrimonial Property Act 1963 the Court has no jurisdiction to entertain an application for extension made after final distribution of the estate as defined in Kidd's and Donohue's cases.

The question of when an estate is distributed so that an executor makes a transition to Trustee of the assets he holds was discussed by Somers J. again in the unreported case of Sullivan v. Brett (C.A. 74/80; 17th December 1981). This was also an application under the Law Reform (Testamentary Promises) Act but the principles are the same. It depends on the concept of his assent as the means of indicating that he

does not require particular property for the purpose of administration, and that it may pass to the beneficiary. In the great majority of cases this arises by implication and is a question of fact in all the circumstances of the case, and as Somers J. said at p.13:-

> "That /inference/ in turn depends upon whether in the circumstances revealed by the evidence it can be said that the executor had by the relevant date completed all those activities which it was his function to perform and the residue of the estate had been ascertained."

When dealing with the residue of the estate, assent will be assumed when the stage has been reached where its existence and nature can be ascertained. It is then ready to be held by the personal representative as Trustee for the beneficiaries entitled, being no longer required by him for the carrying out of his executor's duties. The existence of an outstanding mortgage or of debts still remaining to be paid is not necessarily conclusive against assent (Inland Revenue Commissioner v. Smith (1930) 1 KB 713). In Sullivan's case the Court held the estate had not been finally distributed because of the existence of some modest debts which might require the realisation of assets to meet them. I think those items were in a different category from the outstanding executor's commission mentioned in Mr Tillman's affidavit. The amount is certain but payment has simply been left in abeyance as a matter of convenience and can be readily met by the Trustees from the proceeds of their normal realisation of the estate in the course of their administration, presenting no difficulty in ascertaining the residue available for the beneficiaries.

In addition to this item, Mr Erber referred to the need for the farm property (which comprises virtually all the residue) to be retained until Grant Magson turned 25, when it was to be offered to him first before being sold and the proceeds divided. He also pointed to the fact that Mrs Magson was to be paid a fixed annuity out of that residue, with a discretion to increase the payments and have resort to capital

as well as income should this be necessary. Although there was a power to appropriate a sum for this purpose to the exoneration of the balance of residue, this has not been done. He submitted that with these continuing obligations it could not be said that the executor's duties were completed and the residue ascertained with sufficient certainty to enable assent to be implied. However, I think such an approach confuses the obligations on the personal representatives to perform the terms of the Trusts imposed upon them, and their obligations as executors to get in the estate and put it into a condition in which those Trusts can be carried out. As the cases demonstrate, this occurs when all the assets have been accumulated and the debts paid along with the testamentary expenses and duties, and the other costs incidental to these matters. In most cases the exact time when this stage of administration has been completed cannot be ascertained with certainty. I am satisfied that point had been reached by 30th June 1979 when, according to Mr Tillman, the solicitor's costs of obtaining probate were paid. Thereafter the personal representatives held the assets as Trustees on behalf of the various beneficiaries, obliged to administer them so as to give effect to the dispositions in their favour under the Will. Accordingly, the Court has no jurisdiction to entertain Mrs Magson's application for an extension of time to bring proceedings under the Matrimonial Property Act 1963. However, in case I am wrong, I will consider the exercise of my discretion under this Act as well as under the Family Protection Act, where there is still jurisdiction to extend the time.

Counsel accepted the comments by McCarthy J. in Re McGregor Deceased (1960) NZLR 220 at p.231 as summarising the approach to be taken in considering whether to extend the time under the Family Protection Act. Each application must be dealt with on its own circumstances but, as a general principle (following Sim J. in Hoffman v. Hoffman (1909) 29 NZLR 425), an extension of time "should be granted in any case where the failure to apply earlier arose from honest ignorance by the claimants of their rights...and the defendants will not be placed by such extension in any worse position than they would have been in had the application been made with the time limit

in the Statute. As I see it, the issue in each case is: Is it just that leave should be granted?" The learned Judge went on to say that included in matters to be considered, where there is a considerable time between the death of the testator and the lodging of the claim, is the strength of the plaintiff's alleged moral right to provision existing at the date of death. "The more manifest it is that there was a breach of duty the more inclined the Court will be to grant leave, even though the delay be long."

Dealing with the last point, I am not struck by the affidavits with any obvious breach of duty. As matters stood at the date of death, and having regard to the family and farming background, I can believe there was a clear understanding and acceptance that the estate should be disposed in a way that would keep the farm intact for the son and the attitude of his sisters to this application supports that view. They do not want to interfere with his very much greater interest in residue or his right to buy the farm, although they have made it clear they do not agree to his using his expectant share towards the purchase price. Mrs Magson is now 58 and under the Will she received furniture, effects and car, a legacy of $2,000 and an annuity of $1,560 with power to increase it to maintain her accustomed living standards, and can look to capital and income for this purpose. She has the exclusive right to occupy the home free of rent and outgoings, with power to the Trustees to buy or build alternative accommodation if she wished, or to set the equivalent sum aside and pay her the income. Although Counsel criticised the discretionary powers as requiring her to go "cap in hand" to the Insurance Company Trustee, I consider this a not unreasonable provision, taking into account the likelihood of inflationary rises in the cost of living beginning to be apparent in 1974. In her explanation for the delay Mrs Magson said that originally she did not think there was anything wrong with the provision for her and expected the estate would pay a reasonable living income and she could live in the house (or an alternative) for the rest of her life. She also states she had no objection to her son having the right to buy the farm and

understood her husband's wishes in this respect. According to her affidavit there were problems with him even before her husband's death and relationships between herself and her son have now reached a complete impasse brought about (she says) by his drinking and irresponsibility. She maintains that he will not agree to the purchase of another house for her, nor will he agree to any alleviation of the hardship wrought on her by inflation. She complains that her co-Trustee is negotiating to sell him the farm at a price and on terms with which she completely disagrees, although her Counsel said at the hearing that she will now accept the price. She described him as having a hard streak and holding out "for every penny which he imagines is his". She contemplated proceedings under the Family Protection Act 1978 after discussions with her solicitors and with the Insurance Company's Manager, but at the end of that year she decided not to take further action because she believed she had assurances from her son that when he was 25 he would purchase the farm and would make provision for another house for her.

As could be expected, Mr Grant Magson has a rather different version of events - although he counters his mother's complaints of his earlier misbehaviour by simply stating that he was no worse than other males of his age in that area at that time. He was the only one of the family living at home during his adolescence and it had always been his understanding that when the farm was sold to him the Trustees would buy another house for his mother's occupation out of the proceeds, but it was never expected to become her property, and would remain part of the estate. I think this is plain from the provisions of Clause 10 of the Will. He makes other criticisms of his mother's attitude which I find no need to take further at this stage, beyond noting that relationships between them have obviously deteriorated over the years. He believes that she exaggerated her financial problems and poor standard of living, and that his father's provision is quite adequate for her needs; but any deficiencies could be simply remedied by more co-operation between her and her co-Trustee, who is responsible for the payments. He also believes her present applications

are prompted by a desire to thwart him obtaining the farm or exercising an option to buy a neighbouring property. As I have already indicated, the difficulties between them have led to his action to have her removed as a Trustee, and to the Insurance Company's application for directions about the sale of the farm property.

In the light of this brief recital of the unhappy relations of the two main protagonists, it can be seen at once that this case is outside the ordinary run of applications for an extension of time. The testator's provision was accepted by all parties as reasonable at the date of his death and there was an appropriate direction for augmenting his widow's income, and for her accommodation. I have no information about what surplus income might have been available to Mrs Magson to supplement her annuity, but she says the other Trustee has now agreed to increase it, although she complains it is not likely to be back-dated. The net worth of the estate appears to be well over $300,000 on the current valuation of the farm and Mrs Magson's main complaint is that she has no capital sum to give her any security or to meet emergencies, her total cash resources being about $2,500. Having regard to the size of the estate and the fact that the sale of the farm property as contemplated will release capital, I consider she may have a case for something better under this heading than the legacy of $2,000 left to her in the Will.

The main problem facing Mrs Magson results from her failure to take any action over the period from 1974 to the end of 1978, by which time the implications of her son's attitude must have been clear to her as likely to affect her own economic security and future prospects - that is, if one accepts her account of events which included his expulsion from the house by her Co-Trustee in 1976 because of his conduct to her. She says she accepted his assurances that when he turned 25 and bought the farm, provision would be made for her separate housing. There would then be adequate funds for this and to supplement her income, if indeed this had not been possible previously. (As to this, there is no evidence before

me apart from Grant's suggestion that the failure to increase it was simply due to her inability to reach any agreement with the Insurance Company). Accordingly, she was content four years ago to leave matters as they stood and this application was not made until January 1982, a few months after he turned 25 on the 19th November 1981. He is currently leasing the property from the Trustees but, as I have previously remarked, Mrs Magson would not agree to the price arranged with the Insurance Company for his purchase of the farm, conveyed to her by letter of 16th November 1981, according to the affidavit by Mr Tillman in support of the Originating Summons for directions which was made available to me at the hearing. It is difficult to escape Mr Grant Magson's conclusion that after such a lapse of time, her main purpose in bringing these proceedings was to frustrate his efforts to buy the farm. I can see no evidence of any other circumstances since the end of 1978 (when she abandoned the threat of proceedings) to suggest Mrs Magson's overall position is any different from what it was then. She has now withdrawn her objection to the price, although I gather the terms are still under negotiation.

There should be no need for me to emphasise that the purpose of limitation provisions is to put an end to litigation - particularly in this area of potential family strife and distress resulting from long-running and unresolved disputes. The Court will exercise its discretion to do justice in cases of need, but must turn its face sternly against attempts to manipulate this concession to gratify personal dislike or compensate injured feelings. Against the background of this case I have the gravest reservations about the good faith of Mrs Magson's explanations for her delay of over six years in bringing the applications. She has the support of her daughters, some of whom I believe contemplate claims on their own behalf because of the delay in the enjoyment of their shares, which is postponed until their mother's death or remarriage. They gave no persuasive reasons for their own delay and quite clearly rely on the success of their mother's application to advance such claims, whose merit may be doubtful. Their situation can carry little independent weight in the exercise of my discretion.

The next matter for consideration is the prejudice to Grant Magson if the applications are allowed. In his affidavit he stresses that the whole pattern of his working life has been shaped by the expectation of getting the family farm. He worked on it for what he says was a pittance after he left school until he was requested to leave the property by the Insurance Company in 1975. He leased it for three years from April 1976, carrying out considerable improvements at his own expense. He was then employed on the property for a further three years by the then lessee up until April 1982, and is presently leasing it again. He was also negotiating to take over an adjoining property. All this was on the assumption that the terms of his father's Will would be carried out. It is plain to see what the effect of a successful application under the Matrimonial Property Act would have on these arrangements, even bearing in mind the more limited scope of the 1963 provisions. Any substantial provision for his mother under the Family Protection Act might also make the difference between his being able to afford to buy the farm or giving up the prospect altogether. From the valuations and budget figures supplied to me, it is already touch-and-go whether he will have the financial ability to exercise the option to buy - particularly in the light of his sisters' refusal to let him credit his expectant share in residue. Mr Erber submitted that it was not the outcome of those proceedings which would prevent him buying, but the fact that he has no practical chance of meeting any realistic terms. This is debatable, but is not an answer to the case he raises on prejudice. He says in effect that if Mrs Magson had taken prompt action to challenge the Will or to exercise her rights under the Matrimonial Property Act, he would have had ample advance warning and been able to assess the position years ago. As a result he would not now be confronting a future of such uncertainty and might well have made up his mind to let the farm go and make plans for a different career which by now could have been well on the way to realisation. I think in a very real sense Mr Magson has been prejudiced by directing all his energies towards the acquisition of this property in terms of the Will and this must also be a potent factor in the exercise

of my discretion. Taking it into account along with my reservations about Mrs Magson's good faith, I am not satisfied that this is an appropriate case to grant an extension of time, even accepting that Mrs Magson may have merit in both her claims. Her applications under both Acts are dismissed. I reserve leave to the other parties to apply for costs and I hope that now the air has been cleared on these issues, they may all see their way clear to settling their future along the lines that I am sure they originally expected, and in a way which will reunite the family, to the benefit of them all.

M.L. Casey J.

Solicitors:

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J.N. Matson, Christchurch, for Respondents
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