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Law Reports

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.89/79

No Special Consideration

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IN THE MATTER of the Matrimonial Property Act 1976 and

IN THE MATTER of an application for orders as to property

BETWEEN S JOHNSON of Kerikeri, Married Woman

APPLICANT

AND R JOHNSON of Rotorua, Farmer

RESPONDENT

Hearing: 7th February, 1984

Counsel: J.G.Ross for Applicant
H.Fulton for Respondent

Judgment: 20 February, 1984

JUDGMENT OF GALLEN, J.

This is a notice of motion for orders as to matrimonial property.

The applicant and the respondent were married in 1951 at New Plymouth. The applicant contends, and this does not appear to be in dispute, that at the date of the marriage neither the applicant nor the respondent had any significant assets. The applicant states she had a large trousseau of linen, crockery and household items but no savings. The respondent had a small Morris truck and a small amount of savings which is not quantified in the papers. After their marriage the parties lived on a farm in [illegible] where the respondent was employed to milk on wages. The

applicant claims that at that time she occasionally milked cows when called upon, doing the night milking once or twice per month. For this the payment made was 7s.6d. per milking a payment which she claims was paid to the respondent by the employer and not to the applicant. The applicant also indicates that she did certain other farm tasks when the employer was absent but points out that this was not expected of her.

Some twelve months later they moved to again on an employment basis, and the applicant says that both she and the respondent were employed on wages milking full time. She says that she assisted with both morning and evening milking, helped to feed calves, helped to feed out cattle and to harvest swedes. She also says that she was required to provide meals for harvest workers. She says that she kept a vegetable garden in which the respondent worked as well, that all wages were paid to the respondent and she did not receive any personally. The respondent denies that in either of these positions the applicant carried out the work which she claims. He says that in the first job the applicant rarely assisted with milking cows. As far as the Toko job was concerned, he says that there were no calves reared on the farm nor were swedes grown. He says that the applicant assisted minimally in farm work and not on a regular basis. In 1953 the parties moved to a farm at Rahotu, and remained there for 8 years. Again the applicant claims that she took part in milking, kept

house for the respondent and provided board for the owner of the farm for which she was paid £2 a week and from which she claims to have made some unquantified savings. She also says that she was required to provide meals for persons working on the farm, including contractors. The respondent says that in that position virtually the whole of the farm work was done by himself and another employee. It was during this period of employment that the first son, R was born. Subsequent to the birth of R the applicant claims that a single man was employed by the owner of the farm and he lived with the parties, the applicant being required to look after him for approximately 3 years. During this time she claims to have milked if the farm worker had a night off or if other work made this necessary. She also states that at about this time the owner was away for a period, as the result of which the relationship changed to one of sharemilking. During this period the second son, P was born. In 1960 the respondent had a knee operation and the applicant maintains that for a period of three months she effectively accepted all the responsibilities involved on the farm, employing and obtaining other help where necessary. The respondent accepts that he did have the knee operation but denies that the applicant was left with the responsibilities she claims, averring that he engaged employees until such time as he was able to return to work. He denies that the applicant was required to or did make any substantial contribution to work on the farm.

The parties were determined to obtain their own farm and saved what they could towards the realisation of this ambition. In 1961 the respondent was successful in obtaining a Lands & Survey farm by ballot at Kerikeri. A deposit of £2,500 was paid, the land was held on Crown lease on a 33 year renewable lease at a rental of £96.5.0 per annum. The applicant claims that part of the deposit was saved from accumulated income but a part was advanced by the National Bank. The Kerikeri farm was subdivided into seven large paddocks and contained an area of approximately 30 acres which was substantially gorse and rocks. The respondent set about improving the farm which was ultimately sold in 1976. By that time it had been subdivided into a total of 33 paddocks including a central race, 6 miles of hedges had been established and 9½ miles of fences erected. A plantation of 3000 pine trees had been established at the rear of the farm, water supplied to every paddock, a piggery built and a substantial hay shed put up. The respondent says that he carried out all of this development single handed except for the building of the piggery where he received assistance from neighbours in return for similar assistance rendered to them.

The applicant says that during the first twelve months of the faming operation at Kerikeri the parties lived on a very tight budget imposed by the Lands & Survey Department. After that twelve months budgetary control was removed. The applicant maintains that she milked full time in the early years on the farm. She also claims that she helped with feeding out, fed calves and

assisted with general farm work. By this time R the eldest boy, was at school and a third son, W who had been born just before the Kerikeri farm was obtained, was at home with his older brother. The applicant says that she took the two younger boys with her on to the farm and assisted with fencing,grubbing gorse and similar farm work. She also claims to have assisted with concrete work required in connection with the building of the hay shed. The respondent, in addition to his farming activities, operated a contracting business spraying gorse and making silage between September and December of each year for approximately eleven years from 1964 to 1975. The applicant claims that while the respondent was contracting, in order to free him for the contracting work, she accepted responsibility for the night milking on her own. She maintains that throughout the period on the farm, with the exception of the last year, she assisted with morning milking. She complains that she did not always have that support in milking from the boys which she should have expected and the respondent did not compel them to assist with this. For completeness I should indicate at this point that I was informed from the Bar that the number of cows milked varied between 85 and 100.

There is a considerable dispute between the parties as to the extent of the work carried out by the applicant on the farm. The respondent concedes that she did a substantial amount of milking but denies that she was

left to do the milking on her own at night on any very significant number of occasions and says that any contributions she made to farm development apart from milking were minimal. Mr. Fulton for the respondent maintains that on the affidavits and the cross-examination of the applicant, it is possible to assert that there has been considerable exaggeration by her of the contribution which she made. The applicant was paid wages by the respondent but she claims that this was for tax purposes and that all monies received were spent on family necessities. The respondent claims that he was generous to the applicant in respect of money matters but that she was extravagant and in particular he refers to what he regards as an unnecessary purchase of new cars and an unnecessary expenditure on household furnishings. In particular he contends that it was necessary to borrow money from his family amounting to £300 to meet the purchase of new blinds. The applicant concedes that this sum was borrowed but denies that it was used for the purchase of blinds and says that part of the money at least was used to purchase hay during a period of drought.

In 1974 the respondent gave up his contracting business and in 1975 the applicant refused to milk on her own but claims to have assisted with milking. The applicant kept house for the respondent and the children of the marriage throughout the marriage and it is conceded by the respondent that inthis area she was a competent and efficient housekeeper. No complaint is made about her activities in this regard.

In 1976 the respondent sold the farm, the sale price being $136,000. Following the sale the respondent rented a two bedroomed house in Kerikeri where the family moved and subsequently the separation occurred, the respondent leaving the household with the applicant retaining the three boys.

There were various allegations made as to the conduct of both parties. In the case of the allegations against the applicant, it was submitted that the conduct of which complaint was made was relevant because it had a direct bearing on maintenance obligations and that maintenance obligations had affected the matrimonial property subsequent to the separation. Although the papers referred to allegations of misconduct on the part of the respondent, they were not referred to at the hearing and no reliance has been placed on them by the applicant. The applicant strenuously denied the allegations made against her.

The applicant brought proceedings for maintenance against the respondent which were heard in September 1977. The record of the proceedings and the decision made by K.L.Richardson, Esquire, Stipendiary Magistrate, were annexed to the second affidavit of the applicant. As a result of those proceedings the respondent was ordered to pay maintenance to the applicant. I was informed that an appeal was initiated but this has never been heard. The respondent set aside the sum of $30,000 to invest for this purpose and has submitted that this has a bearing on the

ultimate matrimonial property division. He has paid no maintenance since 1981. After the respondent left Kerikeri he purchased a ten acre block at Kaharoa near Rotorua. He subsequently erected a home on this property and he now resides there having remarried.

Both parties produced a schedule of what it was contended was matrimonial property as at the date of separation. Those which were agreed are as follows:-

Held by respondent

Proceeds of sale of farm	$88,000.00
Credit with Rural Bank	3,428.72
Chrysler car	3,000.00
Proceeds of sale of herd	10,903.00
Proceeds of sale of plant	3,111.52
Commercial Union Policy (surrender value)	1,434.62
National Mutual Insurance policy (surrender value)	1,682.00
Dairy proceeds	2,777.00
Bay of Islands Dairy Co.shares	610.00
Bonus bonds	50.00
BNZ Account	166.00
BNZ Savings Bank	17.00

Held by applicant

Culled cows cheque	152.86

All the furniture from the matrimonial home appears to have been retained by the applicant at her home at Kerikeri. The applicant maintains that this furniture was insured before the separation for $8,000 and on this basis claims that it should be taken into account at that figure. It appears from the maintenance proceedings in

1977 that the applicant indicated during that hearing the the furniture had been insured by her for $4,000. The applicant claims on the basis of a valuation as at the 7th April, 1978, made by a person describing himself as a Livestock Manager for Allied Farmers Co-operative Ltd. that the furniture retained by her nowhas a total value of $780. It seems to me that the best indication of the value of the furniture at the appropriate time may be taken from the sworn evidence of the applicant given at the maintenance hearing when she indicated that she had insured the furniture for $4,000. It seems unlikely that,in her then somewhat straitened circumstances, she would have over-insured it and it may well be that the passage of time has resulted in the reduction reflected in the 1978 valuation. For the purposes of these proceedings, therefore, I hold that the value of the furniture be taken into account as $4,000.

The affidavit also alleges that funds were held in a deposit account by the husband. These were referred to in evidence in the maintenance proceedings in answer to the learned Magistrate when Mr. Johnson indicated that he thought he had about $3,500 in such an account in addition to the money he received from the farm sale. In these proceedings it was suggested that this equated with a sum paid to him by the Rural Bank, but in cross-examination Mr. Johnson conceded that his recollection in 1977 would have been better than it is now. In the circumstances it seems not unreasonable that, if I am to hold Mrs. Johnson to

statements made during the maintenance proceedings relating to assets, Mr. Johnson should also be so held to evidence given by him. I accordingly find that the sum of $3,500 referred to by Mr. Johnson in the maintenance proceedings was a sum on deposit and was an item of matrimonial property. The respondent also indicated that he had certain tax liabilities amounting to $7,119 which had the effect of reducing the amount of matrimonial property retained by him. I accept that this should be taken into account.

The total amount retained by the respondent then amounted to $111,560.86. The wife retained $4,152.86.

The next question which arises is the proportions for division. In his submissions Mr. Fulton for the respondent suggested that the proceeds of the sale of the farm, which would presumably include allied amounts resulting from that sale, should not be divided on an equal basis but on a basis whereby the respondent was credited with $66\frac{2}{3}\%$ and the applicant with $33\frac{1}{3}\%$. In order to support this contention Mr. Fulton contended that the efforts of the respondent in developing the farm were exceptional and should reflect in an increased percentage of its disposal value being made available to him. By contrast he maintains the applicant had exaggerated such work as she had done onthe farm and had effectively done only as much as would ordinarily be expected of an ordinary farmer's wife. He also submitted

that a pattern had emerged in relation to farms and matrimonial property and that this justified an unequal division in this case.

In my view the applicant is entitled to an equal share in the proceeds of the farm. I accept that the respondent was a capable and very hard-working farmer who should receive credit for the development done by him, but I cannot overlook the fact that during the whole period of the marriage the applicant was involved in milking duties and seems to have been responsible at Kerikeri for milking on her own inthe evenings, at least on some occasions when the respondent's contracting duties made it impossible for him to return. With the exception of the last year on the farm she assisted with the milking most mornings. With 85 to 100 cows to be milked, I do not think this contribution could be regarded as token. It involves a continuing and no doubt wearisome obligation and, bearing in mind the responsibility which the applicant accepted in her home, would justify adherence to the general scheme of the Act accepted in numerous authorities placing an emphasis upon equal division. In this regard I note that the respondent fairly conceded the applicant was a competent and hard-working housewife and inthis sphere of her activities he appears to have had no complaint. I do not overlook the affidavit from the eldest son of the family, R , who to some extent discounted the contribution his mother had made to the work done on the farm. By contrast the applicant

received some support from the other two sons of themarriage and also from affidavits filed by several neighbours which supported her contention as to her involvement in the farming activities. Mr. Fulton also relied upon what he claimed to be an established pattern as to the division of farm properties. I cannot accept, however, that such a general pattern exists. It is true that there have been cases where an unequal division has taken place but an analysis indicates that in every such situation there has been some factor generally relating to contributions or the source of the asset which has resulted in the particular conclusion. I do not find that any such special circumstances exist in this case as to take it out of the general basis for division emphasised in the Act itself. If, therefore, division had taken place in 1976 the respondent would have retained $53,704 and would have had to pay such a sum to the applicant.

Unfortunately the parties have been unable to reach agreement on the division of matrimonial property and the dispute has remained outstanding for an unusually long period. During this time the respondent has had the use of the monies derived from the sale of the farm as well as other assets, and he has acquired using funds amounting to matrimonial property the ten acre block and house on which he now lives. Under the provisions of the Act this, being an after acquired asset, is to be regarded as separate property.

Mr. Ross submitted that, in the circumstances, the provisions of s.9 (4) of the Matrimonial Property Act 1976 should be invoked and on the authority of the Court of

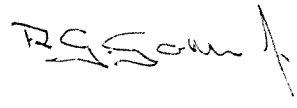
Appeal decision in Brown v. Brown (1982) 1 N.Z.L.R. 513 the farmlet in Rotorua should be treated as matrimonial property and an asset for division. He supported this contention by submitting that the husband had had the advantage of the useof what was a substantial sum to which the applicant was entitled over a lengthy period and maintained that the increase in value which had occurred to that property since purchase had to be regarded substantially as resulting from an inflationary increase inthe value of land. He justified this by drawing attentionto the health difficulties which the respondent has had and which assumed prominence in the maintenance case and which Mr. Ross considered would have prevented him from making much in the way of a labour contribution to the increased value of the farmlet. The current Government capital value of the Rotorua farm is $128,000. Mr. Ross produced a valuation which showed a capital valuation of $136,000. Because there was some dispute over this valuation I have paid regard only to the figure referred to and have not either read or taken into account any comments which relate to improvements on the property.

I consider that, having regard to all the circumstances, it would be just in this case to apply the provisions of s.9 (4) and accordingly I find that the Rotorua property of the respondent should be treated as matrimonial property.

However, I do not consider that it would be proper to divide the value of this equally. When the respondent acquired that property it was open paddock. Since that time he has established on the evidence that, apart from the erection of the house in which he took part, he has made substantial changes. Permanent fencing has been erected, hedges have been planted and water reticulated, turning the property from an undeveloped farm paddock into an operating farmlet. A garden has been developed and I think it is unrealistic to conclude that the increased value of this property does not reflect these activities which would include, no doubt, contributions made by the respondent's present wife. The difference between the cost of this property including the erection of the house and the present Government valuation is $67,400. If a third of this increase were divided between the applicant and the respondent and added to the amount which she should have rec eived on a division in 1976, she would receive an additional $11,000, which would bring her entitlement to $64,000. By coincidence this represents half of the present Government value so that, whether the approach is to increase the amount which she would previously have received or to divide the asset in dispute, a similar result is arrived at. I appreciate that this does not take into account an additional sum derived from the sale of the farm and which the respondent has spent on living expenses since the separation. However, this may more appropriately be considered in relation to his maintenance obligations, and in particular to arrears of maintenance.

Under the provisions of s. 9 (4) I therefore declare that that property consisting of the Rotorua farmlet, acquired by the respondent since the date of separation, is to be treated as matrimonial property and I order that the respondent pay to the applicant the sum of $64,000 in satisfaction of her share under the Act. I believe the respondent should have some time to meet his obligation but that this should not be extensive. I accordingly order that the sum be paid within a period of 3 months from the sealing of the order in these proceedings.

Mr. Fulton argued that the existing maintenance order be terminated using the powers conferred by s.32 (1). I believe it is appropriate in the circumstances that the maintenance order should be terminated. It is clearly desirable that the parties in these proceedings should as soon as possible be able to go their own ways. There are arrears of maintenance according to the evidence. I am prepared to receive written submissions from counsel as to arrears. There will be no order for costs.



Solicitors: Mahcod, Ross & Co., Whangarei, for Applicant

Wilson, Henry, Martin & Co., Auckland, for Respondent