18/12

A 40/81.

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

~~M. 40/84~~

IN THE MATTER of the Family Protection Act 1955

1567

AND

IN THE MATTER of the Estate of E McPARLAND late of Hastings, Retired, Deceased

BETWEEN E McPARLAND of Wellington, Widow

Plaintiff

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED, Napier as proving Executor and Trustee of the Will of E McPARLAND, Deceased

Defendant

A. 56/83

IN THE MATTER of the Matrimonial Property Act 1963

BETWEEN E McPARLAND

Applicant

A N D THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED, as Executor of the Estate of E McPARLAND late of Hastings, Retired, Deceased

Respondent

A. 57/83

BETWEEN E McPARLAND

Plaintiff

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED

Hearing: 26 November 1984

Counsel: J.H. Williams for Plaintiff
R.P. Wolff for Defendant
L.H. Chisholm and M.J. Wenley for Residuary Beneficiaries

Judgment: 14 December, 1984

JUDGMENT OF ONGLEY J.

Three separate proceedings between the same parties are here being dealt with together by consent. They concern the estate of E McParland, deceased, who died on 1979. The deceased left a will dated 22 November 1966, probate of which was granted to the defendant on 17 March 1980. The plaintiff, who is the widow of the deceased, has made application for further provision out of her late husband's estate under the Family Protection Act 1955, a further application under the Matrimonial Property Act 1963, and, as well, has brought an action against the defendant as

personal representative of the deceased under the Law Reform (Testamentary Promises) Act 1949. All three proceedings were commenced outside the time limited by statute in that behalf. No problem arises in connection with the Family Protection Act proceedings as the other parties agreed to an extension of time until 17 June 1981 within which time the application was duly made. The other two proceedings were commenced on 4 August 1983 and so were some two years and four months out of time. Application has been made in each case for extension of time to commence the proceedings and these applications are opposed by the residuary beneficiaries. I will review the merits of the various claims before deciding the motions for extension of time.

The same background facts in large part are relevant in all proceedings so I will deal first with those before turning to the areas of fact which relate more specifically to one or other of the claims.

The plaintiff and her late husband were married on 1947. He was years of age and had not previously been married. She was years of age and had been previously married, there then being two adolescent sons of the former marriage. Her marriage to the deceased was a happy one and subsisted until his death. There were no children. At the time of the marriage the deceased was employed as an inspector

in the Inland Revenue Department while the plaintiff was working as manageress of a drapery shop. He may have had some assets but there is no satisfactory evidence of what their value may have been. I do not think that they were of sufficient worth to affect the outcome of this litigation. The plaintiff, at all events, concedes that she had little by way of assets. In the year 1950, however, they jointly purchased a one half interest in the Grand Hotel at Palmerston North and thereafter conducted the hotel business for a period of 10 years. The plaintiff contributed a sum of 5,000 pounds to the initial cost and her husband contributed 20,000 pounds. About two years later they bought the other half interest in the same proportions. The freehold title to the land was registered in their joint names. When they sold the hotel in the year 1960 the plaintiff received approximately 12,500 pounds and her husband about 50,000 pounds by dividing the proceeds of sale in proportion to their initial contributions.

After selling the hotel the couple went to live for a few months at Waikanae but then moved to Otaki where the husband purchased a house and about four and a half acres of land. Neither of them engaged in any regular employment thereafter. The husband acquired several farm properties from time to time and took an interest in those without engaging in active farming himself. The plaintiff ran the household, kept the large garden in order and followed leisure pursuits to her

liking, such as playing bridge, for which activity she travelled to Wellington once or twice each week by motor car. These trips to Wellington eventually led in 1970 to the purchase of a flat in the city at Oriental Bay so that the plaintiff could stay there overnight and avoid the risks involved on the return journey occasioned by the reckless driving of other motorists or by the advances of importunate males. The plaintiff used the flat more often than her husband because he was less inclined to undertake the journey to Wellington, but when he did so he enjoyed the amenity which the flat provided. Some discussions preceded the purchase of the flat, the significance of which is at the heart of the action based upon a testamentary promise to which I shall return shortly, but I think it is established that in addition to providing a pied a terre in the city they had it in mind that it would eventually be their home when maintenance of the Otaki property became unduly onerous due to their advancing years. As things fell out they did not follow that plan but instead, when the Otaki property was sold in 1974, they moved to Hastings, where the deceased purchased a house in York Street in his sole name. They retained the flat in Wellington but visited it less frequently because of the increased distance involved in travelling there from Hastings. They resided in the York Street house until the husband died. The plaintiff then agreed to York Street being sold by the executor and went to reside at the Wellington flat, where she still has her

home. The sale of York Street took place in April 1980 and realised $69,000.00.

I turn now to the contents of the deceased's will and the nature of his estate. The plaintiff was left all personal effects including any motor car owned by the deceased; small pecuniary legacies were left to the plaintiff's children and grandchildren; the net annual income from the residuary estate was to be paid to the plaintiff and on her death the capital of the estate was to be paid to the children of the deceased's late brother, F McParland, with an appropriate substitutionary provision for grandchildren which is of no effect as all three children have survived to take a vested interest. The plaintiff was appointed advisory trustee, provision was made to resort to capital for her proper maintenance and by codicil it was provided that no part of the estate should be sold or converted without the consent of the advisory trustee.

The estate was valued for duty purposes at $531,363.00. Duties amounted to $165,009.00. After certain realisations and the payment of duties, legacies, debts and administration costs to that date the estate accounts as at 26 December 1980 showed a surplus of $406,586.00. In those accounts the shares in the flat owning company, Oriana Flats Ltd, were shown at a value of $73,993.00. The assets of the

estate were then represented almost entirely by shares in public and private companies and a company debenture. A question arose as to what property was included in the specific bequest of personalty to the widow which was eventually settled by transferring to her certain chattels and a Jaguar motor car having a total probate value of $42,855.00.

In advancing the plaintiff's claims Mr Williams laid most emphasis upon the claim under the Family Protection Act without indicating whether in his view, in law, any one claim should take precedence over the other or others. Mr Chisholm's submission is that the approach to such multiple claims against the estate of the deceased person is correctly stated in this passage in the judgment of Beattie J. in McNaughton v McNaughton [1976] 2 NZLR 538, 543: -

> "It is not practical, in my opinion, to look at the Matrimonial Property Act application away from the terms of the will. In my view, there would not be many cases where a claim by a widow could be successful under the Matrimonial Property Act. Where there has been a harmonious marriage, and what is, in the opinion of the court, adequate provision made for the widow, I think it would be wrong to erode the principles of family protection law by allowing such applications."

Beattie J., later had occasion to reflect upon these observations in the unreported case of Petty v Petty (1204-5 Blenheim Registry 1976) and there are other unreported decisions in which a different approach has been adopted.

These were reviewed by Roper J., in Rossi v Rossi (M.507/76 Christchurch Registry 6 June 1878). I rather think that Mr Wolff, acting for the personal representative, is correct when he says that it must first be established what the estate consists of before it can be decided what provision a just testator would have made. That approach involves first determining the just claims against the estate existing as at the date of death and the claims affecting the estate which arise upon death. Logically the claim under the Matrimonial Property Act takes precedence because, assuming the claim is successful, it means that at the time of the testator's death his estate was less than it appeared to be by the amount of the ultimate award as that part of the property in truth belonged to the claimant subject only to the determination of the quantum of her claim. Next in order is the claim based on the testamentary promise for the reason that if the claim succeeds, the amount of the award is a debt owed by the estate. Only after these claims have been met can it be said what Estate is available for the proper maintenance of the claimant so that a judgment may be made as to whether the testator has fulfilled his moral duty to her. On the other hand a claimant cannot be entitled to the duplication of the benefit by receiving it more than once in different guises and so to that extent provision made in the will must be a factor to be taken into account in the exercise of the Court's discretion in making an award under the Matrimonial Property Act 1963.

I turn then to examine the claim under the Matrimonial Property Act 1963. The principles applicable to the determination of such a claim were settled in Haldane v Haldane [1976] 2 NZLR 715. In relation to the matrimonial home at York Street the Court is required by the Act to have regard to the respective contributions of the husband and wife to the property in dispute whether in the form of money payments, services, prudent management, or otherwise howsoever. Consideration of the wife's contribution in this area in the circumstances of this case must have regard to the former matrimonial home at Otaki as well as to the home at York Street, Hastings. The plaintiff's claim does not relate exclusively to the matrimonial home. Rather it is directed more specifically to the flat at Oriental Bay which was never the matrimonial home and was never held by the deceased in his own name. What he owned were shares in a property owning company which gave the right of occupancy of the flat. Although the plaintiff has chosen to advance her claim in that way I must have regard to her contributions to the matrimonial home and I think that this is a case in which it is appropriate to have regard as well to her contributions to the other property in dispute. Her contributions other than those of a purely domestic nature were of major signficance in relation to the hotel business. Whether that enterprise was conducted as a partnership is not clear but I am satisfied that it was in every sense a joint enterprise. The plaintiff summed up the

position very well when she said in evidence that one spouse could not have functioned in that business without the other. I believe that she gave an accurate picture of the working relationship from which it did not appear to me that she embellished her own performance at the expense of her husband's contribution. It appears, however, that he was not a gregarious man and devoted his labours more to the clerical and accounting side of the business than to dealing directly with the hotel patrons. That part of the business was handled in large part by the plaintiff and, as well, she supervised the house staff and the management of the house generally. By their joint efforts they built up a substantial asset which they were able to sell for over 60,000.00 pounds after ten years. That was a large sum of money at that time and it provided the basis for the later acquisition of the deceased's very substantial estate. The proceeds of sale were divided in proportion to their initial contributions although it appears that the plaintiff had some reservations about the fairness of that distribution. She says that she put it to her husband that the money should be shared equally between them at that stage but when he demurred she carried the matter no further. An equal division would have been unduly favourable to her in my view having regard to the husband's greater cash contribution but I do not think it would have been unreasonable to say that she had contributed equally with him to the increment in value of the asset over the ten year period.

Something more than a return of her proportion in acordance with the cash contribution would have been equitable - say a one third share or in round figures $40,000.00. It may be argued that she had been paid for her services but I do not think that that would have been an answer to her claim for a greater share. Both parties had drawings from the business but it would seem that they drew only enough for reasonable living expenses and left the available cash in the business. There is now no record of what they did but I think it reasonable to assume that both contributed equally to the business in that way.

After leaving the hotel husband and wife kept their finances separate. The plaintiff was able to achieve an improvement in her financial position through wise investment in property so that by the time they left Otaki she was able to realise a sum of $64,000.00 which she then invested in debentures. At about the same time the deceased sold his landholdings and invested the proceeds in shares also. It is not possible to say exactly what his net worth may have been at that stage but he was an astute businessman as is demonstrated by the acquisition by the time of his death of an estate of over half a million dollars from an initial stake of about one fifth of that amount. During that period the plaintiff fulfilled the usual duties of a housewife with a good deal more than ordinary attention given to the large garden at Otaki

while they were there and similar duties at York Street until the time of her husband's death. Her direct contribution to the acquisition of assets after leaving the hotel would have been much less than that of her husband but her contributions by performance of domestic services and the maintenance and preservation of the matrimonial home are not to be ignored. It is also a factor to be taken into consideration that for a period of nearly twenty years the deceased had the use of a large sum of money to the acquisition of which the plaintiff had made substantial contributions and which on a more equitable distribution would have belonged in part to her from the time of the sale of the Grand Hotel.

At the time of the death of her husband I am of the opinion that the plaintiff's contributions in services both of a domestic and commercial nature would have equated in value approximately one sixth of the net value of the assets comprising his residuary estate. I put the figure in moneys worth at that time at $50,000.00. As well as the personal chattels she receives a substantial benefit under the will in the form of income but the income is low in relation to the value of the corpus and I do not think that in the circumstances of the case the provision made for her in the will is a factor which should diminish the plaintiff's claim to receive the full amount of her interest in the disputed property. Since the date of death the residuary estate has increased more than fourfold, a present value of $1,213,617.00 being placed upon the assets by the Executor. There is no

reason why the plaintiff should not participate in that increment which is attributable in part to the foresight of the investor and in part to fortuitous market forces affecting the value of the shares held by the estate. The present value of the plaintiff's share of the disputed property therefore would be $200,000.00.

There remains the question as to whether the plaintiff should be granted extended time within which to bring her claim. The over-riding consideration here in my view is the strength of her claim and the injustice that would be occasioned by refusing the order. The application was at first opposed on the ground that the estate has been distributed but that ground has been abandoned. I am unable to see that there is any prejudice to other parties in extending the time having regard to the fact that the Family Protection Act proceedings were in train anyway and the filing of a claim under the Matrimonial Property Act has not delayed the hearing of those proceedings. The evidence adduced is relevant in large part to both applications and it is not suggested that any other relevant evidence has become unavailable or uncertain with the passage of time. The estate has increased in value to the ultimate advantage of the residuary beneficiaries and the time at which they will take under the will has not in any way been affected by the delay. I am not particularly impressed by the reasons advanced for not commencing the proceedings within the

statutory time limit but no doubt the plaintiff was acting in good faith and on advice so that I do not think she should be penalised for the absence of cogent reasons for not commencing proceedings promptly. That aspect is outweighed in my view by the desirability in the interests of justice of allowing her claim to be heard. The time will therefore be extended to include the 4th day of August 1983 which is the date upon which I understand the application was filed.

The claim under the Law Reform (Testamentary Promises) Act is not in my view well founded. I find no satisfactory evidence of a testamentary promise within the meaning of the Act, express or implied. I regard the plaintiff as a totally honest witness but taking her viva voce evidence at the strongest interpretation in favour of the claim that can be put upon it I find it to be insufficient. The most that the plaintiff says is that her husband bought the flat for the survivor of them to live in after the death of the other of them. He did not lead her to believe that he had bought the flat or the shares in the property owning company in her name and having regard to the pattern of his property investments through the years it is unlikely that she would have expected him to purchase investments in her name. There is no evidence that either he or she regarded the purchase of the property as being related in any way to services which she had rendered nor any evidence that could be construed as indicating that he

would leave the ownership of the shares to her by will as a reward for services. The most that the deceased said, on the evidence of the plaintiff, is that he bought it for her to live in after his death should she survive him. It is to her credit that she did not attempt to put it any higher than that but in the result the evidence does not establish her claim. There would be no prejudice occasioned by allowing the claim to be brought out of time but as I have already said I do not find the reasons for not bringing it within time to be convincing and as in my view the claim cannot succeed I think the proper cause is to refuse to extend the time for commencing the action: It will therefore be struck out

There remains the claim under the Family Protection Act concerning which I shall say very little because of the effect which my decision on the application under the Matrimonial Property Act must have upon the merits of the claim. Whether the testator was in breach of his moral duty in failing to leave the plaintiff a capital sum, whether in the form of shares in Oriana Flats Limited or otherwise, is a question which cannot be decided without having regard to her capital position as it results from this judgment. Had the deceased been aware of her entitlement to such part of the assets of his Estate as she has now been awarded he would have had no obligation to make further provision of that kind for her. I do not think that I need express a view as to what his

duty may have been in the hypothetical situation of her having only her own capital. On the situation as it is now found to be there will be no further provision made for her. If for any reason the plaintiff does not receive the capital awarded to her under the Matrimonial Property Act 1963 she will be free to renew this application.

In the end result I will make an order under the Matrimonial Property Act 1963 that the plaintiff be paid the sum of $200,000.00 out of the deceased's Estate, payment of that sum to be charged on the whole estate.

The costs of all parties on the proceedings under the Matrimonial Property Act 1963 and the Family Protection Act 1955 are allowed out of the Estate on a solicitor and client basis. No costs are allowed on the action under the Law Reform (Testamentary Promises) Act 1949 but of course that does not prevent the Executor making all usual and proper charges against the Estate relating to the defence of the claim.

Solicitors

Holderness, Dennehy & Collins, P.O. Box 4, Hastings for Plaintiff

Carlile, McLean & Co., P.O. Box 349, Napier for Defendant

Willis, Toomey, Robinson & Co., P.O. Box 644, Napier for Residuary Beneficiaries.