IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

No. M.99/82

1358

BETWEEN I PATTERSON

Applicant

A N D W PATTERSON

Respondent

Hearing: 15 October 1984

Counsel: P.B. Churchman for Applicant
D.J. More for Respondent

Judgment: 2 NOV 1984

JUDGMENT OF HOLLAND, J.

The parties in these proceedings, whom I shall refer to as the husband and the wife, were married on 1946. They have had six children of their marriage. They separated 28 years after their marriage on 1978. In that year the wife applied for separation and maintenance orders and those orders were ultimately made on 1979. Pursuant to that order the husband is paying the wife maintenance at $87.50 per week and he was required to pay past maintenance of $5,500.

The wife applied for orders under the Matrimonial Property Act 1976 in the District Court at Dunedin on 29 July 1981. The husband applied on 8 July 1982 to remove those proceedings into this Court and an order to that effect was made by consent on

28 October 1982. On the same day an order was made on the application of the wife "that the Registrar of the Court at Dunedin make an enquiry into the matters of fact at issue between the parties and report thereon to the Court under the provisions of section 38 of the Matrimonial Property Act 1976". That enquiry was duly conducted by the Registrar and although the terms of the order were very wide, apparently the parties and the Registrar accepted that the only matters of fact he was to enquire into were the description and value of matrimonial property, and not any dispute as to contributions. In that respect I am satisfied that the parties and the Registrar took a sensible course, but sadly the enquiry was unsuccessful even in the limited scope accepted for it and was unable accurately and completely to ascertain the matrimonial property and its value.

The matter was set down for hearing before me on 21 September 1984. I adjourned it because I was satisfied that the proceedings were not in order for final determination of the matters and further affidavits were required. The parties proposed to call viva voce evidence and affidavits had not been filed accurately disclosing the parties' property. In this respect the husband must accept the major share of the blame. As a result of the adjournment to the present hearing the issues between the parties have been substantially narrowed and the matters requiring resolution by this Court have been limited.

Sadly, however, there is still a gap in the necessary evidence. A substantial asset of matrimonial property comprises farm stock. There is no valuation before the Court on which the Court can form a view as to the value of the farm stock at the date

of separation, and there is still insufficient evidence as to the actual stock at the date of hearing. Balance sheets have been produced, but they of course only include stock at book value and at annual balance dates. In most cases it is difficult to do justice between the parties when the value of property in question is unknown. It was apparently contemplated by counsel that an order could be made determining the respective shares of the parties and there could later be a valuation of stock. That would have been most unsatisfactory because it made it very difficult for the Court to assess what proper allowance should be made in valuing that property for the fact that the property existed 6 1/2 years ago and some compensation should be allowed to the wife for not having been earlier paid her share, or alternatively consideration must be given as to whether it is necessary to trace the stock and award her some share of stock presently held by the husband and assess post separation contributions. In addition, some provision should be made for the fact that a tax liability will occur to the husband when the stock is sold if the sale is at a price substantially higher than the book value. That tax liability will not necessarily occur on an order being made under the Matrimonial Property Act, but it is nevertheless a relevant factor to be taken into account in assessing the wife's share in the farm stock, although under present legislation this potential tax burden can often be eased.

At the conclusion of the hearing I directed counsel that by 3 p.m. on 18 October they were to provide to the Court a memorandum either agreeing on the value of the stock owned by the husband at 28 February 1978 with an allowance for wool if wool was in the shed or on the sheep, or alternatively advising the Court

that the parties could not agree. No such memorandum was received but I was advised it would be lodged later. Memoranda have now been filed by both counsel in which they have neither agreed nor stated that they cannot agree. It is most unsatisfactory and arises from the inadequate way in which the husband has presented his case to the Court. Counsel for the husband in his memoranda has stated that it would now be impossible to value the stock at separation date. He has supplied figures for a valuation at the annual balance date of 30th June 1978 which are reluctantly accepted by the wife as far as sheep are concerned but not accepted in respect of cattle. This case has gone on for far too long. A final decision should be made now. There appears little to be gained by adjourning for further consideration or evidence. The Court will simply have to do the best it can.

It is common ground that the matrimonial property at the date of the separation was as follows:

A. Husband

1. Farm leasehold property
2. Farm stock and plant
3. Life policies in Government Life office and National Mutual Insurance Association
4. Building society deposits
5. Sundry shares
6. Interest in Roadsend partnership
7. Deposit at Wrightson NMA
8. Deposit at National Bank Cromwell

B. Wife

1. Deposit at Post Office Savings Bank Cromwell
2. Bonus bonds
3. Life policies in AMP Society on life of husband
4. Loan to husband

The following were liabilities of the spouses at the time of separation.

A. Husband

1. Net balance owing on current account of Children's Trust
2. Amount owing on farm plant and vehicle
3. Loan to wife

B. Wife

Nil

In the enquiry before the Registrar some considerable time was spent in respect of competing claims regarding furniture. The enquiry did not resolve that dispute but the matter has very sensibly not been pressed before me and it is unnecessary for me to make any order as to furniture. No doubt the husband and the wufe will retain as their property the furniture which is now in their possession and which was once matrimonial property. Likewise no special order is made in respect of motor cars. The motor car used by the wife at the time of the separation was owned by the family trust but has been given to her by the beneficiaries of the family trust. The husband's motor car forms part of the farm plant and in the circumstances it is appropriate that it be dealt with as farm machinery and plant rather than a special order made in respect of it because it is a motor car.

By the time the matter was before me most of the value of the property in question at the date of separation was no longer in dispute. Because of the difficulties over valuing stock it is necessary to value that asset at 30th June 1978 rather than 1st March. It consequentially follows that current accounts should

be taken at the same date to allow for different values following shearing, sale of wool, sale of lambs and other normal farming activities. I accordingly assess the matrimonial property owned by the husband at the date of separation as follows.

Assets

Farm Leasehold property	$280,000	agreed
Surrender value of A.M. Paul National Mutual Life Policies	6,266	agreed
Building Society Shares and Deposits	2,568	agreed
Share Investments	1,677	agreed
Farm plant and machinery	19,885	agreed
Roadsend partnership	30,000	agreed
Sheep at husband's valuation	44,895	agreed as at 30.6.1978
Cattle at wife's minimum valuation	29,550	as at 30.6.1978
Deposit at Wrightson NMA	55,930	agreed as at 30.6.1978
Loan to Mrs G. Shaw	8,000	agreed
	$478,771	

Liabilities

Net balance owing to W.R. Patterson Trust	62,865
Net Hire purchase payments	11,980
Advance from wife	3,100
	$77,945

Net excess of assets over liabilities at 1978 values $400,826.

I have cancelled out corresponding provision of approximately equal value in assets and liabilities for taxation and made a net figure where items appear both as assets and liabilities. The wife's matrimonial property comprised the loan to her husband of $3,100, her account at the Post Office Savings Bank totalled $1,035.77 and her bonus bonds totalled $100, a total of $4,235.77.

A special valuation was obtained in the Registrar's enquiry because there was no matrimonial home included in the matrimonial property. The homestead was valued on the Bargour

Station, although in fact it was not occupied as the matrimonial home at the date of separation. The husband and the wife were then living on another property purchased and owned by the Children's Trust. The homestead on the leasehold property in the name of the husband, however, was valued at the date of separation at $12,000 for the purpose of these proceedings.

In assessing the contributions of the husband and the wife to the marriage partnership for the purpose of determining the shares in matrimonial property the issues were reduced substantially by the time of the hearing. Although there had been allegations of extraordinary work done by the wife and counter allegations by the husband disputing the claims in some respects, counsel for the husband very properly and sensibly acknowledged at the hearing that within the spirit of the provisions of the Matrimonial Property Act 1976 there was only one argument that he could advance on behalf of the husband against equal sharing of all matrimonial property. That related to the contribution by the husband of the capital enabling the purchase of the property described as Bargour Station previously owned by the husband's father. It is significant that that property was purchased by the husband immediately prior to the marriage but acknowledged by him to be in contemplation of marriage and accordingly falling within the category of matrimonial property. The striking significance is that the purchase price of the property in October 1945 was £2,650 or $5,300. That same property according to a valuation supplied by the Government valuer as at 1 October 1984 is stated to be worth $650,000. Its value at the time of the separation was $280,000.

The station is a high country station of a type which until the wool boom of 1950 barely produced a living for its owners. It was submitted, and I accept, that the purchase price of $5,300 was its full purchase price. No doubt some proportion of the increase in value is due to the labours of the husband supported by the wife during the marriage. But the increase in value represents to a large degree not only the effects of inflation generally but the even greater increase in values of properties of that kind after the 1950 wool boom.

In brief, it is the submission of Mr More for the husband that this marriage partnership has prospered beyond expectation and certainly beyond the actual experience of the vast majority of New Zealanders. The husband had cash available of £2,000 immediately prior to his marriage which enabled him to purchase the property and stock from his father which essentially was little more than taking over his father's liabilities on the farm, but Mr More submits that without that £2,000 (which was in itself a substantial sum in those days capable of purchasing a modest but adequate city house property without encumbrance) the parties would not have been able to acquire this asset which has been so beneficial for the marriage partnership.

The farming venture was so successful that nine years after the marriage the husband was able to create a family trust which purchased another property and which was farmed for the benefit of the trust. It was in fact on that property that the husband and wife resided until the wife left home. The trust property was sold shortly after the separation and the trust was wound up. Although counsel stated that distribution accounts were

produced the accounts exhibited do not make it easy to ascertain the amount each child received. Counsel said one son received $70,000, presumably the other son received a similar amount and each daughter received $35,000. Those figures may not be accurate. It is immaterial. The children have clearly done well. The husband had clearly taken drawings from the trust by way of advances and that is reflected in his liabilities at the time of the separation. On the winding up of the trust he was required to meet his liability and in order to do so he was required to borrow money from his stock and station firm and his children.

The evidence satisfies me that the wife, like most farmers' wives, took an active part in assisting her husband farmer run the farm. She has lived in relatively frugal conditions, particularly in the early part of the marriage and has brought up six children. The substantial improvement in the financial position of the parties arose during the marriage and she is entitled to benefit in that improvement equally with her husband. I do consider, however, that in this particular case justice requires some recognition to be made in respect of the husband's original capital and that accordingly his contribution has clearly been greater than that of his wife. It is relatively small in today's figures but at the time it was substantial. That will be recognised by dividing the matrimonial property in proportions of 53% to the husband and 47% to the wife. Special provisions must be made in respect of the homestead.

Section 2 of the Matrimonial Property Act 1976 was amended in 1983 and now reads:-

> "For the purposes of this Act the value of any property to which an application under this Act relates shall, subject to sections 12 and 21 of

> this Act, be its value as at the date of the hearing of that application by the Court of first instance unless that Court or, on an appeal under section 39 of this Act, the High Court or the Court of Appeal or Her Majesty in Council in its or her discretion otherwise decides."

The amendment does not in any way affect the application to this case of the reasoning of the Court in Meikle v Meikle (1979) 1 N.Z.L.R. 137. It is clear that the Act contemplates that the usual course will be to adopt the value of matrimonial property at the date of the hearing. That will in most cases be appropriate where the matrimonial property at the date of separation and the date of hearing has remained of the same quality and description and the only changes in value have been due to inflation or deflation. In some cases, however, where the principal or the major asset is in the nature of a business owned by one spouse justice may often be done by reverting to the date of separation to assess the initial valuation and then allowing compensation to the other spouse for the use that has been made of his or her share in the matrimonial property during the period for the delay in paying to that spouse his or her share in the property. In some cases it may be easy to assess the post separation contributions of the spouse to that property and to distinguish those contributions from mere increases in value because of inflation. In many cases that will be difficult. In some cases out of spite a spouse in possession of matrimonial property of that nature may use it in a profligate or irresponsible way with the intention of defeating or prejudicing the other spouse's claim. There have been allegations in this case that the husband has at least been generous to himself and persons other than his wife so that his present property is substantially less

than it should be. There have also been suggestions and unsatisfied enquiries as to the precise extent of the husband's present fortune.

I am satisfied that this is a case where it is appropriate to assess the wife's share in the matrimonial property at the date of separation or approximately that date and then to add to that figure compensation to her for her not being paid her share during the 6 1/2 year period. In the case of a business which in this instance is a farm property there is a good deal to be said for this approach because the marriage partnership has come to an end at the separation and there is no great reason why a spouse should share in the profits made by a spouse from his own efforts after separation, nor in most cases will there be any reason why she should share in losses created by him after separation either due to carelessness, deliberate policy or sheer bad luck provided that property still exists in respect of which an order can be made.

The question arises as to how to provide adequate compensation for the wife. This could be done by simply providing for interest to be paid but for a period such as this compensation would be quite inadequate unless compound interest were provided for. If a rate of 14% per annum were taken (and it could hardly be suggested that that was higher than a commercial rate over the period) and allowance made for re-investment of the interest earned each year, the sum would have practically doubled in 6 1/2 years. The wife of course would be liable to tax on that income if in fact interest were provided for as such. As it is contemplated that a total capital sum will be fixed by way of valuing her share in the matrimonial assets, a deduction must be made in respect of tax in regard to this compensatory element. It is neither possible nor

desirable in a matter of this kind to approach the calculation by way of arithmetical precision. Care must be taken in allowing compensation for the wife not to impose any penalty on the husband and also to ensure that the payment is one that can reasonably be made. If in this case the order which I am about to make appears to the husband to be harsh then he has only himself to blame because he has still not disclosed before the Court his full financial position. His balance sheet as at 30 June 1982 is the latest assessment of his financial position and with stock at standard values and the farm property at a book value of $8,052 when it is stated to be worth $650,000 his assets are shown to exceed his liabilities by $59,528. His actual net surplus of assets over liabilities was then clearly more than $700,000.

It is common ground that an order in favour of the wife granting her in the vicinity of 50% of the matrimonial property valued at the date of hearing will be of such magnitude that the husband cannot meet it without selling the farm. There does not appear to be any injustice in this result in the circumstances of this case. The husband is 59 years of age, approaching 60. As a farmer he is very nearly at the end of his working life. He has recognised this himself in his evidence before the Registrar when he indicated that for a period he moved to Christchurch with a view to retiring there but returned to the farm because of financial difficulties both in Christchurch and on the farm. One of his sons is on the farm working for a salary far less than the ruling rate. The evidence relating to the farm and its value makes it clear that in recent years it has not been farmed as efficiently as it might have been. It may well be the wish of the husband ultimately to

pass the farm on to his son so that the property may remain in the family. That could only be done with substantial assistance from him as owner of the farm. In fact, and in equity, he and his wife own the farm, although not exactly in equal proportions. It seems to me to be eminently reasonable that if the farm is to be sold to the son and this can only be done with vendor finance then the wife should have as much a part in this decision as the husband. If in fact it is not possible within a relatively short period for the son to purchase the property then it would seem to be in the interests of all parties for the property to be sold.

The total net matrimonial property at the date of separation was in round figures $404,000 of which the husband had $400,000 and the wife $4,000. If $12,000 is deducted in respect of the lack of a homestead there is a nett balance of $392,000 of which the wife would have been entitled to 47% or $184,240. Added to this must be $6,000 in respect of her equal share in the notional matrimonial home and the $3,100 owed by the husband to the wife which appears never to have been paid, a total of $193,340. Her actual share at the time was $4,000 and accordingly if she had been paid in 1978 she would have been entitled to almost $190,000. Allowing for the substantial increase in value of the property, but essentially simply providing for compensation to the wife for her not having had her share at an earlier date, I propose applying the principles outlined in Meikle v Meikle (supra) to value the amount now payable to the wife in respect of the imbalance of her share of matrimonial property at $300,000. In exercising my discretion to take a value other than the hearing date I have taken into account all the matters previously referred to including post separation

contributions, incidence and effects of taxation and the fact that the husband has been paying maintenance over the period which probably would have ceased once the wife was financially independent. At the hearing the husband agreed to make $10,000 available to the wife within seven days. There will be an order that the wife shall receive from the husband in respect of her share the sum of $60,000 forthwith of which the $10,000, which should by now have been paid, is included. The balance of the wife's share amounting to $240,000 is to be secured as a charge on the farm property of the husband to bear interest in the meantime at 14% per annum from the date of this judgment and to be repaid within 18 months. The memorandum of charge is to be in the ordinary form of memorandum of encumbrance with a power of sale for default. Leave is reserved to apply if agreement cannot be reached over the terms.

Counsel for the wife has applied for an order for costs. It is usual for each party to pay his or her own costs. In this case substantial costs have been iccurred because of the reluctance or refusal of the husband to disclose his full financial position. The parties shall pay equally the valuation fees incurred in or arising out of the Registrar's enquiry. The husband shall pay the wife the sum of $2,500 as a contribution to her costs to be repaid forthwith.

The husband has applied for an order cancelling the maintenance order. Although it would seem that the wife will now be financially independent it is preferable for an application to cancel maintenance to be made in the Family Court where the order was made.

A D Holland J.

Solicitors:

Jackson Lucas & Deuchrass, Dunedin, for Applicant
Quelch McKewen Tohill & More, Dunedin, for Respondent