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IN THE MATTER OF The Family Protection Act 1955

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AND

IN THE MATTER OF The Estate of J THIRD  
of Hamilton, Deceased

BETWEEN S' \_\_\_\_\_ THIRD  
of Hamilton, Wholesale Manager  
Plaintiff

A N D T. \_\_\_\_\_ HENDERSON  
of Te Awamutu, Farmer, as  
Executor and Trustee in the  
Estate of J. \_\_\_\_\_ THIRD,  
deceased  
Defendant

A N D M.458/83

IN THE MATTER OF The Matrimonial Property Act 1963

AND

IN THE MATTER OF An Application for Orders in  
respect of the property of  
the parties

BETWEEN S' \_\_\_\_\_ THIRD  
of Hamilton, Wholesale Manager  
Applicant

A N D T. \_\_\_\_\_ HENDERSON  
of Te Awamutu, Farmer, as  
Executor and Trustee in the  
Estate of J. \_\_\_\_\_ THIRD,  
deceased  
Respondent

Hearing: 29 November 1984

Counsel: D.J. Taylor for Plaintiff  
C. Fletcher for Defendant  
M.J. Cameron for T.J., S.G. and J.D. Nottingham

Judgment: 13.12.84

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JUDGMENT OF BISSON J.

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The applicant, S Third and his wife, the late Mrs J. Third were married on 1967. It was for both of them a second marriage. At that time, the applicant was years of age and the deceased, years of age. She died on 1983 after nearly 16 years of marriage. The applicant has made applications under both the Matrimonial Property Act 1963 and the Family Protection Act 1955, the deceased having made no provision at all for him in her last Will dated 27 July 1972. Both the applicant and the deceased had children by their prior marriages. In the case of the applicant, his two children were aged and years in 1964, when he began living with the deceased. These children lived with their mother and the applicant did not pay maintenance in respect of them. The deceased had three children. At the time the relationship commenced between the applicant and the deceased, two of the deceased's children, Nottingham and J Nottingham were aged years respectively and they remained with their

mother throughout her marriage to the applicant except for a period when S            was away flatting. The eldest child of the deceased's prior marriage, Tl            Nottingham, was in the custody of his father. There were no children of the marriage between the applicant and the deceased.

At the time of their marriage, neither the applicant nor the deceased owned any assets of significance, the deceased owning some household effects and a Morris 1000, the applicant owning a pushbike. Both the applicant and the deceased were in employment throughout most of the marriage but there was a period of 2 or 3 years when the deceased was in business prior to her commencing employment with James Aviation Limited in 1975, this employment continuing down to the date of her death.

Prior to their marriage, the applicant and the deceased lived in a farm cottage owned by the deceased's father and in 1965 moved into a house he purchased in Rukuhia. They lived there initially paying rent but this stopped in 1966 a year or so before they married but they always paid the rates from 1965 onwards. It appears from an exhibit to one of the affidavits sworn by the respondent that this property was sold to the deceased for \$25,400 under an agreement for sale and purchase dated 29 May 1978 and that after a payment by the deceased of \$1,400 to her father, he forgave her \$10,000 of her remaining indebtedness to him leaving a balance of \$14,000 owing, which debt remained down to the date of death of the

deceased. There is no reference to interest being paid in respect of it. Since then, this property has been sold by the executor to Mr J.D. Nottingham, one of the deceased's sons at \$42,000, being the value placed on the property by a registered valuer and the debt of \$14,000 to the deceased's father was taken over by the purchaser. As at the date of hearing, the estate's assets comprised:-

Cash on interest earning deposit at United Building Society	\$52,950.00
Cash in solicitor's trust account A.N. Bisley and Company Limited - 285 ordinary shares	2.66
	<u>\$484.50</u>
	<u>\$53,437.16</u>

At date of death, 4 July 1983, the assets of the estate were:-

Cash	\$3,917.98
Furniture and effects - (value estimated at less than \$6,000)	-
Motor car - 1972 Morris Mini	1,000.00
Life insurance policies and Jamav Staff Credit Union death benefit	8,324.83
285 ordinary shares in A.N. Bisley and Company Limited (gift from her father at \$1.70 each	484.50
Home at valuation	42,000.00
Accrued wages, holiday pay and superannuation benefits with employer James Aviation Limited	9,876.05
Glenview Club Debenture	50.00
	<u>\$65,653.36</u>

Liabilities

Balance purchase money on home owing to father	\$14,000.00
Funeral expenses and cremation	1,077.00
J.D. Nottingham (son) - value for second garage	2,700.00
Sundry debts	<u>163.63</u>
	<u>\$17,940.63</u>

Net value of estate \$47,712.73

The applicant's contribution to the matrimonial property included financial support, he paying money from his wages into a joint bank account, out of which various living expenses were paid. The deceased was also in employment and operated her own bank accounts, but no details of her expenditure from them have been supplied. After the deceased's two sons who lived in the family home finished school, both were apprentices and paid board out of their earnings. At one stage, the applicant was off work for a period of 5 months because of ill health but on the other hand, he would have been the principal bread winner when the deceased's business proved unsuccessful. In addition to the financial contribution which the applicant made from his earnings, he, having worked initially as a carpenter and as a plasterer, was able to do maintenance work and make improvements to the matrimonial home such as painting; replacing guttering; putting in a concrete driveway and tarsealed driveway; building on the glassed-in terrace at the rear of the house; digging in a Para swimming pool and concreting around the pool; alterations to the bathroom; paying for carpets and curtains throughout the house; replacing fences all around the house; water supply to the front of the section of the house and to the double garage; installation of water reservoir tank; installation of a new clothesline; a new rear wall and roof on the henhouse; replacing the existing stove with a new stove; a new stainless steel sink bench and building in a cupboard; building another wall in the hallway of the house to cover a central heating duct and re-papering and painting the hallway at that time.

When the registered valuer made his report and valuation, he was requested to provide a separate assessment of certain improvements to the property. These were the glass enclosed sunporch; internal timber fence; barbecue and swimming pool; concrete driveway; tarsealed driveway; concrete block wall on southern boundary. His assessment for these improvements totalled \$2,700 and his general comment on the property was that the section was well developed, but only moderately maintained, while the house itself required considerable maintenance. There is some dispute as to the worth and as to who paid for some of the improvements claimed to have been provided and paid for by the applicant. However, I accept he did some work of value and at his own expense, but did less after he became a barman.

Mr Cameron submitted that because the home was not acquired until 1978 by the deceased, only contributions by the applicant to that property were relevant after that date, but to the extent that the applicant did work to the house prior to that date, some would be reflected in its value at the date of acquisition and would therefore be a relevant contribution to that asset. However, when one takes into account that the equity in the matrimonial home was derived from the deceased making a cash contribution of \$1,400 and receiving a gift by way of forgiveness of debt of \$10,000 from her father, the maintenance work and improvements carried out by the applicant would be substantially less than the contribution of \$11,400 by

the deceased and of course she would have made a contribution in the care and maintenance of the house itself as the housewife.

So far as other matrimonial property is concerned, the applicant would have made no direct contribution to the deceased's bank accounts, her motor car, life insurance policies, staff credit union death benefit and the amounts due from her employer and no contribution at all to the shares in A.N. Bisley and Company Limited which the deceased received by way of gift from her father. However, the applicant would have made some indirect contribution to these other items of matrimonial property in the estate of his late wife, because of his contribution from his wages to the living expenses thereby sparing the deceased to some extent from spending more of her own moneys in that direction and enabling her to contribute more to the acquisition of her assets. By comparison, the applicant had not accumulated similar assets in his own name - his only assets at the date of his application being a 1972 Marina car which he valued at \$2,000; the proceeds of the joint bank account by survivorship, \$1,726.71; the proceeds of \$740 to which he was entitled under an insurance policy on his wife's life and a credit of \$280.63 in respect of his contributions to a Government Life Insurance superannuation fund. Both counsel agreed that his matrimonial property of

\$4,747.34 should be brought to account, making total matrimonial property, excluding the Bisley shares:-

		\$57,700.00
Net assets in estate	\$53,437.16	
Less Bisley shares	<u>484.50</u>	
	52,952.66	
Add applicant's assets	<u>4,747.34</u>	
	\$57,700.00	

This is a case where an asset by asset calculation of contributions is not appropriate. The picture as I see it is one of two persons, both of whom had prior marriages, continuing in employment after their marriage and making contributions from their earnings to their combined living expenses - the wife performing the normal household work and the husband carrying out certain maintenance work and improvements to the matrimonial home which became vested in the wife as a result of a substantial gift from her father. There was some evidence of the marriage passing through an unhappy stage, but although the suggestion was made that it was the husband's conduct which caused the wife's business to fail, the evidence on this point is inconclusive so I do not find that the husband's conduct should be brought to account in assessment of his contribution to the matrimonial property.

The annual accounts for the deceased's business were not produced nor were copies of her bank statements, with an analysis of her income and expenditure. Similarly, a complete picture of the applicant's income and expenditure was not



provided. However, one fact does clearly emerge and that is that throughout their married life the deceased, thanks to her father's generosity, provided the matrimonial home. This feature of the case tips the scales in her favour.

After taking into account the principles cited by counsel which apply to applications under the 1963 Act, I assess the applicant's share in matrimonial property at one third, which is \$19,233.33, of which he already holds \$4,747.34.

Turning now to the application under the Family Protection Act, the deceased by her last Will provided, after certain bequests to her three sons, for them to share the residue of her estate as to a two-fifths share to each of her sons, S and J and a one-fifth share to T. The applicant deposed that prior to her death, the deceased had discussed with him changing her Will by leaving him everything except the house, which he was to have the use of for the remainder of his life and thereafter it would go to her children. Her children are now aged years respectively. They were all unmarried without dependants. The eldest son has not sworn an affidavit but one can assume he is in a better position than his two younger brothers as the deceased left him half as much of the residue as each of them.

Mr S Nottingham is a qualified diesel mechanic, but because of dermatitis he says he can no longer be employed in his trade. His ability to earn is further limited because of an accident in 1982 which has left him with a crippled arm. He pays \$50 p.w. for private board, but does not give his present employment, income or financial position. Mr

J Nottingham is employed by Hamilton Electroplaters earning approximately \$220 p.w.. He has purchased the family home for \$42,000 and has loans totalling \$38,000 and savings of \$2,000. He was an apprenticed panel beater and is restoring a car over a period of about three years from which he anticipates a profit of about \$3,000 - \$4,000.

After having regard to the applicant's position as a result of my order under the Matrimonial Property Act, I am satisfied that had the deceased known her husband would share to that extent in matrimonial property, she would have considered she was under no moral duty to make any provision for him out of the balance of assets comprised in her estate, taking into account the much reduced size of her estate and the competing claims of her sons by a prior marriage.

Accordingly, there will be no order in favour of the applicant under the Family Protection Act. However, as the two applications were heard together and the applicant has succeeded overall, he is entitled to costs out of the estate.

As accrued interest appears to be brought to account in the above figures, the award itself would not bear interest to the date of judgment, but I reserve the question of interest in case I am mistaken in that assumption. Counsel may now submit draft orders and costs for approval.

*G. B. Swarbrick*

Solicitors for Applicant: Messrs Swarbrick, Dixon and Partners, Hamilton

Solicitors for Defendant: C. Fletcher Esq., Hamilton

Solicitors for T.J., S.G. and J.D. Nottingham: Messrs Cameron, Hinton and Company, Hamilton

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