IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.56/81

IN THE MATTER OF The Family Protection Act 1955

1619

AND

IN THE MATTER OF An Application for further provision under the said Act

BETWEEN E WADHAM
of Te Awamutu,
Widow

Plaintiff

A N D T SMITH of Te Awamutu, School Teacher and M EDMONDS of Te Awamutu, Solicitor as Executors and Trustees of the Will of the said R WADHAM late of Pukeatua, Deceased

Defendant

A N D

M.124/81

IN THE MATTER OF The Matrimonial Property Act 1963

AND

IN THE MATTER OF An Application for Orders to determine certain questions relating to the ownership and division of certain matrimonial assets

BETWEEN E WADHAM
of Te Awamutu, Widow
Applicant

A N D T SMITH of Te Awamutu, School Teacher and M EDMONDS of Te Awamutu, Solicitor as Executors and Trustees of the Will of the said R WADHAM late of Pukeatua, Deceased
Respondent

Hearing: 8 November 1984

Counsel: R.A. Houston Q.C. and S.P. Williams for Plaintiff Applicant
M.H. McIvor for Defendant Respondents
J.E.S. Allen Q.C. for N. Morris

Judgment: 20.12.84

JUDGMENT OF GALLEN J.

The applicant seeks orders under the provisions of the Matrimonial Property Act 1963. In addition, she has commenced Family Protection proceedings in respect of the estate of her late husband. It is convenient to deal first with the matrimonial property application.

In 1941, the applicant separated from her first husband, taking with her the 4 children of the marriage. Three of those children returned to their father, the youngest

N , remaining with his mother. Subsequently another son, R , returned to his mother. In 1941 the position of a separated wife would not have been particularly comfortable and in September of that year, the applicant took up a position milking cows for one, F Wadham, who was then a bachelor. Although qualified as a teacher, the applicant was unable to take up a teaching position that she says was available to her because of the need to obtain housing for herself and the children who were with her. She therefore remained on the farm as housekeeper and help for Mr Wadham. The papers indicate that Mr Wadham initially operated his farm, which is situated some 19 miles from Te Awamutu, as a sheep farm. He had acquired this property about 1937, but in 1938 as a result of problems with what seems to have been facial eczema, his position deteriorated markedly. He borrowed money from a stock company and bought a small, young herd of cows with the purpose of bringing in a regular income, as distinct from the seasonal income which is normally associated with sheep farming. He also retained a flock of sheep. Between 1939 and 1940, the deceased had some assistance from a relative and in January 1941, he employed a labourer to assist on the farm, but in May 1942 that man joined up with the Armed Forces and was not replaced.

The applicant was never paid a salary. The deceased seems to have considered that the provision of food and shelter for herself and her children was all that was necessary to meet his obligations. The applicant's responsibilities were heavy. She states that her day normally commenced about 4 a.m., 7 days a week. For income, the deceased was dependent upon the cream cheque and this meant that it was essential for cream to go out each day. The farm was remote and had inadequate access, the nearest road being approximately 1 mile from the farm buildings. All stores had to be brought in and out by horse and sledge and cream went out in the same way. The farm was also a development proposition. This meant that the applicant was not only involved in the day to day duties of milking, but was expected to play her part in all farm activities. The living conditions as described appear to have been primitive in the extreme. The applicant and the deceased with the 2 boys lived in a corrugated iron shed on the farm with no running water. All water for domestic use as for farm purposes, had to be carried from an outside tank. The cottage contained 2 bedrooms and a living room. The only toilet facilities were in the bush some distance from the house. Not all the windows were glazed; there were no carpets on the floor and the only heating was from an old stove. Water for washing was heated in the copper in the wash house. The isolation of the farm meant that trips to town were comparatively infrequent and it was difficult for the applicant to keep in touch with friends.

By 1945, the financial position of the deceased was such that he could have afforded to employ labour. The attitude of the deceased was such that it was very difficult to persuade anyone to stay for more than a minimal time. It appears that the deceased was passionately devoted to his farm and worked inordinately hard upon it himself. He expected a similar approach from employees and this mitigated against any employment lasting for any length of time. The applicant's two sons, R and N , were also of course affected by the conditions. R was required to milk both morning and night. His secondary schooling was conducted by way of correspondence and from the age of 12 to the age of 16 he was paid 2/6d. per week and from the age of 16 on, he was paid approximately 5 shillings per week. Although he wished to undertake a University course, he was not encouraged to do so. N was 5 years of age when his mother came to live on the farm of the deceased. He seems to have been very close to the deceased from an early age. Indeed, the deceased had known him previously. He too was required to work on the farm.

In July 1945, the applicant and the deceased were married at the Te Awamutu Registry Office. Until the time of the marriage, the deceased provided no clothing for the applicant or the children. After the marriage however, he did make provision of this kind. From 1943 on, access had become easier because a road was available. In 1949, a kitchenette was built on to the cottage which improved living conditions

and hot water was then made available. By 1950, the applicant says that the farm was well established. The deceased was then debt free and by 1953, he was in a position to erect a new house on the property, which he did without the need to borrow. Initially, power was not available at the house. The applicant made curtains for the entire house and also made bedspreads, using a treadle machine. Power was installed in 1955 and shortly after that, the deceased gave up dairy cattle, using the farm exclusively for the farming of sheep and cattle. The applicant's duties in connection with milking lasted up until the time that the dairy herd was sold. After that, apart from the assumption of domestic duties, she still had a number of farm tasks to perform. She also kept a substantial vegetable and flower garden and was required to provide hospitality for persons visiting the farm including cooking for shearing gangs.

In 1962, the applicant reached the age of 65 and from then on, received the old age pension. That was the first time that she had had money of her own, having never received an allowance from her husband. The applicant then had sufficient financial independence to make some trips away from the farm herself. In 1967 the deceased began share farming, but the applicant still retained the responsibility of providing meals for shearing gangs. About 1969, the applicant began having some health difficulties which manifested themselved by way of minor heart turns and dizzy spells.

In 1977, the general health of the deceased deteriorated considerably resulting in two periods of hospitalisation and the responsibilities of the applicant in looking after him increased. By the early part of 1978 the applicant, who was by then over 80 years of age, was finding it impossible to continue. The deceased purchased a property at Kihikihi Road, Te Awamutu for the applicant which is registered in her name and she moved to live in Te Awamutu. The deceased did not wish to leave the farm and came regularly to stay with the applicant in town. In September 1978, he had a further operation and spent his convalescence at the flat. During these periods, the applicant was expected to provide for the deceased without any financial assistance from him. By December 1978, the behaviour of the deceased had become exceedingly erratic. He died approximately 10 days after admission to Hospital. At the date of his death, his estate consisted of a farm at Pukeatea in two titles, the bulk of which is leased and is subject to an agreement for sale and purchase for $200,000. The small balance which is not leased, has a Government Valuation of $5,000 but is worth rather more. He had approximately $100,000 in cash in two bank accounts; owned miscellaneous farm implements and vehicles and a 1965 Chevrolet motor vehicle. For duty purposes, the estate had a net value of $331,146.24.

Mrs Wadham's application falls to be considered under the provisions of the 1963 Act. This means in effect that it is necessary to make an assessment of the contributions made by the parties to matrimonial property and the first question for determination is whether Mrs Wadham may have made any contributions before the date of the marriage. Undoubtedly for the 4 years before the marriage, she lived on the farm and was heavily involved in activities relating not only to domestic responsibilities, but to the operation and development of the farm. The authorities clearly establish that for the purposes of determining the length of the marriage, this period could not be taken into account. It is also clear that contributions which did not reflect in a matrimonial asset would be irrelevant.

The question of competing claims to assets was, until the passing of the Matrimonial Property Act 1963, resolved according to the application of strict rules of law and equity. The Matrimonial Property Act 1963, provided a special basis of division in the case of the relationship of marriage which susperseded the earlier basis. In the meantime, the law relating to disposition outside marriage, advanced generally along the lines of common intention or constructive trust. The

Court of Appeal has considered in Hayward v. Giordani 1983 N.Z.L.R. 140, the development of this branch of the law in so far as it relates to de facto relationships and Cooke J. indicated a personal view that a line of Canadian authorities was appropriate to the position in New Zealand. Those cases depended upon the concept of unjust enrichment. In the meantime, the Courts here have been faced with a number of cases where marriage followed on the period of de facto relationship.

In Cribb v. Lewer (1982) 5 M.P.C. 21, Prichard J. had to consider a situation under the 1976 Act where the marriage had followed a de facto relationship which had itself lasted for some 5 years. The learned Judge followed the decision of Holland J. in Rusden v. Rusden (1982) 5 M.P.C. 132 and the decision of Hardie Boys J. in Campbell v. Campbell (1981) 4 M.P.C. 33 and in particular, accepted the statement from the last of the cases referred to that an asset contributed to at the inception of the marriage is to be credited in the partnership account to the spouse who provided it and if both did, then in accordance with their respective contributions to it. In other words, where the contributions have attained some permanent form, by incorporation in an existing matrimonial asset, it would be unreasonable not to take this into account.

The concept of unjust enrichment is not one which is confined to de facto relationships and in so far as it is a basis for division of assets to which more than one person has contributed, I think it is applicable to the facts of this case. It is analogous at least to the concept referred to above, that both parties already had an interest in an asset at the time of marriage. In this case, the applicant began by taking a position of employment with the deceased and during the period of her employment, made significant contributions to the development of his principal asset, the farm property. Subsequently, when they married, I think it is proper to conclude she already had in the unusual circumstances of this case, an interest which the developing law can properly recognise.

I therefore conclude that it is proper to take into account, contributions made by Mrs Wadham to the development of the farm property before the marriage took place.

In this case it is clear and I accept, that Mrs Wadham made both direct and indirect contributions to the development of the farm. The direct contributions involved the work she did on it; the indirect, the domestic contributions

she made, freeing the deceased to do the work he did and the acceptance of frugal living conditions and no wage. To that extent therefore, I think that the contributions she made before the marriage are relevant and may be taken into account in assessing what is an appropriate proportion to represent her share to be assessed in these proceedings.

In this case, the deceased contributed a farm property and worked to a significant degree in the development and improvement of that property. The applicant on the other hand, made a contribution by way of work on the farm property and by the acceptance of domestic responsibilities freed the deceased to continue his own exertions. By accepting a very low standard of living over a considerable period, she allowed the accumulation of assets which has reflected in the size of the estate. In this case, I think that the fact that the contributions of the deceased extended over a longer period and that he provided the basic asset in the farm property, must reflect in his being entitled to a higher proportion than the applicant. This however, was not a short marriage and I think the length of the marriage itself is sufficient to have reduced to some extent the disparity.

Having regard to all the circumstances, I think that this is an appropriate case for the applicant to be awarded 40% of the estate of the deceased. Her own assets will of course need to be brought to account in arriving at the final amount to which she is entitled.

That leaves the question of the Family Protection Proceedings. The Will made provision for the payment of an annuity of $1,000 p.a. to the applicant. In view of the capital situation which she possesses as a result of the matrimonial property proceedings and her own acquisitions over the years, I do not think it could be contended that she is entitled to additional capital provision.

If it were not for the conclusion I have reached with regard to matrimonial property, I think the applicant would have had a clear claim under the provisions of the Family Protection Act 1955. The circumstances were such that although she owned her home unit, she had only a very modest income and at her age, as she points out in her affidavit, she is in need of assistance in the house and may ultimately be in need of full-time accommodation. Her situation has now been changed by a recognition of her rights against the estate in respect of matrimonial property. On the basis of her 40% award and bearing in mind the income which the lease produces, she will receive an increase in her income of something between $3,000 - $4,000 p.a.. This would I think, provide a reasonable amount of home help. It would not go very far in providing full-time accommodation.

Mr Houston asks that the applicant receive the total income from the estate. Mr Allen quite reasonably points out that it is not desirable that a distribution of the estate should be prolonged because of the effect which inflation will have on the value of the assets concerned.

Family Protection jurisdiction is designed to ensure proper maintenance and support is available in context to persons who are entitled to claim. The estate in this case is not small. While on the one hand, it is not reasonable for the applicant to receive now an income which she neither needs nor spends, I think it must be contemplated that her needs may increase markedly in the future and I think too that she is entitled at this stage of her life, to live at a level which the financial position of her husband would have permitted before, but which his attitude towards his assets never allowed to occur.

I think it is reasonable for the applicant to receive the whole of the income from the residuary estate during her lifetime. In that respect, the terms of the Will are varied.

Having regard to the circumstances I think it is reasonable that all parties should receive costs out of the estate and counsel are invited to submit a memorandum for this purpose.

R Q Miller J

Solicitors for Plantiff Applicant: Messrs Evans, Bailey and Company, Hamilton

Solicitors for Defendant Respondents: Messrs Edmonds, Dodd and Company, Te Awamutu

Solicitors for N. Morris: Messrs East, Brewster, Urquhart and Partners, Rotorua