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B/Worths

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.301/84

IN THE MATTER OF The Matrimonial Property Act 1963

1618

AND

IN THE MATTER OF The Estate of
L ABEL
late of Hamilton,
Company Director

BETWEEN E ABEL
of Hamilton, Widow

Applicant

A N D E ABEL
of Hamilton, Widow and
M WAKEFIELD
of Auckland, Chartered
Accountant, as Executors
and Trustees in the Estate
of L ABEL

Respondents

Hearing: 6 December 1984

Counsel:

Judgment: 18.12.84

JUDGMENT OF GALLEN J.

This is a notice of motion for orders pursuant to the Matrimonial Property Act 1963. The applicant is the widow of the late L Abel who died on 1982. The applicant therefore brings these proceedings under the provisions of the Matrimonial Property Act 1963 by virtue of the provisions of s.57 (4) of the Matrimonial Property Act 1976. She is clearly entitled to do this, see the decision of the Court of Appeal in Poppe v. Grose (1982) 1 N.Z.L.R. 491.

The applicant and the deceased were married on 21 June 1958. There have been 4 children of the marriage born on

respectively. At the time of the marriage, the applicant was aged years and was employed as a . The deceased was then aged and was employed by his father in a grocery store at Whangarei. Following the marriage, both applicant and deceased continued to work and the applicant made available the whole of her earnings for the common benefit of herself and her husband. At the time of the marriage, neither party had any substantial assets. The deceased is said to have owned stereo equipment, together with savings of approximately 300 pounds. The applicant had savings which totalled 400 pounds.

Following the marriage, they were determined to eventually own their own home and therefore made a conscious decision to live frugally with every possible sum saved from

their earnings. Approximately 12 months after the marriage, they believed that they had accumulated sufficient savings to go ahead with this ambition and accordingly purchased a section and eventually built their own home, borrowing an unspecified sum in order to do this. Approximately 4 years after the marriage, the deceased's father disposed of his business in Whangarei and shifted to Hamilton where he established a supermarket at Hillcrest. On doing so, he offered employment to the deceased and as a result the applicant and deceased sold their home in Whangarei and travelled to Hamilton. On arrival, they obtained a rented home in Hamilton and remained living in rented accommodation for some years. Eventually they purchased a home at Hamilton. This was financed with a small sum from savings, with the most part borrowed.

The Hillcrest supermarket was operated by a company known as Abel and once the Hillcrest shop had been established, a decision was taken to expand the business. The deceased and his father then took the lease of a further property at Hamilton, which they operated as a discount grocery outlet. Subsequently, further supermarkets were established at Melville, a suburb of Hamilton and eventually at Tauranga. In 1963, the deceased became a shareholder in the company, acquiring 2,000 shares. These were purchased, the source of the funds involved being the proceeds of the house property at Whangarei. There was no element of gifting.

In 1967, the deceased increased his shareholding to 3,000 and in 1969 to 4,667. The funds came from accumulated savings. The applicant holds 333 shares in the company which she acquired in 1967. The remaining shareholders are the father of the deceased who holds 4,333 ordinary shares and 10 preference shares and his wife who holds 667 ordinary shares. The operation of the supermarket is said to have been very much a family affair. There is no doubt that the deceased worked very long hours in connection with the operation of the business, but the applicant also worked directly in the business. Whenever there was a staff shortage, she assisted and she has testified to the fact that she assisted from 1-2 days up to a week or more at a time. She assisted with the employment of staff; took part in stock-taking and occasionally helped out with wages. It was the practice of the deceased to bring home with him work each evening and the applicant assisted her husband with this work, particularly with advertising. In her affidavit, she indicates one occasion when she personally made 30 or 40 staff smocks and for a period, she accepted responsibility for washing these each week. She also made cakes and other articles which were sold in the coffee bar associated with the supermarket. Those of course were direct contributions, but the applicant also made indirect contributions since she accepted the responsibility for coping with the family and maintaining and running the family home which she did in such a manner as to free the deceased from responsibilities, allowing him to play the part which he accepted in the operation and building up of the business.

Some 9 years ago, the applicant and the deceased sold their home in Hamilton and purchased 100 acres of farmland in the vicinity of Hamilton. They moved to that property and resided there until the death of the deceased in 1982. The deceased there began the establishment of a cattle stud. The applicant also accepted responsibilities in connection with the farm and the stud and carried out general farm work, including feeding-out; moving of stock; shifting electric fences and in particular, accepted major responsibilities in connection with entertainment occasioned as a result of the building up and operation of the stud aspect of the farming.

For some 2 years before the death of the deceased, he suffered from ill health and during this period the applicant was required to and did accept, additional responsibilities, particularly in relation to the farm. Throughout the marriage, the applicant kept a vegetable and flower garden and did so to the extent that it was possible to sell flowers grown by the applicant in the supermarket. All the earnings which the applicant received, as well as the family benefit moneys which were paid to her on behalf of the children of the marriage, were applied for the benefit of the family as a whole and were used for the purchase of items such as furniture. The evidence of the applicant is supported by affidavits from the children of the marriage who substantially support her in her account of the manner of life the family enjoyed and the contribution which she made to the accumulation of family assets.

The net estate of the deceased for death duty purposes was $779,473.50. The greatest single asset was the value of the shares in the family business which amounted to $533,038. The value of the applicant's own assets is just over $160,000, made up of a half interest in the farm property at Government value, savings and the value of her shares in the family business.

Mr Hudson for the applicant contends that she is entitled to a substantial sum in respect of her claims under the Matrimonial Property Act 1963 and specifically submits that it would be appropriate if her interest were to be assessed at 50% of the total family assets. The claim is not opposed either by the executors of the estate of the deceased or by beneficiaries under that estate, or specifically, by children of the marriage.

There are an increasing number of cases of this kind coming before the Courts. A significant number of them are not opposed. Undoubtedly one of the attractions is the effect which a substantial award has on the liability of the estate to the payment of duties. The application should not however, even if unopposed, be regarded as a matter of form.

The Matrimonial Property Act 1963 made major changes in the law relating to the disposition of matrimonial property. In England, a line of decisions which may properly

be represented by the decision of the Court of Appeal in Hine v. Hine 1962 W.L.R. 1124, led to a position where the Court had accepted that the provisions of the Married Womens' Property Act gave the Court a discretion to make such order as appeared to be fair and just in all the circumstances of the case. That decision was not followed in New Zealand. It was ultimately held to be wrong in England. Up therefore until the passing of the Act in 1963, the law in New Zealand meant that assets accumulated by husband and wife fell to be divided, in the case of a dispute, according to strict legal and equitable laws. Following the passing of the 1963 Act, in Hoffman v. Hoffman 1965 N.Z.L.R. 795, Woodhouse J. referred to the background and at p.800, that learned Judge made the following statement"-

> "Marriage is a partnership of a very special nature and with respect I think this act puts a proper emphasis upon that fact. In my opinion, it enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis, not only to the part played by the husband, but also the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. Each is in a unique position to support or to undermine the constructive efforts of the other and it appears to me that consideration of this sort will now properly play a considerable part in the assessment to be made. At least it can be said with confidence that artificial adjustments founded merely on money contributions by the one spouse or the other, can now be avoided and that women who have devoted themselves to their homes and families need not suddenly find themselves facing an economic frustration......which their husbands or wives who are wage earners have usually been able to avoid."

The learned Judge referred to the capital family assets as being the working capital of the marriage partnership. While that decision was referred to with approval in a number of subsequent cases, generally speaking the proportion which the Courts considered appropriate to represent that part of the marriage partnership capital accumulated as a result of domestic contributions of the wife, was regarded as fairly small. It should not be forgotten that there was a distinction in the 1963 Act between the matrimonial home itself and other assets and the approach of the Court towards the division of these. In E. v. E. 1971 N.Z.L.R. 859, the Court of Appeal laid down certain propositions of which the most significant had the effect of leading to a conclusion that contributions made to the home and family could not reflect in business interests unless it was shown that a direct contribution had been made to that business. In Haldane v. Haldane (1976) 2 N.Z.L.R. 715, the Privy Council considered the Matrimonial Property Act 1963 and substantially liberalised the approach to be adopted to the interpretation of that Act. In particular, their Lordships held that an asset by asset approach was not required by the Act and that consequently, a contribution made in one area could properly reflect in another.

It should not however be forgotten, that the decision in Haldane v. Haldane had no real bearing on the assessment of contributions as such. In Haldane's case, the

wife did not appeal from the decision in the Supreme Court. The appeal was by the husband. Consequently when the wife appealed to the Privy Council, she was not in a position to appeal against the original assessment which had been made subject to the restrictive conclusions of E. v. E.. Haldane v. Haldane should not therefore be regarded as an authority in respect of the proportion of division which had in that case been fixed in the Supreme Court

The passing of the 1976 Act meant that there was never any opportunity for Haldane v. Haldane to have a follow-on effect on the assessment of contributions. Speaking in very general terms, while there are major differences between the Acts, the basic philosophical difference may be said to be that under the 1963 Act, the Courts approached an assessment of the rights of the parties by weighing up the contributions which had been made to the assets accumulated during the marriage. Under the 1976 Act, there is a presumption of equality which can be displaced in certain circumstances which includes a comparison of contributions. There has been some speculation as to the reason why this statute should require applications brought after the death of a spouse, to be dealt with under the provisions of the 1963 Act. Mr Hudson made the submission that this reflected the difference in onus which appears in the two Acts. He suggested that since in the case of a deceased spouse there is no person necessarily able to controvert any argument which is put forward, it is desirable that the onus contemplated by the 1963 Act should apply.

There have been a number of decisions in the High Court where the approach to applications of this kind has been considered. In South British Guardian Trust v. Plumley (1983) 1 F.R.N.Z. 73, Greig J. referred to the need to up date the approach in the light of 1983 conditions. The attitude to the division of matrimonial property within the community must by now have been affected by the provisions of the 1976 Act, but I do not think that can blur the basic distinction between the approaches under the two Acts. At the same time, I think it may well affect the assessment of contributions. In the early years of the 1963 Act, the assessment of the value of particularly domestic contributions, tended to be down-graded by comparison with that made to the accumulation of business assets. In my view, it is appropriate to use the starting point indicated by Woodhouse J. in Hoffman v. Hoffman. That is that the comparison of contributions should be one rather of effort than of monetary value. On that basis, where one party has worked hard in the home as the other has worked in the business, then the contributions might appropriately be assessed on an equal basis. There is room of course for recognising special contributions such as a particular ability which reflected in the decision of the Court of Appeal under the 1976 Act in Reid v. Reid (1979) 1 N.Z.L.R. 572. It is also important to remember that cases under the 1963 Act accepted that certain property acquired independently of the other spouse, did not fall to be divided - a principle which, in the 1976 Act, has been translated into the separate property concept.

In this case, Mr Hudson contends that the contribution made by the applicant is exceptional. The evidence establishes quite conclusively that both parties put maximum effort into development of the matrimonial enterprise. I have no doubt that the deceased worked exceedingly hard in the business, but there is no suggestion that the applicant worked any less hard in the home or the business. By comparison of effort, it would be difficult to suggest that one had made a greater contribution than the other. Nor is there any suggestion that in this case any special contribution by way of exceptional skill, should reflect in an unequal division of the property.

There may have been a particular advantage brought by the husband to the accumulation of the family assets by virtue of his relationship with his father and the opportunity which this gave him to become involved in the business and to acquire shares. These acquisitions however in the development of the business, occurred after the marriage and at a time when it must have been apparent to all involved that this was genuinely a family enterprise. They were in any event, financed out of matrimonial savings.

Having regard to all the circumstances, I am prepared to accept the submission made that this is an appropriate case for equal division. This means of course that the assets of the applicant will need to be taken into account. In accordance with the above, counsel may submit a draft order.

Messrs Tompkins, Wake and Company,
Hamilton

Messrs Stace, Hammond, Grace
and Partners, Hamilton

Messrs McKinnon, Garbett and
Company, Hamilton

Messrs McCaw, Lewis, Jecks,
Hamilton