IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.243/84

IN THE MATTER OF The Matrimonial Property Act 1976

1466

BETWEEN D BOYDE
of Huntly, Stock Agent
Appellant

A N D A..... BOYDE
of Hamilton, Karitane Nurse
Respondent

Special Consideration

Hearing: 7 November 1984

Counsel: E.J. Hudson for Appellant
P.R. Heath for Respondent

Judgment: 28.11.84

JUDGMENT OF GALLEN J.

This is an appeal against a decision given by Judge Ryan in the Family Court ordering a division of matrimonial assets between the appellant and the respondent on the overall global basis of 52½% to the appellant and 47½% to the respondent.

The parties were married on 1970 and there have been 2 children of the marriage born in and At the date of the marriage, the appellant was sharemilking and his accounts indicate that he was possessed of a herd, a tractor, a car and certain plant. On the figures indicated in his accounts, he had net assets as at the date of the marriage in the vicinity of $3,416. Counsel for the appellant submitted that the actual value was somewhat higher because the herd was shown in the accounts at standard value and the evidence clearly established that sales and purchases of stock had taken place at about the time at rather higher figures. There was no evidence as to actual value at the time. I think however, it may reasonably be said that the submission has merit and it is probable that the appellant's assets were rather higher than his books prepared for taxation purposes at the time indicated.The respondent had no assets at the time of marriage.

From the date of the marriage unti the appellant and the respondent carried on sharemilking on the farm property which had belonged to the deceased parents of the appellant using the herd which was the property of the appellant at the time of the marriage. In 1973, a farm property was purchased in the joint names of the appellant and the respondent at for $40,000. The whole of the purchase price was financed by borrowing. $23,000 was advanced by the Estates of the appellant's parents and the balance was made available by the bankers to the parties.

There was evidence that the appellant and the respondent paid interest on the moneys borrowed from the appellant's parents' estates. In 1976 the share of the appellant in his parents' estate was calculated at $22,144. He paid to the estate the sum of $855 being the difference between his share in the mortgage advance made in 1973 and effectively the mortgage was released as representing his share in the estates.

While the parties were sharemilking, both appellant and respondent played their part in operating the farming venture, the respondent assisting with milking and doing other chores which frequently fall to the lot of a farmer's wife. The Road property in Stratford purchased in 1973, was run for dry stock. The appellant had accepted employment as a stock agent. This was a full time occupation and he ran the farm as an additional interest. The respondent took employment during the week at this time and her earnings were made available to the family enterprise. There was some dispute as to the number of nights per week she worked, but it was a refreshing factor in this case that the parties did not seek to denigrate the contributions which the other had made. Both accepted that the other had worked hard and clearly they must have done so to meet the substantial responsibilities involved in operating a farm while holding down additional outside employment and coping with the needs of a family.

In 1981, the property was sold for $150,000. After payment of all liabilities and expenses, there was a balance left of $119,000. In 1978 before the sale of the property, the parties had shifted to Huntly. In 1983 that property was sold for $60,000 which after payment of liabilities, left a net profit of approximately $40,000. Subsequent to the sale of that property, a farmlet was purchased at Huntly. This property was purchased for $190,000 of which $130,000 was contributed by the parties from the profits made on the sales of the earlier properties. Since its purchase, that property has been run as a dry stock unit.

The appellant and the respondent separated on 1983. The son of the marriage remains with the appellant and the daughter with the respondent. The respondent claimed that during the course of the marriage, she contributed to the marriage partnership the sum of $5,000 which she said had been received by way of gift from her father. The respondent also claimed to have received the sum of $3,800 from her grandfather's estate. In respect of the $5,000 from her father, she said that sum was used for extras for the farm and that the amount received from her grandfather's estate went into farm development. These statements were contained in affidavits. The appellant in his affidavit in reply, denied that the sum of $5,000 had been made available and oral evidence was called at the hearing from a sister of the respondent who confirmed that she had

received a similar amount from her father and had been present when a cheque for some undisclosed amount was handed by her father to the respondent. The learned Family Court Judge specifically found as a fact that he was satisfied that the sum of $5,000 was made available to the respondent and by her to the family partnership.

The first point on appeal made by the appellant was that the learned Family Court Judge had erred in respect of that finding. Counsel indicated that the respondent's contention as to this sum was contained in an affidavit as was the appellant's denial and that the evidence of the respondent's sister was not sufficiently cogent to justify the finding. Because the evidence had been substantially contained on affidavit, he submitted that the decision was not one which involved credibility and could be reconsidered. The respondent in the face of this attitude, sought leave to produce additional evidence from the respondent's father. The respondent was not required to appear for cross-examination, although the appellant was required to do so. While the evidence available to the learned Family Court Judge may not have been conclusive, I believe he was entitled to come to the conclusion which he did. Had the contribution been seriously in dispute factually, then it would have been open to the appellant to require the respondent to submit herself for cross-examination and this course was not adopted. However this may be, counsel for the appellant was not in a position to point to any material which would suggest that the

conclusion was wrong.

Under those circumstances, I indicated that I was prepared to accept the conclusion of the learned Family Court Judge and therefore saw no need to grant leave to adduce additional evidence. While there is clearly power to allow such evidence to be called and I accept that the jurisdiction to do so is wider in respect of matrimonial property appeals because of the wording of the Act , nevertheless, there are good practical reasons why the calling of evidence should be regarded as exceptional and indeed this is the view of the Court of Appeal expressed in Castle v. Castle (1980) 1 N.Z.L.R. 14.

The learned Family Court Judge in his decision, identified the matrimonial property and concluded that its total value was $148,852.32. Having accepted that the amounts claimed by the respondent to have been made available to her by her father and grandfather were in fact put into the family enterprise, he concluded those sums would effectively be regarded as counter-balancing the stock which the appellant brought to the marriage and he indicated that that being so, he intended to disregard those contributions. The respondent had sought an equal division of matrimonial property. The appellant considered that it should be unequal, relying on the provisions of s.15 (1) and in particular, asserting that the advance made by the estate of the appellant's parents was the source of the parties prosperity. The learned Family Court

Judge referred to the provisions of s.15 (1) and of the 1983 amendment. In respect of that amendment, he indicated that he was unable to see any difference between the replacement of the words "clearly being greater", with the words "being clearly greater". He accepted that with the exception of the contribution made by the appellant's parents' estate, the contributions made by the parties had been equal. He then concluded that given what he described as the foundation for the matrimonial property build-up provided by the legacy from the appellant's parents' estate, there should be some small difference, but he was not prepared to base that difference on the amount which the estate provided. He concluded that a proper differentiation would be to make a division of matrimonial property as to $52\frac{1}{2}$% to the appellant and $47\frac{1}{2}$% to the respondent. He then applied those percentage figures to the total of the matrimonial property and went on to order that the appellant should be given an opportunity to buy out his wife's interest.

The appellant appealed on four grounds:-

"1. THAT His Honour the learned Family Court Judge was wrong in fact in finding that the respondent contributed to the marriage partnership the sum of $5,000 alleged to have been received by way of gift from her father.

2. THAT His Honour the learned Family Court Judge erred in assessing the contributions of the respondent to the marriae partnership in that:
(a) He failed to give weight to the contribution made by the appellant of bringing to the marriage partnership stock, plant and a motor vehicle.

(b) He was wrong in principle in disregarding the contributions made by the appellant of bringing to the marriage partnership stock, plant and a vehicle.

(c) He failed to give any or sufficient weight to the contribution made by the appellant of obtaining moneys from his parents' estate to enable the purchase of the Stanley Road farm property.

3. THAT His Honour the learned Family Court Judge's decision to divide the matrimonial property 52½% to the appellant and 47½% to the respondent was wrong in principle.

4. THAT His Honour the learned Family Court Judge was wrong in principle in calculating the party's interest in the matrimonial property in that he made a percentage division across the board."

The respondent cross-appealed on the following ground:

"THAT the learned Family Court Judge was wrong in law in holding that there had been contributions by the husband being clearly greater than the wife in terms of Section 15 (1) of the Matrimonial Property Act 1976. It is submitted that any division of property should be an equal division of all property of the appellant and the respondent."

As I have already indicated, I concluded that the appellant was not entitled to succeed in respect of the first ground of appeal. As far as the fourth is concerned, both parties are agreed that although it may have been a convenient way of disposing of the dispute between the parties, to apply the percentage for division effectively across all matrimonial property, this was not in accordance with the Act. In particular, the homestead and family chattels should have been divided equally. While I understand the reason behind the decision of the learned Family Court Judge in endeavouring to arrive at an order which overall reflected a just division, I think there is merit in the contention put forward that he was not entitled to do this.

The parties are agreed that in accordance with a valuation produced at the hearing, the appropriate value for equal division of the homestead is $66,000. Counsel are agreed that a half of the homestead figure together with a half of the family chattels after making allowance for certain retained chattels, gives a figure of $29,531 to be paid to the respondent in respect of this property.

In essence, the appellant's argument as to the balance is that the learned Family Court Judge failed to give sufficient weight to the contributions made by the appellant firstly, at the date of the marriage and secondly, in the funding made available through the advance from his parents' estate. He submits that when the learned Family Court Judge referred to the assets of the appellant at the date of the marriage, he referred only to stock which did not take into account the tractor and plant and further, that in looking at the monetary value of the assets only, the learned Family Court Judge failed to take into account the particular advantage they conferred in that being associated with the sharemilking enterprise, they allowed the family unit to carry on sharemilking. It is convenient to deal with this contention first.

It is true that the learned Family Court Judge did refer only to stock in his decision, but it should not be forgotten that the decision was an oral one and I think in context bearing in mind the overall assessment, the learned Family Court Judge was entitled to look at the contributions as he did as being roughly equivalent. Mr Hudson says this does not take into account the special advantages which the assets of the appellant had in enabling the parties to carry on with the farming enterprise. He says that an assessment

on a purely monetary basis is contrary to the general principles of the act which have been authoritatively held to frown on an assessment based on the monetary values of contributions. I accept of course that it is not proper to consider non-monetary contributions as being in any sense less significant than monetary ones, but in this case the learned Family Court Judge has not done that. What he has done is attempted to compare particular contributions which may readily be compared in terms of money values and I can see no error in that provided any other relevant circumstances are also taken into account. Mr Hudson's submission is of course that there are other relevant circumstances in this case. The problem is that such circumstances may also apply in respect of the monetary contributions made by the respondent. The evidence does not indicate the purpose to which these contributions were put except very generally to indicate that the substantial sum was used for farm development. In at least a broad general sense, this tends to equate with the advantage Mr Hudson contends the appellants' farming assets had. I cannot find that the learned Family Court Judge was in any sense in error in this aspect of his decision.

The major dispute between the parties arises however in respect of the proportions of division. For this it is necessary to consider the provisions of s.15 of the Act. The learned Family Court Judge noted that the Act had been amended in 1983 but concluded that the amendment had no significance.

Counsel take issue with this and in particular, counsel for the respondent submits that the change was made to incorporate a view expressed by Woodhouse J. in the case of Reid v. Reid (1979) 1 N.Z.L.R. 572. At p.586 the learned Judge indicated that the use of the word "clearly" was not to be interpreted as the way in which the contributions were to be seen, but the degree to which one was to be considered greater than another. He indicated that he was aware this involved transposition of words but considered that this was required by the context. At p.599, Cooke J. appears to have adopted an opposite view.

Under those circumstances, counsel submits and I think rightly, that the action of the Legislature in adopting the actual order of words suggested by Woodhouse J. is significant. I think it must now be accepted that the comments he made in Reid v. Reid represent the way in which the amended section should be interpreted. Subsequently in the same decision, Woodhouse J. indicated that on the basis of the interpretation which he adopted:-

> ".....for my part such a disparity would involve in practical terms a finding that the one contribution had been at the very least one quarter greater in its value for the marriage partnership than the other."

He went on to say at p.586:-

> "In terms of percentages such a finding would produce an apportionment of approximately 45 percent on the one side and 55 percent on the other. I think, too, that if artificial refinement is to be avoided, closer progressive steps than one-quarter or one-fifth could hardly be used to determine the varying degrees by which one contribution might seem greater than the other. If this approach were adopted then assessments that one was greater than the other by one-quarter or by one-half or by three-quarters would produce approximate answers on a pro rata basis of 45:55 and 36:65. It follows, of course, that if an assessment of the respective contributions were to produce a definitive result of that kind for the purposes of s.15 (1) the same answer would need to be applied when determining the respective shares of the parties in their matrimonial property in terms of s.15 (2)."

Counsel for the respondent submitted that on the basis of the findings of the learned Family Court Judge in this case, the disparity was not sufficiently great to meet the criteria set out by Woodhouse J. and that under those circumstances, the general assumptions of equality should prevail. It should be noted however, that Woodhouse J. in Reid v. Reid did not conclude that mathematically speaking, if there was a disparity, it would have to be at least 25%. He went on to compare the contributions in that case and concluded that there was a disparity.

The question of disparate contributions has been considered in a number of cases. Counsel for the respondent quite properly makes the point that all of those decisions reflect the law before the amendment to the Act. That change however, goes to the degree of the contribution which is required rather than the nature. In Mills v. Dowdall (1983) N.Z.L.R. 154, the Court of Appeal clearly accepted the possibility that the advantage achieved through a family relationship might properly in the appropriate case, be considered as a contribution.

Disparity of contributions was also considered by the Court of Appeal in the case of Maw v. Maw (1981) 1 N.Z.L.R. 25. There have been a number of decisions in farming cases which have understandably enough tended to start with Maw v. Maw as the starting point. Assessment of disparity of contributions has tended to vary, taking into account the particular circumstances of each case. For example, the length of marriage can have the effect of reducing the significance of some contributions and increasing the importance of others.

In this case, the marriage lasted 13 years which is not in the shortest category, nor is it in the very long category. That being so, I think that the significance of the initial family contribution made by the husband had not diminished as much as it may have done had the marriage been longer. Clearly the learned Family Court Judge considered that there was a disparity for this reason and I agree with him.

I am of the view however, that once having arrived at this decision, he did not adequately reflect it in the ultimate proportions he put forward.

I arrive at this conclusion for two reasons. The first is that the length of the marriage had not in my view been such as to so substantially reduce the significance of the family advantage which enabled the parties to acquire the assets under consideration but more importantly, because of the comments made by Woodhouse J. in Reid v. Reid where he indicated that the need to establish a significant degree of disparity to comply with the terms of the section, was such that small variations in percentage would be inappropriate. That observation must apply with special force to this case where the actual decision involved a differentiation of 52½% to 47½%.

I am reluctant to interfere with what is a discretionary decision. Having accepted however that the decision cannot stand in so far as it did not provide for an equal division of the homestead and matrimonial chattels, I think it is appropriate to reflect my view on the appropriateness of the percentages by making a change in that area. At the same time, I think also the conclusion of the learned Family Court Judge to the effect that there was not a very large disparity, should be preserved.

The appeal will accordingly be allowed. The homestead and matrimonial chattels are to be divided equally. The balance of matrimonial property is to be divided on the basis of 45% to the respondent and 55% to the appellant. The cross-appeal is allowed to the extent reflected in the above decision. Having regard to the circumstances, there will be no order for costs.

Solicitors for Appellant: Messrs Tompkins, Wake and Company, Hamilton

Solicitors for Respondent: Messrs Stace, Hammond, Grace and Partners, Hamilton