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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.454/84

IN THE MATTER of the Matrimonial Property Act 1963

BETWEEN K EIVERS

Applicant

A N D R EDGLEY

Respondent

A N D A.227/84

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of F EIVERS of Christchurch, Retired Farm Manager, deceased

BETWEEN K EIVERS of Christchurch, Widow

Plaintiff

A N D R EDGLEY of Wellington, Queen's Counsel, as Executor of the will of the abovenamed F EIVERS deceased

Defendant

Hearing: 15 October 1985

Counsel: J.F. Burn for Plaintiff and son
B.J. Drake for Defendant
G.D. Trainor for The Mother Aubert Home of Compassion Trust Board

Judgment: 21 NOV 1985

JUDGMENT OF HERON J

These are two applications heard together, one brought under the Matrimonial Property Act 1963 by the

applicant as widow against the trustees of her deceased husband's estate in respect of property owned by the deceased at his death. The applicant alleges contributions and seeks an order for the division of matrimonial property. The applicant is also the plaintiff in family protection proceedings brought by her again against the trustees of her husband's estate seeking further provision out of the estate. It is appropriate to deal with these closely related matters firstly by considering the Matrimonial Property Act application, required to be dealt with pursuant to s.5 of the Matrimonial Property Act 1963 which was preserved so far as actions brought by or against a deceased spouse were concerned by s.57(4) of the Matrimonial Property Act 1976.

The history of the marriage, and the circumstances relevant to both applications can be dealt with together. The wife is now aged 87. The husband was 80 when he died in September 1983. The parties were married on 15 April 1936 and there is one child of the marriage, a son now aged 47. The deceased commenced work as a farm labourer and became a farm manager, and was a farm manager at the time the parties were married. He continued in that occupation until 1952 when he left that employment to take work in Christchurch working as a labourer for a number of Christchurch companies, retiring at the age of 65. The wife indicated that she worked when they lived on the farm in the sense that she performed all the usual housekeeping duties, fed stock and did the sort of work expected of a farmer's wife whilst her husband worked as a manager. She was not paid for such work. She says that the assets that they acquired during their lifetime, apart from one which I will mention, resulted wholly from savings during the marriage. She speaks of inheriting some money which she used for the purchase of furniture in their home. At the time of the deceased's death the parties were living in the house that they owned at and there were other assets which had been accumulated. The wife had $12,000 in cash as a result of small regular savings being made over 50 years and the husband's assets comprised approximately $65,000 in cash assets representing as I have said savings accumulated

over his life. The matrimonial home at
is worth approximately $60,000. There is a mortgage investment of $9,800 and also an interest in the estate of the deceased's sister valued at $23,886. Whilst there was no direct assertion as to the means by which these assets were acquired, it would seem that they represent a lifetime's savings reflecting careful and prudent management of what must have been a relatively modest single income.

The principles to be applied are well established. The inquiry must be into the contributions made by the applicant to matrimonial property which contributions can include ordinary, domestic duties as well as the provision of money. See Haldane v Haldane [1975] 1 NZLR 672, and E v E [1971] NZLR 859. Apart from some inherited money which went into the matrimonial property generally the widow is able to show efforts whilst her husband was a farm manager which would perhaps involve a greater element of contribution than might otherwise be the case in urban marriage. But this work was undertaken only up until 1952 and about the same time as the only child of the marriage commenced employment himself. I think the Court is entitled to recognise that it would only be the combined, prudent management of this household existing as it was on a labourer's income which could have resulted in the accumulation of a relatively substantial sum in cash in addition to the unencumbered matrimonial home. In my view it would be paying only lip service to the clear direction given by virtue of the the Matrimonial Property Amendment Act 1968 inserted subs 1(a) to s 6 of the Matrimonial Property Act 1963, if in this case a substantial contribution was not recognised. In the context of 1985 there can be no doubt that contributions are measured by a somewhat more generous yardstick than was previously the case. In those circumstances I think there is considerable force in the suggestion made by Mr Burn that 40% of the assets overall, excluding the interest in his sister's estate, and making no distinction between the matrimonial home and the other assets, is appropriate. The matrimonial home was acquired some time after the parties worked together on the farm and I see little reason for any distinction between it and

the other assets.

Unfortunately in this case the benefits received by the widow under the will are of such an inadequacy that it is not appropriate to have regard to them.

Accordingly there will be under the Matrimonial Property Act 1963 an order vesting in the applicant 40% of the deceased's assets as at the date of death with the exception of the interest in the estate of A Eivers. This order is to be satisfied by the trustee in the manner I direct later in this judgment.

I turn now to the family protection proceedings. The deceased's will dated 30 September 1957 appointed R Edgley then of Christchurch, Solicitor, (now one of Her Majesty's Counsel) to be the executor and trustee and directed the trustee to permit the widow to occupy any house property belonging to the deceased at his death and the furniture therein for the benefit of the widow, and to pay her an annuity of 4 Pounds per week. After the death of the widow there was to be paid from the residuary estate a further annuity of 100 Pounds per year to the son, J Eivers, and after his death the residuary estate to go to the Mother Superior for the time being of the Home of Compassion Wellington. At the hearing of the family protection proceedings Mr Burn, who also appeared for the son, indicated that the son also sought further provision from the estate, and indicated that the primary inquiry should be directed to the interests of his mother and her requirements, before the question of any benefit for him should be considered. It will be seen that an annuity of $8 per week for the widow and an entitlement to live in the matrimonial home, the outgoings thereon being paid by the trustees but repairs being the responsibility it would seem of the widow has with the passage of time become an anachronistic provision. Mr Edgley's affidavit explained the circumstances surrounding the execution of the will, as he was able to recall it with reference to his file which fortunately was still in existence. He says that it seems that he had some difficulty

in obtaining the appropriate information from the deceased in regard to his will. There was no record on his file of his not being satisfied that the provision for the plaintiff was adequate or that he considered it could lead to litigation. He feels that had he been concerned about it he would have advised the deceased because he did advise him that the provision for the son was in his view inadequate. It is plain that the deceased was not prepared to accept the advice of Mr Edgley to make a better provision for his son, particularly in regard to the residuary estate. The deceased was apparently reluctant to entrust his son with any large sum of money having regard to his relative youth at that time, although there is no evidence of why he should have such misgivings and those seem to be simply of general observation rather than directed to Mr Eivers personally. No one can explain the decision to leave the residuary estate to charity by reference to any direct or immediate connection with that charity, although its good works were widely known then as they are now. The connection there was between the deceased and this organisation seems to have emanated originally from a connection that the widow had with that organisation which in itself was of no real significance. It seems however that the deceased was reluctant to consider the method by which he should dispose of the capital. It was only when he was pressed by Mr Edgley to give him instructions as to that, that he elected to allow the residue to go to the Home of Compassion.

It is appropriate here to consider the personal situation of the plaintiff and her son. The plaintiff is now aged 87. She has her own property comprising $12,000 in the Post Office Savings Bank. As I have said she has no other assets. The life interest would allow her to occupy the home but the annuity is entirely inadequate. Her son, now aged 48, is married with three children, and his income at his father's death was approximately $25,000. He works as a storeman with Air New Zealand. His wife worked until their first child was born in 1977. They have an unencumbered house property in Christchurch worth approximately $52,000. They have two small, inexpensive motor vehicles and a small amount of cash savings

of approximately $1,700. He speaks of a close relationship with both his parents and regular visiting by his wife and himself. There appears to have been a normal grandparent relationship between deceased and his grandchildren. Mr Eivers says that at the time of the making of his father's will he was 20 years old and living at home and in employment. He is unable to explain the particular reason why the will should be made in this way. Mr Burn, acting as he did for both the plaintiff and the son, indicated that with the consent of both the plaintiff and Mr J Eivers they would suggest that the balance of the estate, namely the 60% as determined, together with the interest in the estate of A Eivers, should be dealt with on the following basis. That the son would receive now an amount of $50,000, the charity the sum of $10,000 and the widow satisfaction of her 40% interest in the matrimonial property, by the house property being vested in her absolutely. The balance of approximately $50,000 being held by the trustee on trust for the widow and on her death to her son. That having been discussed between the plaintiff and her son, it seems to me there is a great measure of common sense in dealing with the matter in the way that the parties would prefer, provided I can be satisfied that I am in no way intruding into the rights of the charity beyond that justified. Mr Burn reminds me that but for the charitable considerations the parties in this case could have entered into a deed of family arrangement to achieve this, but of course I must be satisfied in the absence of a complete consent that such orders are in all respects in accordance with principle and the decided cases. The test now is clearly stated in Little v Angus [1981] NZLR 126. An adult son is entitled to sustain a claim notwithstanding that his requirements are not based on impoverishment.

In my view there was a serious breach of moral duty at the date of death of deceased having regard to the extent of his estate, the requirements of his widow, and the reasonable requirements and expectations of his son. The charity must accept that. I believe the figure proposed by Mr Burn, $10,000, is an appropriate amount for this charity in all the circumstances to receive. The estate is not large. In general

terms it would be unusual for a charity to receive such a proportion of an estate given the circumstances here. Clearly the interests of the charity cannot be overlooked or ignored. Again I think the figure proposed by Mr Burn is a proper one and I intend to make orders which recognise the proposal put by him to me.

There will be the following orders in respect of both applications.

1. In satisfaction of the applicant's claim under the Matrimonial Property Act 1963 the property at . Christchurch is vested in her.

2. From the other assets of the estate there is to be paid to J Eivers the sum of $50,000 and to the Mother Superior for the time being of the Home of Compassion, Wellington, the sum of $10,000.

3. The balance of the estate is to be held by the trustee on trust to pay the income arising therefrom to the widow during her lifetime, with the right to resort to capital if in the opinion of the trustee the same is required for the maintenance and support of the widow with a gift over on her death to J Eivers absolutely. The life interest provided in the will to the son is cancelled. The power of the trustees are to remain as in terms of the will.

4. There will be leave to apply to settle the form of this order or for further directions if required. The costs of the applicant in the matrimonial property proceedings and the plaintiff in the family protection proceedings are to be paid out of the estate. Mr J. Eivers is to meet his own costs

Robertson J.

Solicitors:

Alpers Johnston & Co, Christchurch, for Applicant/Plaintiff
B.J. & J.M. Drake, Christchurch, for Respondent/Defendant.