

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M No 91/87

Under the Matrimonial Property Act  
1963

in the Matter of the Estate of  
FRANCIS O'DOWD late of Auckland,  
Retired, Deceased

BETWEEN DOREEN MARY O'DOWD

Plaintiff

A N D

DOREEN MARY O'DOWD as  
Executrix of the Estate of  
FRANCIS O'DOWD

Defendant

Date of Hearing: 3 November 1987

Counsel: Ms Lewis for Plaintiff

Date of Judgment: 3 November 1987

---

ORAL JUDGMENT OF McGECHAN J

---

This is an application brought under the Matrimonial Property Act 1963 by the widow and sole successor of the late Francis O'Dowd. In it under that Act she seeks a fixing of her share in that estate at 50% and an order for vesting accordingly. The proceeding nevertheless is one by Mrs O'Dowd in her capacity as widow against herself in her capacity as executrix. As she is the sole successor and taker by survivorship the only effect of orders made will be in relation to estate duty. With that in mind Mr Justice Prichard directed that the Commissioner of Inland Revenue be served. He has indicated to the Court through counsel that he takes no position in the proceeding and did not appear at

hearing. I treat the revenue consequences one way or the other as merely incidental and as immaterial. The Court needs always to approach these applications with some care. It is not to be used as some form of rubber stamp which on a half informed basis makes orders which must be unopposed for purely revenue purposes. Having reminded myself of that need for caution there is of course nothing at all to stand in the way of an appropriate order where the circumstances so dictate.

In this case I had the benefit of an affidavit, albeit filed at hearing, and later, when I perceived and expressed concern over difficulties, the benefit of some oral evidence by leave by Mrs O'Dowd who helped with further background. The history which is revealed is a common enough one of its time and for its type. I doubt whether some of those who are now younger have any concept of the difficulties of setting up a business and a home in the 1930's and through the 1940's after the war. Times were indeed hard. This story reflects that very situation.

Put very briefly the pair were married in 1947, the husband having returned from the war. Both were aged in their middle 20's. Mrs O'Dowd had some office and clerical skills. Her late husband had no particular skills but obviously had a real determination to work and to succeed. He set up a diecasting business and they set up a house and proceeded to have a family of five children. As tended to happen in those days the children came close together. There was little in the way of domestic appliances and the work of a housewife and mother was hard and dedicated. He also worked long hours. Naturally, as the mother of a young family and given the nature of the business, she would not have been able to do a great deal on the shop floor but she certainly did everything she could in the evenings by way of book-keeping and clerical assistance and I have no doubt general encouragement and availability for odd jobs. I

suspect, as was common at the time, she had a better business brain and a tidier head for figures and details than her hard working husband. It would have been a common enough situation. They accumulated money slowly in their different ways. She to a limited extent at outset from her own earnings and family benefit. He from the business. Much was ploughed back in, including any payment shown as made to her by her husband's company in return for her services and so they proceeded on through life in a normal enough and happy enough way accumulating assets until ultimately with advancing years the business was sold some 14 years ago or thereabouts. By the time of her late husband's death the assets, including residential property registered as a joint family home, had accumulated to a nett value of some \$634,000.00.

The claim as I have said must be determined under the 1963 Act which, for some reason known only to Parliament and successive governments, has been allowed to remain in relation to claims against deceased spouse's estates. That Act while in many ways the parent of the present 1976 equal sharing act traditionally was approached differently. There was not a statutory presumption of equal shares. Instead the Court was directed, subject of course to questions of express common intention, to ascertain contributions, ultimately as a result of the Haldane decision on a global basis. The traditional attitude was to regard contributions of a non-monetary or non-physical nature as being less productive. The result was that the services of a wife and mother as such around the home, and even to some extent in the business and farm, relatively tended to be somewhat downgraded. The tide was perhaps turning with the Haldane decision but that roughly speaking was the situation at the time the 1976 Act was introduced and probably was the reason for the 1976 Act. It is hard now for us sometimes to turn our mind back to that previous way of thought which on customary social thinking in 1987 seems strange and indeed to some at least wrong.

I am grateful to counsel for reference to two cases. One is the reported decision of His Honour Mr Justice Greig in South British and Guardian Trust v Plumley [1983] 1 FRNZ 73. I need not go into details. The significant feature of that decision for present purposes is that His Honour, with the benefit of reservation which I do not have, was prepared to construe the 1963 Act more liberally than previously had been the case. His Honour said at p 74:

"... it is in my view inevitable that the Act must be applied and the discretion exercised to achieve justice in 1983. That means that I am not bound by what now appears as rather meagre awards to a spouse under the 1963 Act. Of course each case must be determined on its own facts but it appears that before 1976 a spouse seldom received an award of a half of the property in dispute. The limiting factor is the contribution by the spouse to the property but I think that today, independent of the changes made by the 1976 Act, a wife's contribution may be more generously assessed."

With respect His Honour Mr Justice Greig appears to be prepared to adopt an interpretation more in keeping with modern thinking and notwithstanding apparent Parliamentary hesitancy in that regard.

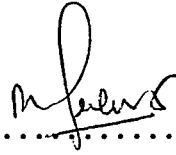
The second authority is a decision of His Honour Mr Justice Williamson in Stevenson v Young and Another (unreported) High Court Christchurch 7 October 1986 M 173/86. Again I need not go through the facts. They have a certain resemblance to the present but it is obvious that in the course of a joint enterprise business between the pair both spent many hours many days a week actually within the business itself. On that basis, and with respect not surprisingly, Mr Justice Williamson was prepared to award 50%. I think an interpretation which attributes to him an initial assumption that 50% should be awarded may be a little strained when the judgment is read as a whole but such in the end was the decision on the facts. If the present case were to be judged on the traditional basis under which the 1983 Act was approached, even allowing for

the developments in Haldane, I would think the present applicant would be entitled to about one-third of the nett estate. That would have been consistent with awards and approaches made in many very similar situations, and appeals as intrinsically right on the evidence.

The question is whether I should join His Honour Mr Justice Greig and adopt a more liberal approach in 1987. It is not suggested, and I think very wisely not suggested, that any award exceeding half should be made, so a liberal approach would produce something within that range. In the end the amount concerned, if anything, by way of duty saving may not come to very much. Quite deliberately I have not attempted the arithmetic. The question is one of principle. I think the efforts of Mrs O'Dowd in the early years of this marriage, at a very difficult time, were probably of considerable, and indeed crucial, importance in laying the foundation for the family's ultimate wealth. Little things by way of assistance to a very busy and very tired man can make all the difference between success and failure. On the facts I think I can justify taking the more generous approach which His Honour Mr Justice Greig was persuaded to take.

There will be an order assessing the share of the plaintiff, Mrs O'Dowd, in the estate of the late Francis O'Dowd at 50% of the nett estate and vesting accordingly. I am aware there is a factual difficulty over the status of a section adjacent to the former family residence. I am not in this proceeding prejudging that difficulty in any way. If that section is a part of the estate, as a result of this judgment she has a 50% entitlement. If not, then of course it is hers by survivorship through passage of the extended joint family home area.

I would emphasise that while I have been prepared to approach this matter along with Mr Justice Greig in a more liberal fashion than previously has been the case, other cases must depend upon their own facts and such would not necessarily always be the appropriate approach. Costs are reserved.



.....  
R A McGechan J

Solicitors: Kensington Swan, Auckland for Plaintiff