

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M 239/85

IN THE MATTER of the Matrimonial
Property Act 1963

A N D

IN THE MATTER of the Estate of RUSSELL
WILLIAM LAWTON DYER late
of North Taieri, Farmer,
Deceased

BETWEEN JANET BEATTIE DYER of
Mosgiel, Widow

Plaintiff

A N D

JANET BEATTIE DYER of
Mosgiel, Widow, as Execu-
trix and Trustee of the
Will of the said RUSSELL
WILLIAM LAWTON DYER

Defendant

M 238/85

IN THE MATTER of the Family Protection
Act 1955

A N D

IN THE MATTER OF the Estate of RUSSELL
WILLIAM LAWTON DYER late
of North Taieri, Farmer,
Deceased

BETWEEN JANET BEATTIE DYER of
Mosgiel, Widow

Plaintiff

A N D

JANET BEATTIE DYER of
Mosgiel, Widow, as Execu-
trix and Trustee of the
Will of the said RUSSELL
WILLIAM LAWTON DYER

Defendant

NOT
RECOMMENDED

Hearing 8th May 1987

Counsel R. M. Kean for plaintiff
D. J. More for defendant and Gertrude Jane Dyer
P. S. Rollo for four adult children of deceased
J. M. Conradson for infant son and grandchildren
born and unborn of the deceased

Judgment 8th May 1987

ORAL JUDGMENT OF TOMPKINS J

The plaintiff is the widow of Russell William Lawton Dyer who died on 13th December 1979. Probate of his last will dated 14th June 1972 was granted to Maurice John Walsh of Mosgiel, solicitor and to his widow. Mr Walsh died on 21st October 1984. In this judgment I shall refer to the plaintiff in her capacity as the widow of the deceased, as the plaintiff, and in her capacity as trustee of the estate, as the trustee. Mr Kean for the plaintiff, has made it clear that he wishes the Court to rule on the application under the Matrimonial Property Act before it does in respect of the application under the Family Protection Act. Both applications are out of time. I am satisfied, from the material produced before the Court, that there are adequate reasons for the delay that has occurred, and that the assets in the deceased's estate have not been distributed. Mr Rollo for the adult children, consents to both proceedings being brought out of time. Mr Conradson is not in a position to consent, but he raises no objection. There will therefore be orders in both proceedings granting leave for them to be brought out of time. In

respect of the proceedings under the Matrimonial Property Act, Mr Kean has made detailed submissions to me based on the factual evidence contained in the plaintiff's affidavit in support of her claim under that Act. In view of the attitude of the other parties to which I shall shortly refer, I do not propose in this judgment to set out in detail the family history or the grounds advanced, but I am satisfied that the plaintiff made an active and valuable contribution to the matrimonial property, sufficient to justify an order being made in her favour. Mr More for Gertrude Jane Dyer, the deceased's widow, advised that she would abide the decision of the Court. Mr Rollo for the four adult children, advised that he has obtained firm instructions from his four clients to consent to the order Mr Kean now seeks on behalf of the widow. Mr Conradson is not in a position to consent, however the infant son is aged 18. He has played an active part in the family discussions that have resulted in the proposal, and Mr Conradson has indicated his approval, both to the proposal under the Matrimonial Property Act and under the Family Protection Act. I should add that counsel are agreed that this always has been and still is, a closely knit harmonious family.

Mr Kean, for reasons that he advanced in detail in his submissions, contended that an appropriate Matrimonial Property Act order in favour of the widow would be for her to be awarded 40 per cent of those matrimonial assets that consisted of the assets in the estate of the deceased. In practical terms, the result of such an order would be that the debt of \$42,000 that

was advanced by the estate to the widow to enable her to purchase a house, will be cancelled and the widow, in addition, will receive a sum of approximately \$20,000 from the estate which approximates one sixth of the balance of the estate.

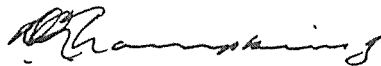
I am satisfied from the evidence that an award of this kind is an appropriate recognition of the contribution that she made to the matrimonial assets. There will therefore be an order accordingly.

Mr Rollo advanced a claim for further provision out of the estate under the Family Protection Act on behalf of the two daughters of the deceased. Under the terms of the will the children were not treated equally in two significant respects. First, under Clauses 5(a) and (b) the sons were entitled to share in first \$15,000 and secondly \$12,000 on the basis set out in those two paragraphs. The daughters do not. Then in Clause 5(c) the testator left the remainder of his estate to his children but provided that the share of each son shall be twice the share of each daughter. The further provision that Mr Rollo seeks on behalf of the daughters is that the daughters should in all respects be treated equally with the sons. He advises me that he has express instructions from the adult sons to consent to an order in those terms. Again, Mr Conradson is not in a position to consent on behalf of the infant son or the grandchildren, but he advises me that Murray has again participated in the discussions leading up to this proposal and that he approves of the

order suggested. Relevant to this application is the nature of the family unit to which I have already referred. Further, there is evidence to show that the two daughters played a role in the family and in particular in respect of some of the family assets that did not in any respect differ from that of the sons.

Under these circumstances I consider it appropriate to grant to the two daughters further provision out of the estate in the form sought by Mr Rollo. In respect of both applications counsel may submit orders to give effect to this decision.

Concerning costs, it is appropriate that the Court should order that Mr Kean, Mr Rollo and Mr Conradson should have their solicitor and client costs paid out of the estate. The draft orders to be submitted should incorporate the costs sought.



Solicitors

Messrs Webb, Brash, Ward & Co., Dunedin for plaintiff
Messrs Quelch, McEwen, Tohill & More, Dunedin for defendant
and Gertrude Jane Dyer
Messrs Brunton, Farry, Cassidy & Gowing, Dunedin and Mosgiel
for four adult children
Messrs Webb, Brash, Ward & Co., Dunedin for infant son and
grandchildren