IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. No.206/86

UNDER THE MATRIMONIAL PROPERTY ACT 1963
UNDER THE FAMILY PROTECTION ACT 1955

IN THE MATTER of the Estate of CHRISTOPHER MORGAN HANSEN late of Christchurch, Deceased

BETWEEN LENA ENID HANSEN

Plaintiff

A N D THE PUBLIC TRUSTEE sued as executor and trustee of the Will of the abovenamed Deceased.

Defendant

Hearing: 1 July 1987

Counsel: B.S. McLaughlin for Plaintiff
P.N. Rotherham for C.V. Hansen
T.G. Sullivan for Defendant

Judgment: 1 July 1987

ORAL JUDGMENT OF TIPPING, J.

This is a proceeding brought by a widow against the estate of her late husband under the Matrimonial Property Act 1963 and under the Family Protection Act 1955.

I take the following account of the broad background from the helpful summary supplied by Mr McLaughlin for the Plaintiff widow.

The deceased, Christopher Morgan Hansen, died on 16 October 1985 at the age of 82. He left him surviving his widow, the Plaintiff, then aged 63 and three adult children: Christopher aged 40, John aged 34 and Cecily aged 31. The two sons have not taken any part in the proceedings, having filed no address for service and no affidavit. [See accompanying minute as to son Christopher].

The daughter Cecily was represented at this hearing by Mr Rotherham and Mr Sullivan appeared for the executor, the Public Trustee. There are some grandchildren who are represented by their parents, but in view of the size of the estate there is no question of any independant claim being made by the grandchildren.

The deceased made a will on 23 September 1966 in which he named the Public Trustee as his executor, and then gave all his estate equally to his three children. There had in fact been two other children of the deceased's marriage to the Plaintiff but they had died, both at young ages, and well before the will was made in 1966. The will did not contain any provision for the Plaintiff widow.

The assets in the estate comprise a nett total of some $70,000.00. This is after the sale at $36,000.00 of the property at 71 Spencer Street which was, as I shall come to in a minute, the matrimonial home of the parties when they lived together.

It was the first and only marriage of the testator when he married the Plaintiff widow in November 1944.

After the marriage of the parties they had a number of different homes throughout the South Island because

the testator worked for the New Zealand Railways and was shifted from time to time in the course of his employment.

Some 16 years after the marriage, the late Mr Hansen retired at about the end of 1960 and at that time the parties moved to Christchurch where they bought the property at 71 Spencer Street. The title was taken in the name of Mr Hansen alone and his retirement gratuity from the Railways, was used to fund the purchase.

The separation of the parties, which features significantly in this case, took place in 1964. The late Mr Hansen however continued to live in the Spencer Street property until his death and it formed an asset in his estate which, as I have said, was converted by the Public Trustee, and realised the sum of $36,000.00. That can I think be properly taken as its value at the date of death.

The Plaintiff says that while the parties lived together she was engaged in the upbringing of the children, looking after the household, caring for the husband and generally acting as a wife and mother. She did not have any outside employment.

She says that life with the late Mr Hansen was far from easy. She speaks of his problems with alcohol. She mentions that he gambled substantially, she claims that he verbally abused her and was generally arrogant, crude and embarrassing in his behaviour. She also says that he held the purse strings and she was given no regular housekeeping money.

There were two separations before the parties finally separated in 1964. I shall have occasion to come back to that aspect of the case.

However, in 1964 and on medical advice, so the Plaintiff says, she finally left her husband. The children initially stayed with him but not long after the separation came to live with her. She says that she was almost entirely responsible for the maintenance and rearing of the children after the separation, although Cecily in her affidavit, does say, and I have no reason to doubt her, that the deceased did provide some contribution to the upbringing of the children by reason of paying school fees and various other bills pertaining to the children.

The Plaintiff says that she had to work very hard after the separation to look after the children and herself. She was able to put down a small deposit on a property in Rosewarne Street. She subsequently left Christchurch and went back to Central Otago for a period, then she bought another house in Christchurch in Spring Grove Road where, I understand, she now lives. She carried on working and retired some four or so years ago at the age of 60.

There is some differnce between the Plaintiff and her daughter as to how long the period was when there was some resumption of a relationship between the Plaintiff and her late husband. The impression created by the Plaintiff's affidavit is that she resumed something of a relationship over a period approaching ten years; although Cecily says the relationship, such as it was, only lasted for not more than one year.

It is very difficult fo this Court, on affidavits, without hearing the parties, to resolve the matter. In the overall view I take of the case it is not something which I think needs precise resolution. The

relationship was not in any sense by way of a resumption of cohabitation. The Plaintiff simply did some washing for her late husband, went to see him, took him shopping, helped him with his bets and when he was in hospital went to see him quite regularly.

I should now make brief mention of the fact that the late Mr Hansen seems to have been motivated to some extent, in his total exclusion of the Plaintiff from his will, by the proposition that she had committed adultery.

There is a note attached to the affidavit of the District Public Trustee by the solicitor who took instructions for the will in which there is reference to this subject, and it does, I think, appear probable, on the evidence, that this was a significant factor influencing the deceased in deciding the terms of his will, whereby he left everything to his three children and did not make any provision for his wife, now his widow.

The evidence pertaining to this shows that on the first occasion Mrs Hansen left home and went to live in the company with a man called Donoghue, who was a butcher and made it a condition of her living with him that she should work for him in the butcher's shop without wages, and, as the Plaintiff puts it, after sometime in this circumstance, as a matter of the lesser of two evils, she decided to go back to live with her husband.

Things did not work out and later on she left again and took up residence with a man called Hill, but again her relationship with him did not last and, as Mr McLaughlin

put it, in his submissions, he, Mr Hill faded out of the picture.

In support of the matrimonial property claim Mr McLaughlin submitted that the Plaintiff should be awarded a half share of the proceeds of sale of the property at 71 Spencer Street which, it will be recalled, had been purchased substantially with the husband's Railways gratuity.

It is I think convenient in this case, and in accordance with normal practice, to consider first the widow's claim under the Matrimonial Property Act because that is a logical preliminary in that it defines what is left in the estate to form the subject of any subsequent claim under the Family Protection Act.

There was clearly no direct contribution by Mrs Hansen to the acquisition of 71 Spencer Street but in my view there was a significant indirect contribution. That property became the parties' matrimonial home and, assessing the matter as if this claim hdd been brought not long after the separation, this would in my view have been a case for a significant award under the Matrimonial Property Act 1963, if such claim had been made during the lifetimes of both parties.

Mr McLaughlin emphasised the contributions of a wife and mother over a marriage which, for this purpose, can be taken as having lasted something like 20 years with three children, indeed five children if one counts the two that unhappily died at such a young age.

Mr Sullivan for the Public Trustee naturally and properly indicated that the Public Trustee would abide the decision of the Court, and Mr Rotherham for the daughter in

making submissions in reply to the matrimonial property claim accepted that there was no jurisdictional bar to that claim but drew to my attention the fact that the Plaintiff had decided not to bring a claim, either under the Matrimonial Prperty Act 1963 or under the Matrimonial Proceedings Act 1963, during the lifetime of her late husband and it was submitted in short, that by reason of the fact that she elected not to do so she should not get the full benefit of inflation since separation.

Mr Rotherham went so far as to submit that the Court, by reason of the delay in the widow not bringing a clai until after her late husband's death, some 21 years after the separation, should not allow the claim at all or at least should substantially discount it for that reason.

I take the view that the proper approach is to assess what would have been the widow's proportionate share of this property at or shortly after the date of separation. If one notionally credits her with that share at that time it seems to me that there is no logical reason why her thus assessed proportionate share should not carry the benefit of inflation from the time of assessment up until now.

There may be some force in the point which Mr Rotherham made, that an assessment of that kind should be discounted to some extent, by reason of the fact that Mrs Hansen has not had any input into the property, in the sense of maintenance of it, paying its upkeep, paying its rat that sort of thing during the intervening 21 years.

Against that, of course, is the proposition whi I think has some validity, that the late Mr Hansen has really had the benefit of his wife's proportionate share throughout

that period without any payment for it. That may sound a somewhat commercial approach. I mention it only as a counter weight to the proposition there should be some marking down by reason of no contributions by Mrs Hansen post separation.

I have weighed up in my mind all these various points. It was a marriage of some length, 20 years with three children. There is nothing to suggest that Mrs Hansen, during those years, did not pull her weight fully in the marriage. We are dealing with a matrimonial home and I consider that she is entitled to a substantial equitable share in that property and thus to a substantial share in the proceeds of sale.

Weighing up all the factors as best I can in my mind, my view is that the Plaintiff should be awarded a 40% share in the property and thus in the proceeds of sale and that results in her being entitled to 40% of $36,000.00, which on my arithmetic is the sum of $14,400.00.

I turn now to the claim under the Family Protection Act which Mr McLaughlin properly accepted must be viewed in the light of the award which has just been made under the Matrimonial Property Act.

It was submitted for Mrs Hansen, as Plaintiff under the Family Protection Act, that the Plaintiff had made a major contribution to the marriage up to the time when she left in 1964. She had been obliged to bring up the children to a frugal standard of living and after the separation of the parties, she contributed in a very broad sense by looking after the children and caring for them with some, but not much, assistance in material ways from the deceased.

We are, however, here dealing with a case involving a separated wife of considerable duration.

Mr McLaughlin helpfully referred me to a number of the principles pertaining to claims under the Family Protection Act and in particular to claims made by separated wives. I was referred to Re Churchill [1978] 1 N.Z.L.R. 744, and Barna v. McKenzie (1985) 3 N.Z.F.L.R. 529, the latter being a decision of Hardie Boys, J. I was also referred to an unreported decision of McGechan, J. in the case of Re Warman, A. 371/83 Christchurch Registry, judgment 31 October 1986.

On page 16 of that judgment, McGechan, J. said:-

> "I take into account also the approach appropriate in relation to claims by separated wives as explored in Re Churchill [1978] 1 N.Z.L.R. 744 and Barnar v McKenzie [1985] 3 N.Z.F.L.R. 529. At the risk of a self-condemning statement generalisations are dangerous. I adopt however wth respect the observation by Hardie Boys, J. in the latter case at 532 that:
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> 'whilst a separated wife is still a proper legal claimant and, without other disqualifying circumstances, will usually be entitled to succeed, the award will generally be relatively small.'"
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> McGechan, J. goes on:-
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> "Quantum will always depend in the end upon circumstances. The fact of separation - particularly when it has almost matured to divorce obviously is a relevant factor. However, it is only one factor amongst many."

Mr McLaughlin submitted that I should award, under the Family Protection Act, a lump sum and that such lump sum should be the same as he was contending for under the Matrimonial Property Act. In that context he was contending for half the value of the property at 71 Spencer Street, i.e. $18,000.00 and a similar sum was sought under the Family Protection Act.

Mr Rotherham made the submission that in all the circumstances the testator owed no moral duty to his separated wife of 21 years. I was referred to the wellknown case of Allardice and it was submitted that the testator had just cause to exclude his wife.

It was pointed out that there was no corroboration of the widow's allegations and that the daughter could not really confirm the matter or deny it by reason of her relatively young age at relevant times. Mr Rotherham also pointed out that this had been a case where there had been more than one separation. There was a separation in 1949 and another one in 1962 before the final separation in 1964 and Mr Rutherham further submitted that the Plaintiff did not in terms deny a close relationship with the two men whom I have mentioned.

It was pointed out that the deceased's will had been made in 1966, about two years after the separation, and Mr Rotherham submitted that sufficient time had gone by from the separation to support the proposition that he made, that it was not a will made punitively.

Mr Rotherham then correctly pointed out that there was evidence that the deceassed had given some support to the upbringing of his children. I have already mentioned and accepted that, and it was further pointed out that, in the last 21 years the wife had not really shown a great deal of interest in the deceased and on this point the question as to how long the resumed interest lasted has some degree of relevance.

In summary, Mr Rotherham submitted that the wife's circumstances, as they now are, to which I shall refer

in a moment, coupled with the relationship or perhaps absence of relationship, for some 21 years before death, demonstrated that there was no moral duty remaining on the testator to make any provision for his wife.

In so far as competing claims are relevant, there is of course no evidence as to the circumstances of either of the sons but I do note the point properly made by Mr Rotherham that, in summary, the daughter's circumstances are modest.

The widow's present financial position is as follows.

She has capital assets of -

(1) A property in Rosewarne Street with a Government valuation of $33,000.00 and a probable market valuation of between $30,000 and $35,000.00.

(2) She has the property where she lives in Spring Grove Road with a Government valuation of $35,500.00.

(3) She has cash in the bank of about $12,000.00; and

(4) She has a fairly antique Toyota vehicle valued at about $4,000.00 or thereabouts.

By way of income, she has the national superannuation of $284.00 a fortnight and she also has a Railways pension, which Mr McLaughlin found out about only recently, which properly was brought to the attention of the Court. This amounts to some $117.00 per fortnight, giving the widow a fortnightly income of about $400.00 or $200.00 a week.

I must also remember, as I do, that by reason of the award which I have just made under the Matrimonial Property Act, the widow's capital will be increased

to the tune of $14,400.00, subject to the costs of these proceedings.

If there had been no resumption of any relationship between these parties I think I would have been minded to take the view that there was no call for the testator to make any further provision for his widow, on top of the award which the Court now in effect makes for him under the Matrimonial Property Act.

While I apppreciate that the widow may have received some monies of relatively modest proportions for the services which she rendered to the deceased in the last period of his life, it seems to me that with that resumption of some degree of relationship, falling short of course, of cohabitation, there was some reconciliation between the parties and the wounds of earlier times I hope were to some extent healed.

It is however in my view a case for only a very modest award under the Family Protection Act. It is one perhaps which comes fairly close to the line as to whether or not it qualifies at all but influenced primarily by that late partial reconciliation between the parties, which I hope I am not over emphasising, I think that there was some call in this case for the deceased, irrespective of the award made under the Matrimonial Property Act to remember his wife of 40 years, I say that advisedly, (She was really a wife in reality for only 20 years) by making some provision for her in his will.

I am going to award what, on the face of it, might appear to be a strange figure, simply in order to make the total up to a round figure.

In my view the sum of $5,600.00 should be awarded by way of legacy to the Plaintiff under the Family Protection Act. The figure of $5,000.00 as a round figure would have been the one I would have picked other than perhaps for the slightly simplistic logic of making the total up to the round sum of $20,000.00 which strikes me overall as being a fair figure, bearing in mind the criteria both of the Matrimonial Prooperty Act and Family Protection Act. I emphasise however I have come to the total by the separate analytical routes which I have travelled along during the course of this judgment.

As to costs the Plaintiff will have a significant fund out of which to bear her proper solicitor and client costs and I do not propose to make an order in her favour.

The daughter has taken part, as she was entitled to do, and in order to make some allowance, as it were, in her favour, in relation to costs as against her brothers, I propose to award the daughter $500.00 for costs plus disbursements to be approved, if necessary, by the Registrar, to be paid out of residue.

I make it clear that the widow's awards are not to bear any part of that order for costs. That order is to run against residue once the widow's orders have been satisfied.

As to the sealing of the order the matter can be referred to me if there are any difficulties with the terms of the order. If a draft order is lodged bearing the

endorsed approval of all three counsel, the Registrar is authorised to seal an order in those terms without reference to me.

Solicitors:

Messrs Harold Smith & Dallison, Christchurch for the Plaintiff

Messrs Gough & Irving, Christchurch for C.V. Hansen

Public Trust Office, Christchurch