LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M503/91

UNDER the Matrimonial Property Act 1963

AND

UNDER the Family Protection Act 1955

IN THE MATTER of the Estate of A JONES

BETWEEN C JONES of Christchurch, Retired

Plaintiff

AND R HENDERSON of Christchurch, Chartered Accountant, in his capacity as Executor of the Will of A JONES late of Christchurch, Deceased

Defendant

Hearing: 27 May 1992

Counsel: N A Till for Plaintiff
J G Hardie for Defendant
S P Rennie for residuary beneficiaries

Judgment: 02 JUN 1992

RESERVED JUDGMENT OF HOLLAND, J.

The plaintiff brings proceedings under the Family Protection Act 1955 and the Matrimonial Property Act 1963 seeking further provision from the estate of her husband, who died on 1992.

The plaintiff and the deceased were married, each for a second time, on 1970 when they were aged and respectively. There were no children of this second marriage but the plaintiff had four children and the deceased had three children from previous marriages. Apart from the youngest child of the plaintiff all these children were independent of their parents at the time of the marriage.

The marriage was for some 20 and a half years but there was a further period of two years prior to the marriage when they had lived together as man and wife.

In accordance with a statement of assets and liabilities presented by the defendant on the day of the hearing, the nett value of the testator's estate is $129,913. According to the affidavit of the plaintiff her nett worth, independently of any interest in her husband's estate, was $123,257.

Under the terms of the testator's will the plaintiff is entitled to a life interest, terminable on remarriage, in the husband's half share of the ownership flat and furniture occupied by the plaintiff and the testator at the time of his death with power at the request of the plaintiff to sell and purchase another property or to receive the income from the proceeds of sale.

The plaintiff is entitled to the income from the residue of the estate during her life until her re-marriage and upon her death or re-marriage the residue is to be divided into four parts of which one part is to go to the

testator's son and three parts to be divided equally to the testator's two daughters in equal shares.

The assets of the testator comprise:-

1)	half share in the ownership flat	60,000
2)	half share of furniture and chattels	20,000
3)	moneys on investment	47,913
4)	shares in public companies	2,000
		$129,913

The plaintiff's assets are:-

1)	half share in ownership flat	60,000
2)	half share of furniture and chattels	20,000
3)	Datsun car	2,500
4)	Cash at bank	4,757
5)	Investments	29,000
6)	Loan to son	7,000
		$123,257

In accordance with the decision in Re Mora (1988) 1 NZLR 214 the plaintiff's claim under the Matrimonial Property Act 1963 is to be considered on its merits without regard in the first instance to the benefits which the plaintiff may be entitled under the will of the testator. Those merits are to be considered in accordance with the principles expressed by the Privy Council in Haldane v Haldane (1976) 2 NZLR 715.

The Court must consider the property owned by each spouse at the time the dispute between the spouses arises, in this case the date of death of the testator.

The performance of domestic duties in the matrimonial home by a wife is regarded by the legislature as a contribution to the matrimonial home and can be regarded as a contribution to matrimonial property generally, except that there will be some property which may lie outside the jurisdiction of the Court. That property was defined by the Privy Council at p.727 as being:-

> "Property to the acquisition, preservation or enhancement of which a spouse made no contribution at all either direct or indirect (that is, by releasing the partner for its acquisition, etc)."

It is further stated in Haldane that:-

> "It means that, apart from such assets as fall by their nature outside the Act, and apart from the necessary separate consideration of the matrimonial home and any other assets, there can be no justification or foundation for an "asset by asset" approach. It is, indeed, more immediately, incompatible with the legislative vindication of the moral rights arising from the functional division of labour between husband and wife which is implicit in the proposition that the court *may* consider the ordinary domestic contribution of a usual housewife towards assets other than the matrimonial home. The unfettered discretion of the court to make (subject to s.6(2) and regard to contribution) such order as is just is emphasised by the 1968 amendment to s.5(2)."

The plaintiff bases her claim on the fact that at the time of marriage she owned the home that was occupied by the plaintiff and the testator. It had been occupied by them for two years prior to marriage and was sold some months afterwards for $14,000. The testator had, however, altered the house and added a garage to it and re-paid a mortgage of $1200 which the plaintiff owed to her former husband. The testator clearly made substantial contributions to the plaintiff's property in this regard.

The proceeds of sale were invested by the plaintiff and have been retained by her except for a period when she made a loan to the testator for his business.

A section was purchased in the Marlborough Sounds and the testator used money from his business to build a home there. There was substantial work done by the testator in relation to the building and he was supported in this work by the plaintiff.

I infer from the fact that the plaintiff says "We bought a section" that it was purchased in the names of both the plaintiff and the testator and this has followed through from subsequent sales and purchases until the ultimate purchase of the ownership flat owned by the plaintiff and the testator at the date of death.

The plaintiff did at some stage lend money to her husband for his business but that was re-paid.

The plaintiff claims that much of the furniture and household effects were purchased by her from income earned from her investments and she also claims that she used the income from her investments for food and daily living expenses to supplement the housekeeping provisions provided by her husband. She appears to have had no other income except that for a few years of her marriage she received a modest wage from her husband's business. As the contents of the home are insured for $57,750 it would seem that the husband probably made a substantially greater financial contribution to the food and daily living expenses of them both and to the acquisition of furniture and furnishings than did the plaintiff.

In 1973 the plaintiff sold an interest in a property which had been gifted to her by her mother from which she received $8000. She received a further $5000 following her mother's death in 1982 and these sums together with the $14,000 earlier referred to comprise her present investments.

The testator carried on business as a scrap metal merchant, ultimately forming a company with his son, and that business was sold in 1983 for $62,000 plus $15,000 for stock. The testator's share of the proceeds of sale was retained by him and is reflected in the $47,913 by way of investment.

I am not in the slightest doubt that if the plaintiff and the testator had separated on the day prior to their death the plaintiff would not have been able to recover under the Matrimonial Property Act any sum from the testator. She undoubtedly was a dutiful wife over a period of some 20 years. She undoubtedly made contributions to the matrimonial property and it may well be said that the testator made no contributions to the $5000 received from her mother and the $8000 received from the sale of the house given to her by her mother. On the other hand, the testator owned the scrap metal business at the time of the marriage. It may be that the plaintiff made some contribution to that business both directly and indirectly by fulfilling domestic duties to her husband but the fact that at the end of their marriage each spouse had almost the same nett worth of assets is significant.

The 1963 Matrimonial Property Act carried with it no notion of equality of property except possibly relating to the matrimonial home. Here is a husband and wife with approximately the same amount of capital and each equally owning a half share in the matrimonial home and contents. There was no claim which the plaintiff would have had against her husband on the day prior to his death and his death in the circumstances cannot materially affect that claim.

The claim brought by the plaintiff under the Matrimonial Property Act 1963 fails.

I accept the submissions advanced on behalf of the plaintiff that in this case a widow of a happy marriage of some 20 years has a paramount claim on the estate of her husband and that this is so whether the marriage is a first marriage or a second marriage and is so notwithstanding the fact that there are children of the first marriage which cannot be expected to be beneficiaries in the widow's estate. A paramount claim does not, however, in all cases supplant a testator's duty to other members of his family.

Since the decision of the Court of Appeal in Re Wilson deceased (1973) 2 NZLR 359 there is no longer any suggestion of a presumption against the making of an award of capital to a widow. That must not, however, be converted into an absolute right of a widow to capital. The Court of Appeal in that case said at p.362:-

> "The point is obvious that the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time. For myself, I think that the occasions when capital grants can rightly be considered necessary "in

> order to enable a widow to live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime" are probably more frequent today than in the past."

Earlier the judgment had referred to the fact that Wilson was a case where there were no other dependents and it was not a case where children could be deprived of their future patrimony.

The fact that the Family Protection Act is a living piece of legislation was reinforced by the Court of Appeal in Little v Angus (1981) 1 NZLR 126 where it was said at p.127:-

> "Changing social attitudes must have their influence on the existence and extent of moral duties."

In many cases of estates of moderate size widows have been awarded the matrimonial home and furniture and often the whole estate under the provisions of the Family Protection Act 1955. That is not to say, however, that such a practice should be regarded as universal. It will often occur when the beneficiaries under the estate are strangers to whom the testator owes no testamentary duty, or, are children who can expect to receive some benefit under the wills of their mothers.

A testator who has married for the second time is often in a considerable quandary as to how he can fulfil the primary duty which he owes to his widow and also carry out duties which he considers he owes to his children to whom his widow is in no way related.

Counsel, in his submission, adopted the phrase of another in describing a testator who made no capital

provision for his widow as displaying an attitude "redolent of a patronising parsimony of former generations". There may be circumstances where that description is justified but it does not apply here and it was unfortunate that it was said.

There is no doubt that in the circumstances of this case the testator was bound to fulfil his duty to his widow. The duty which he owed is to ensure in terms of s.4 of the Act that adequate provision is available from his estate for her proper maintenance and support. There are circumstances where that proper maintenance and support can be provided from the estate without making a capital provision and I am satisfied that this estate is one of them. Proper maintenance and support was first defined in Allardice v Allardice (1910) 29 NZLR 959 and re-stated in Re McGregor (1961) NZLR 1077. In Bosch v Perpetual Trustee Company Limited (1938) AC 463 it was made clear by the Privy Council that attention should not be restricted simply to the question of need "or what was adequate" but "what in the circumstances was proper".

Proper maintenance will generally be maintenance of a kind that will enable the widow to continue to live at the standard at which she has been accustomed during her life time with the testator insofar as the assets of the estate are able to so to provide.

In this case the testator had retired. The testator and his wife were living in an ownership flat owned by them and were in receipt of income by way of their joint investments together with National Superannuation. Under

the terms of the testator's will the plaintiff will now receive that combined investment income solely for herself.

I recognise that in some cases there is a need to provide some capital by way of a nest egg if the widow does not have capital available for that purpose. This widow does.

In the circumstances of this case I have not been persuaded that making an order as sought by the widow granting her an absolute interest in the ownership flat together with a cash award of up to $30,000 will substantially improve her situation from what it is at present except that it would enable her to dispose of what was her husband's property to benefit beneficiaries of her choice rather than of his and give her the use of an additional $30,000.

There should be no difficulties in the path of the plaintiff selling the flat and purchasing another in the name of herself and the trustee. In the event of her being unable to maintain her own home because of advancing years or ill-health, she will have half the proceeds of sale of the flat by way of capital in her own right as well as the income from the other half. She also has available capital by way of investments in the sum of $29,000 together with $7000 which she has been able to advance, apparently interest free, to her son.

It is not desirable in matters of this kind to contemplate further applications and an order should usually be made that allows for the reasonably foreseeable future. I am satisfied that within the reasonably

foreseeable future proper maintenance of the plaintiff is available from the estate of the testator and that her claim under the Family Protection Act should be dismissed. I am strengthened in reaching this conclusion by realising that the estate will not be distributed until the death or re-marriage of the plaintiff. I certainly do not wish to encourage a further application but in the event of the plaintiff having inadequate means from the estate to be properly maintained, an application for leave to bring a claim out of time could in extraordinary circumstances be justified.

In the foregoing I have deliberately omitted to mention the position relating to the household furniture and personal effects. It is acknowledged apparently on behalf of the estate that the plaintiff owns half of the combined furniture and personal effects and that the estate owns the other half. I do not consider that leaving a widow of a marriage of 20 years in this unfortunate position in relation to the household furniture and personal effects is proper maintenance and support. When I indicated to counsel for the residuary beneficiaries that I only wished to hear from him in relation to the possibility of an order being made in favour of the plaintiff as to the estate's half share of the household and personal effects, counsel very properly and sensibly stated that he did not wish to make submissions.

Although I propose to make an order varying the will to some extent the plaintiff has essentially failed in the proceedings brought by her under both statutes.

It should not have been necessary in a case of this kind to refer to the cases which I have found it necessary to do earlier in this judgment. I have referred to the cases because of the need to return to fundamental principles. That need appeared to me to be demonstrated because of the submissions made on behalf of the plaintiff which although eloquently and politely presented, were nevertheless wrong.

This is a relatively modest estate and I do not consider that the residuary beneficiaries, who are in only modest circumstances, should have been put to the expense of this litigation. That can be met by an order, as I am about to do, that they should receive their full solicitor and client costs from the estate. I likewise consider that this is one of the rare cases where the residuary beneficiaries should not have their inheritance reduced because of the claim brought by their stepmother. I am quite satisfied if the only matter in issue had been that of furniture there would have been no need for Court proceedings.

The formal order of the Court is as follows:-

1) The claim under the Matrimonial Property Act is dismissed

2) The claim under the Family Protection Act is allowed to the limited extent that clause 3 of the last will of the testator is varied by deleting the words "and my share in the furnishings and other articles of household and domestic use or ornament" and substituting a

provision that all articles of household or domestic use or ornament owned by the testator on his death be bequeathed absolutely to the plaintiff.

3) That the residual beneficiaries shall have their solicitor and client costs paid from the residue of the estate, such costs to be approved by the Court on receipt of a memorandum from counsel as to quantum.

4) That the plaintiff pay her own costs.

A D Holland J

Solicitors:
Young Hunter, Christchurch, for Plaintiff
Harman & Co, Christchurch for Defendant
Rhodes & Co, Christchurch for the residuary beneficiaries