IN THE HIGH COURT OF NEW ZEALAND 196 M.85/90
CHRISTCHURCH REGISTRY

LOW PRIORITY

198

UNDER the Matrimonial Property Act 1962

A N D

UNDER the Family Protection Act 1955

IN THE MATTER of the Estate of KENNETH JOHN PAGE

BETWEEN PATRICIA JANE PAGE

Plaintiff

A N D DAVID ARTHUR STONE and BRYCE WILLIAM STEWART

A N D Defendants

Hearing: 2 June 1992

Counsel: S J Hembrow for Plaintiff
J H M Eaton for Defendants
G J Venning for Children

Judgment: 0 9 JUN 1992

JUDGMENT OF FRASER, J.

By these proceedings plaintiff seeks orders under the Matrimonial Property Act 1963 and the Family Protection Act 1955 against her late husband's estate.

Plaintiff is 33 years of age and was born and brought up in Australia. She met the deceased when she was on holiday in New Zealand in 1980. He was a farmer at Parnassus, farming a property which he had purchased from his father in 1979.

In mid-1980 plaintiff and the deceased were involved in a motor car accident in Australia as a result of which they were both injured. The deceased's injuries were quite serious and plaintiff returned to New Zealand with him to live on the farm, and, initially, to nurse him. They married on 23 March 1981 and have two children: , now aged 9, and , 6.

In July 1983 deceased developed a brain tumour. Despite treatment and periods of remission it ultimately proved fatal. He died on 26 January 1990. Between April and August 1987 and March 1988 and August 1989 plaintiff and deceased lived apart. She returned to him in August 1989 and remained with him caring for him until his death approximately six months later.

By his last will made on 28 September 1989 and a codicil made on 20 October 1989 deceased appointed the defendants his executors, bequeathed his personal chattels including any motor car to the plaintiff and gave all the rest of his estate to his trustees (after payment of debts, expenses and duty) upon the following trusts: (1) to hold one half of the residuary estate upon trust to pay thereout a legacy of $50,000 to the plaintiff and to pay the net annual income from the rest of that half to her so long as she remained his widow and after her death or remarriage to hold the rest of that one-half of the residuary estate for such of his children as should survive him and attain the age of 25 years and if more than one in equal shares; (2) to hold the other half of the residuary estate upon trust for his

children who lived to attain 25 and if more than one in equal shares. The trustees were given power to purchase a home out of the capital of the residuary estate for occupation by the plaintiff and the children to be held on the same trusts as the part or parts of the residuary estate out of which the capital was provided. There is a direction that if capital is provided out of both shares, the home is to be held upon the trusts of each share proportionately. By clause 12 of the will the deceased directed that if plaintiff should obtain any share in his property under the Matrimonial Property Act 1976 she was not to receive any benefit from or interest in the first half share of the residuary estate.

The principal asset in the deceased's estate was his farm property, stock and plant. The net value of the estate at date of death was $419,508. Subsequently the farm was sold for a price rather higher than the value which had been ascribed to it at date of death. The trustees purchased a house in Australia as a home for the plaintiff and her children. As at 31 March 1992 the estate comprised:

	$
Current Assets	8,718
Investment Rural Bank	111,930
Investment Trust Bank Canterbury	111,930
Shares	4,250
House	194,975
	$431,803

Plaintiff had by then received the personal chattels and motor vehicle of the deceased to a total value of approximately $25,300. The estate following sale of the farm and before the partial distribution referred to was

accordingly approximately $457,000. The $50,000 legacy has not been paid to plaintiff. The usual statutory provisions as to maintenance and advancement apply. Income of $15,054 was allocated to the infant beneficiaries' account for the year ended 31 March 1992 and payments amounting to $13,856 were made for their benefit.

Plaintiff seeks an award which in effect would give her a lump sum equivalent to the value of the house, ($194,975) in addition to the personal chattels and motor car ($25,300), the legacy of $50,000 and a life interest in part of the residue.

Any provision for the plaintiff will be at the expense of her children who are represented in these proceedings by Mr Venning, appointed by the Court for the purpose. He accepts that there should be an award under the Matrimonial Property Act, (a figure of $50,000 being suggested for consideration) but submits that if an award of that order is made no further provision should be made under the Family Protection Act.

Approach and Principles

Both counsel accepted, and I agree, that the proper approach where dual claims are made under these statutes is first to determine whether a claim lies under the Matrimonial Property Act 1963. If it does then the Court may look at the claim under the Family Protection Act 1955 on the basis of the widow's altered position and consider whether any further provision is justified.

The principles applicable are as stated in **Haldane v Haldane** [1976] 2 NZLR 715 and **Re Mora** [1988] 1 NZLR 214.

Contributions

Plaintiff and her mother, Mrs Coleman, set out the contributions which plaintiff made to the farm including the matrimonial home which formed part of it. It is not disputed that there were contributions but affidavits filed on behalf of the defendants dispute some of the claims and generally portray those which were made as of lesser degree and value than described by plaintiff. No deponent was required to be cross-examined.

Contributions made to the matrimonial home must be taken into account in relation to it and may be taken into account in relation to other property. In the present case, in my opinion, contributions to the farm generally must be taken into account.

The broad picture which emerges from the affidavits is that throughout the course of the marriage except for the periods totalling about 22 months when she was away from the farm, plaintiff made a contribution in a number of ways both to the home and to the farm operation as a whole, the extent of her contribution fluctuating with seasonal requirements, the ages and needs of the children, the state of the deceased's health and his ability to continue managing the farm.

In respect of the house, as well as attending to the general housekeeping including meals for visitors and others as is customary in family farms of this nature, she

carried out maintenance, including redecoration and painting, and kept a vegetable garden. In the farm operation itself she assisted with the outdoor work, and provided care and assistance for her husband during his illness and the effects of treatment which he had from time to time. She was a registered nurse and would have been able to provide care to a greater extent than an untrained person. This indirectly contributed to the farm by facilitating the deceased doing as much as he could in the way of farm management and operation.

Plaintiff's present position

Plaintiff lives with the children in the house which has been purchased by the trustees for the estate. This is of course for the benefit of the children as well as the plaintiff. She works as a casual nurse in a private hospital, her taxable income for the year ending 30 June 1991 being $A16,875.00. She has received payments from the estate in respect of the children and a small benefit from the Australian Government. She has savings of approximately $26,500 and has expended approximately $5,000 in maintenance of and repairs to the house. She would like to make alterations to it to increase the living space, refurbish the kitchen and replace the carpets.

Pursuant to the will (and leaving the question of matrimonial property aside for the moment) she has already received the personal chattels amounting in value to some $25,000 and is entitled to be paid $50,000 out of one half share of the estate, the balance of that half share being

on trust, to pay her the income until her death or remarriage (subject to the provisions about the home).

The Children

Mr Venning's enquiries disclose that both children are in good health although may need glasses in the near future and will need some orthodontic work on his teeth within the next few years. The home in which they live has three bedrooms and is regarded as being in a good residential area. It is five minutes walking distance from the public school which they both attend. is at least average in her class and well settled. is below average in terms of reading and writing skills although average at maths. Some special assistance is being provided for him. They both enjoy swimming and is a member of a Rugby League team at school. The children's maternal grandparents are both alive and live approximately 20 minutes away by car, the children seeing them regularly.

Value of Matrimonial Home

On the basis of a total farm value of $360,000, $97,000 was apportioned to the matrimonial home for duty purposes. In fact the farm was sold for $436,000 (net $418,000). I think the proper course is to adopt the Inland Revenue Department basis of apportionment applied to $418,000 to assess the value of the matrimonial home and to deduct therefrom a proportionate part of the mortgage indebtedness. Mr Hembrow argued to the contrary on the latter point, **inter alia** on the ground that interest on the mortgage had been

debited as a farm expense for taxation purposes. I do not accept the approach which he contended for. On the basis I adopt the net value of the matrimonial home is $58,400 and the balance property is $398,600 ($457,000 less $58,400).

Having regard to the length of the marriage, its unusual features and the contribution made by the plaintiff to the matrimonial home and the farm in general I accept Mr Venning's submission that an appropriate starting point is to take half of the net value of the matrimonial home and 15% of the value of the other property but I have adopted figures different from his for the reasons expressed above and leading to the following result:

Half share of matrimonial home of $58,400		29,200
15% of balance property $398,600		59,790
	Total:	88,990

which I round up to $90,000.

With that assessment, post mortuary benefits and the interests of others require to be weighed. As to the interests of others the children's welfare at this stage of their lives is closely connected with and largely dependent on the plaintiff. She has the responsibility of caring for them and bringing them up. Their interests may diverge to some degree when they are adult or if she remarries but in my view there is nothing arising with regard to the children's interests which ought to be taken into account now by reducing an otherwise appropriate share of matrimonial property.

The post mortuary benefits are those accruing under the will. In Mr Venning's suggested formula the value of the chattels is deducted from the matrimonial property entitlement to reach a just share but the others (the legacy and the widowhood interest) are not brought into account.

I think there can only be a broad approach as to what is fair and just in the particular circumstances and having reflected on the circumstances of this case it is my judgment that the post mortuary benefits ought not to be taken into account even to the extent suggested by Mr Venning to reduce what would otherwise be a proper share of matrimonial property. The chattels, motor vehicle, legacy and widowhood interest are all essential for the widow's support, the necessity for which was recognised by the testator and the benefits of which flow on directly or indirectly to the children.

In the result therefore I assess plaintiff's share of matrimonial property at $90,000 which in the circumstances of this case can be implemented by a lump sum payment of that amount to her.

Family Protection Act

The relevant principles are summarised in the following passage from the judgment of the Court of Appeal in **Little v Angus**[1981] 1 NZLR 126 at 127:

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to

> remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

Mr Hembrow submitted that in the current social climate having regard to the value of the estate it was the testator's moral duty to provide a house of the value of that bought by the trustees to be beneficially owned by her, a lump sum in cash and such income as is available in terms of the will until her death. Her needs, he submitted, are security and accommodation, the ability to manage her own affairs, the dignity of not having to ask for money, the ability to make financial plans for herself and children and to have any income payable to her available for life, not terminable on remarriage.

Plaintiff's position (without any provision under the Family Protection Act) is that she would have her matrimonial property entitlement of $90,000 which can be paid to her in cash and has received or would receive under the will, the chattels, (which have been converted to cash, $25,300), and the $50,000 legacy which would provide her in total with $165,300. In addition she would have a widowhood interest in a half share of the residuary estate (less the $50,000 legacy) with the trustees having power to provide a home (as has been done) for her and the children with ancillary powers. Remarriage would terminate her widowhood interest in a portion of the residuary estate but would not

necessarily mean that a home would no longer be provided for her and the children because it may be that providing a home for the children out of the estate so long as they are infants being cared for by their mother whether she had remarried or not would be a proper exercise of the trustee's powers in the circumstances. Obviously it is not for me to give any direction or even express any firm view about that because much would depend on the circumstances at the time which would require assessment by the trustees. My point is that although she will have a continuing responsibility for the children for some years she can look to the estate for assistance either by way of the provision of a home (pursuant to the will) or by way of the allocation of income for the children's maintenance and advancement in terms of the statutory powers available.

There must be balanced with the testator's duty to his widow, the duty which he owed to his children. That duty would include their proper maintenance, support, education and establishment in life and I think would clearly require a share of the estate being set aside to make provision for those needs independently of the provision made for the widow.

The combined effect of the will and the successful Matrimonial Property Act application are that as a result of the latter, plaintiff receives $90,000 capital in cash and the estate is reduced to $367,000. Of this figure plaintiff has already received $25,300 by way of chattels leaving $341,700 to be divided into the two separate trusts. Out of

the first half share ($170,850) plaintiff receives $50,000 cash and is entitled to the income on the balance ($120,850) until her death or remarriage. On either of those events and the children attaining 25 years of age they become entitled to the balance of the fund. The remaining $170,850 is held in trust for the children. The money held in both trusts may be used (and has now in part been used) to buy a house for the plaintiff and the children to be held on the same trusts. The children's $170,850 is available until they are 25 for their maintenance education and advancement in life and the balance of that fund will be available to them when they attain 25.

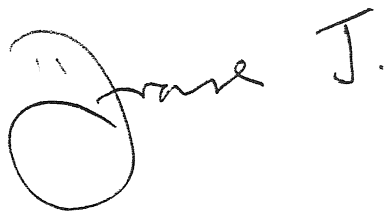
Looking at the matter overall, out of a total combined figure of $457,000 plaintiff would receive by way of matrimonial property entitlement and testamentary benefit assets or cash to a total of $165,300 and a widowhood interest in $120,850. Each of the children will eventually receive (using present day figures merely as an illustration) an eventual total of $145,850.

None of the figures mentioned are intended to indicate the precise amount in dollar terms which will be received by the beneficiaries. The figures used are approximate amounts based on the 31st March 1992 accounts. The position will change as time goes by with changes in the value of the house and the manner in which the trustees exercise their discretionary powers. But the analysis and comparison of approximate present figures does, I think,

reasonably demonstrate the position of the widow and children relative to each other and to the estate as a whole.

Weighing up the testator's duties to the plaintiff and to his children in the context of the estate which he left and the plaintiff's matrimonial property entitlement it is my view that no breach of moral duty has been shown and that no further provision is required under the Family Protection Act.

Plaintiff's costs and Mr Venning's fee are to be paid from the residue of the estate. Counsel are invited to submit memoranda.



Solicitors:

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Wood Marshall, Christchurch, for Defendants
Wynn Williams, Christchurch, for Children.

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