

IN THE PRIVY COUNCIL

No. 39 of 1975.

O N A P P E A L  
FROM THE COURT OF APPEAL OF NEW ZEALAND

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BETWEEN:

DOROTHY HALDANE

Appellant

- and -

GEORGE CHRISTOPHER HALDANE

Respondent

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CASE FOR THE APPELLANT

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RECORD

1. This is an appeal from a judgment ([1975] 1 N.Z.L.R. 672) dated 21 February 1975 of the Court of Appeal of New Zealand (McCarthy P., Richmond J., Woodhouse J. dissenting) allowing an appeal from a judgment dated 19 June 1973 of the Supreme Court of New Zealand (Wild C.J.)

(unreported)

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2. This appeal arises out of proceedings instituted by the appellant (hereinafter referred to as "the wife") against her former husband, the respondent (hereinafter referred to as "the husband") in the Supreme Court of New Zealand at Napier under the provisions of Section 5 of the Matrimonial Property Act 1963. In those proceedings the wife sought an order from a Judge of the Supreme Court that the husband should pay to the wife such sum as the Supreme Court should think fair and reasonable from matrimonial property the legal title to which was vested in the husband.

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3. The provisions of the Matrimonial Property Act 1963 material to this appeal are as follows :

5. Property disputes - (1) In any question between husband and wife as to the title to or possession or disposition of property (including any question as to investment by one party of money of the other without consent) the husband or the wife, or any person on whom conflicting claims are made by the husband and wife, may apply to any Judge of the Supreme Court, or subject to the provisions of subsection (4) of this section, to a Magistrate's Court. 10

(2) On any such application the Judge or Magistrate may make such order as he thinks fit with respect to the property in dispute, including [but without limiting the general power conferred by the foregoing provisions of this subsection] any order for - 20

- (a) The sale of the property or any part thereof and the division or settlement of the proceeds; or
- (b) The partition or division of the property; or
- (c) The vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit; or 30
- (d) The conversion of joint ownership into ownership in common in such shares as he thinks fit; -

and may make such order as to the costs of and consequent upon the application as he thinks fit, and may direct any inquiry touching the matters in question to be made in such manner as he thinks fit. 40

(3) Subject to the provisions of subsection (2) of section 6 of this Act,

10 the Judge or Magistrate may make such order under this section, whether affecting the title to property or otherwise, as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

[(4) A Magistrate's Court may exercise jurisdiction under this section where the value of the property in dispute is not more than \$14,000 in the case of an estate or interest in land or of a matrimonial home and not more than \$5,000 in the case of any other property:

20 Provided that a Magistrate's Court may make an order under this Section granting to the husband or wife the right to occupy the matrimonial home or to possession of the furniture therein irrespective of the value thereof.]

(5) An order made under this section shall be subject to appeal in the same way as an order made by the Judge or Court in an action in the Supreme Court or a Magistrate's Court, respectively, would be.

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(6) This section shall apply with respect to any matrimonial home, whether or not it is a joint family home within the meaning of [the Joint Family Homes Act 1964]:

[Provided that no order may be made under this section in respect of a joint family home after the death of either spouse if at that date the spouses were cohabiting.]

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(7) In this section and in [sections 5A, 6, 7, 8 and 8A] of this Act the terms "husband" and "wife" include the legal personal representatives of the

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husband or wife and also include the parties to a former marriage and the parties to a purported marriage that is void.

6. Matters to be considered by Court -

(1) In considering any application under section 5 of this Act, the Judge or Magistrate shall, where the application relates to a matrimonial home or to the division of the proceeds of the sale of a matrimonial home, and may in any other case, have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever).

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(1A) The Judge or Magistrate's Court may make an order under section 5 of this Act in favour of a husband or wife, notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character.

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(2) The Judge or Magistrate shall not exercise the powers conferred upon him under section (2) or subsection (3) of section 5 of this Act so as to defeat any common intention which he is satisfied was expressed by the husband and the wife.

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6A. Relevance of conduct - On any application under Section 5 of this Act, the Judge or the Magistrate's Court, as the case may be, in determining the amount of the share or interest of the husband or the wife in any property or in the proceeds of the sale thereof, shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value.

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4. The facts on which the proceedings depended were furnished in affidavits sworn by the wife, by the husband, by three children of the parties (Warwick Greville George Haldane, Virginia Anne Sherratt, and Sandra (sometimes known as "Rosandra") Christina Chambers), and in addition two affidavits were sworn by by one Dora Agnes Yeoman, a Law Clerk of Hastings. These two affidavits related to searches of the records of the (Hawke's Bay District) Land Registry in Napier dealing with properties in dispute in the proceedings. No viva voce evidence was given, nor were any of the deponents required to attend for cross-examination.
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5. In summary the facts and allegations set out in the affidavits are as follows :
- 20 (a) The parties were married in Hastings on 2 December 1940 when they were both aged 19 years. At the time of the swearing of the affidavits they were both aged 49 years. p.2, 11.33-38
- (b) There were five children of the marriage - p.3, 11. 1-7
- Rosandra Christina Haldane, born on the 12th June, 1941
- 30 Warwick Greville George Haldane born on the 20th November, 1942
- Virginia Anne Haldane, born on the 4th July, 1944
- Christopher John Haldane, born on the 16th March, 1947
- Richard Quentin Haldane born on the 6th March, 1948
- (c) The husband was an only child, and on the marriage of the parties the wife and the husband lived with the husband's parents in their large family home at Hastings. p.3, 11.8-11
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- p.3, 11.11-14 (d) The husband's father, who was a man of substance, owned a farm of approximately 112 acres some distance from the family home. This farm was situated near Hastings.
- p.3, 11.14-20 (e) This farm was worked on a limited basis below its capacity. Some cropping was done, and race horses owned by the husband's father were kept there. The husband at that stage worked with his father on the farm. 10
- p.3, 11.21-36 (f) Approximately a year after the marriage the husband joined the New Zealand Army and remained in the New Zealand Forces until 1944. During the period of the husband's service in the New Zealand Forces, the wife moved from place to place in order to be near him.
- p.3, 11.36-39 (g) During the period of the husband's enlistment in the New Zealand Forces the parties were supported by his service allotment supplemented by assistance from his parents. 20
- p.3, 11.40-43 (h) Following the husband's discharge from the Forces his parents built a home for the parties on the farm already referred to and the parties went to live there with the three children who at that time had been born.
- p.3, 1.45  
p.19, 11.9-15 (i) At the time the parties commenced to live on the farm it was transferred to the husband by his father. No information was given to the Court as to any purchase price, both parties in their affidavits referring to the transaction as a gift. Nevertheless the husband took over responsibility for a mortgage of \$12,600 to the Public Trustee which was secured on the property at the time he acquired it, and, in addition, gave a mortgage of \$5,300 back to his father. 30 40
- p.19, 11.15-22 (j) As at 10 December 1955 the amount owing under the mortgage to the Public

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Trustee had increased to the sum of \$17,540 and the amount owing under the mortgage to the husband's father had been reduced to the sum of \$2,550.

(k) The amount owing to the husband's father was eventually completely paid out of the husband's share in his father's estate.

P.19, 11.22-24

10 (l) The husband worked and developed the farm. He grew crops for a canning factory and became the largest supplier to a company known as Birdseye New Zealand Limited. Crops grown for canning included peas, tomatoes, broad beans, maize, and grain seed and in latter years the husband had grown asparagus, as well as established a peach orchard of 38 acres. He also grazed sheep and harvested grass seed.

p.3, 11.44-47

p.4, 11.1 -10

20 (m) In the early years of the marriage the wife's time was fully devoted to caring for the children and managing the home; and it was not possible for her to give direct assistance on the farm.

p.4, 11.11-15

p.32, 11.18-27

p.33, 11.12-14

30 (n) Most of the harvesting and some of the planting was done by contract labour. The wife claimed to have prepared and taken morning and afternoon teas and lunches to the husband where he happened to be working on the farm. She also claimed to have provided morning and afternoon teas from time to time for a contract gang planting tomatoes, but generally it was the practice of the contract gangs to supply their own refreshments.

p.4, 11.15-27

p.26, 11.33-37

p.33, 11.15-19

40 (o) The wife claimed that the husband had been selfish and ungenerous towards her and the children, but admitted that in some ways the family had lived well. She claimed to have been embarrassed by lack of money and to have had to borrow from tradespeople.

p.4, 11.29-34

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- p.4, 11.35-38 (p) The wife claimed to have sold tomatoes and walnuts from the property at the farm-gate and to have used the proceeds for the purchase of household requirements.
- p.4, 11.39-45  
p.5, 11.1 - 4 (q) During the marriage no provision was made for regular payments of an allowance by the husband to the wife except over the last few months before the parties finally separated (which occurred in June 1969), when the husband paid to the wife the sum of \$40 per week, from which she purchased food and other household requirements. After the separation this sum was reduced to \$30 per week. 10
- p.5, 11.5-13  
p.31, 11.10-29  
p.34, 11.6 - 8  
p.34, 11.30-36 (r) The wife claimed that the children were her responsibility and that the husband did not take a great deal of interest in them, nor was he closely involved in their day-to-day upbringing and activities. The wife claimed that the husband was able to devote his full attention to the farm, because she undertook responsibility for the children. 20
- p.5, 11.13-20 (s) The daughters of the family attended a private school in Hastings as day pupils and later went as boarders to a private school, Chilton St. James School in Lower Hutt, for their secondary education. The sons of the family went as boarders to Hereworth Primary School, a private preparatory school in Havelock North; and then to Wanganui Collegiate School, a private secondary boarding school in Wanganui. 30
- p.5, 11.20-22 (t) The education of the children in the earlier years was paid for by the husband's father and in later years by the husband. 40
- p.5, 11.35-39  
p.27, 11.41-42  
p.34, 11.38-41  
p.35, 11.1 - 3 (u) While the first son Warwick was studying for the final units for his Law Degree at Victoria University of Wellington the wife went to work for 4 months at the food-processing factory



operated by Birdseye New Zealand Limited and sent the money to Warwick for his expenses.

(v) There was a history of domestic upset and dispute between the parties, which culminated in separations in the years 1958, 1962 and 1969.

p.5, 11.40-43

(w) Following the final separation in June 1969 the parties have remained continually apart.

p.16, 11.11-12

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(x) At the time of the original application to a Judge of the Supreme Court under the Matrimonial Property Act 1963 the wife had no home, no savings, and no assets. She received maintenance from the husband and some income from a trust fund set up by the husband's mother, who had settled shares with the provision that the wife and the husband should take half the annual income derived from the trust fund during their joint lifetime, the survivor to take the whole income, and the capital to be eventually paid to the children of the wife and the husband. At the time of the making of his affidavit the husband deposed that the wife's one half share amounted to \$330 per annum.

p.6, 11.23-24

p.6, 11.26-36

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p.14, 11.26-31

(y) During the course of the marriage the husband gave instructions for notices to be sent to business houses advising them that he would not be responsible for debts incurred in his name.

p.13, 11.1 - 7

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(z) In June 1970 the husband through his solicitors offered a settlement to the wife of the dispute between them as to property. The husband offered :

p.16, 11.22-43

(a1) To increase maintenance for the wife from the sum of \$30 per week to \$35 per week.

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(b1) To purchase in the name of the wife either a new Mini motor-car or a low mileage motor-car to be the wife's own vehicle and entirely her own responsibility.

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- (c1) To purchase a flat (apartment) at a cost of up to \$12,000 in the husband's name; the husband to pay all outgoings; and the same to be carpeted at his expense; the flat to be occupied by the wife rent free.
- p.17, 11.32-37 (d1) Following the separation the husband subdivided the farm property into 5 lots and sold 4 of them. 10
- p.18, 1.4  
p.18, 11.5-14 (e1) The sale price of the land amounted to \$117,400 from which the husband paid expenses and bank overdraft totalling \$74,600.
- p.18, 11.14-27 (f1) Of the surplus of \$42,800, \$34,000 was spent on acquiring properties :
- (a) Two flats at Flaxmere
  - (b) A beach cottage at Waimarama
- leaving a cash balance available to the husband of approximately \$9,000. 20
- p.20, 11.25-37 (g1) At the time of the original application the husband owned the following assets -
- Land (last remaining lot from original farm property) \$60,000  
(containing 30 acres, 3 roods, 9 perches more or less, being Lot 2 on Deposited Plan No. 12401 and being all the land in Certificate of Title Volume D3, Folio 373, Hawke's Bay Registry) 30
- |                          |        |
|--------------------------|--------|
| Flaxmere Flats Valued at | 22,000 |
| Beach House " "          | 12,000 |
| Farm Equipment " "       | 2,000  |
| Company Shares " "       | 3,200  |
| Company Debentures " "   | 3,000  |
| Two Motor Cars " "       | 8,000  |

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Bank A/c in London	2,000
Bank of New Zealand, Hastings	4,000
Hawkes Bay and Gisborne	2,300
Savings Bank	

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\$118,500

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- 10 (h1) In 1956 the husband obtained a new mortgage from the Public Trustee for the sum of \$24,000, which was subsequently reduced to \$12,400 from money received by him from his father's estate. p.19, 11.28-34
- (i1) In 1959 the husband paid off the balance owing to the Public Trustee by borrowing \$16,000 on first mortgage from a life insurance company and in 1961 borrowed \$2,000 on second mortgage. p.19, 11.35-40
- 20 (j1) By various increases in mortgages and refinancing, the first mortgage to the Public Trustee eventually secured the sum of \$46,000. at the time when the land was subdivided and sold. p.20, 1. 2
- 30 (k1) The husband claimed that the increases in the mortgage were due to the fact that the amount being spent on normal living expenses and school fees greatly exceeded his farming income and that he became heavily in debt to his trading bank and/or his stock firm and had to increase his mortgage to clear his current indebtedness. In addition he sold shares for an amount in excess of \$2,000. p.20, 11.3-12
- (l1) Capital expenditure on the farm property amounted to \$4,000 for irrigation purposes and the husband spent \$3,000 for additions to the residence. p.20, 11.13-19
- 40 (m1) His net income after taxation and personal drawings resulted in a net deficit as follows : p.21

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<u>Year Ended</u> <u>30th June</u>	<u>Net Income</u> <u>after</u> <u>Taxation</u>	<u>Personal</u> <u>Drawings</u>	<u>Life</u> <u>Insurance</u>	<u>Net</u> <u>Deficit</u>
1959	\$1319.17	\$6454.49		\$5135.32
1960	1175.67	6298.41		5122.74
1961	2954.24	7904.41		4950.17
1962	4591.27	7214.78		2623.51
1963	2280.91	9192.53	\$335.50	7247.12
1964	92.50	3371.18	740.00	4018.68
1965	1591.84	5996.99	56.64	4461.79
1966	4968.19	6055.48	56.65	1143.94
1967	2128.38	4733.34	56.65	2661.61
1968	3544.72	3206.21	656.65	318.14
1969	2266.34	4674.78	706.40	3114.84
	\$26,913.23	\$65,102.60	\$2,608.49	\$40797.86

6. The Appellant brought proceedings under the provisions of Section 5 of the Matrimonial Property Act 1963 asking for an order that the Respondent pay to the Appellant such sum as the Court thought fair and reasonable, from matrimonial property in the name of the husband. 20

It was expressly agreed between counsel for the husband and for the wife that the assets owned by the husband as indicated in paragraph g1 hereof should be accepted as representing the present form of the matrimonial property which could be traced and dealt with in accordance with the authoritative decisions by the Courts. 30

7. The action was heard on 19 June 1973 by Wild C.J. who delivered judgment on the same day.

p.38, 11.3-13

- (a) He first described the nature of the claim and the kind of order which it was open for him to make.

p.38, 11.13-47

- (b) He held that he was not concerned to apportion blame for the breakdown of the marriage and that wrongful conduct did not relate to the acquisition of the property. 40

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- (c) He indicated that three of the children of the marriage had made affidavits and that he considered some significance attached to the fact that broadly speaking the children supported the application of their mother. p.39, 11.9-16
- 10 (d) He then compared the situation financially of the wife and the husband and referred to the order which the wife sought. p.39, 11.17-40
- (e) He then dealt with the question of the manner of acquisition of the farm property and stated that it came originally from the husband's father and that the wife had contributed nothing towards its acquisition. However, he rejected the husband's submission that the proceeds of sale of the farm were not matrimonial property but proceeds of the husband's sole business. p.40, 11.23-25  
20 p.40, 11.3-15
- (f) He agreed with the submission of counsel for the wife that it was artificial not to treat the home and the area of land on which it stood as one family unit, which could properly be regarded as matrimonial property. p.40, 11.26-40  
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- (g) He then referred to the increase in value which had occurred as a result of - p.40, 11.30-45
- (i) Appreciation in value of the good land of Hawke's Bay near Hastings;
- (ii) The development of the canning industry;
- 40 (iii) The fact that the husband had worked on the property over the years of the marriage;

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- (iv) The fact that the wife had kept the home and family and made it possible for the husband to do that work.
- p.40, 11.45-49  
p.41, 11. 1 - 4 (h) He stressed that the value would not have increased to the present level of assets without the husband's work; but the fact that he did that work was contributed to by the wife's services and management and her general contribution as a wife and mother of five children, thus distinguishing from that referred to by the Court of Appeal in E. v. E. [1971] N.Z.L.R. 859. 10
- p.41, 11.25-41 (i) He then assessed the wife's contributions to the property, bearing in mind what had been laid down by the Court of Appeal in E. v. E. and where the onus lay, as well as bearing in mind the origin of the property. 20
- p.41, 11.41-44 (j) He considered that the actual contribution that the wife had made by providing tea and refreshments and by the sale of fruit and by working in the Birdseye factory was minimal; but stressed that the wife's real contribution was her general services and management over the 24 years during which the marriage subsisted and the property developed. 30
- p.41, 1. 45  
p.42, 11. 1 - 8 (k) He also mentioned that the wife had no regular allowance from the husband virtually until the time when the separation occurred; but, although both of them lived extravagantly, she did not have what wives were entitled to expect, and most received; namely a regular allowance for herself. 40

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- (l) He also referred to the forbearance which the wife showed in the circumstances of the marriage. p.42, 11.9-12
- (m) He mentioned that the children were substantially educated at boarding schools, but considered that the mother's part was still vitally important. p.42, 11.13-18
- 10 (n) He then considered that he was entitled to take into account the fact that an offer had been made by the husband which reflected an acknowledgment that there was an obligation upon him. p.42, 11.26-30
- (o) For the foregoing reasons Wild C.J. ordered :
- 20 (i) That a one-quarter share or interest in all that piece of land containing 30 acres, 3 roods, 9 perches more or less being Lot 2 on Deposited Plan No. 12401 and being all the land in Certificate of Title Volume D3 Folio 373 (Hawkes Bay Registry) be vested in the wife. p.43, 11.16-31
- 30 (ii) That the husband pay to the wife the sum of \$4,000.
- (iii) That the husband pay to the wife her costs in the agreed sum of \$500 together with all disbursements, including agency charges.
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8. By notice of motion of appeal dated 31 October 1973 the husband appealed to the Court of Appeal of New Zealand. The appeal came on for hearing before McCarthy P., Richmond and Woodhouse JJ. on 21 October 1974 and was allowed by judgment delivered on 21 February 1975 (McCarthy P. and Richmond J., Woodhouse J. dissenting).

9. McCARTHY P.

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p.45, 11.20-23

(a) McCarthy P., referred to two considerations, the first being the judgment of the Court of Appeal in E. v. E. [1971] N.Z.L.R. 859, and the second, the case's own particular facts.

p.45, 1.24 -

(b) He then referred in detail to E. v. E. (mentioning that that case had been the subject of approval and condemnation) and set out what in his view that case established as to the principles which should be applied by Courts in determining disputes arising under the provisions of the Matrimonial Property Act 1963. He set out 7 propositions:

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p.49, 1.33

1. Section 5(1) is directed solely to the determination of disputes regarding identifiable items of real or personal property and each item must be considered individually.

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2. A spouse's claim must be based on contributions, and an award can be made only if and to the extent that the claimant spouse establishes contributions. It is proper to take a more benevolent attitude in favour of a wife when she

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10 claims in respect of a matrimonial home and perhaps of assets which can fairly be regarded as family assets. Too much regard should not be had to the way in which the legal or equitable interests of the husband and wife in the matrimonial home have been defined. The onus lies on a wife to establish her claim, but the burden of proof is not so heavy in respect of a claim relating to the matrimonial home.

20 3. A spouse will not be entitled to share in the other's business interests as distinct from the matrimonial home and family assets, unless it is shown that they have both carried on the business more or less jointly, but the words "more or less jointly" are not to be interpreted in a heavily technical way. The fact that a wife had been a good wife looking after her husband well domestically does not of itself justify an order in respect of business assets, but a wife who has deliberately accepted a reduction in her standard of living and gone without in order to make more money available for employment in business activities can claim. The Court may also have regard to the assumption of a domestic responsibility in some special or unusual way if that resulted in freeing the husband to add to his assets.

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4. When dealing with assets other than the matrimonial home the Court has a discretion whether to take contributions into

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- account or not, the term matrimonial home has to be interpreted in a commonsense way and will include so much of the total land holding as can fairly be said to be used for domestic purposes associated with the home in contrast with that used mainly for farm activities. 10
5. The Court is given the widest discretion in the form of an order it makes, but the jurisdiction should not be used as conferring a like jurisdiction to that of the Matrimonial Proceedings Act 1963, - namely as a general maintenance empowering statute. The purposes of the two Acts are different and those differences should be maintained. 20
6. Although wrongful conduct is irrelevant in the generality of cases, it may be taken into account in so far as it relates to the acquisition of the property in dispute or to its extent or value.
7. There is no justification for allowing a spouse an interest in property obtained by way of gift or inheritance during the marriage unless it is established that both parties were intended to be beneficiaries. There is an exception to this, the case where the claimant spouse can show that by his or her contributions in one form or another he or she has contributed to the retention of a property received by way of gift or to some increase in its extent or value. 30  
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- (c) Applying the principles set out by him, McCarthy P. came to a different conclusion from that taken by the Chief Justice in the Supreme Court. p.49, 11.34-38
- (d) He pointed out that the special facts of the case were a dominating feature. He stressed that the equity in the farm property on which the matrimonial home was erected, was derived originally by the husband as a gift from his parents. He could not accept the view contended for that the husband should be regarded as a normal purchaser, although he recognised that the husband took it subject to certain mortgages. He said there was no evidence which justified an assumption that the equity at the time of acquisition was not substantial. p.49, 11.38-43  
p.49, l. 44 to  
p.50, l.12
- (e) Following the decision of E. v. E he considered that the wife had a claim only to the extent that the farm property was retained or improved as a result of her contributions and he separated the matrimonial home from the remainder of the farming property. p.50, 11.13-20
- (f) He could see no evidence which justified a finding that the wife assisted by contributions either through the retention or improvement in value of the matrimonial property. He considered that what the wife had done was relatively unimportant, and insufficient to support a claim under the Matrimonial Property Act to an interest in the farm property. p.50, 11.20-30
- (g) He said that he did not overlook the strength of sociological arguments in favour of allowing a wife who had long borne the stresses of married life to p.50, l. 34 to  
p.51, l. 2

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- share in assets which the husband had acquired or developed during the period of marriage, even if it be that she could not establish any significant contributions beyond that which a wife normally provided in looking after a home and children, but he was obliged to decide according to the law and this required him to preserve the distinction between a wife's rights under the Matrimonial Property Act and those under the Matrimonial Proceedings Act. 10
- p.51, 11.3 - 9 (h) In his opinion any contributions which a wife made by looking after a home and children were considerations which were relevant to an application under the Matrimonial Proceedings Act, but insufficient to support a claim under the Matrimonial Property Act. 20
- p.51, 11.10-13 (i) He pointed out that too little use had been made of the powers under the Matrimonial Proceedings Act to make orders for capital sums.
- p.51, 11.17-26 (j) He considered that there had not been an accretion to the husband's interest in his farming and other business assets and real money terms over the period of the marriage; but that the high standard of living which the family as a whole had enjoyed, and in which the wife must have, to some degree at least, participated had resulted in depletion of assets rather than growth. 30
- p.51, 11.27-46 (k) He entertained doubts whether the wife had established a claim, even as far as the matrimonial home was concerned, but had decided to apply a benevolent approach and considered that a sum of \$5,000, which was roughly one-fourth of the value of the asset was an appropriate order. 40

10. RICHMOND J.

The second judgment was delivered by Richmond J.

- (a) He commenced by setting out the facts on which he based his decision. He emphasised that the parties lived well and that the wife did not go short. He referred to a general impression from the affidavits that the parties lived well and that, although there were disagreements over money matters the wife did not go short as regards her personal requirements. He referred to the information in the affidavits as being somewhat meagre, but accepted that the wife cooked the meals, looked after the children when they were at home, and generally carried out ordinary domestic duties of a wife in a reasonable and proper way. He mentioned that the children were at boarding school for a great deal of the time. He referred to the overall picture being of a wife who during the years 1946 to 1949 made no special domestic contributions such as specially frugal management or any of the other types of special service such as gardening or redecorating. He considered that over a period of 24 years she had carried out the ordinary and usual domestic duties of a wife and mother in a proper way and in return had received the benefit of what appeared to have been a fairly high standard of living. He referred to the separation in 1969 and the husband's decision to subdivide and sell off portions of the farm. He referred to the sale of various lots and the retention of one lot containing 17 acres, including the former matrimonial home. He referred to the land which remained and its

p.52, l. 16  
to p.58, l.26

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use by the husband for the purpose of growing asparagus and the general result of the sales of the subdivided land, leading to a net figure of \$42,800. He then set out the assets which the husband had and which are referred to in the facts set out above.

- p.58, 11.26-39 (b) He said that the central submission of counsel for the husband was that the property as a whole was substantially a business asset to which the Appellant had no claim, and that this argument had not been accepted by the Chief Justice. 10
- p.60, 11.12-33 (c) He then referred to a decision of the Court of Appeal Aitken v. Aitken (unreported Court of Appeal No. 28 of 1973 30 November 1973) and in particular its re-emphasis of the principles stated in E. v. E. namely that the wife was required to show the nature of the contributions which she made to particular properties and that the observations made in Hofman v. Hofman [1965] N.Z.L.R. 795 (at pp.800, 801) could not be extended to the husband's business interests, unless it was shown that the spouses had carried on a business more or less jointly. The learned Judge accepted this and agreed with it as setting out the law. 20 30
- p.60, 1.37 to p.61, 1. 3 (d) He referred to the decision of the Chief Justice and his reference to the home and the land on which it stood as one family unit and that accordingly the farm should be regarded as matrimonial property. He pointed out that neither of these expressions was to be found in the Matrimonial Property Act itself and that the only distinction made was between a matrimonial home and other forms of property. 40

RECORD

- 10 (e) He considered that the ordinary popular meaning of matrimonial home was the dwelling house together with its immediate domestic grounds. He considered that the entirety of the farm with the exception of the matrimonial home itself ought to be regarded as a purely business asset of the husband. p.61, 11.6-13
- (f) He considered that there was nothing in the evidence which established that the spouses carried on a business more or less jointly. p.61, 11.17-21
- 20 (g) He considered that the Chief Justice had relied on the fact that the wife had kept the home and family and made it possible for the husband to do that work, but pointed out that this could be said of every good wife who had a husband going out to work, whether on a farm or in a city, and this was insufficient to entitle the wife to an interest in a business as opposed to an interest in the matrimonial home. p.61, 11.30-42
- 30 (h) He considered that for a wife to become entitled to an interest in a business asset it had to be shown that she played a real part, either in contributing to its acquisition or in the carrying on of the business. p.61, 11.42-47
- 40 (i) He then considered whether the wife had any right to a claim of an interest in the property in relation to her contributions to the matrimonial home. p.62, 11.5-10
- (j) He referred to cases where a wife had been held entitled to a substantial interest on the basis of her performance of usual domestic services and pointed out that such cases were almost always p.62, 11.10-31

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- ones in which the matrimonial home or a series of homes had been acquired by purchase and in which with repayments in respect of the mortgage and inflation, there had been a substantial effect on the value of the equity. He considered that in such circumstances, ordinary domestic services had played a real part in the acquisition and retention of property. 10
- p.62, 11.31-42 (k) He then referred to the fact that the family home had been given to the husband and the most that could be said is that the wife's services over a long period of years no doubt assisted in the husband's ability to retain the family home and to keep the mortgage on the property at a level which though constantly increasing because of heavy family expenditure, might otherwise have been greater still. 20
- p.62, 1.42 to p.63, 1.26 (l) He considered that it was just that the Court should make an order recognising that the wife was entitled to some interest in the entire property by virtue of her services and he quantified that interest at \$5,000. 30
- p.63, 1.38 to p.64, 1.9 (m) He then pointed out that the wife had a further remedy under the provisions of the Matrimonial Proceedings Act if she should choose to pursue it.
11. WOODHOUSE J.
- The final judgment was delivered by Mr Justice Woodhouse, dissenting. 40
- p.66, 1.33 to p.67, 1.37 (a) He dealt with the question of acquisition of the farm property and referred to it as a purchase. He did not consider that there was any evidence of gift.



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- 10 (b) He dealt with the question of the living standard of the parties and the schooling of the children. He considered that the figures showed that there had been no extravagance in housekeeping, but that in fact the wife must have had to exercise a good deal of prudent restraint in order to prevent a strained economic situation from becoming far worse. p.67, 1.38 to p.69, 1.18
- (c) He considered that it was clear that the wife had demonstrated that she had done everything which could be expected of her as a wife and mother of five children and as an unpaid housekeeper. p.69, 11.24-37
- 20 (d) He pointed out that if the husband had had to pay for someone to manage his home during the period in issue, then because of the additional drain on his resources, he could probably not have retained the farm at all. p.69, 11.27-35
- 30 (e) He did not agree that the absence of direct physical or money contributions excluded the wife from any entitlement to a share in the capital assets. He did not consider that the case of E. v E. justified such a submission and pointed to the converse situation where bad housekeeping could have prejudiced the husband's ability in handling his business affairs. p.69, 1.41 to p.70, 1.11
- 40 (f) He considered that a domestic contribution that freed a man to apply himself to business activities was an important, even if, indirect contribution to that activity and to the preservation of the capital assets of the business. p.70, 11.11-27
- (g) He then referred to the income and expenditure of the husband p.70, 1.27 to p.71, 1.4

RECORD

- over the period of the marriage, emphasising how low it had been even although the husband had been relieved of domestic responsibilities, in his opinion the true need was to compare the relative performance of each spouse in order to consider what had been the respective influence of each upon the acquisition and the accretion in or diminution of the property concerned, whether or not that contribution or influence could be regarded as direct or indirect. 10
- p.71, 11.4-13 (h) He pointed out that where a matrimonial home alone was the property in issue, it was easier to relate the domestic activities of a housewife to the notion of contributions to the property and this arose from a tendency to equate the home as an institution with the house as a capital asset. 20
- p.71, 1.14  
p.72, 11.37-42 (i) He then referred to the Court of Appeal decision in Aitken v. Aitken and to his own decision at first instance in that case which he said had been approved by the Court of Appeal and therefore should be applied. 30
- p.73, 11.1-24 (j) He again emphasised that the property was not a gift to the husband and pointed out that the wife was not responsible for the increase in mortgage liability, but rather the husband's method of farming and his decision to have the children educated at expensive schools.
- (k) He would have dismissed the appeal. 40
12. The wife respectfully submits that the decision of the majority of the members of the Court of Appeal was wrong -

- A (i) In particular the wife submits that the principles to be applied in determining cases under the Matrimonial Property Act 1963 are in substance those enunciated in general terms by Mr Justice Woodhouse in the case of Hofman v. Hofman [1965] N.Z.L.R. 795. These principles are set out substantially on pp.800 and 801 of the report. In summary they are as follows :
- 10
- (a) Orders are to be made which are "just" and the Courts are expressly empowered to extinguish established legal or equitable rights even in favour of a spouse who might entirely lack any such interest.
- 20
- (b) A common and expressed intention of the parties should not be over-ruled.
- (c) Property rights of parties to a marriage are not to be determined on the basis of money alone and legalistic assessments of the property rights of spouses must give way to the justice of the case.
- 30
- (d) Presumptions developed in a social climate which has little in common with the view that marriage is really a partnership of equals are no longer applicable.
- (e) The legislation is designed to by-pass solutions which involve tip-toeing around conventional rules or the attribution of implausible intentions to husbands and wives.
- 40

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- (f) Marriage is a partnership of a very special nature and emphasis is put on this by the Act.
- (g) The Court is empowered to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband but also to the important contributions which a skilful housewife can make to the whole family unit by the assumption of domestic responsibility and by freeing her husband to earn the money income they both need for the furtherance of their joint enterprise. 10 20
- (h) Consideration of matters such as the supporting or undermining of the constructive efforts of the other spouse will play a considerable part in assessment.
- (i) Artificial adjustments founded on money contributions can be avoided. 30
- (j) The purpose of the legislation is to enable possession to be given or a just and proper apportionment to be made of those capital family assets which consist of the things intended to be a continuing provision for the parties during their joint lives. 40
- (ii) Those principles follow from a correct interpretation of the provisions of the Matrimonial Property Act 1963 in accordance

with the principles of statutory interpretation in force in New Zealand and in particular in the light of the law as it existed before the passing of the Matrimonial Property Act 1963.

- 10 (iii) Those principles were followed in a considerable number of cases, both reported and unreported until the Court of Appeal decision in E. v. E. [1971] N.Z.L.R. 859.
- (iv) The correctness of the decision in Hofman v. Hofman is reinforced when the provisions of the Matrimonial Property Act 1963 are considered as a part of a general code of law relating to matrimonial disputes.
- 20 B. The decision of the Court of Appeal of New Zealand in E. v. E. [1971] N.Z.L.R. 859 was wrong and the principles set out by the Court of Appeal in that case and later cases in so far as they conflict with the principles established by the decision in Hofman v. Hofman are wrong and should not be followed, because the decision in E. v. E. wrongly interpreted the provisions of the Matrimonial Property Act 1963.
- 30 (i) There is no basis in the Matrimonial Property Act 1963 for restricting the discretion of the Court in the manner determined by the decision of E. v. E. and by the decision of the Court of Appeal in this case.
- 40 (ii) The Court of Appeal further restricted the discretion under the Matrimonial Property Act 1963 by reference to the discretion which had been established in cases under the Married Women's Property Acts and there is no justification for restricting the discretion in this way.

RECORD

- (iii) The confining of the enquiry to particular contributions to particular assets as distinct from a global approach is not justified by the Matrimonial Property Act 1963 nor is this a practical or workable approach for determining disputes coming before the Court in terms of the Act. 10
- (iv) The means of quantification of value or contributions laid down in E. v. E. is too restrictive and not in accordance with the Matrimonial Property Act 1963.
- (v) There is no justification in the Matrimonial Property Act 1963 for confining a consideration of domestic contributions to domestic assets and in particular to the matrimonial home. 20
- (vi) There is no justification for treating the business activities of the husband as entirely separate from and as unrelated to the general matrimonial enterprise.
- C If the decision in Hofman v. Hofman is correct and the principles as set out in that case are accepted, then their application to the facts of this case justifies the decision of the Chief Justice at first instance in this case and his decision should be restored. 30
- D If contrary to the submission of the Appellant the decision of the Court of Appeal in E. v. E. was right then that case should be confined to its own peculiar facts and not treated as laying down general principles of interpretation of the Matrimonial Property Act 1963. 40
- E In any event, even if it is considered that E. v. E. was correctly decided and that the principles enunciated in that

case are correct and should be applied, in the particular circumstances of this case, the decision of the Chief Justice at first instance was correct and should be restored.

13. On 8 July 1975 the Court of Appeal of New Zealand made an order granting the wife final leave to appeal to Her Majesty in Council.
- 10 14. The Appellant wife therefore respectfully submits that the judgment of the Court of Appeal of New Zealand was wrong and ought to be reversed and this appeal ought to be allowed with costs for the following, amongst other reasons :
- 20 1. Because the Court of Appeal applied the principles enunciated by that Court in the case of E. v. E., which was wrongly decided and which laid down principles that were not in accordance with the Act and should not have been applied.
2. The Court ought to have applied, but did not, the principles which were laid down in the decision of Hofman v. Hofman.
- 30 3. In any event, even if the case of E. v. E. was correctly decided, it should be confined to its own facts and should not be regarded as enunciating principles of general application to cases under the Matrimonial Property Act 1963.
4. Even if the principles enunciated in E. v. E. are applied the decision of the Chief Justice was right and should be restored.



R.G. Gallen

COUNSEL

No. 39 of 1975

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW  
ZEALAND

B E T W E E N :

DOROTHY HALDANE

Appellant

and

GEORGE CHRISTOPHER HALDANE

Respondent

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CASE FOR THE APPELLANT

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