

IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY

D.523/66

626

BETWEEN [REDACTED] STEWART
of Auckland,
Garbage Contractor
Applicant

A N D [REDACTED] STEWART
of Auckland,
Married Woman
Respondent

Hearing: 1 December 1977

Counsel: M.S. Cole for Respondent
B.K. Shenkin for A [REDACTED] Stewart,
the Widow
G.S. Milfar for Estate of deceased Petitioner

Judgment: 19 DEC 1977

JUDGMENT OF VAUTIER J.

The respondent, [REDACTED] Stewart (to whom I will refer hereafter in this judgment as "the former wife") makes application for ancillary relief by way of permanent maintenance, the application being directed against A [REDACTED] Stewart of Auckland, Widow; P [REDACTED] Stewart of Auckland, Contractor and D [REDACTED] Stewart of Auckland, Sales Manager. The persons so named are the executors and trustees under the last Will of the petitioner, D [REDACTED] A [REDACTED] Stewart who died on 9 May 1975. Probate of the Will was granted on 21 July 1975 to them, they being respectively the widow and the two sons of the said D [REDACTED] A [REDACTED] Stewart and the former wife. In the notice of application, the former wife seeks an order that the executors and trustees of the deceased petitioner pay her a periodical sum by way of maintenance for her lifetime and also such capital sum as the Court thinks fit.

The former wife on 4 September 1967, obtained an order pursuant to a previous application for ancillary relief filed by her in this cause seeking an order for permanent maintenance and an order for payment of a capital sum. This order was made by consent and in terms thereof, the husband was ordered to pay to the former wife the sum of \$26 p.w. by way of permanent maintenance together with a capital sum of \$8,000 it being provided that as from the date of the payment of the capital sum, the maintenance was to reduce to the sum of \$22 p.w.. The former wife's affidavit shows that such weekly payments were maintained up to the date of death of the husband on 9 May 1975. Since that date, no payments of any kind have been made to the former wife from the husband's estate.

I questioned whether the Court had the power now to award to the former wife in these proceedings, a capital sum as sought having regard to the fact that s.41 of the Matrimonial Proceedings Act 1963 was repealed by s.57 (1) of the Matrimonial Property Act 1976. Mr Cole's answer to that was to submit that notwithstanding the repeal of s.41 as from the date of the coming into force of the Matrimonial Property Act 1976 i.e. 1 February 1977, s.41 continues to apply in this case by reason of what is said in s.5 (1) of the Matrimonial Property Act 1976. This sub-section provides as follows:-

"(1) Subject to subsections (2) and (3) of this section, and except as otherwise expressly provided in this Act, nothing in this Act shall apply after the death of either spouse, and every enactment and rule of law or of equity shall continue to operate and apply in such case as if this Act had not been passed."

I think it is somewhat doubtful whether this contention is sustainable in the way in which it was advanced by Mr Cole, or indeed at all. He contended that the effect of

s.5 (1) is that whenever one of the spouses has died (which of course includes a former spouse by virtue of the extended definition of marriage contained in s.2 of the Matrimonial Property Act 1976) s.41 is brought back into operation and can be relied upon and an order made in pursuance thereof. I am rather doubtful whether s.5 (1) can properly be interpreted as going as far as this. The words, ".....every enactmentshall continue to operate and apply in such case as if this Act had not been passed" may well in my view, be limited to enactments which still exist as such. I do not think the words are really apt to describe an enactment which is no longer such because it has been repealed in toto. S.5 (1) must, I think, be read in the light of the provision contained in s. 4 (3):-

"Every enactment shall, unless it or this Act otherwise expressly provides, be read subject to this Act."

S.5 (1) is one such "provision to the contrary" within the meaning of s.4 (3).

In addition, I note that s.57 (4) expressly provides as regards widows and widowers, for the continued operation of Part VIII of the Matrimonial Proceedings Act 1963 and there is also express provision in subs. (2) preserving the validity of orders made before the commencement of the Matrimonial Property Act 1976 under s.41 of the Matrimonial Proceedings Act 1963. If it was intended that s.41 of the Matrimonial Proceedings Act 1963 should continue to be available in all the cases embraced by Mr Cole's submission, it seems strange that express reference to that fact should not have been made in s.57 when the other preserving provisions were thus being made.

Apart from the question to which I have adverted above, there is another reason here why I think it doubtful whether in these proceedings a capital sum can be awarded to the former wife as sought in the application. As it will be noted, she has already made application in terms of s.41 for a capital sum and an order has been made awarding her such. I think it is doubtful whether a second application for a lump sum can, in any event, be advanced in terms of s.41 and I refer in this regard to Coleman v. Coleman (1972) 3 All E.R. 886.

No detailed submissions were made to me in this matter with regard to the first point and the second point was not raised at all at the hearing. I do not think it is necessary for me in this case to decide either of these questions because I am satisfied that all that I consider the former wife to be justly entitled to can be given to her by my acting in terms of s.47 (2) of the Matrimonial Proceedings Act 1963. None of the difficulties or possible difficulties to which I referred above have any application as regards that section.

Turning to the facts of this matter, I note that the assets and liabilities of the estate of the petitioner as returned for estate duty purposes, show that the total assets aggregated in value \$63,193 and the net approximate value of the estate was \$54,415. This however, was on the basis of the realty being valued at \$60,000. The market value as at 6 May 1977 was assessed by a registered valuer at \$72,000.

The order of maintenance in this case was (possibly inadvertently) so worded that it ceased to operate on the death of the petitioner. In terms of s.47 (2) as amended by s.4 (1) of the Matrimonial Proceedings Amendment Act 1968 and by s.56 and the Second Schedule of the Matrimonial Property Act 1963, there is clear authority provided for an order to be made now

either by way of variation or extending of the existing order or by the substituting of a new order whereby the personal representatives are required to contribute towards the continued maintenance and support of the former wife. It is clearly just in my view, that there should be such an order. The evidence shows that the former wife is now aged nearly 65 and is not in good health. The affidavit of Dr Wardrope confirms that the former wife's state of health is such that it is not reasonable to expect her to continue to work to earn money for her own support.

Furthermore, I am obliged, in terms of s.43 of the Matrimonial Proceedings Act 1963, to have regard to the extent of the former husband's estate. This it is clear, is quite sufficient to enable a contribution to be made to the support of the former wife without causing hardship to the widow of the petitioner. Indeed, her affidavit makes it plain that it is largely because of her personal wishes the large area of land on which the matrimonial home stands (2 acres) situated within the Borough of Mt. Reskill, has not been sub-divided or sold to some other person with that in view. The reason she gives is that it provides "a wonderful place for the children and their friends to play". She is referring here to the children of her previous marriage. While this may be very understandable, I do not think that the retention of this land which is clearly capable of sub-division, whereby substantial capital sums could be realised, is justifiable in the circumstances here pertaining. If the widow of the petitioner desires to retain all the land in this way, she will have to make other arrangements to provide for what, in my view, is a liability which the petitioner's estate must discharge. She could of course do this by further mortgaging of the land.

The budget put forward by the former wife, is, in my view in the circumstances here disclosed, a modest one. It was criticised mainly on the basis that the former wife should continue to provide something towards her own support from earnings. This, as I have already said, I do not think is justifiable on the evidence before me. The items in respect of car expenses and gifts are also criticised. The first of these is I think modest in the light of present day costs and if the second is a little on the generous side, I think this is offset by some of the other items being very modest assessments.

The order which I make is as follows:-

- (a) The personal representatives of the petitioner are ordered to pay towards the maintenance and support of the respondent, [REDACTED] Stewart, the sum of \$27 p.w., the first payment to be made on 23 December 1977.
- (b) The personal representatives are ordered to pay to the respondent, [REDACTED] Stewart, the sum of 4,000 dollars in respect of past maintenance. This sum is computed approximately on the basis of weekly payments of maintenance of \$27 p.w. from the date of death of the petitioner down to the date of this judgment and an allowance in addition, of interest at the rate of 7½% p.a. on the unpaid instalments. I have taken the figure however, at a round sum which I deem appropriate in the circumstances, computed after taking into account the figures to which I have adverted above.
- (c) The sum of 4,000 dollars is not required to be paid until the expiration of 12 months from the date of this judgment, but it is to bear interest

in the meantime from the date of this judgment at the rate of 7½% p.a. and the payment of this sum and the interest thereon (payable quarterly) together with the payment of the future maintenance, is to be secured by a memorandum of mortgage over the land at 378 Richards Road being all the land in Certificate of Title Volume 524 Folio 36 incorporating a charge in the nature of a rent charge as provided for by para. (d) in the definition of "mortgage" contained in s.2 of the Land Transfer Act 1952. The Memorandum of Mortgage is to provide for repayment of the \$4,000 at any time without notice and for variation so as to release from the security, any portion of the land which the trustees are in a position to sell.

The form of this security is to be settled by the Registrar and I will hear counsel further as to this if required and a general liberty to apply is reserved in view of the various alternatives which were canvassed before me as to the most satisfactory way in which the property could be sub-divided or the provision for the former wife secured.

The respondent is entitled to costs and I fix these in the sum of 200 dollars plus disbursements.

Solicitors for Respondent:

Messrs Simpson, Coates and
Clapshaw, Auckland

Solicitors for A [REDACTED]
Stewart, the Widow:

Messrs Shenkin and Ryan, Auckland

Solicitors for Estate of
Petitioner:

Messrs Peak, Longland and
Company, Auckland
