IN THE HIGH COURT OF NEW ZEALAND 6/4
BLENHEIM REGISTRY

A. No. 11/82

Special Consideration

138

IN THE MATTER of Sections 64 and 66 of the Trustee Act, 1956

A N D

IN THE ESTATE of R McPHEE late of Blenheim, Accountant Deceased

Hearing : 7th March 1983

Counsel :

Judgment : 11th March 1983

JUDGMENT OF CHILWELL J.

This is a motion for directions by P McPhee, the administratrix of the estate of R McPhee deceased pursuant to Sections 64 and 66 of the Trustee Act 1956. She is the deceased's widow. She was his second wife. There were five children of the deceased's first marriage; one of the second.

When the deceased and his first wife ceased to live together he had no assets. She remained in occupation of the family home.

The deceased's second wife, now his widow and administratrix of his estate, provided the first homes for their marriage. They were in They were sold

when the parties moved to Blenheim. A mortgage was raised with the National Bank of New Zealand Ltd. (the National Bank) to buy a house in Blenheim. A mortgage repayment insurance policy was taken out with the Australian Mutual Provident Society (the A.M.P.) and assigned to the bank. That house was subsequently sold. The nett proceeds of the sale, plus a mortgage advance from the New Zealand Permanent Building Society (the Building Society), were applied in the purchase of a house and rural land occupied by the deceased and his second family at the time of his death. It is presently occupied by the widow. It was purchased by the deceased and the widow as tenants in common in equal shares. The policy assigned to the National Bank was never surrendered. The mortgage was, however, repaid upon the sale of that property. Another mortgage repayment insurance policy was taken out with the A.M.P. when the present property was purchased. Upon the death of the husband, the A.M.P. paid out two sums: one to the National Bank and one to the Building Society.

The widow as administratrix seeks directions First as to whether the benefit of the reduction of the Building Society mortgage by the second of the A.M.P. payments forms part of the estate of the deceased or is an asset of the estate and of the widow as tenants in common in equal shares. Secondly, whether the sum received by the National Bank as the proceeds of the first A.M.P. policy is held for the estate alone, for the widow alone, or for the estate and her jointly. Thirdly, pursuant to a joint ambition of the widow and the deceased, she wishes to develop the present house and rural land as a cherry farm. Some money has been spent by her on the property since the deceased died. A valuation has been obtained. The widow as administratrix seeks the consent of the Court to the purchase by her in her own right of the half interest of

the deceased as a tenant in common.

The deceased owned a Jaguar motor car which was wrecked in the accident that killed him. The widow is entitled to succeed to "the personal chattels" of the deceased by virtue of Section 77 of the Administration Act 1969. The vehicle was insured with the S.I.M.U. Mutual Insurance Association. The insurance company accepted a tender for the wreck at $800 and paid the proceeds of the policy ($5,200) to the estate. Is the widow entitled to the proceeds of the policy or the value of the wreck? This question has been resolved by the decision in Wilson v Commissioner of Stamp Duties (1948) N.Z.L.R. 1208. The relevant passage in the head note states :-

> "When a husband, who died intestate, was killed in a collision, in which the motor-car which he was driving was damaged, only a badly damaged car passed to his widow under s.6(1)(a) of the statute; and the facts that such car was insured and that the insurance company treated the damaged car as a total loss did not affect the position of the widow, who was entitled to the ascertainable value of the car at the time of her husband's death."

The section and statute referred to is now Section 77 of the Administration Act 1969. Christie J. said at 1213 :-

> "..... at the moment of his death, he was possessed only of a badly damaged car. If the car had been uninsured, there could be no question as to what would have passed to the widow on the death of her husband. The facts that the car was insured and that the insurance company exercised its unfettered discretion to treat the damaged car as a total loss cannot, I think, have the effect of depriving the widow of the value of her statutory rights: nor, on the other hand, do I think that a personal contract between her husband and the insurance company (a contract that subsisted between the parties until the death of the insured) can have the effect of increasing the value of those rights."

On the authority of that decision, which I propose to follow,

I determine that the asset which passed as "personal chattels" to the widow was the wrecked vehicle worth $800 and not the proceeds of the insurance policy.

The issues involved in the proceeds of the A.M.P. policies require a close consideration of the facts. That consideration will provide also the relevant background against which I propose to exercise my discretion under Sections 64 and 66 of the Trustee Act 1956 with regard to the proposed purchase by the widow of the deceased's half interest in the present house and rural land.

The deceased's first marriage was dissolved by decree absolute on 1972. There were five children of that marriage born in and respectively. The deceased and his widow married on 1972. There is one child of that marriage born in . The deceased died on 1982 as the result of the motor accident. He was then years of age. He left no will. Letters of Administration were granted to the widow on 19th April 1982. The present motion for directions was filed on 8th November 1982.

When the deceased and his first wife ceased living together he had no assets other than a house which was then occupied by his wife and five children. They have remained in occupation. I understood the widow to say that the house is now owned by the first wife in consequence of a recent settlement of her rights under the Matrimonial Property Acts.

The first home of the deceased and the widow was provided by her before their marriage. They were then living in She purchased it with her own money and a mortgage advance of $3,000. The deceased guaranteed the mortgage. That house was sold and another house purchased

by her in The price was paid from the proceeds of sale of the first house and a mortgage advance, again guaranteed by the deceased. They moved to Blenheim in 1979. The second Dunedin house was sold. The nett amount received was about $15,000.

In 1979 a house was purchased in Street Blenheim for $36,500. A mortgage advance of $20,000 was arranged with the National Bank. The Bank Manager required that the mortgage repayment insurance be obtained. This was to cover the amount of the advance and be further security for repayment. The Manager nominated the A.M.P. He also required the deceased's guarantee. This was supplied. The deceased applied to the A.M.P. for the mortgage repayment insurance policy. The policy was issued with effect from 3rd October 1979. He was nominated as the life insured and as the policy owner in the policy with provision for the sum insured to be paid to the Bank. That sum was $20,000 reducing each month as provided for in a table. The benefit was expressed to be payable on death prior to 3rd October 1994. A single premium of $387 was paid. The deceased paid it from his bank account with another Bank. His cheque was debited to that account on 3rd October 1979. That debit placed his account in overdraft to the extent of $115. At his request the widow paid him $100 and $200 on 12th and 30th October 1979 respectively. In her evidence in chief the widow was asked if there was any discussion between her and the deceased as to the ownership of the policy. She replied "No none at all". She was then asked why it was taken out and her reply was : "To safeguard our home".

The Street house was sold in 1981. A property at Renwick containing firstly 1370m^2 and secondly

2.2313ha (the Renwick property) was purchased for $75,000. The purchase price was obtained from the nett proceeds of the sale of Street, namely $33,000.00 and a mortgage advance of $45,000 from the Building Society. On this occasion title was taken in the names of the deceased and the widow as tenants in common in equal shares. Because the source of the equity was the widow she advanced $16,000 to the deceased. He executed an acknowledgement of debt. The A.M.P. policy assigned to the National Bank was not surrendered on the sale of Street. The widow deposed that it was presumably overlooked.

The Building Society stipulated that there should be a mortgage repayment insurance policy on the life of the deceased as a condition of its advance. In consequence the second policy was taken out with the A.M.P. with effect from 14th August 1981. The single premium on this policy was $669. This was paid by the deceased from his own bank account. His cheque was debited to his account on 17th August 1981. That debit placed his account in overdraft to the extent of $1,485. Again the deceased was nominated in the policy as the life insured and the policy owner with the proviso that the sum insured was to be paid to the Building Society. The sum insured was again $20,000 reducing each month as before. This policy was expressed to be payable on the death of the deceased prior to 14th August 2001. The Building Society required the parties to open a savings account with the Society. This was a necessary pre condition before the loan application would be considered. A savings account was opened on 17th July 1981 with a deposit of $5,000. The widow paid that sum from her own bank account with the National Bank. The deceased calculated that about $5,000 would be required to meet money payable on settlement of the purchase of the Renwick property including the single premium on the mortgage repayment insurance policy, solicitor's

fees, and other disbursements. The first sheet of the savings account was produced in evidence. The material payments out were $1,700 on 14th August 1981 "balance to settle," $400 on 30th September 1981 "part A.M.P. insurance premium" and $1,937.58 on 11th November 1981 "legal fees stamp duty". But these notations are in the widow's handwriting, not the deceased's. As required by the Building Society $30 per week was paid into the account. The widow made these weekly payments. When the Redwood Street property was sold some surplus furniture belonging to the widow since before the marriage was also sold. At the deceased's request she paid him $500 which he banked on 18th August 1981 i.e. the day after his cheque for the single premium of $669 had been debited. This deposit reduced his overdraft to $985.15. The sum of $400 withdrawn from the Building Society Savings account on 30th September 1981 was paid to the deceased. The widow left the management of the Building Society Savings account to her husband. She accepted his assessment of the need for an opening deposit of $5,000. She did not inquire about his withdrawals. She knew he intended to withdraw the single premium payment. She gave him the $30 each week required to keep the account going.

In evidence the widow explained how it came about that the Renwick property was purchased by them as tenants in common in equal shares. She said it was her idea that the property should be purchased jointly. When the agreement for the purchase of the property was signed in about mid July 1981 the purchasers were shown to be purchasing jointly. She took advice on the significance of joint tenancy from her solicitor. She said she was advised that her share would devolve upon her husband if she predeceased him. She said that she felt that their son had suffered in terms of parental care and attention due to her having worked throughout the marriage. She wanted him to succeed to her share. She

was advised that in order to achieve this it was essential that the title to the property be taken not jointly but as tenants in common in equal shares. She said also that was why her husband was asked to sign an acknowledgement of debt for $16,000 - to ensure that her financial contribution was recorded.

Following the deceased's death the A.M.P. Society paid the sum of $17,861.00 to the National Bank and $19,717.00 to the Building Society. These sums represented the benefits payable under the policies as at the date of death on the basis of the monthly reductions provided for in the policies and in terms of the tables incorporated in those policies. The Building Society applied the money received by it towards reduction of the principal sum secured by its mortgage. When the National Bank received the sum of $17,861 it created a term deposit in the name of the estate. Subsequently that sum plus interest, making a total sum of $18,011.11, was paid to the widow's solicitors who hold it in their trust account in the name of the estate pending determination of this action.

The widow worked throughout the marriage, first for three firms of Chartered Accountants in and more latterly in Marlborough for the Marlborough Catchment Board. She took six weeks off work when her son was born. In Dunedin the deceased worked for as a secretary. While there he qualified as a chartered accountant. By early 1979 he had taken employment with a firm of chartered accountants. He suffered a loss in salary of $4,000. He worked as a chartered accountant in Blenheim. I was not informed if he was in practice on his own account or employed, but it is of no consequence for it appears that he was never financially well off and was

constantly in overdraft due in the main to his financial obligations to his first wife and their children which he observed. He paid them maintenance and also the outgoings on the house in which they lived. The household arrangements between the widow and the deceased were that she paid for household food and for her and their son's clothing and medical expenses. The deceased paid the electricity and telephone accounts. They shared the mortgage payments. Her cross-examination on these matters is significant :-

> "Throughout your marriage to the deceased you yourself worked and earned money apart from the short period around the birth of your child? That's correct.
>
> So that with the exception of that brief period you and your husband were both income earners? That's right.
>
> And you pooled your financial resources as and when required? That's correct.
>
> In fact you described that because of his commitments with his earlier family he was frequently in need of your financial help so that throughout the marriage you would give him money to assist him? Yes, right throughout the marriage.
>
> And I take it there was no arrangement that he would repay that money to you, they weren't loans? No they weren't loans.
>
> Did he ever assist you on occasions financially? Never.
>
> Because presumably he wasn't in a position? No he was never in a position." (page 4)

> "In your evidence you gave details of two payments made by you, $100 on 12th October and $200 on the 30th October of that year (1979)? Yes.
>
> Do I understand you are saying that that total of $300 was given by you to your husband to pay the mortgage repayment insurance premium? Not necessarily. It was given to him because paying out that meant monies budgetted for that particular month wouldn't be available, so I reimbursed him.
>
> In other words, it was simply a continuation of what you had been doing throughout your marriage, when he was short you would help him out? Right. Also, I thought it was my responsibility as it was in my interest as well.

> But he had of course paid the premium on that policy before you made those payments? Yes, he had. He had to pay it that day." (page 5)

The Renwick property was purchased with a view to its development as a cherry farm. They hoped that when it was developed the deceased could work full time on the farm, but in the meantime they considered that he could supplement his earnings by taking in some accounting work. In her affidavit in support of the motion the widow deposed that it was their joint ambition to set up a cherry farm on the Renwick property, that she would like to continue with this aim and purchase the deceased's share in the property. Since he died she has installed exterior lights to the dwelling including a time switch and an exterior standard light to the driveway: she has effected repairs and renovations to a cottage on the property including new windows and partially relined the building: she has put a new fence along one boundary and put in standard and cyclone fences to protect young shelter belts. Finally, she has recently finished having the proposed cherry farm area cultivated and planted in cherry trees at a cost of $2,000.00. She annexed a valuation made by a well known and well respected firm of registered valuers in Blenheim. This shows the present value of the property at $84,000 including the sum of $1,500 for the added value of work done by the widow. This figure excludes the cost of cherry trees and cultivation. These were acquired and the cultivation done after the valuation. The widow seeks the approval of the Court to her taking over the deceased's half interest in the property on the basis of a valuation of $82,500. There is no need for me to analyse the valuation. I accept it and I accept that the added value figure is correctly assessed at $1,500.

With regard to the proceeds of the insurance policies it is the function of the Court to give effect to

the intentions of the parties subject to the application of certain presumptions where the intentions of the parties are not proved. Garrow & Kelly Law of Trusts & Trustees 5 Ed. 191. In Gissing v Gissing (1971) A.C. 886, 906 Lord Diplock said (page 906) :-

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.
>
> In drawing such an inference, what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. Unless it is alleged that there was some subsequent fresh agreement, acted upon by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only upon the basis of their having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interests should be held. But it would in my view be unreasonably legalistic to treat the relevant transaction involved in the acquisition of a matrimonial home as restricted to the actual conveyance of the fee simple into the name of one or other spouse. Their common intention is more likely to have been concerned with the economic realities of the transaction than with the unfamiliar technicalities of the English law of legal and equitable interests in land. The economic reality which lies behind the conveyance of the fee simple to a purchaser in return for a purchase price the greater part of which is advanced to the purchaser upon a mortgage repayable by instalments over a number of years, is that the new freeholder is purchasing the matrimonial home upon credit and that the purchase price is represented by the instalments by which the mortgage is repaid in addition

> to the initial payment in cash. The conduct of the spouses in relation to the payment of the mortgage instalments may be no less relevant to their common intention as to the beneficial interests in a matrimonial home acquired in this way than their conduct in relation to the payment of the cash deposit."

Proof of an express common intention is lacking in the present case. What were the realities of the transactions and what inferences are to be drawn?

In each instance the policy was acquired in consequence of a stipulation by the mortgagee: in each instance the policy provided cover against the death of the deceased: in each instance the policy provided for payment of the sum insured to the mortgagee: in each instance the cover reduced from $20,000 to $nil over a fifteen year term for the first policy, a 20 year term for the second policy.

In the first transaction the widow was the sole owner of the matrimonial home, she was the borrower, the deceased guaranteed her obligations, the amount borrowed was $20,000, the initial amount of the cover was $20,000. The realities of the transaction are that the deceased acquired a policy for a relatively small premium to provide a reducing cover in the event of his death to be paid to the mortgagee of the matrimonial home owned by his wife. The widow understood the position. The deceased, as a chartered accountant, must have understood the position. When the deceased died the terms of the policy were carried out - viz,. "Sum insured payable to the National Bank of New Zealand Limited". There was then nothing owing under the mortgage. The principal sum had been repaid and the mortgage discharged. If there had been money owing under the mortgage the Bank would have taken it. That would have reduced the widow's indebtedness or discharged it depending upon the amount then due to the Bank. The deceased's

personal representative could not have claimed from her the amount taken by the Bank in reduction because the sense of the transaction was that the money be paid to the mortgagee in reduction or discharge of the mortgage but would any surplus not so required belong to the deceased as the policy owner? In the absence of any discussion between the parties when the policy was taken out the only proper inference is that the deceased's personal representatives would be entitled to the surplus. As it happened the Bank was owed nothing: it had no longer any right to take the money to pay off the wife's mortgage. It received the money as the deceased's because he owned the policy. The widow did not purchase the policy. The husband purchased it. The widow did not specifically repay the deceased the amount of the purchase price. She paid him $100 and then $200 but not specifically on account of the purchase price. There is no room for the presumption of a resulting trust on the basis that she purchased an asset which was vested in the name of another first because the realities of the transaction indicate to the contrary and secondly because she did not pay the price. In the result I find that the sum of $17,861 (now represented by the sum of $18,011.11 plus all interest being earned thereon) is the property of the deceased and hence of his administratrix as such.

In the second transaction the widow and the deceased owned the matrimonial home plus rural land as tenants in common in equal shares. Both of them were the borrowers. Theyborrowed $45,000 from the Building Society. The initial amount of the life cover was $20,000. Mr. Conradson drew attention to the fact that only $20,000 insurance cover was taken out on this occasion. He invited me to draw the inference that the policy was in every sense the deceased's because the cover was intended to be limited to the deceased's share of the mortgage particularly as the

property was acquired by the parties as tenants in common in equal shares and, in order to protect the widow's half interest in the equity, he had signed an acknowledgement of debt for $16,000. I do not draw that inference. The more likely inference is that the Building Society fixed the amount of life cover as part of its lending arrangements in respect of that policy. The reason why the National Bank wanted full cover and the Building Society less than half probably reflects the different lending policies of the two lending institutions. So far as the $16,000 acknowledgement of debt is concerned, that issue arose after the Building Society had been first approached for an advance and after the Savings Account had been opened. I conclude as a matter of inference that the cover of $20,000 stipulated for by the Building Society was not influenced by the acknowledgement of debt. The realities of the situation are that the deceased acquired this insurance policy for a relatively small premium to provide a reducing cover in the event of his death to be paid to the mortgagee of the matrimonial home and adjoining rural land owned by him and his wife as tenants in common in equal shares. The widow understood the position. The deceased made most of the financial arrangements: so he understood the position. When he died the terms of the policy were carried out - viz, "Sum insured payable to New Zealand Permanent Building Society". It must have been understood by the parties that the sum insured would be taken, as it was, in reduction of the amount owing under the Building Society mortgage. The position is really the same as with the National Bank: if nothing had been owing under the mortgage the Building Society would no longer have had the right to take the deceased's money except to place to his account. He was, as before, the policy owner. But there was more than $19,717 owing to the Building Society. It exercised its right to take the sum insured in reduction of the mortgage. In so doing it acted in

accordance with the understanding of the parties when the mortgage was taken out. The mortgage advance was the liability of the deceased and the widow jointly. The reduction reduced that joint liability. In the present case the proper inference from the payment out of $500 from the Savings Account to the deceased's Bank account, almost contemporaneously with the payment of the price for the policy ($669), is that the sum of $500 was provided by the widow out of the widow's money which she had paid into the Savings Bank Account. I do not find that one can draw the same inference with regard to the sum of $400 withdrawn later at the end of September. However, I find, on the basis of the widow's evidence, which is corroborated by the withdrawals made from the Savings Account, that when she provided the sum of $5,000 to open the account it included the price of the policy. Prima facie there is room for the presumption of a resulting trust - the purchase by the wife of an insurance policy in the husband's name. But I find that presumption rebutted by the realities of the whole transaction. In the result I find that the sum of $19,717 received by the Building Society and applied by it in reduction of the mortgage is the property of the deceased and the widow in equal shares.

I accept the widow's evidence as recorded in this judgment. In particular I accept the evidence regarding the financial arrangements between her and the deceased and the pooling of funds which occurred. Unfortunately, in the light of Gissing v Gissing that type of evidence is insufficient from which to draw an inference as to common intention with regard to the ownership of the two insurance policies or the sums insured thereunder nor is it available to create any new form of presumption beyond those known to the law at the time of Gissing v Gissing. It is for that reason that I have concentrated my attention on the transactions themselves and what I conceive to be the realities of each.

Turning now to the application for the consent of the Court to the purchase by the widow of the deceased's half interest in the Renwick property, the provisions of Section 64 of the Trustee Act 1956 give the Court extensive powers to authorise dealing with trust property. The section is reviewed in Garrow & Kelly op cit 246-250. But the Court's discretion is not completely unfettered. It is stated in Garrow & Kelly 249-250 :-

> "Nevertheless, before making an order the Court must be satisfied that the transaction in question is expedient for the trust as a whole, and not merely in the interests of one beneficiary. The same view has been expressed in rather more detail in In re Dawson where it was held that the word 'expedient' did not require the Court to be satisfied that the transaction would be expedient or advantageous to each and every beneficiary considered separately; but that the Court must take into account the interests of all the beneficiaries and upon a broad and commonsense view be able to conclude that the proposed transaction could fairly be said to be expedient for the trust as a whole. The words'or would be in the best interest of the persons beneficially interested under the trust' did not appear in the section at the time when these decisions were given, and their effect can only be to enlarge the jurisdiction."

The widow's proposal is intended to advance the joint venture on which she and the deceased were engaged, it is in her best interests and those of her son. It is also in the best interests of the deceased's five children by his former marriage that the property be sold. The real issue so far as they are concerned is whether the market ought to be tested but, the valuation has not been attacked, it is a valuation by a well known and highly respected firm of registered valuers and it is recent (13th July 1982). The widow is a tenant in common in equal shares and, accordingly, the most likely buyer on the market in the circumstances of this case. I conclude that the widow's proposal is also in the best interests of the deceased's five children of his former marriage. There will be an order consenting to the proposed purchase.

The formal orders of the Court are :-

1. Directing that the deceased's motor-car which was in a state of wreck at the time of his death passed to the widow as "personal chattels" under Section 77 of the Administration Act 1969.

2. Directing that the sum of $5,200 being the proceeds of the motor vehicle property issued by the S.I.M.U. Mutual Insurance Association is the property of the deceased subject to the payment thereout to the widow of the sum of $800 being the value of the wreck which passed to her as aforesaid.

3. Directing that the sum of $17,861 received by the National Bank of New Zealand Ltd. (now represented by the sum of $18,011.11 plus interest accruing thereon held in the trust account of Wisheart, Macnab and Partners) being the proceeds of A.M.P. policy No. Z 1292772 - V is the property of the deceased.

4. Directing that the sum of $19,717 received by the New Zealand Permanent Building Society as the proceeds of A.M.P. Policy No. Z 1440991 - C and applied by it in reduction of Mortgage No. 105963.3 (Marlborough Land Registry) is the property of the deceased and the widow in equal shares.

5. Consenting to Patricia Gay McPhee purchasing the interest of the deceased in the property described as first 1370m^2 Lot 2 D.P. 4991 all C.T. 3A/1436 (Marlborough Land Registry) and secondly 2.2313 ha being part Lot 4 D.P. 3165 all C.T. 3A/1442 the price to be based on a value of $82,500.

6. All parties have liberty to apply for such further or other order or direction as may be necessary or expedient for the implementation of the foregoing orders.

With regard to costs, the widow as administratrix does not require an order but if it is considered that an order ought to be made having regard to her personal interest in the application counsel may file a memorandum. Mr. Conradson is entitled to an order for costs to be payable out of the estate. I invite him to file a memorandum. Counsel should exchange memoranda before I am asked finally to fix costs. Meantime, all questions of costs stand reserved.

M J Edwards J

10th March 1983.

Solicitors :

: Wisheart Macnab & Partners, Blenheim.