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N.Z.L.R. Reports.

A.No.8/84

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

334

BETWEEN J McGRAW of Palmerston North, Beneficiary

Plaintiff

AND THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED having its registered office at Auckland and carrying on the business of a Trustee Company

Defendant

Hearing: 23 February 1984

Counsel: P. Whitehead for Plaintiff
K.C. Bailey for Defendant

Judgment: APR 12 1984

JUDGMENT OF EICHELBAUM J

The plaintiff is the widower of M McGraw. The defendant is her executor and trustee. Both the plaintiff and his late wife had been married previously. Three children of Mrs McGraw's previous marriage had been living in the household of the plaintiff and the deceased. At the time of the latter's death they were aged Although the evidence is not explicit on the point it was common ground that there was also a child by Mr McGraw's earlier marriage.

Mr McGraw had a policy on his own life that pre-dated his marriage to the deceased. After their marriage a policy was taken out on Mrs McGraw's life.

Premiums on both policies were paid by automatic transfer from Mr McGraw's bank account.

In March 1979 the policy which has given rise to the present proceedings was taken out. As a result of some introduction to Mrs McGraw a life insurance agent, Mr Owen Sherlock, had a meeting with her and her husband. Mr McGraw's immediate reaction was that they had neither the means nor the need for a further policy. However, Mr Sherlock introduced discussion on what was described as a joint life policy. For present purposes the main features of such an insurance were as follows. The lives insured were those of the husband and the wife, the sum insured being payable on the first death to occur. The survivor, if under 55, had an option to take out a new policy on the survivor's own life irrespective of his or her then state of health. Such option had to be exercised within a period of 90 days during which the surviving partner remained covered for the basic sum in the policy. One of the attractions of the policy was that the premium was little more than on insurance of a single life for the same sum.

The McGraws duly took out a policy in this form. In 1980 Mrs McGraw was killed in a motor accident. The present proceedings have been brought to determine ownership of the proceeds of the policy. The plaintiff claims them on the basis of a trust, express, implied or constructive. The defendant opposes that claim. Unless the plaintiff can establish a trust it follows from the wording of the policy and the proposal on which it was based that legal ownership of the policy lay with the wife whose estate would therefore be entitled to the proceeds.

It is now necessary to refer in more detail to the meeting between the parties and Mr Sherlock. According to Mr McGraw, there was a discussion about their wills, and Mr Sherlock referred to the potential delay before probate could be obtained. Mr Sherlock said one of the advantages of the joint policy was that the insurance company would pay out to the survivor immediately upon death so as to provide cash for necessary expenses. Then, in the discussion, the question arose who was to be the proposer for the policy. Because the insurance company had found itself being drawn into matrimonial property disputes it had decided, as a rule of general application, that there was to be one proposer only. The relevant portion of the form to be completed was headed as follows :

> " Statement and Declaration
> of the Proposer (who shall
> be the owner of the policy)
> if not the life insured. "

Notwithstanding this explicit statement the agent told Mr and Mrs McGraw it did not matter who made the proposal. His understanding at the time was that regardless of the identity of the proposer, the proceeds would go to the survivor. He believed that the requirement for a single proposer was relevant solely to the question of matrimonial property disputes. He said that on other occasions the question of which spouse's name was to be shown as

proposer was decided by the toss of a coin. In Mr and Mrs McGraw's case there was a friendly discussion which was decided on the basis of "ladies before gentlemen". When issued the policy, reflecting in this respect the proposal, showed the lives assured as J McGraw and M McGraw, but "the assured" as Mrs McGraw alone. Mr Sherlock adhered to the view that on the information he had been given by the insurance office it should have made no difference. Consequently he disagreed with the stand the insurer had taken in the present proceedings, namely that the proceeds went to Mrs McGraw's estate.

There is a discrepancy between Mr McGraw's evidence and Mr Sherlock's in regard to whether the subject of wills arose. Mr McGraw said they "more or less" told Mr Sherlock the contents of the wills, namely that they were to the same effect and "the survivor took all". On being shown a copy Mr McGraw agreed that in fact the survivor took a life interest with remainder to the children in equal shares. Then later in his evidence when asked why, since he was opposed to the taking out of any further insurance, he in fact agreed to enter into this particular policy he answered "we still never changed the wills, this was only to give the survivor enough capital until everything was sorted out". Mr Sherlock said there was no mention of wills, but it is understandable that such a detail would be more likely to remain in Mr McGraw's memory and I accept that the subject was in fact discussed. Indeed it was apparent that in Mr McGraw's view this played some significant part in the discussion and the parties' decision to proceed. Further it was obvious that Mr McGraw was not clear as to the effect of the wills. He thought that a life interest meant that the survivor

could use the estate as he pleased but was bound to divide his property among the children on his death. I have to add that Mr McGraw was not an impressive witness; unfortunately his prejudice against his late wife's children was only too apparent. He showed himself to be a self opinionated person and one statement of his that I had no difficulty in accepting was that no-one persuaded him to do anything against his wishes. I have no confidence at all that at the time of the meeting with the agent Mr McGraw correctly understood the effect of the mutual wills he and his wife had made. Nor can I say whether he thought that the proceeds of the proposed new policy would follow the same destination as the wills or on the other hand be dealt with separately. Clearly the representation that the policy would ensure that cash was available promptly on the death of one party was a persuasive factor but in light of the understanding held by Mr McGraw as to what constituted a life interest, this was not inconsistent with a view on his part that the destination of the proceeds of the policy would be governed by the wills. That is to say, any funds of the deceased in the first instance would become available to the survivor (so Mr McGraw may have thought) but eventually any balance would form part of "the estate" to be divided between the children. However, the evidence fails to satisfy me that this or any of the other alternatives represented Mr McGraw's intention at the time. I am unable to say what his intention was. So far as Mrs McGraw was concerned I am certain she would have played a secondary part in the discussion. Not being satisfied as to Mr McGraw's intention, still less can I be satisfied that he succeeded in communicating it to Mrs McGraw, that she was in agreement with

it, and that expressly or by implication she adopted the same intention.

The only other evidence bearing on intention was the incident to which the eldest son deposed as to a statement made by Mrs McGraw about a month prior to death, to the effect that if "someone" was killed he (the eldest son) and his brother and sister would be well looked after from a family and financial point of view. Since in fact the house itself had been registered as a joint family home the mother had no property of substance in which the children would have an interest in remainder, unless she was under the impression that the life policy would form part of her estate. Her remark however is capable of any number of interpretations, the discussion was not a serious one and I do not place any significance on it except to the extent that at least it is consistent with the view I have formed that the parties were not clear either as to the effect of their testamentary dispositions or as to the position regarding entitlement to the proceeds of the policy.

As to Mr Sherlock, while I accept that he did his best to give his recollection of the events of a single interview that occurred five years ago, I find it difficult to accept that - given Mr McGraw's and, by inference, his wife's uncertainty about the concepts of joint ownership, survivorship, and life interests - he succeeded in explaining to them precisely the position regarding ownership of the policy as he understood it to be, compared with what was stated in the heading on the form of proposal. I bear in mind that the meeting was long before the decision in the McCarthy case, concerning the same form of policy, to

which I refer below. Accordingly the insurance company might well have thought that the identity of the proponent governed legal rights, as was in fact the company's attitude when the dispute arose. With all respect to Mr Sherlock therefore I do not regard it as proved that in 1979 he was as clear and convincing about the position as he thought when giving evidence.

There are one or two other aspects of the evidence given on behalf of the plaintiff to which I should refer. After the new insurance had been taken out the previous policy on the wife's life was cancelled. Payments on the new policy were made out of the wife's earnings : as noted previously premiums in respect of the earlier policy had been made by the husband. In respect of the previous policy Mr McGraw said that the proceeds would have been paid out to him. For the reasons already discussed I am unable to accept it as established that Mr McGraw was legally the beneficiary under that earlier policy.

Relating my findings to the essentials for the constitution of an express trust (38 Halsbury 3rd Edn paras 1349 et seq) I do not regard it as proved that whatever Mrs McGraw assented to was sufficiently clear to amount to the creation of a trust (ibid, para 1393). Even if that hurdle were overcome, in my view the objects of the supposed trust have not been established with sufficient certainty (ibid, para 1399). I do not feel any confidence that Mrs McGraw would have assented to an arrangement whereby the use and benefit of the proceeds passed absolutely and without fetter to Mr McGraw on her death.

I have of course given careful consideration to the judgments in McCarthy v Public Trustee, No A 245/80 Wellington Registry judgment of Quilliam J 31 August 1981, affirmed in the Court of Appeal (Woodhouse P and Cooke and Richardson JJ) C A 118/81 judgment 5 May 1982. While the case was concerned with what appears to have been the identical form of policy, the evidence established the necessary intention on the part of the single proponent to hold the policy in trust in favour of herself and her fiance as joint tenants. Here, for the reasons given I am not able to reach a similar conclusion.

I turn then to the plaintiff's alternative case based upon a constructive trust. Here the plaintiff naturally leaned heavily upon the recent decision of the Court of Appeal in Hayward v Giordani, now reported 1983 NZLR 140. There, although the actual decision went on grounds of an express trust, Cooke J with some support from Richardson J and McMullin J favoured the view that in suitable circumstances the Courts should be prepared to impute an intention of equitable ownership, notwithstanding that the parties had not turned their minds to the topic, or that the evidence did not support the conclusion that the parties intended to share the property in that way.

Hayward v Giordani of course arose from a de facto relationship. Since the advent of modern matrimonial property legislation no New Zealand case, so far as I am aware, has found it necessary to explore the issue as between spouses or former spouses. Section 4 of the Matrimonial Property Act 1976 provides that the Act is to have effect in place of the rules and presumptions of the common law and equity to the extent that they apply to transactions between husband and wife

in respect of property. Further, without limiting the generality of that provision, the section goes on to state that the presumptions of advancement and of resulting trust, and the presumption that the use of the wife's income by her husband with her consent during marriage is a gift, are not to apply as between husband and wife. In the present case no submissions were directed towards the effect, if any, of these provisions on a situation such as the present. I appreciate that by virtue of s 5 nothing in the Act applies after the death of either spouse, and that in such case every rule of law or equity shall continue to apply as if the Act had not been passed. Assuming therefore that s 4 is irrelevant to the present problem, what has to be contemplated is an equity that may fasten to matrimonial property (here the insurance policy) at the time of its acquisition, or at any rate while the marriage subsists, but which as it were remains in suspension until the death of one spouse. If they are parted sooner, the equity never attaches, and any dispute about the property is resolved according to a different set of rules prescribed by the legislation.

The views expressed on this branch of the law in Hayward v Giordani lead back to Pettitt v Pettitt 1970 AC 777 and Gissing v Gissing 1971 AC 886, particularly the speeches of Lord Reid and Lord Diplock in the former case and Lord Reid in the latter. In the present circumstances, if a foundation is to be found for the concept of constructive trust favoured by their Lordships, it must lie in contributions, direct or indirect, made by the spouse in whom legal ownership has not been vested, or some sufficient inequitable conduct (see per Lord Diplock in Gissing, p 905) on the part

of the other. In either event the contributions or the conduct must relate to the property in question. Even that firm proponent of the constructive trust, Lord Denning, accepts that qualification, see his judgment in the Court of Appeal in Gissing v Gissing, 1969 2 Ch 85, 93.

I approach the matter then on this basis : assuming the most benevolent view of the current state of the law in the husband's favour, are the facts sufficient to support the contention of a constructive trust? I do not think they are.

First, the husband made no direct contributions to the policy. As to indirect contributions, the position was that in the case of the previous policy on the wife's life the premiums were being paid out of the husband's bank account. Those for the new policy were met by Mrs McGraw. I infer that the change was at Mr McGraw's request. Presumably it mattered to him. There was no evidence that the earnings of the spouses were pooled or indeed to say how they managed their finances. Based on my observation of Mr McGraw I think the most likely inference is that he said something like : "This new policy is your idea; you can pay for it". The new arrangements left him better not worse off.

As to some form of inequitable conduct on the wife's part, for the plaintiff reliance was placed on the cancellation of the previous policy on the wife's life. As stated, I do not find it proved that the husband was the beneficiary under that policy. In the absence of such a holding, there is no basis for saying that the wife induced the husband to act

to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the policy (see Gissing v Gissing at p 905).

I add that much of the legal ground relevant to this branch of the argument is helpfully rehearsed in Burns v Burns 1984 1 All ER 244, a decision of the Court of Appeal (Waller Fox and May LJJ) recently reported which came to my attention after the hearing of the present case. It however does not enable the plaintiff's argument to be taken any further.

Accordingly I hold that the alternative case based on a constructive trust fails also.

The action is dismissed with costs to the defendant as per scale as on a claim for $10,000, together with disbursements and witnesses expenses to be fixed by the Registrar.

After the conclusion of the hearing the Registrar drew my attention to the fact that the action had not been set down. There is a history to the matter that renders this oversight explicable. Originally the issues were to be determined by originating summons but at the stage of a fixture, a week before the present hearing, it was realised that this course would be inappropriate. The current proceedings were then issued and by co-operation brought to trial almost immediately. When the parties appeared before me to obtain an order abridging the time for a statement of defence clearly it was intended that an order should also be sought under Rule 250B; and

to cure the oversight and give effect to the intentions of the parties I make an order in terms of that rule nunc pro tunc directing that the action be tried on 23 February 1984 without being set down.

Solicitors :

Jacobs Florentine & Partners (Palmerston North) for Plaintiff

P.H. Barbour Esq (Foxton) for Defendant