IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

14/5

A. No. 893/80.

N.Z.L. Reports.

457

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the estate of G MARTIN formerly of Auckland, Chartered Accountant now deceased

BETWEEN M MARTIN of Auckland, Widow

PLAINTIFF

AND P MARTIN Executive and M MARTIN Widow, both of Auckland, as Administrators of the estate of G MARTIN deceased

DEFENDANT

Hearing: 21st and 22nd July, 1983.

Counsel:

Judgment: 6 April, 1984.

JUDGMENT OF MOLLER, J.

G MARTIN (the deceased) died on 1979. On that day he was driving over the Auckland Harbour Bridge in a northerly direction when his car hit one of the central buttresses. He was alone in the car, and he died as a result of the accident. He was an alcoholic , and tests of

his blood showed that, at the time of the collision, he was in an advanced state of intoxication. He was then years of age. He died intestate, and the plaintiff, who is his widow, commenced these proceedings seeking further provision out of his estate than that to which she is entitled under the provisions of the Administration Act 1969. She is in her year.

There are two children of the marriage, both adopted. One is P Martin, born on 1950; and the other, at the time of the issue of these proceedings, was unmarried and was then B Martin, born on 1956. She was married on 1982 to one, A Baker, and the second of her two affidavits is made under the name of B Baker.

It is to be noted that the son and the widow are the administrators of the deceased's estate.

The son (P has two sons of his own. They are: A born on 1971; and D born or 1973. Mrs. Baker has a daughter, born on 1983.

Mrs. Baker makes no claim for further provision from the estate either for herself or her daughter. She lends support to the widow's claim. P makes no

claim from the estate for anything beyond what the Administration Act allows him, but very strenuously opposes the plaintiff's claim. However, Mr. Reeves, appointed as counsel to represent P two sons, seeks provision for them.

There is a very considerable amount of bitterness between P and the widow, and this has obviously occasioned difficulties in the administration of the estate. Indeed, some of the affidavits, particularly those of the widow, which contain allegations against P are very open indeed to the criticisms directed towards such matters by the late Chief Justice, Sir Richard Wild, in Re Meier [1976] 1 N.Z.L.R. 257.

The deceased was born in the United States of America and served in its army in the Pacific during the Second World War. It seems that he met the plaintiff while on leave in New Zealand, and they were married in Auckland on 1944. From 1946 to 1949 they lived in Seattle, where the deceased finished obtaining a degree in accountancy at the University of Washington. Then, between 1949 and 1953, the deceased studied for, and eventually obtained, the degree of Master of Economics at the Auckland University . In Auckland they first lived in a house in Epsom, which was finally registered in their names as joint owners. This home was sold and another purchased. This was Remuera. It was registered in the names of both of them as tenants-in-common in equal shares. The deceased and the plaintiff were still living in this property when the deceased died, and the plaintiff is still occupying it. Then, in 1950,

they bought a beach property at Manly, and this was registered in their names as joint owners.

The plaintiff began working full-time in 1976. She did this because of problems that had arisen in the marriage as the result of the deceased's becoming an alcoholic. As already indicated, this condition continued until his death, and the plaintiff says that she worked because she "was worried about (her) security". On the totality of the evidence before me, I feel fully justified in finding that, although the plaintiff and the deceased continued living together until his death, the atmosphere in the home must have been one of considerable tension which developed out of the attitudes of them both.

At the time of the deceased's death he was a partner in a firm of chartered accountants with an extensive connexion throughout New Zealand.

The assets in the estate were first dealt with in an affidavit by P and the plaintiff, as administrators. This was filed on 1st July 1981. Then, on 8th July 1983, a further affidavit was filed dealing with this aspect of the matter, this one being sworn by a solicitor engaged in the administration of the estate. However, on 20th July 1983 (the day before the hearing commenced) there was filed another affidavit sworn by this same solicitor, which, though it differed to some considerable extent from the details to which the deponent had sworn twelve days earlier, I have accepted as correctly setting out the position.

Summarizing what appears in the solicitor's second affidavit, but leaving aside for the moment the property in Road and also another asset which is referred to in the document as ' Station", there is a nett balance of approximately $115,000. Included in this sum is a valuation of a share portfolio amounting to $70,782.35, and the balance appears to be in cash, either available or readily available.

I turn now tc Road. The house on the property is a large two-storeyed one in "Tudor style" containing 4 bedrooms, a sunroom, and all living and general utility rooms that one would expect in such a home. In respect of it I have two valuations. One has been supplied by the plaintiff, and the other by the solicitors for P The first of these is to the effect that, at 9th June 1983, "the subject property's market value range" was between $185,000 and $190,000, and it suggests that, if it should be placed on the market, it should be "listed at just under the $200,000 level". The other valuer says that the market value, at 1st March 1983, was $190,000.

I intend using the figure of $190,000 in connexion with this aspect of that matter, and that means that there must now be added to the figure already mentioned of $115,000, the sum of $95,000, giving a total, without yet including Station", of $210,000.

I now come to "Rahui Station". This is a difficult matter. Filed on behalf of the plaintiff is an affidavit by one, P Howell, who describes himself as "a partner in the firm of

Chartered Accountants, formerly known as

And he goes on to say that, as such partner, he is "responsible for the Station Partnership, and the associated company Farm Contractor's Ltd.". It appears that the company owns a block of land upon which the partnership carries on a farming business. The company has a total shareholding of 26,000 shares, of which the estate owns 1,080 fully paid-up ordinary shares of $1 each. It also has an interest of $26,000 in the partnership , which on 8th July 1983 (the date on which the affidavit was sworn) had "a present capital of $604,500". Mr. Howell goes on to say that the estate also has "a proportionate interest in 890 shares in the company being part of the 26,000 shares already referred to", and that these 890 shares " are held in the proportion that the partners own partnership capital". He adds that the "overall result is that the shares in the company ... and the partnership are held in identical proportions".

However, Mr. Howell adds that "the farming activities to date have basically incurred losses which have been met internally by the partnership and the Estate has not been liable to make any contributions beyond a capital contribution (in 1982) of $1000". It appears from the last paragraph in the affidavit that the partners decided to sell, that a sale was almost effected but "appears to have fallen down", and unless "it can be revived no other sale is at present in sight".

The first affidavit by the estate's solicitor was sworn on the same day as that of Mr. Howell, and in it this appears:-

" Interests in Station partnership and Farm

> Contractors Limited. As at the date of death these assets were together valued at $37,000.00. We understand that a sale of the property is currently being negotiated which would realise approximately $70,000.00 for the estate. Sale proceeds would be subject to a tax liability on approximately $16,000.00 of this sum."

The solicitor then includes the share in the partnership and in the company in the assets of the estate at $70,000.

In his submissions to me Mr. Cavanagh , for P] acknowledged that one would have difficulty in fixing the value of this asset, and also that distributable cash may not become available to the estate for some years. However, it would not seem unrealistic to say that the total value of the assets of the estate could well exceed $250,000.

I can now consider the claim by the widow for further provision out of the estate, and, in this connexion, the first thing to be examined is the extent to which she benefitted under the intestacy by virtue of the Administration Act. She receives, by virtue of the provisions of that Act, as amended by the Administration Amendment Act 1975,

1.	A capital sum of	$25,000.00
2.	1/3rd of the estate's half interest in Ranui Road	31,650.00
3.	1/3rd of the estate's interest in the Station	
4.	1/3rd of the estate's interest in the residue (that is to say: $115,000 less 25,000	
	$ 90,000)	30,000.00

Items 1, 2 and 4 total $86,650, and, at what seems to me to be a very conservative estimate, I am assessing item 3 at $15,000. This means that the total for all 4 items is $101,650.

I comment in passing that I have not overlooked that section 77 (1)(a) of the Administration Act also gives to the widow, as her absolute property, the deceased's personal chattels. In his first affidavit the solicitor for the estate says that "for Estate Duty purposes we assessed personal chattels as having a value of less than $6,000". Considering the other substantial assets of the widow to which I am about to refer, I propose disregarding the value of the chattels in my assessment of her capital position.

By virtue of her survival of the deceased, she now owns, wholly as her own property, the beach property at Manly. This has been valued, on her behalf, at $61,000. Consequently as a direct result of the death of the deceased, she became entitled to assets worth at least $162,650.

In addition to this, further assets came to her by way of survivorship or because of her husband's death. These are amounts from overseas bank accounts, insurances, and a lump sum payment from the Accident Compensation Corporation. In all they total about $11,000.

The total is therefore approximately $173,000.

On 22nd July 1983, the second day of the hearing, the widow swore her fifth affidavit which, in effect , showed that she then had the following assets

1.	Her own half share in Road	$95,000.00
2.	Bank accounts containing say	8,200.00
3.	A mortgage investment of	7,000.00
4.	Inflation-proof bonds of	20,000.00
5.	3800 "shares in Fletchers" 1100 "shares approximately in Ceramco" 432 "shares approximately in Yates" 500 "shares in Brierly" (based on share quotations at the time of the hearing)	16,000. 00
6.	The property	61,000. 00
	TOTAL	$ 207,200. 00

This, however, is without taking into account what she would receive, as I have already set out, under the intestacy, if no order in favour of her or the grandchildren is made in these proceedings.

The total value of her assets in those circumstances, would be in the vicinity of $300,000.

If therefore no orders are made in these proceedings the widow would be in a very strong position as far as capital is

concerned.

I turn now to consider her position as to income.

It is not an easy matter to make accurate calculations in connexion with this. But it seems that, at the time of the hearing, her income, before deductions for tax, was made up of National Superannuation, payment by way of Accident Compensation, personal earnings, rent from the Manly property and returns on her different kinds of investments. The total of these items returned a gross income of approximately $650 per week.

On behalf of P Mr. Cavanagh immediately conceded that it was unreasonable to expect the plaintiff to work beyond the age of 60, and that consequently it would be realistic to deduct immediately from that weekly total the sum of $177, this leaving a balance of $473. Then, too, one must take account of the fact that the payment by way of Accident Compensation is reconsidered as to renewal each year, though there is nothing in the affidavits to show the basis upon which any reduction in the amount payable, or a refusal to continue any payment at all, might be made. However, it is proper to keep in mind that these payments do end when the plaintiff reaches the age of 65. Even then, however, it seems to me on the figures before me that she would still be in receipt of a gross income of about $200 per week.

But there is another matter to be considered in this connexion . There is nothing in the plaintiff's affidavits (and there were, as I have already mentioned, five of them, in any one of which the subject could have been raised) to suggest that she wants to continue living in the home in Road or that she would consider buying from the estate its half-share in the property. Indeed, in one of her

affidavits, she seems to contemplate a situation in the future in which, because she is alone and "cannot expect any help from (her) son P and (her) daughter B may not be well enough to look after (her) and her own family", she will "need to go into an old people's retirement home or hospital".

If therefore, as seems to me to be the realistic approach to the problem before me, Road were sold and the plaintiff's share of the proceeds used by her in the purchase of smaller and more suitable accommodation, there could be a not inconsiderable sum still left to her which could be invested to provide further income. And, of course, Road as a home for her alone is far too big, and its present and future demands in respect of maintenance, rates, insurance premiums and other outgoings make it an uneconomic unit for either her or the estate to retain.

I cannot leave the plaintiff's claim without expressing the opinion that, after reading all her affidavits, I am left with the uneasy feeling that it is based very largely on the bitterness that she demonstrates towards P and not upon a genuine view that the deceased failed in his moral duty to make adequate provision for her.

I dismiss her claim.

I now have to consider the claim made by Mr. Reeves on behalf of P children. This, too, raises difficult problems.

At the date of the deceased's death, A was almost years of age and Da was approachin They were then both pupils at in Auckland. By the date of the

hearing A was and had been accepted to enter David was then nd was due to start at the same in

Both of these educational institutions are, of course, private schools. P himself attended and then proceeded to another private school in Auckland, namely College. And it was Mr. Reeves' submission that a grandfather who was a wise and just testator could well have felt that he should make whatever provision might reasonably be necessary to ensure that the two children should continue their education at the schools which, in effect, had actually been chosen for them.

In connexion with this whole question there is an important affidavit from one, M Thompson, who is the father of P wife. This affidavit was sworn a fortnight before the hearing. He received his education at another private school, He expresses the opinion that he firmly believes "that once a parent has decided to send a child to a private school it is encumbent (sic) on that parent to ensure that the child stays there for the duration", and, following upon this, he says that he believes that "it would be very destructive for a child (especially either or both of the Martin boys) to be taken away from a private school because of lack of funds". Mr. Thompson says that this was a view that would have been shared by the deceased in that he sent P to the schools that I have mentioned and his daughter to Mr. Thompson adds that the deceased "was very pleased when (the boys) started at and that he "was proud of their achievements there".

Mr. Thompson has not merely expressed these views and

opinions, but, as far as these two boys are concerned, he has done a great deal to ensure that they have been able to enjoy the benefits of which he speaks.

Paragraphs 2, 3, 4 and 5 of his affidavit read as follows :-

" 2. I have being (sic) paying for my grandsons' education at since A began there in when I paid about half of their fees. At present it is costing me about $3,000 a year for both of them at that School. I think I have been paying all their fees from about two years ago. Prior to that my daughter and her husband, their parents, paid about one-third. Each year their contribution got less.

3. WHEN my daughter and her husband decided that their boys should go to they were my only grandchildren and my other daughter was not expected to have children. However she now has three girls one of whom I am educating at the at the cost of $1,200 a year.

4. NEXT year for example I will be paying about $7,000 for my grandchildren's education in the following way:

I will have two granddaughters at the School at a cost of $2,400 per annum.

I will have one grandson (A

School at a cost of $3,000 per annum.
One grandson (D MARTIN) at at the cost of $1,500 per annum.
Eventually I will have the two Martin boys at College at present day costs of $6,000 per annum together with my three granddaughters at the School at present day values of $3,600 per annum together totalling about $10,000.

5. I have some time ago set up a family trust of which I am the Trustee. At present I settle some $20,000 annually on the trust which I earn from directors' fees. The trust also has its own income from its investments. I am now aged and may not continue working for very much longer. When I stop work the income I settle on the trust would diminish substantially. There are of course other demands on the trust apart from the Martin boys as I have already outlined. If I were to die or otherwise be unable to settle monies on the trust my wife's life style would be curtailed although at her age she obviously does not have an expensive need. I regard my grandchildren's education to be the first charge on the trust. "

Paragraph 11 of the affidavit is in these terms:-

" 11. TO recap, from the start the boys' parents assumed the primary liability for payment of their school fees. Some terms they paid the fees from their own resources. The past few years, however, I think I have found from the Trust all the monies

required. The money has been paid to the parents to assist them with the boys' 'maintenance and education' in terms of the trust deed and they have paid their own cheques to Kings School. No doubt that procedure will continue."

And in paragraph 10 Mr. Thompson says:-

" 10. I would welcome any assistance which could be given to me from the estate of G MARTIN which could assist me with our grandsons' education. I knew G MARTIN and liked him and I believe he would have endorsed my efforts to provide the education the Martin boys have and will receive."

In a further reference to what he believed to be P financial ability in respect of his sons' education Mr. Thompson said that he did not believe that the deceased knew that he, Mr. Thompson, was paying for their education "although it was probably clear to him that his son P was unable to pay".

In a memorandum lodged on the second day of the hearing Mr. Reeves supplied further details of the trust set up by Mr. Thompson. This shows that the capital sum of the trust is now about $200,000; that there are eight beneficiaries; that these are Mrs. Thompson, Mrs. Martin, her two children, his other daughter and her three children; that all five children are being educated at private schools; that Mr. Thompson is now aged that, over the years, he has transferred to the trust all his assets except his unencumbered half-share in the matrimonial home occupied by him and his wife; that, over the past few years, he has owned a half share in North Island Freighters Limited; that he has sold this share to the trust; that his director's fees from this operation (amounting to $21,000 per annum) are paid direct to the trust; and

that, if he had to cease working, income from the company would probably cease. At the same time he apparently told Mr. Reeves that he "could not envisage something happening which would prevent the Martin boys from being kept at their schools".

A further matter for consideration in this claim by the grandchildren is the domestic and financial situation of P I am not going into great detail in connexion with this - indeed, in respect of his financial position, there is nothing very concrete to assist the making of a clear decision about it. But what there is suggests that his financial position is not very stable or otherwise satisfactory, and that this is made more obvious by what appears to be a breakdown of the marriage.

Looking at this whole picture broadly, I consider that there are indications that cannot be neglected that the deceased knew something of his son's financial problems, that he would certainly have wanted his two grandsons to continue with the type of education that they were receiving prior to his death, that he very possibly did not know of the provision being made for them by Mr. Thompson, and that therefore he would, and should, have made some provision out of his estate, if he had made a will, to meet at least part of the expenses involved in their schooling.

I am therefore of the view that the claim put forward by Mr. Reeves on behalf of the two grandsons should succeed.

I think that the situation will be appropriately met if the sum of $40,000 is set aside as a class fund to be used, in co-operation with the Thompson Trust, for the education of the grandchildren during such time as both of them are, or either of them is, engaged in a course of full-time study. When the period comes to an end the balance of the fund then remaining is to be

distributed as part of the deceased's estate. I am also clearly of the view that this class fund should be administered by a corporate trustee, and I make an order accordingly.

I ask that counsel now confer, agree upon the corporate trustee to be appointed, and submit a draft order.

I also want each counsel, except counsel representing the administrators in their official capacities, to submit suggestions as to the quantum of his costs. I have had grave doubts as to whether I should order that those of the plaintiff should be paid out of the estate, but I have finally decided that they should be. However, I shall be considering the amount of them carefully because of the unhelpful nature of much that appears in her affidavits.

Finally I think it proper to recommend that, in view of the animosity that exists between the plaintiff and her son, there should be an appointment of an independent administrator, which might, of course, be the corporate trustee of the class fund.

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