IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M 703/84

NOT RECOMMENDED

IN THE MATTER of the War Pensions Act 1954

A N D

IN THE MATTER of an Appeal under Section 85A thereof as to the disposition of accrued pension unpaid at date of death

A N D

IN THE MATTER of the Estate of GORDON JOHN MORAN late of Marton, War Pensioner, deceased

BETWEEN MAURICE DANIEL MORAN of Wanganui, Retired

First Appellant

A N D RAYMOND EDWARD MORAN of Palmerston North, Farm Manager

Second Appellant

A N D MYRTLE WALKER of Feilding, Married Woman

Third Appellant

A N D WALLACE JAMES MORAN of Palmerston North, Retired

Fourth Appellant

A N D THE SECRETARY FOR WAR PENSIONS

First Respondent

A N D THE WAR PENSIONS MEDICAL RESEARCH TRUST BOARD

Second Respondent

Hearing: 14 May 1987

Counsel: J C Corry for all appellants
G D Pearson for first respondent
G J Burston for second respondent

Judgment: 8/6/87

RESERVED JUDGMENT OF GREIG J

This is an appeal made under s 85A of the War Pensions Act 1954 against the decision of the War Pensions Board acting in pursuance of its authority under s 85 of the Act in disposing of unpaid pension funds amounting to $27,207.49 accumulated in respect of the late Gordon John Moran, born on 2 October 1918, who died at Lake Alice Hospital on 25 March 1984. The decision made by the Board was to pay the funeral account from the accumulated fund, to pay $3,000 each to the second and third appellants and to pay the balance to the War Pensions Medical Research Trust Fund for the purpose of assisting ex-servicemen generally. In so doing the Board acted in terms of subs (2) of s 85 which reads as follows:

> "Subject to subsection (3) of this section, the amount of any pension or allowance unpaid at the date of death may, in the discretion of a War Pensions Board, be paid to all or any of the following in whole or in such shares as the Board determines:
>
> (a) To or for the benefit of the widow or widower or any dependent child or dependent children of the deceased, or to any person for the time being caring for and maintaining any such child:
>
> Provided that if the deceased is survived by a widow who was living with him at the date of death, or by a dependent child or children, the entire unpaid amount shall be paid to or for the benefit of the widow or dependent child or children:
>
> (b) To or for the benefit of any person who, in the Board's opinion, has been dependent on the deceased:

(c) To or for the benefit of any person who, in the Board's opinion, has a just entitlement by virtue of having taken care of the pensioner's needs or having provided him with comforts:

(d) To the estate of the deceased:

(e) To the War Pensions Medical Research Trust Fund established under section 181 of this Act:

Provided that any payment to that Trust Fund shall not be made before the expiry of a period of 6 months after the date of death of the deceased."

In its determination then, the Board paid out the $3,000 each to the two appellants under subpara (c) of that subsection and the balance in accordance with subs (e).

The four appellants are the surviving brothers and sister of the deceased pensioner. The first and fourth appellants took no part in the hearing and on the formal application of the fourth appellant he was given leave to withdraw. The effective appeal was made by the second and third appellants, the only members of the deceased pensioner's family who had had any substantial dealings with him during his lifetime.

The first respondent, the Secretary for War Pensions, on his application was also given leave to withdraw. The opposition or challenge to the appeal was carried by the second respondent, the remaining or residual beneficiary of the funds.

There are three previous reported cases of appeals in similar circumstances to this appeal. These are Re R [1975] 1 NZLR 545; Re P [1976] 2 NZLR 601, and Re C [1978] 1 NZLR 417. What is to be derived from these three cases, the

circumstances of which are each different from each other and from the present case, are that in the first place the Court has an appellate review function to deal anew with the matter but giving due weight to the reasons given by the Board. The second matter is that the question as far as the appellants is concerned is whether they have a just entitlement and the extent of that. It is not a question which can be decided by reference to the principles applied under the Family Protection Act, the Testamentary Promises Act or even any claim that might be made as a beneficiary under a will or as a person entitled on an intestacy. The third matter which arises from these cases is that the personal and financial circumstances of the claimant appellants can have little if any relevance to the question in issue.

In this case, unlike the earlier cases, there was before me a complete file retained by the War Pensions Board which commenced from the War Pension claim dated 22 August 1944 and continued thereafter with all the correspondence, notes and other documents which had been gathered through the years. There was further a very complete report from the Secretary for War Pensions setting out the steps taken following the death of the pensioner, the inquiries that were made and the basis upon which the decision for disposition of the funds was made. There is, therefore, a very complete background. On the appeal I heard as evidence the two appellants and the husband and son of Mrs Walker. This was an unusual and somewhat moving experience because, while they all spoke of the help and support that they had given to the deceased pensioner, it was their honest family feeling which was most striking and which spoke of their great regard and sympathy for their brother who, following service in the war, had spent the greater part of his life in mental hospitals.

The facts are that the deceased pensioner was shot in the head by a sniper's bullet on one of the Pacific Islands in

1943. After a lengthy period in hospital, during which his injuries were repaired but in which he lost the sight of one eye and suffered some brain damage, he was finally invalided home with what was then a relatively small but economic pension. He seems never to have worked thereafter at any regular employment but undertook a variety of odd jobs and assisted to some extent his mother and father while they remained alive. At this time it is clear that the family rallied round and gave such support as they could but at all times the other sibling members of the family were employed in occupations mainly allied to the farming industry and were situated in rural areas, not at all times within close vicinity of the pensioner or his family. I am satisfied, however, that support and assistance was given even at that time to the best of the family's ability and, in particular, the second appellant attempted to encourage the pensioner into regular work.

There seem to have been some problems, which were lightly touched upon, but seem to have been caused by the pensioner's difficulty in rehabilitating himself into the ordinary life of his community. There were some brushes with the police, in at least one of which the second appellant gave again some assistance and support. On 23 July 1957 the pensioner was admitted to Porirua Hospital. He then became a committed patient and he remained as a committed patient confined to a mental hospital until he died in 1984. One thing that was plain in the hearing of the evidence was that the family were and have remained bewildered and ignorant of the reasons for the pensioner's committal and continued confinement to mental hospitals.

As will appear, over the years the two appellants have seen, attended to and lived with the pensioner on a number of occasions. Like many people who are unwilling to challenge the authorities, and remembering that this was a time some 30 years

ago when it was not so fashionable to question authority, little real attempt was made to investigate independently the mental condition of the pensioner or to endeavour to inquire into his welfare outside the hospital or the question of any possible release. In the briefest terms, however, it is plain that as far as they were able, and having regard to the distance at which they lived and their commitments to employers and families, the two appellants, and particularly Mrs Walker and her family in later years, spent a considerable amount of time, effort and care in giving support and companionship as members of the family and in concrete ways on many occasions. These two appellants made numerous visits to the hospitals in which the pensioner was confined. Latterly, because of the relative proximity of Mrs Walker, she and her family made relatively frequent visits for a number of years to the Lake Alice Hospital. On a number of occasions the family took the pensioner out on leave and gave him Christmas and other holidays away from his hospital surroundings. On a number of occasions clothes and other comforts were provided at the expense of the appellants, they never realising until after his death that there was a substantial and accruing fund which might have been used for the better comfort and welfare of the pensioner.

There can be no doubt that under the words of the Act these two appellants have a just entitlement to a share of the accrued funds, having taken care of the pensioner's needs and having provided him with comforts. The question is as to how much that share should be.

There might be a question when regard is had to the relative participation of the two families comparing the assistance given by the second appellant in comparison to that given by the third appellant and her husband and son, that there might not be equality of entitlement between the two appellants. They themselves were quite clear that they wished

to be treated equally. I think that is justified because the second appellant in earlier years seems to have given more support, as he was more readily available to do so, than the third appellant. She and her family in earlier years were more involved with a family and were for some time living too far from the hospital in which the pensioner was confined to provide easily the visits which in latter years they, rather than the second appellant, did. I think that in the end it is fair that these two appellants should be treated equally.

It is plain that the Pensions Board took some care to make inquiries into the persons who might have a just entitlement and to the grounds upon which that entitlement might be quantified. There were some investigations and inquiries made at Lake Alice among the staff and certain records were perused there and information given by the staff. That appears to have been somewhat vague because no precise records were taken as to the number of visits and as to precisely who were making these. Likewise, there seems to have been no complete record made of the numbers and extent of the visits away from the hospital in the care of the members of the family. Officers of the Pensions Board made inquiries of the members of the family and undertook an interview with the appellants. That, I think, was somewhat unsatisfactory because the appellants were not given much time or notice to prepare what might have been thought to be their case as to their claim. They are not readily articulate people who would be able at short notice to describe in detail transactions with the pensioner over the previous 30 years. Indeed it might be asked who at a sudden invitation to an interview about the past dealings with a member of the family would, without adequate reflection, give any coherent and full history of the past. In the result the Board obtained a somewhat sketchy outline of the association between the pensioner and the two appellants. This Court has heard a great deal more about the association and it is clear to me that the care, the support and the comfort that

was provided for a long time by the two appellants was not adequately acknowledged or measured in the decision made by theBoard. In my opinion that is entirely because the Board was not made aware of the whole of the facts.

There are no other possible beneficiaries or persons who could claim to have any other just entitlement. The deceased pensioner had no dependents, he died intestate and leaves no one who, apart from the appellants, can lay any claim to these accumulated funds.

In quantifying the just entitlement in a case such as this it is necessary to take into account the amount of the fund at stake. It is, however, necessary to reflect that any payment to the appellants is of the nature of a windfall coming from funds which they have done nothing to increase and which indeed the pensioner himself has done nothing to increase. He was looked after by the State while his pension, apart from a small amount paid for regular comforts, was accumulated. The appellants in giving their care and attentions to their brother had no thought of reward and were indeed entirely ignorant of the moneys that were accumulating. It is their complaint that if they had known they might have endeavoured to have some of the money spent for the better care and comfort of the pensioner in his life.

I think that this is not a case where the whole of the fund should be divided between the two appellants. Although their care and attention was given over a long time and with some regularity, it is not, however, so much outside the ordinary expectation of family association or so extensive in time or money or effort to the appellants as to require more than a share of the funds which gives some real recognition of their efforts through the years. It is obvious, of course, that it is neither possible nor appropriate to attempt to measure the services which have been given to the pensioner

and to convert them into money on any hourly or other similar basis. So much of the services were abstract in the form of companionship, family support, conversation and general interest and attention. These can never be measured simply in monetary terms.

In the result I think that justice will be reached if the funds remaining after the payment of the funeral account is divided more or less into three parts, of which two ought, in my opinion, to go to the appellants. I round the figures down to $8,500 to each of the appellants. The result then is that the appeal is formally allowed and the decision is modified by the Court to the extent that the payment ordered to each of them, Raymond Edward Moran and Myrtle Walker, are increased from $3,000 to $8,500. The balance of the funds is then to be paid to the War Pensions Medical Research Trust Fund.

There remains then the question of costs. I note in previous cases that costs have been awarded on a relatively modest scale to the appellants against the Secretary. I do not think that that is appropriate in this case. Although the appellants have been successful in their appeal I do not believe that it can be said that any blame of any kind attaches to the Secretary or to the War Pensions Board in their adjudication in the first instance. They did make such inquiries as were fit but these did not elicit adequate information. It was only after the appellants sought some advice and then brought this appeal that the full facts were disclosed and their proper entitlement made apparent. In circumstances such as this I think that it is appropriate that the parties should bear their own costs. I therefore make no order for costs.

I make an order that the photographic exhibits which were produced at the hearing by the appellants be returned to them and I make an order that the departmental files numbered 16/1453 be returned to the department.

[signature] J

Solicitors for the appellants: L W Goodman (Palmerston North)
Solicitors for the respondents: Crown Law Office (Wellington)