IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.105/87

NOT RECOMMENDED

UNDER THE Matrimonial Property Act 1963

IN THE MATTER OF the Estate of Beverley Gay Garrett, late of Te Awamutu, Married Woman, now deceased

BETWEEN F.M. GARRETT

Plaintiff

AND THE GUARDIAN TRUST CO LTD and M. EDMONDS

Defendant

Hearing: 28 October 1987

Counsel: B.J. Paterson for the Plaintiff
Miss Strang for the Defendants
J.J. O'Shea for the Children

Judgment: 28 October 1987

ORAL JUDGMENT OF DOOGUE J

This is an application under the Matrimonial Property Act 1963.

The Plaintiff was the widower of the Deceased, who died on 9 June 1986, aged 56 years.

By virtue of the provisions of Section 57(4) of the Matrimonial Property Act 1976, this claim was brought under the provisions of Section 5 of the Matrimonial Property Act 1963. That section empowers the Court in circumstances such as the present, to make such order as the Court thinks fit with respect to the property in dispute.

Under Section 6(1) of the Matrimonial Property Act 1963 the Court, in considering the application under Section 5, may have regard:-

> "...to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management or otherwise howsoever)."

The claim is supported by the children of the Plaintiff and the Deceased. They are the residuary beneficiaries under the Will of the Deceased. The Will dated 23 May 1982 makes certain specific gifts to the Plaintiff and the Children. The Plaintiff is then left a life interest in respect of 3/4 of the net income derived from the residue, with the remaining 1/4 to be held by the trustees and to be applied in their discretion either towards the reduction of any liabilities owed by the estate or the cost of any improvement to the real property, with the balance of the 1/4 share of income being held for the four children.

The background to the claim is that the Plaintiff and the Deceased married on 15 June 1957 and lived together as husband and wife until the Deceased's death. Thus the marriage was a marriage of almost twenty years duration, brought to an end solely by the untimely death of the Deceased. There are the four children of the marriage, all of whom survived and all of whom, at the date of death, were over the age of 20 years. None of the children are married and there are no grandchildren.

The history of the marriage discloses that in 1951, prior to the marriage, the Plaintiff together with his brother, purchased from their father a 177 acre dairy farm. Eight years after the marriage the Plaintiff acquired from his brother the brother's half interest in the property and the Plaintiff retains ownership of that dairy farm. In addition the Plaintiff, in 1971, acquired a further 50 acres initially in his own name but this has since been transferred to a family trust. The Plaintiff, with some assistance from the Deceased by way of a loan, built a very comfortable home on the 177 acres which was the family home. In addition the Plaintiff and the Deceased acquired a beach property which they owned as tenants in common in equal shares.

The case is slightly unusual in that it is one where the Deceased's estate is approximately four times the size of the Plaintiff's estate. At the date of death of the Deceased

the Plaintiff owned the dairy farm, already referred to, which had a then Government valuation of $400,000 in round figures. He also owned the half share in the beach property, some shares in public companies and a motor car, with a total estate at that time of a little under $600,000. The Deceased at the date of death had an estate of approximately $2,400,000, with the majority of the assets being held in shares (approximately $1,900,000). The shares were the consequence of her having received from her father, prior to marriage, shares in an unlisted public company. It is not clear what the value of the shares was at that time but it is believed not to have exceeded $50,000. The shareholding of the Deceased was built up as a result of changes in the ownership of the unlisted public company and as a result of subsequent bonus share issues, but also as a result, I am satisfied, of the prudent management of the Deceased's portfolio of shares by the Plaintiff. There is clear evidence before me, not only from the Plaintiff and the Deceased's sister, but also in the support of the children, that it is because of the actions of the Plaintiff that the Deceased was dissuaded from disposing of her shares at various times and it was a result of the actions of the Plaintiff which have resulted in the share assets being treated prudently, with the substantial increase in their value since they were originally acquired. It may be, I am informed from the Bar, that notwithstanding recent movements in share values, the probability is that notwithstanding that no current valuation

has been made that the shares are in fact at the present time worth something like $200,000 more than their value at the date of death.

I am quite satisfied from the evidence before me that the Plaintiff has contributed to the Deceased's estate indirectly by way of providing for his wife and family from the income from the farm property during the growing years of the children. I am further satisfied that the Deceased and the Plaintiff, whilst they somewhat unusually perhaps kept their property in separate ownership, operated as a true family partnership where the affairs of both partners to the marriage were operated for their mutual benefit, so that it was in reality a marriage where each party made equal shares to the marriage in the way that they were best capable of doing.

Mr Paterson has properly referred me to the principles applicable to applications of this type, and in particular such cases as Haldane v Haldane, [1976] 2 NZLR 715 and to dicta in such cases as Hofman v Hofman, [1965] NZLR 795 at page 800, and in an unreported decision of Abel (M.301/84, Hamilton Registry, 18 December 1984, Gallen J).

I have no doubt that whilst the position may have been more difficult for the Plaintiff under the 1976 Matrimonial Property Act than under the 1963 Act in so far as that the shares in question were initially separate property,

and the Plaintiff may under the 1976 Act have had more difficulty in showing that they had taken the form of matrimonial property than under the 1963 Act, it is proper for me to regard the shares as matrimonial property in the wider sense and shares to which the Deceased had made both a direct and indirect contribution in the manner already stated. It will also be apparent from what I have already said that I have no doubt that the Plaintiff made a contribution to the general estate of the Deceased in the way already stated.

The only issue for me in this case is, on my view of the facts before me, the appropriate distribution of the Deceased's estate or rather the appropriate award to the Plaintiff.

In my view of the matter the appropriate course for me to adopt is to treat the assets of the Plaintiff and the Deceased as matrimonial property and to look at them as a total estate and then to consider what is the appropriate share that the Plaintiff is entitled to of the total estate and then finally endeavour to reflect that in an award in respect of the Deceased estate.

There is evidence before me that the parties had intended to make an agreement under the provisions of the Matrimonial Property Act 1976 to equalize their assets but that the death of the Deceased prevented this. The evidence before

me satisfies me, as I have already indicated, that the parties treated their assets for their mutual benefit and that it was a marriage in which the parties regarded themselves as equal. It therefore seems to be appropriate, bearing in mind the different views taken in earlier cases under the Matrimonial Property Act 1963, that at the present time the appropriate award in respect of matrimonial property would have left each partner with a 50% share without any need to consider any other form of share.

Applying that reasoning to the joint estates in the present case and to the estate of the Deceased, it would appear appropriate, looking at the values of the estate at death in a global fashion and looking at some increase to the share of the Deceased's estate since death in the way already indicated, and some downturn in the Plaintiff's estate by reason of a reduction of the value to the dairy farm property, that the award in favour of the Plaintiff against the estate of the Deceased should be 40% of the net estate.

No order for costs is sought.

I leave the parties to lodge a draft order to give effect to the order already indicated.

Solicitors for the Plaintiff:	Swarbrick Dixon & Co Hamilton
Solicitors for the Defendant:	Edmonds Dodd Te Awamutu
Solicitors for the Children:	Judd Brown Partners Te Awamutu