IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1579/89

UNDER The Matrimonial Property Act 1963 and the Matrimonial Property Act 1976

IN THE MATTER of the Estate of M FULLER deceased late of Auckland Businessman

BETWEEN C FULLER

Plaintiff

A N D C FULLER and M FULLER

Defendants

Hearing: 2 July 1990

Counsel: Marsh for Plaintiff
Ms Reynolds for Defendants
Morgan-Coakle for Children of Marriage
Dreardon for Stepchildren of deceased

Judgment: 2 July 1990

(ORAL) JUDGMENT OF SINCLAIR, J.

Before the Cout at the moment are two applications; one under the Matrimonial Property Act 1976 seeking to set aside a matrimonial property agreement dated 5 May 1983 entered into by the plaintiff and her late husband, and the other under the Matrimonial Property Act 1963 seeking a division of the matrimonial property as between the plaintiff and the estate.

The brief facts are that the plaintiff and her late husband met in 1980, both having previously been married. Mrs Fuller had two daughters of her previous marriage. While they are represented here today by Mr Dreardon in accordance with a Court order, I cannot see how, at the moment, they can have any possible claim under the provisions of the 1963 Matrimonial Property Act. Any rights they may have may be properly brought under the Family Protection Act but I am not faced with such an application here. After they first met, Mrs Fuller and her husband lived together at 52 Brighton Road in rented accommodation. They subsequently married on 7 May 1983. They have two children; Kristin, born on 23 September 1982 and Joanne, born on 14 February 1984. The late Mr Fuller had the misfortune to die whilst engaged in a game of football on 27 August 1988.

Mrs Fuller explains that when the parties first married they entered into a matrimonial property agreement which really restricted each of them to the assets which they respectively had when they married. At that particular time the principal asset, which was owned by Mr Fuller, was his shareholding in Raeburn Private Hospital (1981) Ltd, a company formed to acquire a hospital in Cambridge at or about the time the parties first met. Prior to that time Mr Fuller had been engaged in operating a coffee lounge in Henderson by the name of "Tradewinds". This was sold in June 1981 for a nett figure in excess of $76,000 -

which is somewhat remarkable when one realises that the original purchase price was just over $51,000 with borrowings from the vendor of $30,000 being paid off in the interim. The private hospital was acquired for a purchase price of $330,000 with monies being made available from the coffee lounge sale, a loan of $190,000 from Broadland Finance, the vendor leaving in a second mortgage of $30,000, Mrs Fuller contributing $8,300 and further loan monies of $30,000. From then on Mr Fuller seems to have devoted most of his time and effort into running the hospital. Although he was not there on a daily basis he was in charge of its general running and the supply of the requisite necessities for its operation. For much of the time many of the supplies were stored at the matrimonial homes which were in three different locations during the marriage.

In 1984 a leasehold property was purchased in Hobday Place, St. Johns, funded by loans from Marac and Mrs Fuller's parents as well as an overdraft from the hospital. Renovations were subsequently made to the hospital. Later on, another piece of land was acquired nextdoor when again substantial alterations were carried out financed, in the main, by borrowings from the National Bank. Following Mr Fuller's death the shares were valued at a figure of almost $1.3m, showing a dramatic rise in value, despite the borrowings, over a relatively short period of some seven years. This shows quite remarkably,

in my view, that Mr Fuller was able to give his time and attention to the running of this hospital which was, in no small measure, contributed to by the fact that he had what appears, on the evidence before me, to have been a stable marriage.

On the evidence before me - and I have no reason to doubt it - Mrs Fuller has demonstrated herself to be a prudent and good housekeeper, she has looked after the gardens, her parents have helped with the finances which must have assisted the parties particularly with regard to the acquisition of their matrimonial home, she advanced what money she had for the purchase of the hospital, has helped in no small measure in the running of it from the date her husband took over the administration, and has continued to attend to its operations. As a commentary to her ability to deal with the situation, I simply draw attention to the draft accounts for the 1989 financial year. After she was paid $40,000 the business showed a nett profit, after payment of tax, in excess of $200,000. That surely is an asset which, if at all possible, ought to be retained for the widow and children of the second marriage. It is a very viable proposition and it is obvious that because of the attention given to it, not only by Mrs Fuller but also by her accountant Mr Ward, the stage has been reached where the occupancy rate is high and the profiability is very very good. One could not help but say that if the business were sold and the monies invested, the

probabilities are that the nett income would be much less than has been generated at the moment by the hospital company.

There is little doubt now that the ability of the Court to set aside an agreement, such as was entered into by the parties in this case, is exercised not as sparingly as might have been the case when the Act was first passed. In Aldridge v. Aldridge [1983] NZLR 576, it is noteworthy that the Courts stated that the discretion given to it by the combined operation of s.21(8)(b) and (10) to decide whether it would be unjust to give effect to an agreement, was a very wide one. The headnote goes on to say that when the statutory criteria is so wide, the ordinary constraints on appellate review of discretionary decisions had to apply with special force. That, of course, was a commentary by the Court of Appeal in that case. Of more recent date, the matter has been considered further in Re Mora [1988] 1 NZLR 214, a case where a wife was claiming in respect of her husband's estate which, in the main was made up of a farm property. The wife had made contributions, but possibly not as wide as those made by this present plaintiff. In that particular case, the Court commented that where there was an intestacy and the application was one which might result in savings of duty, those were not to be factors debarring an applicant making that particular claim. In the Mora case, the award made was 40%.

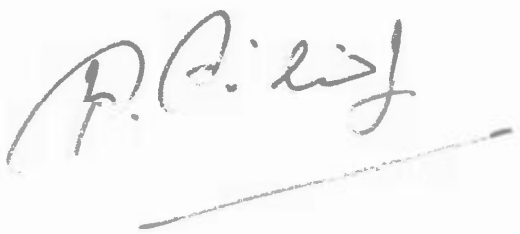
I note that during the marriage, Mrs Fuller bought up the two children, attended to the daily housekeeping, worked initially at a day centre for three days a week and later for the hospital, has been attentive to her mother-in-law and I am satisfied that she has, when required, entertained business associates of her late husband. She has now demonstrated that she has a facility to cope with the running of this hospital and I have already illustrated the success she has made of it since her husband's death. Mr Morgan-Coakle, who was appointed to represent the two children of the marriage, supports this application - and well he might because it is in their interests as well as their mother's that this matter proceed on a basis where the interests of all, having regard to the contributions which have been made, ought to be recognised.

Having regard, therefore, to the wide wording of s.21 of the Matrimonial Property Act 1976, I have no hesitation in saying that history has rendered this matrimonial property agreement unjust. It was made at a time when the parties could not contemplate whether the marriage would be successful or not. It was very successful with contributions from each of them in their own various ways being such that a substantial asset has been built up and one which could not have been built up without conjoint efforts. With that in mind, I therefore declare that the agreement dated 5 May 1983 is unjust and is set aside and

is no longer binding upon Mrs Fuller.

The question then is, what share should Mrs Fuller receive? Under an intestacy she receives $90,000 cash and one-third of the residue with the children receiving the balance between them. She has indicated that until there is cash available she is not interested in asking the Estate to give her the $90,000 and is prepared in the meantime for that sum to remain within the control of the estate so that the hospital may prosper. That is entirely her affair and it would have susprised me if she acted in a way that would be detrimental to the principal asset in this Estate.

Having regard to the contributions which have been made I am prepared, in a case which I regard as somewhat special on its own facts, to declare that Mrs Fuller is entitled to a 50% interest in the matrimonial property which formed the Estate as at the date of her husband's death. The plaintiff's counsel is not seeking costs at the moment but should any question arise I formally reserve leave to apply further in respet of her costs. The Administrator does not require any order as to costs and counsel appointed to represent the children and stepchildren are each allowed costs in the sum of $500 plus GST to be paid out of the residue of the estate plus any requisite disbursments.



Solicitors:

Earl Kent Alexander Bennett, Auckland, for Plaintiff;

Jackson Russell Dignan Armstrong, Auckland, for Defendants;

Morgan-Coakle Ryan & Bierre, Auckland, for Children of the marriage.

Greig Bourke Kettelwell & Massey, Auckland, for stepchildren of deceased;