NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND 19/3
PALMERSTON NORTH REGISTRY

No. 219/90

235

UNDER	the Family Protection Act 1955
IN THE MATTER	of the estate of BEVERLEY MARY EWERS late of Levin, Married Woman, now deceased
BETWEEN	NOLAN PERCY EWERS of Levin, Retired Plaintiff
AND	MARIAN JOY NIXON of Raumati South, Married Woman and YVONNE BEVERLEY SHERRIFF of Napier, Shop Assistant, Trustees and Executors of the will of the said BEVERLEY MARY EWERS, deceased Defendants

Hearing: 11 March 1993

Counsel: Helen Cull for Plaintiff
M J Wenley for Defendants including Kevin Ewers
C J Walshaw for Daryn Ewers
T Peters for Marlene Ewers

Decision: 12 March 1993

RESERVED JUDGMENT OF McGECHAN J

The Proceedings

These are proceedings brought by Nolan Percy Ewers ("the husband") against the estate of the late Beverley Mary Ewers ("the deceased") pursuant to the Matrimonial Property Act 1963 and Family Protection Act 1955. Orders were made for service upon the eight adult children of their marriage. The second eldest, Kevin Nolan Ewers disappeared in 1973. An order was made dispensing with service and appointing the defendant trustees to represent his interests. The defendant trustees have filed statements of defence in their capacity as executors and trustees of the deceased, naturally abiding decision as such. A child Daryn Andrew Ewers suffers from some mental disabilities. An order was made appointing Mr C J Walshaw, barrister, Palmerston North, to represent his interests. While no statement of defence has been filed, counsel has filed a memorandum on his behalf in effect seeking that provision made for Daryn be upheld. I accept that document as if a statement of claim in those terms. Another child Christopher Daryl Ewers has filed, or purported to file, an appearance; but was not represented at hearing. The youngest child Marlene Karen Ewers belatedly filed a statement of claim and affidavit in support, received by leave. The children abide, but do not consent. Marlene specifically subordinates her claim to the husband's.

Family History

The husband and deceased were married on 10 November 1944. The husband was born in December 1926, and was only 17. The deceased was only 16. It was war time. The husband was in the Airforce. After the war ended, the pair remained in the Nelson district for over 20 years, not leaving until 1969. The husband worked as a driver for Baigents for some 12 years, and then for Transport Nelson for another 12 years. Children followed at regular intervals. The complete list became:

Full Name	**Date of Birth**
Marian Joy Nixon	28 February 1946
Kevin Nolan Ewers	Date unknown, 1947
Yvonne Beverley Sherriff	21 February 1948

Rex Anthony Ewers	17 March 1950
Brian John Ewers	9 August 1953
Christopher Darryl Ewers	19 July 1960
Daryn Andrew Ewers	18 March 1965
Marlene Beverley Ewers	2 September 1967

Marlene was an adopted child. It appears she was adopted at age 1½ or 2, after the 1969 move to Wellington. Her evidence, corroborated by the refusal to treat her as a daughter in the deceased's will, is to the effect the deceased resented the adoption. I have no other information as to its circumstances.

Over the 20 plus years in Nelson the husband, following something once a common practice amongst workers families, gave his entire pay packet, unopened, to the deceased, who gave him back a small allowance and otherwise kept complete control of the family finances. This practice in fact enured right down to the husband's retirement in 1986, which was the first occasion on which he opened a bank account. The deceased over the Nelson era did not work. She was fully engaged in bringing up the ever growing family. Money was tight.

In 1969 the family moved to the Wellington area. They bought the first of their homes at Wainuiomata. This was the first of some seven houses which were bought and sold over the intervening years down to 1986. The husband obtained employment as a driver for Griffins, a local factory, and remained so employed down to retirement in 1986. He was something of a handyman, and he regularly renovated the houses which were purchased. Following his renovations they were resold, undoubtedly on the market conditions prevailing from 1960 onwards at a worthwhile profit. The deceased in 1973 obtained her first employment, for a start also with Griffins, and following redundancy, with Fords. She was a canteen worker, and by the time she came to retire in 1986 had become canteen manager. I have no details, but no doubt she made reasonable wages. She remained the sole financial manager for the family in relation to all money, whether earned by the husband, coming in from sale of houses or any investments, or earned herself. She selected and attended to the buying and selling of the houses. She was a dominant figure.

As a matter of family history, it appears that about 1973 the eldest child Kevin, following the break-up of his marriage, departed to Australia. He said goodbye to the deceased. He never contacted her or was heard of again. He cannot be traced, if still alive. It seems in about 1983 the youngest child Marlene, whom the deceased did not want at school beyond age 15, left home. On her evidence the relationship continued to be an uneasy one, and apart from seeing her mother at the Levin house in (probably) December 1986 at Christmas time, and probably during the year following, there was no contact between the pair. On the second of the contacts mentioned, the deceased bought Marlene a watch costing some $450.

The pair had purchased, probably in the early 1970's, a property at Dewe Terrace, Foxton, later resold, with a further property purchased in Pratt Avenue, Foxton. The pair purchased in late 1984 another property at 6 Highfield Place, Levin. At some point around this time the husband received a $4,000 lump sum as Accident Compensation. There is no evidence, but possibly it went into the Levin property directly or indirectly. Obviously the latter was intended as their retirement home. The husband carried out upgrading work, as had been his lifetime habit. He retired in 1986, and moved to live in the Levin property. The deceased followed him three months later, after she retired herself. Certainly the Levin property, and I am prepared to infer all other previous properties, were purchased jointly.

The husband received lump sum superannuation from Griffins of $32,000. He spent $24,000 on a new car (a Honda) and spent an unspecified part of the balance of $8,000 upon home improvements at the Levin property including a Kent heater, and "household goods". I am not aware of the superannuation position of the deceased, if any. However, there is evidence as at 15 April 1987 she had $10,000 available for investment through Philips Shayle George & Co, Wellington solicitors. Given she retired in mid 1986, it may be that represented savings from her own wages, or superannuation. I do not know. Obviously she regarded it as hers. Having brought up a family from girlhood, and then worked all her remaining years to retirement, within a little over a year after that she contracted cancer. She was to die 18 months later. From late 1987, following diagnosis, the husband nursed and cared for her as would be

expected. Treatment was required at Palmerston North. He claims to have travelled some 13,000 kms over the period involved. I have no evidence as to the participation of the other children, apart from Marlene, but I do not exclude the possibility they may have taken at least some interest. Again I do not know.

In early 1989 it seems likely the deceased realised the end was near. She took a number of steps to reorganise her affairs. On 23 March 1989 she made the will, subject of the present Family Protection Act proceeding. It was professionally drawn, by Levin solicitors. The husband did not know of this will until after the deceased's death. She made various bequests of personal items to the seven children other than Marlene. It is clear she did not regard Marlene as her child, although the gift of the watch not very long before could have entered into her thinking on the specific bequests aspect. There is room for doubt whether the items concerned were owned by the deceased alone, as opposed to being owned jointly with the husband (I am speaking in terms of legal ownership, not in terms of matrimonial property legislation). I leave ownership open. Obviously, however, the deceased regarded those items as her sole property, open to such disposition. She appointed the two eldest daughters Marian and Yvonne to be her trustees. She directed creation of a trust fund of $30,000 to be held as to the income for life for the child Daryn, who had been an institutionalised mental patient, with remainder in equal fifth shares to Marian, Yvonne, Rex, Brian and Christopher. She directed the residue be distributed as to one seventh shares to all the children excluding Marlene, the seventh share allocated to Daryn being held on the income and residue trusts already noted. The one seventh held for the son Kevin, who had disappeared, was to be held for 10 years from her death, and if he had not by then been found was to go in fifth shares to Marian, Yvonne, Rex, Brian and Christopher. The only bequest to the husband was a "scooter bike".

On the husband's evidence, previous wills (number unspecified) by each had left all to the other. I have not been advantaged by production of copies of these wills.

I have no evidence from the [illegible] solicitors as to any explanation having been given to the deceased [illegible] implications of the Family Protection

Act 1955, let alone Matrimonial Property Act 1963. The will was witnessed by persons describing themselves as "legal executive" and "typist". I have no medical evidence as to the state of mind on the date concerned. One of the trustees, of course a daughter, deposes to a belief the deceased was concerned to ensure provision was made for her children, and Daryn in particular; one of her concerns being that the husband would remarry, and a subsequent wife would obtain entitlement to the detriment of the children. The husband has since remarried. I am not given the sources and justifications for the trustee daughter's stated belief, but I evaluate the possibility accordingly.

More or less in conjunction with the new will, she procured transfer of the property at 6 Highfield Place, Levin to herself and the husband as tenants in common in equal shares, ending any possibility the entire property would pass to the husband by survivorship on her death. Interestingly, she did not go through the same manoeuvre with the other property, also jointly owned, at Pratt Avenue, Foxton. What is said to be the husband's signature to a memorandum of transfer was procured. On the state of the evidence the husband claims the dealing was unknown to him. Whether it is in fact his signature on the memorandum of transfer, or he did not understand what he was signing, or he has simply forgotten that aspect, remains unknown. The transfer was registered on 10 April 1989.

On 3 April 1989 it appears $10,000 previously mentioned became available to her through repayment of the Philips Shayle George mortgage investment. It is not clear on the evidence what occurred, but the likelihood is the sum was obtained and credited to her savings account. She would have seen liquid cash as desirable.

On 30 April 1989 she died. The youngest daughter Marlene was not informed of her death by the family, and read of it in the newspaper.

At the date of the deceased's death, on the evidence before me, the pair owned as tenants in common in equal shares the property at 6 Highfield Place, Levin which had a Government Valuation (October 1990) of $117,000. It was mortgage free. I accept that as near to its then and present value, on the depressed market of recent years. In the absence of an up-dated professional valuation, I regard the husband's estimate of

$150,000 as unreal. They also owned as joint tenants the property at Pratt Avenue in Foxton, which passed to the husband by survivorship and was subsequently sold for $60,000. I am prepared to accept its value at the deceased's death was $60,000. The deceased had some $16,000 in savings (which probably included the repaid mortgage investment mentioned), or soon came to do so, and a 1986 Ford car worth (subsequent sale price) some $10,000. Her debts as at death, comprising mainly the funeral account, can be taken at $3,500. The husband had savings of some $5,000, plus a Honda car purchased in 1986 from his superannuation money for some $24,000. Its value would be correspondingly less. He also may have had a Suzuki motorcycle worth some $3,000. The evidence is not clear whether that was held at the date of the deceased's death. Both were receiving national superannuation.

The husband lived on in the Levin property. Subsequently, he remarried. I have no evidence as to his second wife's financial position. It appears both may be existing on national superannuation, plus no doubt in his case some minor interest income. He has continued to pay the outgoings on the Levin property attributable to both his own and the deceased's separate shares. He is now aged 66. Life expectancy tables forming part of the Estate and Gift Duties Act 1968 give an average life expectancy of some 12 years. A medical certificate attached to his solicitor's affidavit, which I think I can notice, states he has ischaemic heart disease and angina, and politely hints it would be highly advisable for his affairs to be put in proper order as soon as possible.

The estates assets are now represented by some $24,000 cash, on deposit at call, and the half share in 6 Highfield Road, Levin. There are some outstanding tax and administration expenses. After costs in this proceeding, the $24,000 is likely to go sharply downwards.

I have no information as to the position of the children, apart from Marlene, who has no assets, no job, and lives in a de facto relationship; and Daryl, who now lives at Fergusson House, requires care, and exists on social welfare.

Matrimonial Property Claim

The claim is brought under s6(1) and (1A) Matrimonial Property Act 1963. No reliance was placed upon any s6(2) express common intention. Emphasis was laid upon the husband's earnings throughout the 42 years of marriage, and his work on upgrading houses purchased and sold. He was put forward as the principal income earner. The approach urged was that in ***Haldane v Haldane*** (1976) 2 NZLR 715; as considered and applied in ***Re Mora*** (1988) 1 NZLR 214. As it was put, contribution in one form or another is a pre-requisite to an order. There could, therefore, be assets to which the deceased made no contribution at all, and which therefore would fall outside statutory provision. However, where an order can be made, that order is not limited to one co-extensive with contributions. It is to be such order as is just. On that approach, counsel for the husband submitted firmly that the husband should receive the entire estate. Any needs on the part of the children could be met later from the husband's estate.

While there is no active contrary claim by the children, neither do they (apart from Marlene) actively consent. As it was nicely put by counsel for the trustee, while the children are "not resisting, they do not yield, and leave the matter to the Court". Further, the quite contrary interests of Daryl, unable to fend for himself, demand protection. There is no escape from an evaluation on the basis of strict 1963 Act entitlement.

I must say immediately the plaintiff cannot possibly be awarded the entire estate. While emphasis was laid upon his years of hard work for wages, and in upgrading homes, and I do not ignore his assistance particularly at the end by way of nursing the deceased, he was not the only working partner in this marriage. He was not the only one who contributed to its assets. His wife - from a girl of 16 - kept house, bore 7 and raised 8 children, and managed the family and its finances through early hard times and later better times. From 1973 to 1986, with the family increasingly off her hands, she chose to work and earn in her own right, as well as successfully steering the family fortunes. She was not a mere accessory. To the contrary, she was a dominant figure. I suspect for the first 20 odd years in the Nelson area hard work on both sides did not yield a great deal in assets. The family took all. The bonus came in the later period from 1969 onward through better wages, decreasing family commitments, and a successful house renovation and dealing enterprise. Her role, particularly on the last, is not to be dismissed. A few hours of financial management

can produce a better return than days of uninformed work in front of a concrete mixer. Each obviously played an important role reflected in ultimate success. I am not blessed with information as to how the deceased spent her own earnings, or any surplus left from money received from the husband. However, it would be an unusual woman who did not make some impact in the decoration and furnishing of a family home; and the range of specific bequests may be some small confirmation.

Actions during a life time often speak more truely than words afterwards. In this case parties' actions were very consistent with recognition each had played an important and overall equal part in asset accumulation. Properties were taken in joint names. Ordinary people do not operate on subtleties of real estate law. Joint ownership is seen as equal ownership. Each evidently saw the other as entitled to an equal share. Each made a will totally in favour of the other. I hesitate to give undue weight to the ultimate transfer of 6 Highfield Place being signed by both, as there are circumstances of suspicion not yet resolved, but so far as it goes it signals like common intention down to the last. All the signs point to recognition of equal effort during life time. Such signs frequently reflect a reality. They do so in this case. The requirements of justice are clearly in that direction.

I suspect, like many of his generation, the plaintiff will never be able to accept that a woman who merely "looked after the family" when he "did all the hard work", could have contributed and be justly entitled to equality with himself. I am careful not to apply the mere dogma of the 1976 Act, although it is indeed a pointer to current perceptions of justice in these cases. Quite simply, given the circumstances of this long marriage, the contributions made by each in his or her own way, and the dictates of justice, the correct division of the matrimonial property comprised in the Highfield Place and Pratt Avenue properties was equality.

On that basis, the husband is owed nothing in respect of 6 Highfield Place. He has done very handsomely out of Pratt Avenue; receiving by survivorship the deceased's $30,000 equal share. Their estate assets - cash sourced to savings, superannuation, and cars likewise previously sourced - may indeed fall outside the [illegible] matrimonial property. There could well be difficulties in tracing any contribution from the other. If the

husband can be regarded as having made a contribution - perhaps through providing a home platform - it would have been relatively small; and as a matter of justice would have been more than covered by the Pratt Avenue receipt.

I find against the plaintiff's claim under the Matrimonial Property Act 1963.

There is a reservation as to the question of chattels specifically bequeathed in paragraph 3 of the will, to which I refer subsequently.

Family Protection Act

Counsel for the plaintiff submitted, in accordance with ***Little v Angus*** (1981) 1 NZLR 126, deceased had owed and breached moral duty to the husband. In a thorough review, it was argued the traditional distinction between widows' and widowers' claims should be revised in the light of changing social practice and attitudes. I need not canvass the authorities cited. I am readily persuaded. On a modern approach, the dying spouse who is in a relatively stronger position should make provision to assist the relatively weaker surviving spouse. Gender should not matter. It is modern day and foreseeable prospects which should govern. I do not resist the concept it could be incumbent upon a dying wife to leave her entire estate to her surviving husband, including capital, particularly if he is aging or infirm. From that standpoint counsel then pointed to the husband's contribution to the assets concerned; the duration of the marriage; and the competing claims being merely those of adult children. Counsel submitted, and I accept, the Court must take account of the size of the estate. Clearly, the estate was insufficient to satisfy all claims open in full. The claims of the children - including Daryl - it was said could await resolution through receipt in due course of the husband's estate. No undertaking was given in the latter regard.

Counsel for Daryl submitted, as obliged for the latter's protection, the bequest of $30,000 plus one seventh residue should be preserved, to the extent the Court best is able. He resisted any distribution to the plaintiff which would be adverse to that intended for Daryl. The bequest was one

which had been carefully thought through. A widower should not necessarily have priority to a weaker child.

Counsel for Marlene simply sought treatment equal to that given to the other 7 children, excluding the obviously special position relating to Kevin and Daryl. She does not seek to assert an immediate claim ahead of the husband.

Counsel appointed to represent Kevin resisted a possible approach - outlined from the Bench to ensure argument - that Kevin's one seventh share might be taken over by Marlene. The appropriate course - if Kevin's share was to be affected at all - was for Marlene to be brought in as an additional child residuary beneficiary, with the effect spread over all children as opposed merely to Kevin. The principal submission was that Kevin's share should be maintained. Obviously, in the circumstances, it cannot be increased; and sensibly no such argument was mounted.

For the trustees, counsel raised the possibility of resolution by way of a life interest or life occupation right to the husband in the estate's share in 6 Highfield Place, with power to resort to capital. From the fact such was raised as a possibility, I assume it is regarded as administratively feasible. I note that in submissions in reply, responding particularly to an indication from the Bench of a provisional view against giving the whole estate to the husband under the Matrimonial Property Act 1963, counsel for the plaintiff (while continuing to press strongly for the whole estate) accepted that "at the very least" there should be a life interest. It at least gave security, where none presently existed.

The deceased's first obligation as a just and wise testator with a grasp of available assets and potential moral claims upon her, was to provide adequately for her surviving husband, then for her mentally disabled son. After appropriate provision in that direction, she could look at assisting her remaining able bodied children.

The obvious need for her surviving husband was a secure home, and some cash cushion. He was in his 60's. He had retired. He was in suspect health. The proper and just cause was to ensure he could stay on in the house at 6 Highfield Place to which he was accustomed, for as long as he

wished to, and was able. Older men should not unnecessarily be disturbed. After that, care should be taken to see he could live in an institution, or under care, so far as funds would extend. If the estate had been larger, the proper course would have been for the deceased to leave her half share to him outright, or to have allowed it to pass to him by survivorship. However, the estate was not large enough. To do so would leave virtually nothing for her children, except by grace and favour of the husband and subject to the uncertainties of a foreseeable remarriage on his part. The husband on normal actuarial expectations would only have some 12 years to live. The eldest child is only 43. The children could wait.

The correct course in the circumstances was for the deceased's half share to be held by her trustees for her husband for life. It would be available for the husband to occupy, he paying all outgoings. If the husband could not or no longer wished to occupy the house, it would be proper for the deceased's half share to be sold, invested, and the income made available to assist the husband, particularly in other accommodation or nursing care. When the husband passed on, the house interest or investments derived would of course be sold or realized with the proceeds of the deceased's interest passing to her children in terms of her will as planned.

The obvious need for Daryl was an income trust for life. Her assessment of $30,000 plus one seventh residue was about right. It was sufficient to make a small but worthwhile contribution to his upkeep. The problem today is that there is insufficient to fund that trust without selling the deceased's half share in 6 Highfield Place. So far as there is a shortfall, and I suspect it will be considerable, Daryl simply should wait. He has managed to this point. There is no real fear he will suffer neglect. He must give way to the more imperative need of housing the husband in his final years, and be content with a reduced fund meantime. When the husband passes away, and funds are freed through sale of the estate's interest in 6 Highfield Place, the difference between the sum available now for Daryl's trust and the directed $30,000 can and should be paid from that source.

Marlene should indeed have been treated in exactly the same way as the other children. She is in law the deceased's child. Adoption, if it was indeed resented, was not Marlene's doing. It was not her fault. She was

only two. She was owed the same affection and provision as each other child. There is no disabling conduct proven. There was no different moral duty. Indeed, it seems to me distinctly arguable that she had an entitlement well ahead of the vanished son Kevin. I have considered extinguishing Kevin's share and awarding it unconditionally to Marlene. However, that could have uncomfortable effects on family coherence if Kevin ever makes a prodigal return. It is probably better, and in the end makes little financial difference, to add Marlene in as a one eighth residuary beneficiary, equal to other children, and a one sixth residuary beneficiary additional to the present one fifth residuaries.

Beyond that, the will should stand unchanged.

Specific Bequests of Chattels

I deliberately leave open all questions of ownership and entitlement to the chattels listed in paragraph 3 of the will. The plaintiff, strongly, asserts all chattels were joint property, and passed to him by survivorship. He seeks to obtain possession in these proceedings. The facts may well not be so simple. There can be separate ownerships within marriage, certainly prior to death. I am not inclined to make some form of off-hand binding adjudication with uncertain information and in an inappropriate proceeding. If the husband genuinely presses his claim, he can commence proceedings in his own right against the children concerned. Those children might, in the meantime, reflect upon where their best interests lie. It might not enhance their chances of receipt under their father's will at some point in the future if they take a difficult stand on this relatively minor matter now. It is the sort of problem which should be resolved within a family.

Order

The will will be altered as follows.

(a) By insertion between clauses 3 and 4 of a new clause 3A:

"3A. I DIRECT my trustees shall hold my interest as tenant in common in 6 Highfield Place, Levin UPON TRUST to

permit my husband Nolan Percy Ewers personally to reside therein for the remainder of his lifetime he paying all rates, insurance premiums and other outgoings including necessary maintenance and repairs in respect thereof PROVIDED ALWAYS that with the consent of my said husband or otherwise pursuant to Court order my interest therein may be sold and the net proceeds held upon trust to pay the net annual income arising from investment thereof to my said husband for the purpose of assisting in provision of his necessary care and accommodation with power to resort to capital if such income in the opinion of my trustees be insufficient AND following the death of my said husband TO HOLD the proceeds of sale or the balance then held UPON TRUST FIRST to make up any difference between the $30,000 directed to be held for my son Daryn under clause 4(i) hereof and the sum actually so available for the purpose upon constitution of that trust, and SECOND upon the trusts set forth in clause 4(iii) hereof.

(b) By altering clause 4 as follows:

(i) Change 1/7 to 1/8.

(ii) Change six to seven.

(iii) After the name Christopher then add the name Marlene and change 1/7 to 1/8.

(iv) Change 1/7 to 1/8; 5 children to 6 children; and add after the name Christopher the name Marlene; change 1/5 to 1/6.

Counsel for the trustees will draft an order encapsulating the rulings above, and submit for my approval. Leave is reserved to apply in the event of any drafting problems in the above provisions being seen.

Costs

The trustees have indemnity and need no order. Counsel for the trustees is entitled to reasonable solicitor and client costs in respect of representation of Kevin as directed. A memorandum may be submitted in the latter regard.

Plaintiff will have costs on a reasonable solicitor and client basis and may submit a memorandum.

Counsel for Daryl will have costs on a reasonable indemnity basis and may submit a memorandum.

Counsel for Marlene will have costs on a reasonable solicitor and client basis and may submit a memorandum.

All costs will be against residue; and not against the interest in 6 Highfield Place.

I would ask for the draft order and such memoranda be submitted to me within 14 days.

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R A McGechan J

Solicitors:

Helen Cull, Wellington for Plaintiff
Willis Toomey Robinson, Napier for Defendants
C J Walshaw for Daryl Ewers
T Peters for Marlene Ewers

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PALMERSTON NORTH REGISTRY

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RESERVED JUDGMENT OF McGECHAN J
