IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY A.34/81

853

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the estate of MAGGIE TATANA late of Kaitaia, Widow, Deceased

BETWEEN MARY ANNE ROGERS

Plaintiff

A N D MARY ANNE ROGERS and HARRY VALENTINE TATANA as executors and trustees of MAGGIE TATANA deceased

Defendants

Hearing : 18th November 1982

Counsel : D.S. Hislop for Plaintiff
Miss C.F. Bradley for Defendants
A.J. Twaddle for Beneficiary
No Appearance for Grandchildren

Judgment : 18th November 1982

(ORAL) JUDGMENT OF BARKER J

This is a claim under the provisions of the Family Protection Act 1955 in the estate of Maggie Tatana, late of Herekino, widow, deceased (hereinafter called "the deceased").

D.H.Barker

The deceased died at Kaitaia on 9th December 1980 aged 75, leaving a will dated 9th June 1975. Under this will, she left her whole estate to Louis Malcolm Tatana, her grand-nephew whom she had adopted in accordance with Maori custom and who was regarded as her "mokopuna".

The plaintiff is the only child of the deceased; she is aged almost 62. The deceased had no other children; her husband died in 1937 when the plaintiff was only 17.

The main assets in the estate are two blocks of Maori land at Herekino; the first is known as Manukau D4B Block; it has an area of 28.8 acres and a value assessed at April 1982 by a registered valuer of $26,000; the second is 38 out of 43 shares in Manukau E2B 3 Block with an area of 4.25 acres and a value, as at 20th April 1982, of $7,000.

At the date of death, the deceased was running a number of beef cattle on this farm, including 30 cows, 14 yearling heifers, 7 yearling bulls and 2 XB bulls, valued at the date of death at $5,470.

The trustees have not provided the Court with an up-to-date valuation of the estate assets. They did not provide an up-to-date valuation of the land; the valuer's report was obtained by the solicitors for the plaintiff. There should have been - and there is not - an up-to-date valuation of the livestock; counsel have estimated, for the purposes of the hearing, the value of the stock at $6,000. Not only is there no estimate of the value of the livestock, but there is no information as to what has been happening financially to the farming operations since the date of death.

One might have expected that the same animals on the farm as at the date of death are not there now; also there may have been some natural increase in the stock. I am told nothing about the present situation of the stock nor its value nor what has happened to the farm income. if any, since the date of death.

Miss Bradley appears today on instructions from the estate solicitors in Kaitaia; she informs me that the estate solicitors had sought a valuation of the stock from a Kaitaia stock agent but none was forthcoming allegedly because of the

distance of the property from Kaitaia. I expressed some surpris at this excuse for the non-availability of a valuation when I learned that the property was near the township of Herekino which is not particularly far from Kaitaia although I am not aware of its exact distance.

I state again, as has been stated by the Court on other occasions, that there is a clear duty imposed upon trustees by Section 11A of the Family Protection Act 1955 to provide the Court with all information concerning the estate in which a claim is made; in this case, the Court and indeed counsel have been hindered by the lack of such information being provided. There is no statement as to what happened to the $2,310 in a bank account at the date of death. One assumes that this money was used to pay off the $1,000 of debts and funeral expenses and that there has been some charge for administration expenses, but again the Court has not been provided with the information. One imagines that the defendant concerned, who is resident in Auckland, would have left this matter in the hands of the estate solicitors in Kaitaia and I should think that if there is any blame to be cast, the estate solicitors should have provided this information I proceed on the rather unsatisfactory information outlined above.

The deceased worked for many years at the Herekino Hotel after the death of her husband. She bought the land at a time when there was only an uninhabitable house on the property; for some 12½ years she took into her care her grand-nephew, Louis Malcolm Tatana, her mokopuna - he is now aged 16. A modest dwelling was erected on the Manukau D4B Block. The plaintiff states - and it is not denied - that her husband lent the deceased some money to assist with the building and the purchase of shares in the Manukau E2B block. He did

not seek repayment.

It is acknowledged by the plaintiff that Louis Malcolm Tatana was regarded by the deceased as her mokopuna. An affidavit was filed by Mr J.K. Barrett, a senior Community Officer with the Maori Affairs Department at Whangarei; he has an extensive background of working in Maori social organisations and has a good knowledge of Maori customs and traditions. He deposed to the common practice for Maori people to bring up as a member of their own immediate family, a grandchild or grand-nephew and that the substitute parents would consider themselves as owing to the mokopunas the same obligations and responsibilities as to their own children. He spoke of an instance of this custom occurring in his own family. Usually, legal adoption procedures are not carried out.

In this case, whilst the plaintiff acknowledges that Louis Tatana was her mother's mokopuna, she denies that it was the custom of the Rarawa people, of which her mother was a member, for there to be any duty to pass on family or tribal land to a mokopuna. She claimed that it was still the custom for family land to be passed to immediate family in direct line.

Louis Tatana has now left school and is living in the dwelling erected on the Manukau D4B block; he is looking after the cattle and the land virtually on his own. He has no support from his natural father; his natural mother who has filed an affidavit, has only modest means. He had no assets at the date of death and has no assets of substance now, other than his interest in the estate.

The plaintiff has had 7 children of her own, all of whom are married and all of whom are in good health. She and her husband live in what she describes as a modest house in

Kaitaia which is unencumbered; they own modest furniture and effects. She has no savings. Her husband is now aged 78 and is in poor health. He owns a 1958 Austin A40; I think judicial notice can be taken that that vehicle would not be worth anythin much at all. His savings are minimal. The plaintiff has been granted full legal aid with the minimum contribution for the purposes of bringing these proceedings.

The plaintiff is particularly concerned that the Manukau D4B block is kept in her family as papakainga, in her own words, "as it has been since before the coming of the pakeha"; she does not want that particular land to be placed in a situation whereby another owner may be tempted by a large cash offer to dispose of the family ancestral land forever.

There is no valuation of the plaintiff's property in Kaitaia; therefore, some of the strictures made by the Court of Appeal in Groves v. Franich (Judgment 10th June 1981) have some application; I think that I have just sufficient information about the plaintiff's assets to assume in her favour that she is of modest means, although she and her husband do own an unencumbered house.

Mr Hislop for the plaintiff submitted that there was a breach of the moral duty owed by the deceased to the plaintiff. He reminded me of the well-known authorities which do not need repetition. The most recent, of relevance to married daughters' claims, have been Groves v. Franich and Little v. Angus, (1981) 1 N.Z.L.R. 126.

Broadly speaking, the Court should consider that an adult daughter is entitled to claim in her own right, regardless of her husband's position; her need for maintenance

and support is not to be judged on a narrow economic basis but also on a moral and ethical one; the Court must take into account changing social attitudes and their influence on the existence and extent of moral duties.

There is some reference in the affidavits to the history of the relationship between the plaintiff and the deceased. I do not think it necessary to traverse this in any detail. It seems to me that it has not been proved that the plaintiff was other than a dutiful daughter to her mother over the years; she of course had her own large family to care for and the claims of the family on her care and attention must have come first.

There is some evidence from the plaintiff that her mother did promise to reward her under her will. The plaintiff did have only a modest education as was perhaps not unusual in the depression times when she was growing up; she did not benefit in her father's estate - not that there was very much in that estate; what there was went to the deceased.

There were some affidavits filed by counsel for the beneficiary to indicate that one of the reasons why the deceased left the property to Louis Tatana was that he bears the Tatana name; he belonged to the same family as the deceased and she thought he would revere the land, at the same time as receiving thereby a good start in life.

Louis himself filed an affidavit saying that, for sc long as he could remember, he helped the deceased on the farm, doing work for her as she grew older; she relied on him; there is no suggestion other than what he says is correct. In fact, he always referred to the deceased as "mama".

The plaintiff did speak of a promise by her mother that she would leave her land to her as her only daughter; clearly, in the context of this case, the question of land is all-important. When the authorities require the Court to pay regard to social attitudes, I think that when dealing with Maori land and Maori customs, the Court is obliged to pay regard to the very closely-held, deeply-felt feelings of the Maori people as a whole about their land.

One can take judicial notice of the fact that land is regarded by the Maori people as more than just an investment; it has a deep spiritual meaning for them and therefore, the Court must take that factor into account. The Court must also take into account the custom of adoption of a mokopuna which has been referred to earlier in my judgment. Those are very relevant matters in this case; this Court is obliged to pay regard to them now that it has assumed from the Maori Land Court jurisdiction under the Family Protection Act. This jurisdiction was given by the Maori Affairs Amendment Act 1967, Section 80(2), and Section 7(2) of the Maori Affairs Amendment Act 1976.

Counsel were unable to refer me to any case where the particular considerations relating to Maori land and to Maori customs have been taken into account by this Court. Despite their inability to refer me to any authority, I have no doubt that the matters that I have mentioned of peculiar interest to Maori people have relevance to this case.

Mr Twaddle submitted that the plaintiff was not entitled to any provision; there was not any breach of moral duty. He contrasted the circumstances of the plaintiff on the one hand, who has her own home and is relatively comfortably off, with the situation of Louis Tatana who was only 14 at the time

his adopted mother died; he has natural parents from whom he could expect little in the way of financial support. Counsel referred to Louis' complete dependence on the deceased and his contribution to the estate, working on and maintaining the property.

As to that of course, the valuation report shows that these two blocks are not an economic unit; in the opinion of the valuer the property is too small to be developed to any kind of economic pastoral utilisation; it can only be classified as a small holding. Mr Twaddle submitted that in this modest estate, the deceased could not be said to have failed in her moral duty to the plaintiff because she did not have the means to cater for both demands on her, namely, that of Louis Tatana and that of the plaintiff; therefore, no order should be made.

With respect to Mr Twaddle's careful argument, I consider that the plaintiff is entitled to provision under the Act. In all the circumstances of the case which I have endeavoured to outline, I consider that the deceased owed her daughter a moral duty to make for her some provision in the will. She was her only natural child; there is no evidence that she was other than a dutiful daughter to the best of her ability throughout the deceased's relatively long life. I think, without going into all the authorities to which counsel have referred me and with which I am very familiar, that the plaintiff has made out a case for provision.

The Court must then consider what is the appropriate order to make in the circumstances; of course, as Mr Hislop pointed out, once breach of moral duty is established, quantum must be considered in the light of present day circumstances. These include of course the relatively modest financial position of the plaintiff and her husband, the husband's poor

health and the value of the estate which was about $16,000 at the date of death and which is now, through inflation of land values, around about $40,000.

In deciding on an appropriate award, I am very conscic of the fact that it would be undesirable to have to sell this land; undesirable mainly because of the strong emotional ties that both the plaintiff and Louis Tatana have for the land. In some respects, it is fortunate that the land is in two blocks. I am mindful of the relatively better financial situation of the plaintiff and her husband who own their own unencumbered home. I am mindful too of the plaintiff's desire to have some of her mother's land. I think that I should vest in her the deceased's shares in Manukau E2B 3 block. In addition, I think that she should have some small legacy which would really mean that the cattle may have to be sold; they would probably have to be sold in any case. I think she should have a legacy of $1,500.

In addition, the plaintiff is entitled to costs on a solicitor-and-client basis to be paid out of the estate. Mr Twaddle is entitled to his costs paid out of the estate on the full solicitor-and-client basis.

It may well be that some, if not all, of the cattle will have to be sold but at least the land will be available; within the confines of this small estate, I have endeavoured to do justice to the plaintiff without doing what I am forbidden by the authorities, namely "do the fair thing" or remake the testatrix's will. I have been loath to order a sale of the land.

I therefore await the form of an order to be presented by counsel in due course. Such order will no doubt

embody the machinery provisions which have to be undertaken in the block of land awarded to her by this judgment.

The effect of the decision of the Court will be of course that the major block of land worth $26,000 will be held by the defendant trustees on behalf of the infant beneficiary, Louis Tatana.

R.D. Barker, J.

SOLICITORS:

Plaintiff : Thorne, Dallas, Perkinson & McGregor, Whangarei.

Defendants : Dragicevich, Campbell & Smith, Kaitaia.

Beneficiary: Thomson, Wilson, Fidler & Heenan, Whangarei.