IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M 119/81 X

371

IN THE MATTER of an Originating Summons

A N D

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of C NORTHE late Napier, deceased

BETWEEN E WHYTE
A WHYTE
F WHYTE
N WHYTE
infants suing by their Guardian ad litem
D WHYTE
and S WHYTE
of Napier, Shop Assistant

Plaintiffs

A N D D TWIGG and J MATTHEWS both of Napier, Solicitors

Defendants

Hearing: 5 April 1984

Counsel:

Judgment: 17 April 1984.

RESERVED JUDGMENT OF GREIG J

This is a claim made by five of the grandchildren of the deceased for further provision from the estate. Four of the grandchildren who are infants sue by their father as guardian ad litem. These children were born in The fifth

plaintiff, S was of full age when the proceedings were commenced in September 1981. The deceased died on 1979 and at that time the final net balance of the estate including the value of gifts made before death and the deemed value of the residence amounted to some $35,000. The value of the estate at the date of the hearing was $20,000 held in cash or investments by the defendant trustees plus the deemed value of the flat still occupied by the deceased's widow at $18,000. Administration costs to date have all been met but there are still some further costs on distribution as well as the costs in this action.

The deceased was survived by his widow and two children. One of these, a son, has two grandchildren and these I describe as "the Northe family". The other child was a daughter who had six grandchildren of which five are plaintiffs. I describe them as "the Whyte family". By his will the deceased made a bequest to his son of the car, furniture,clothing and other chattels and these have now been distributed to him. There was a bequest to the son of $5,000 and the daughter of $1,000 and a bequest of $4,000 to be divided among the six Whyte grandchildren surviving and who attain the age of 25 or earlier married. There was a further bequest of $400 to each grandchild on attaining the age of 21. That is then a bequest to the two Northe grandchildren and the six Whyte grandchildren and in addition an illegitimate child of the daughter. There was a life interest in the deceased's home left to the widow and the whole of the residue was then left to the Presbyterian Social Service Association of Hawke's Bay and Poverty Bay (Inc).

The Northe family have taken no steps in the matter nor have the daughter or the eldest Whyte grandchild. The widow intimated that she does not apply for any further provision and the Presbyterian Social Service Association intimate that they abide the decision. The plaintiff Stephen expressly disavows any further interest or claim but supports the claims of the four younger

plaintiffs. Counsel for the widow, Presbyterian Social Service Association and Stephen appeared at the hearing but were given leave to withdraw. The plaintiffs do not suggest any variation in the bequests to the other family members but seek further provision out of the residue.

This is a case in which there was no challenge of the claim of the plaintiffs and I am satisfied that they have a claim and that further provision ought to be made. I do not propose to deal at any length with the facts of the claim but will cover the whole question of the merits quite shortly.

The daughter, the mother of the plaintiffs and her husband, the guardian ad litem, separated in or about 1975 in circumstances in which the daughter virtually abandoned her family. She remained in association with the eldest daughter of the Whyte family but left the father to bring up the remaining children, which indeed he has done with a considerable struggle and sacrifice. It is only now with the remaining two youngest children at home that he is able to work and has some prospects of renewing his working life. The daughter of the deceased, the mother of the children, now lives somewhere in Europe, goes under another name and has a child. In spite of the fact that the deceased and the Whyte family remained in the same town and the difficulties of the family must have been known to the deceased he gave no assistance in any real sense to the grandchildren. There had been some minor assistance given in the past when the husband and wife lived together but it seems that after the separation the deceased preferred the daughter and to some extent ignored the situation of his grandchildren.

The position now is that the father who has provided a home for the children now has the two youngest children at home and they still attend school. He is able to take up employment and receives approximately $200 net a week. He has had to borrow substantially to maintain the family home and has relatively

heavy commitments in that respect. I am satisfied that the condition of the family home is not satisfactory and considerable expenditure is required to bring that into order. Clearly there is a need for provision for the family and for the continued welfare and upbringing of the grandchildren. Although two of the four infant plaintiffs have now left home at least one of these is likely to return and it is necessary, in my view, that the father, as he intends, should provide a home base for the whole of the family.

The sum of $9,330 is required to make payment of the bequests to the son and the two Northe grandchildren, the daughter, her illegitimate child and the two older Whyte grandchildren. That then leaves a sum of $10,670 immediately available for the further provision sought. It is appropriate, in my view, that the sum of $10,000 be immediately set aside as a class fund for the four Whyte grandchildren, the plaintiffs. That will then leave the residue in the form of the flat. Although that has been described throughout by all the parties and in this judgment as a flat it is in effect an advance of $18,000 which the deceased made to the Presbyterian Social Service Association in what appears to be a retirement village. The widow continues to occupy that flat. On the termination of the occupation the amount of the loan or a proportion of that calculated in relation to the value of the flat will then be repaid and that amount will then be the residue. I agree that, as sought by the plaintiffs, the appropriate provision should be that that be divided equally between the Presbyterian Social Service Association and the four plaintiff grandchildren. Both the immediate sum of $10,000 and the ultimate residue which will not exceed $9,000 should be held in the same class fund.

I have given some consideration as to who should be the trustee of the class fund and have decided it ought to be the father, Desmond Russell Whyte. I am confident that he can be trusted to administer the fund

for the benefit of all the children who are plaintiffs although I accept that to some extent any expenditure from the fund on or about the home will be to his benefit as well. There can be arguments that in a case such as this a stranger ought to be the trustee but that always involves additional expense and thus a diminution at least of the income of the fund. It is a relatively small fund and any diminution of that in the way of costs is to be avoided.

I have been concerned about the position of the eldest named plaintiff, E . She is now and has been living away from her father and the rest of the family for some time. There appears to be some estrangement although it may be on her part rather than on anybody else's. The need in any event is for a family home and for the family who live in the home. I am confident that the father has no feelings of estrangement himself in regard to that daughter and will see to it that the daughter receives her proper share in the class fund.

I think that the class fund should provide for termination on the first of F and N attaining the age of 21 years or on the earlier death of both of them. That will mean, of course, that as far as the older children are concerned there will be some delay in the receipt by them of any final benefit and at the same time it provides in fact a termination to the father's benefit indirectly through expenditure on the home.

The provisions of s 6 of the Family Protection Act 1955 give power to expend capital and income for maintenance of the beneficiaries of the fund. That will permit payment direct to E or to any other child. There ought, in addition, to be power to the father to expend both income and capital of the class fund on the repair, maintenance and improvement of the family home and it may well be desirable to do that in part by repayment of loans already made for home improvement. I think, however, that there ought to be some

limit on that and I have decided that the trustee father should not be entitled to expend more than one half of the total capital of the fund for those home purposes. That will allow him to expend up to $5,000 immediately and when the life interest falls in another $4,500.

What is proposed in this judgment means that the Northe family, the daughter, and the illegitimate grandchild, G and S will receive in accordance with the terms of the will their bequests and benefits in the bequests. To the extent that any of the grandchildren do not obtain a vested interest in their entitlements they will, of course, fall into residue. On the other hand the four infant plaintiffs will have no rights or interests in the bequests and other benefits in the will but will have only their interests in the class fund of $10,000 which will be augmented on the widow's death by the half of the remaining residue. The Presbyterian Social Service Association will receive in the end a half of the residue.

The trustees are entitled to their costs. In the circumstances of this case I will make no other order as to costs.

I will leave it to counsel to submit a draft order to carry out the terms of this judgment and I expressly reserve leave to counsel to apply further if it is thought necessary, especially to settle any terms of the order.

Hunt J