

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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Wick

A.863/82

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IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of R
RICHTER formerly of
Rothesay Bay, Auckland,
Retired Farmer, now
deceased

BETWEEN

M HOWE
Of Hamilton, Housewife

Plaintiff

AND

N BRADFORD of
Christchurch, District
Court Judge as executor
and trustee of the Will
of R RICHTER
formerly of Rothesay Bay
Auckland, Retired Farmer
deceased

Defendants

Hearing: 9th February, 1984

Counsel: Miss Wallace for Plaintiff
Mr Young for Defendant and the Residuary Legatee

ORAL JUDGMENT OF SINCLAIR, J.

This estate is a small one by any standards and at the date of the death of the deceased, which was 1968, it was even smaller. Probate was granted on 1968 and these proceedings were not commenced until August 1982.

Initially the Plaintiff has to get over the hurdle of the Court extending the time within which the action may be brought, but in this particular case, having regard to the merits of her claim and the very proper attitude of the residuary legatee, that factor does not present very much

of a problem.

The principles to be applied in considering an application for extension of time within which to bring the proceedings are now collected in an unreported Court of Appeal decision of Magson v. N.Z. Insurance Company Ltd C.A. 206/82, judgment 28th June 1983. There the Court collected all the cases right back to 1909 and said that the factors to be taken into account are the length of the delay; the extent to which it is excusable because of ignorance of rights or otherwise; the strength of the claim that there was a breach of moral duty by the deceased; and the extent of any prejudicial effect on beneficiaries who have ordered their lives in reliance on the will or intestacy.

As at the date of death of the deceased his estate was valued at \$12,149. His estate consisted almost entirely of a house property in which his widow was permitted to live for the remainder of her life. On her death there was a bequest of \$1,500 to the Plaintiff and her brother John.

The Plaintiff's mother had died when she was four years of age and it was in fact her stepmother who obtained the benefit of the provision in the will. But the estate was so small that had it not been for the rather careful actions of the Trustee, the stepmother would never have been able to remain in the house and the house would have been sold and she would have been left with but the income from it. By reason of the very careful approach taken by the Trustee the property was preserved and, of course, the Plaintiff was faced with the situation that her stepmother had a life interest in a very small estate in which she had an interest

which, combined with her brother's interest, really was 25% of it at the date of the deceased's death. It is little wonder that in those circumstances no action was taken by her at that particular time and that it was not until her stepmother's death that she really considered her position at all, that being brought about to a certain degree by the fact that she received no benefit under the stepmother's will.

The estate is still small, being just over \$30,000, and the Plaintiff's situation is modest by any standards. There is nothing to suggest that she is in any way disqualified from obtaining a benefit under her father's will and this is one of those cases where I have no hesitation in holding that there ought to be an extension of time.

The Plaintiff herself has very properly approached the situation of the residuary legatee which is a charity by stating that she does not wish to claim the whole of the estate. Counsel for the charity has very properly conceded that the Plaintiff's suggestion that she should receive two thirds of the estate and the charity one third is not a suggestion at which he could really quibble.

In all the circumstances it seems to me to be appropriate that the residue of the estate be divided, after payment of the Defendant's costs as Trustee, as to two thirds to the Plaintiff and one third to the residuary legatee, both the Plaintiff and the residuary legatee bearing their own costs out of their respective shares in the estate.

P. B. King.

SOLICITORS:

Bassett Buchan & Partners, Hamilton for Plaintiff
Stevenson & Young, Browns Bay for Defendant