21/8

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

No. A.248/81

963

IN THE MATTER of The Family Protection Act 1955

A N D

IN THE MATTER of the Estate of G TOWNSEND deceased

BETWEEN M TOWNSEND

First Plaintiff

A N D H TOWNSEND

Second Plaintiff

No Special Consideration

A N D SOUTH BRITISH GUARDIAN TRUST COMPANY LIMITED (now known as THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED) as executor of the will of G TOWNSEND

Defendant

Hearing: 24 May 1984

Counsel: Mr T.J. Castle and Miss S.J. Taylor for Plaintiffs
Mr A.R. Marshall for Grandchildren and Great-grandchildren born and unborn of the testatrix
Mr G.P. Barton for St. Ninian's Church
Mr J.P. Lynch and Helen Aikman for Defendant

Judgment: 13/8/84

ORDERS FOR FURTHER PROVISION OUT OF ESTATE OF ONGLEY J

The above-named plaintiffs are the children of G Townsend late of Wellington, deceased, who died at Wellington on 1973. The testatrix, as I shall call the deceased, left a Will dated 9 May 1970, probate of which was granted to the above-named defendant on 27 November 1973.

In these proceedings the plaintiffs seek orders for further provision to be made for them out of their late mother's estate under the provisions of the Family Protection Act 1955. The action was not commenced until 7 September 1981 so that their application is made out of time by a wide margin and they must obtain the leave of the Court to proceed. I intend to review the relevant facts and the nature and merits of the respective claims before making a decision upon the application for leave to proceed out of time.

The testatrix was married only once and that on 1941. Her husband survived her and is still living. He has re-married and has signified his intention of taking no part in these proceedings. Such benefits as he received under the will of the testatrix are not under attack.

The two plaintiffs were the only children of the marriage. M was born on 1947. She was married in 1972 but is now divorced from her first husband. There were no children of the marriage. H was born on 1950. He is single and has no children.

By her will the testatrix made a gift of $1,000.00 to St. Ninian's Presbyterian Church at Karori, Wellington (referred to in the Will sub nom. St. Ninan's). She left to her husband her half interest in a house at Raumati South owned by her jointly with him. She empowered her Trustee to permit her husband and children to occupy her house property at Street, Karori up until 8 years after her death. Personal chattels were to be divided among her children and grandchildren in shares to be determined by her Trustee. The residuary estate was left in equal parts for life to the plaintiffs with a gift in remainder in

respect of each part to their surviving children. There was provision for substitution of greatgrandchildren in the event of a grandchild predeceasing the life tenant and a provision for accrual between the shares in the event of one or other of the plaintiffs not being survived by a child or grandchild. In the event of no child or grandchild of either plaintiff surviving to take the residuary estate one half was to go to St. Ninian's Presbyterian Church and the other half to the children of the testatrix's sister, M Heasley.

The pecuniary legacy to St. Ninian's is not attacked and in respect of the Church's contingent interest in the residue Mr Barton informed the Court that his client would abide the decision of the Court. The Heasley children, of whom there are three, were not represented at the hearing but it is understood that their attitude in respect of their contingent residuary benefit is the same as that of the Church.

The competing interests therefore are those of the plaintiffs and of their children or grandchildren born and unborn.

The testatrix's estate was valued at $128,889.79 for estate duty purposes. Within that assessment the Friend Street house was valued at $40,000.00 and the testatrix's half interest in the Raumati South house at $7,900.00. The testatrix's husband brought proceedings under the Matrimonial Property Act 1973 in which he was awarded thirty per cent of the proceeds of sale of the matrimonial home (Friend Street). The property was sold for $100,000.00. He has been paid his

share of that amount and the Raumati South house has been transferred solely to him, in pursuance of Clause 5 of the Will. As a result of the Trustee's administration the corpus of the estate is now worth $166,603.11 represented almost wholly by investments in shares and group funds but including a loan on mortgage to the second plaintiff of $17,100.00.

The testatrix did not express any reason for not leaving her two children any capital sum and it may be no more than speculation to say that she did not regard them as being well equipped for the responsibility of handling a sizeable capital sum. If that had been her reason it would seem that her fears were groundless as both children appear to have conducted themselves in a responsible way since her death.

M received her education at private school and subsequently completed a bachelor's degree in science at Victoria University of Wellington. She taught school for a period of four years and later was employed in various commercial positions as a salesperson and as a management services officer. Her first marriage was terminated by divorce in the year 1975 and she has since re-married. She and her present husband have a year old child. They reside in a jointly owned home at Lower Hutt purchased in 1981 for $59,000.00 subject to a mortgage securing a loan of $30,000.00. The present market value is put at $80,000.00. Chattels in the home are valued at $37,000.00 for insurance purposes. She has a car worth $4,000.00, shares in public companies of an approximate value of $20,000.00 and a whole of life insurance policy for $10,000.00. On those figures her net worth is probably about $65,000.00

allowing for the reductions made in the mortgage debt. Her husband has assets of something the same order. He works as an industrial engineer but the first plaintiff, herself, is not now in employment.

The first plaintiff's relationship with both her parents appears to have been unremarkable. Obviously, she was brought up in comfortable circumstances but having regard to the family's financial standing she did not receive any material benefits of an exceptional nature. Nor was she called upon to provide any unusual or unduly arduous services. She deposes that her relationship with her mother was a normally warm and loving one. I would assume that her relationship with her father was on a similar plane during her mother's lifetime although it became strained for a period of some years following her mother's death. That rift happily appears to have been healed but the first plaintiff does not expect to receive any testamentary benefit from her father because of his obligation to provide for his present wife.

H is a single man employed as a fitter receiving a net wage of about $200.00 per week plus a small amount of overtime. He also was educated at a private school but, unlike his sister, did not achieve a very high scholastic standard. After working for his father's company for about eighteen months he embarked on a career as a speedway rider which took him to England and Australia on numerous trips. It does not appear to have been an extraordinarily lucrative occupation judging by his asset position. However, he has acquired a one-room bungalow of his own now worth about $40,000.00 subject to a first mortgage to his late mother's

estate securing a loan of $18,000.00 at 18% interest and a second mortgage to the Housing Corporation for $4,000.00. He has other assets worth about $17,000.00 including some chattels received from his mother's estate.

H was very close to his mother but did not get on so well with his father during his adolescent years. They are now on reasonably good terms but he does not have expectations of receiving any substantial testamentary provision for the same reasons as apply in his sister's case.

In view of the close relationship which existed between the testatrix and the two plaintiffs, it seems clear that in leaving them a gift of income only she was doing what she thought was best for them. Her preference cannot have been induced by personal attachment to the ultimate successors to the capital of her estate because there were none then in existence. Even now, more than ten years later, there is only one very young child who may succeed to the whole of the capital. That seems to be illogical in a way because while she appears to have a definite view as to the way in which her own children's interests would be best served, she was in no position to gauge what might be best for her grandchildren or greatgrandchildren then unborn.

The question to be decided is whether the testatrix acted wisely and justly in restricting the provision for her children to income during their respective lifetimes. At the time of her death they were years and years of age, respectively. So far as the affidavits show, neither of them had any substantial assets at that time and although Mary Ann had some prospects as a result of her educational

achievements, H had little to enable him to obtain a start in any business venture. Perhaps she did not trust him to use the money prudently but I think it can be said that subsequent events have shown her to have been unduly cautious in that regard. Whether she was thereby in breach of her moral duty to the children should be judged by the circumstances as they then existed subject to such reasonable probabilities of future change as may have been apparent. I am of the opinion that the testatrix did fail to provide adequately for each of the two plaintiffs by omitting to make any provision for them to receive a capital sum out of her estate. I am fortified in this view by the submissions of Mr Marshall who has considered the issue in the light of his duties as Counsel appointed by the Court to represent the grand-children and great/grandchildren of the testatrix born and unborn. He has reached the same conclusion and with due regard to the interests of those he represents concedes that capital provision should now be made for the plaintiffs.

I turn now to the application for leave to bring the proceedings out of time. There has been a very long delay and I find the reasons for the delay given by either plaintiff show it to have been barely excusable. By reason of there being no opposition to an extension of time I am able to take a more accommodating view than I might otherwise have done. The application is assisted by there being no prejudice to any other interested person by reason of the proceedings having been brought so long after the grant of probate. Having regard to that circumstance and to the strength of their respective claims I believe that an injustice would result if leave was refused. Leave will therefore be granted.

As to the manner in which the testatrix's failure should now be remedied, the estate is a substantial one and there is room to accommodate her wish to benefit her more remote descendants and as well to make adequate provision for the plaintiffs. That can best be done by providing for a pecuniary legacy for each of the plaintiffs and otherwise leaving the Will undisturbed. The financial circumstances of the plaintiffs are not on a par but they approach this application jointly and have expressed the wish through Counsel that if further provision is to be made for them they be treated equally. Acceding to that wish, I find that the appropriate provision is a payment of a capital sum of $50,000.00 to each of them to be made forthwith. As they will receive between them the income from the whole of the residue up to the date of this order there will be no provision for interest on the legacies.

There will be an order for the payment out of the estate of the costs of all parties ordered to be served with the proceedings on the basis of solicitor and client bills of costs as taxed by the Registrar.

J.