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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

No Special Consideration

1668

A.713/80

IN THE MATTER OF The Family Protection Act 1955

AND

IN THE MATTER OF the estate of F ALLEN late of Auckland, Salesman, deceased

BETWEEN B ALLEN

Plaintiff

AND B ALLEN, H ALLEN and E DONALD TUCKER as executors of the Will of FRANCIS W ALLEN late of Auckland, Salesman, deceased

Defendants

A.751/84

IN THE MATTER OF the Trustee Act 1956

AND

IN THE MATTER OF the estate of F ALLEN late of Auckland, Salesman, deceased

BETWEEN B ALLEN

Plaintiff

AND B ALLEN, H ALLEN and E TUCKER as executors of the will of F ALLEN late of Auckland, Salesman, deceased

Defendants

Hearing: 10 December 1984

Counsel:

Judgment: 10 December 1984

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(ORAL) JUDGMENT OF BARKER, J.

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A somewhat unusual situation has arisen in the estate of the late F Allen, late of Auckland, salesman, ("deceased"). He died at Auckland on In his will, dated 11 August 1970, he left his assets other than his home unit at Onehunga and the furniture etc. in that house, to his widow, J Allen, provided she survived her husband.

Under the will, the widow was given a life interest in the home unit at and in the furniture etc.; the remainder was given to the plaintiff provided he was alive at the date of death of the widow or at the date of her earlier remarriage. The will went on to state that, should the plaintiff predecease the widow or not be alive at the date of her remarriage, there was to be a substitutionary provision in favour of the plaintiff's children who attained the age of 21 years. If that devise and bequest were to fail, then the home unit would fall

into residue.the residuary beneficiaries are the three children of the widow; they are named in the will.

The deceased was married twice. His first wife, the mother of the plaintiff, predeceased the testator. He married J Allen in She is now aged she and the deceased lived in a house at Epsom all their married life; they were living there at the date of death of the deceased. The widow has been independently advised; she has renounced her life interest in the home unit at She and her three children, the residuary beneficiaries, support the present applications of the plaintiff which seek to have the property at and the contents vested in him absolutely.

The plaintiff is now aged He is unmarried and has no children. He states he has no intention of marriage at the present time or in the foreseeable future. He has lived in this property at which is a former state unit, for years. He lived there with his father before his father married the present widow; as noted earlier, the father and the present Mrs Allen went to live in her property at on their marriage.

The home unit has a Government value, as at October 1983, of $36,000; the household furniture and effects have no great value.

There are three ways in which it is sought that the home unit and furniture be vested in the plaintiff absolutely:

(a) By way of a declaration that the interest of the plaintiff in this property has been accelerated by the renunciation of the widow's life interest;

(b) By application under S.64A of the Trustee Act 1956 for approval by the Court of an

arrangement on behalf of the unborn children of the plaintiff;

(c) By application by the plaintiff for further provision under the Family Protection Act 1955.

I deal shortly with the first and third applications. It seems that there are difficulties in the case law in the way of the plaintiff's application for a declaration that his interest has been accelerated. Mr Woodhouse helpfully referred to two cases which would seem to give different results, depending on the wording of the will: he foresaw difficulties in the wording of this particular will which might make the declaration inappropriate.

Under the Family Protection Act, I have to consider whether, as at the date of death of the deceased, he failed in his moral duty to make provision for the plaintiff. In my view, there is no suggestion that the will of the deceased was other than unexceptionable, viewed at the date of his death. He was a man with a limited estate. He gave a small amount of cash - about $8,000 - to his widow and left her a life interest in his other asset, namely, the home unit at Roosevelt AVenue with remainder to his only child.

In those circumstances, in this small estate, one could not say that the testator had failed in his moral duty; whilst it is a sensible solution to vest the property in the plaintiff, I do not think that the Family Protection Act can be stretched to allow this application, particularly when the Court has to consider the unborn children of the plaintiff, the future existence of whom must be considered a possibility because the plaintiff is only 51.

I therefore consider the application under S.64A of the Trustee Act 1956. Under this jurisdiction, the Court

is permitted to consent or approve settlements or other dispositions arising out of trusts held under a will on behalf of (inter alios) unborn persons with the proviso that the Court shall not approve an arrangement on behalf of any person if the arrangement is to his "detriment". The legislation goes on to state that in determining whether any such arrangement is to the detriment of any person, the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs. There are various statements of principle in the cases to which reference should be made.

1. The Court should decide whether it is proper to "take a risk" and if it is the sort of risk that an adult would be prepared to take, the Court may be prepared to take it on behalf of an infant. See Re Cohen's Will Trusts, (1959) 3 All E.R. 523, 524.

2. In approving on behalf of unborn children who do not presently exist, one can expect that they would participate in their parents' estate on their respective deaths. See Re Aitken's Trust, (1964) N.Z.L.R. 838, 843.

3. In determining the welfare and honour of the family, a liberal interpretation is to be given. See Re Bryant, (1964) N.Z.L.R. 846.

4. One must look at the overall intention of the testator and the realities of the situation. See Re Bryant (supra).

In this particular case, it is very germane to note that the widow has surrendered her life interest; that fact heightens the argument that the testator intended the plaintiff to benefit by taking a vested interest in his estate on her ceasing to be the widow of the deceased either by death or remarriage.

The next consideration is that it is relatively unlikely that there will be unborn persons to benefit. The plaintiff has strongly disavowed any intention of marrying and having children. The widow is 73 and in the normal course of events, is likely to predecease the plaintiff.

Although the likelihood of change in the present situation is not as remote as it was in Re Parker Trust, (1964) N.Z.L.R. 573, it is nevertheless reasonably remote; looking at the welfare of this family in the broad way, I think that the Court can take the risk and approve an arrangement under S.64A of the Trustee Act.

In Bryant's and in Van Grusen's Will Trusts, (1964) 1 All E.R. 413 and in other cases, the interests of the unborn persons affected by an order under the Act, were protected by a deed of covenant and in some cases by life insurance policies.

In my view, this estate is too small and the means of the parties too slim to put them to the trouble of life insurance policies; however, I think that there should be a deed of covenant by the plaintiff to leave the property to his children, if any; also, the deed of covenant would have to contain a provision that prior to marriage, the plaintiff would covenant to enter into an agreement under the Matrimonial Property Act 1976 so that his wife would not acquire an interest in the property under that Act. The property is to be for any children of the plaintiff. It may be that such an arrangement or covenant can be protected by a caveat; of course the arrangement which the Court will have to approve in detail at a later date will have to make provision for substitution of property, if that were the plaintiff's wish. The intention is that he shall take the property subject only to this covenant which of course would expire on the death or remarriage of

the widow.

I therefore approve the proposed arrangement under S.64A of the Trustee Act and await the form of order and draft documents for approval in due course.

K. D. Keelan J

SOLICITORS:

Glaister, Ennor & Kiff, Auckland, for Plaintiff.
McElroy, Duncan, Milne & Meek, Auckland, for Defendants, Mrs J.M. Allen and residuary beneficiaries.