3/10.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.199/82

1166

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of A BORLAND late of Christchurch, Retired Machinist

BETWEEN B BORLAND of Christchurch, Cook, and L BORLAND of Napier, Shop Retailer

Plaintiffs

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED a duly incorporated company having its registered office at Auckland, as the executor of the Will of the above-named deceased

Defendant

Hearing: 12 September 1984

Counsel: J.F. Burn for Plaintiff
M.J.B. Hobbs for Defendant
G.S. Brockett for Children

ORAL JUDGMENT OF HARDIE BOYS J.

This claim under the Family Protection Act is brought by the two sons, the only children of the deceased, who died on

The deceased was married to the

plaintiffs' mother in but there was a separation in when the deceased left the home, the two sons then aged remaining with the mother. In there was a divorce based on the mother's adultery. Both boys continued to live at home for a period. The younger one left school at the age of was away working for a considerable part of the next two or three years, and then at the age of went to Australia where he lived until he returned to New Zealand in He is now years of age. The elder boy, who is now , lived at home until but he is a seaman by occupation and has obviously been away at sea for lengthy periods probably dating back to relatively soon after the divorce. The mother remarried in and she of course has no part in these proceedings.

The sons were respectively years old when their father died and they were excluded entirely from his will. That will was dated and it provided for a gift of chattels and a virtual life interest in a property which the deceased had acquired since the divorce in favour of a Mrs Poulsen with whom the deceased had been living for a considerable number of years. No attack is made in these proceedings on the provision made in Mrs P favour. The remainder of the estate was left, in the events that have occurred, equally between the six brothers and sisters of the deceased. They are all of independent means. The youngest of them is

The deceased left a net dutiable estate valued at $72,720 but that included a residential property at a value of $22,700, which two years ago was valued at $41,000. Other

assets have increased in value since the date of death so that at the present time in addition to the property there are immediately realizable cash assets of some $66,000 which, after the payment of outstanding commitments and the costs of these proceedings, one can confidently expect will not be reduced below $60,000 at a minimum.

The reason for the exclusion from the will of the plaintiffs, the deceased's only children, is set out in a memorandum which he signed on the day he made his will. It is to the effect that the sons were excluded because since the divorce they had not visited their father or acknowledged him in any way; that although they lived quite close to him whilst they were in their mother's home they made no effort to visit him and that even since they had grown up and become independent they had not tried to see him. The memorandum concludes with the rather sad sentence "As they do not recognise me as a father I do not recognise them as sons". The deceased's description of his relationship with his sons is naturally enough disputed by them. They speak of boyhood recollections of bitterness, if not violence, at the time of separation and of considerable unhappiness both before it and afterwards. They say that their father took little interest in them even when the family was together, and that he was resentful and hostile and rejecting of them after the separation. It may exemplify his attitude or the situation generally that he was erratic in his payment of maintenance despite Court orders. One of the sons has deposed, as an example of his father's attitude, to a joint project in which the two of them were engaged in growing vegetables from which

he was turned out once the separation occurred. He also speaks of an incident some 20 years later when he visited his father in hospital to find that his father really wished to have nothing to do with him. It is I think quite likely that the deceased's hostility and bitterness towards his wife rebounded onto his sons and because they remained with her and no doubt loyal to her he associated them in his mind with the unhappiness and disloyalty with which he blamed her. His attitude was, I am sure, hurtful to them, for they had difficulties enough to contend with at that time. The elder son speaks of a skin problem caused, he claims, by the stresses in his life at the time of the separation. The younger son says he went to Australia largely because of the difficulties between his parents.

The father's brothers and sisters have a rather different view of what happened. They give an account of the relationship which appears to place a considerable amount of blame on the mother, whose attitude to the father and his family was one of hostility and of depriving them all of the company and affection of the boys. They say that as the years went by, even as the boys matured they did not take the opportunities that did present themselves for a reconciliation. Their father had a severe accident shortly after the divorce and was in hospital on a number of occasions over the following years on that account. Neither plaintiff visited him or had any other form of contact and the deponents say that the deceased was saddened and depressed by their attitude.

This kind of situation is not infrequently encountered in family protection proceedings. It is quite understandable that following a bitter separation the children may side with the parent with whom they remain living and may then have transferred on to them some of the antagonism which is felt towards that parent. And also, of course, the attitudes of children are formed by the parent with whom they are living. So there can be little doubt that these boys, at the age at which they were at the time of the separation, would have had their attitudes moulded by their parents. They can hardly be blamed for the difficult relationships which ensued. Mr Brockett makes the point, which has some validity, that although that is understandable whilst the boys were younger, there have been a great many years since during which as they matured and were able to take a more balanced view of things, they could have made overtures themselves and endeavoured to restore the breach. It is true that once a breach has occurred, the longer it continues the harder it is to remedy. One might properly think that the principal obligation to repair a breach of this kind between father and sons lay on the father.

Whatever the rights and wrongs of this may be, the first question for the Court is whether the sons have been shown to have been guilty of conduct such as to disentitle them to the kind of recognition which sons would normally expect under the will of their father. Because the causes of the breach here were initially quite out of their hands and because the opportunities for remedying it lay equally with their father as with them, and because as I have said I think the principal

obligation lay with him, I do not think that it has been established that they have been guilty of disentitling conduct.

The next question is whether they have established that kind of need which is a prerequisite to the making of an order under the Act. It has been made clear over the years as this jurisdiction has developed in the light of modern social attitudes that the Court is not concerned with purely economic considerations but that ethical and moral factors are highly relevant. The test now is simply whether there has been a breach of moral duty judged by the standards of a wise and just testator and in considering that the size of the estate and other moral claims on the deceased are relevant: Little v Angus [1981] 1 NZLR 126. I think Mr Burn is correct in his submission that as the relationship between father and sons was unable to be restored during the deceased's lifetime, it was encumbent on him as the father to make some gesture to his sons in his will: not just a gesture of reconciliation but to make amends to some extent for the deprivations the boys had suffered in their earlier years. I think therefore that there was a moral duty to make provision of some kind, and it follows that by failing to make any provision at all the deceased was in breach of that duty.

Whilst I consider that the remoteness in the actual relationship between father and sons did not justify their exclusion from the will, it is a factor to be taken into account in determining the proper award that should be made to satisfy the breach of duty. It is clearly established, as Mr Brockett has said, that the Court is not entitled to remake the will. It must respect the wishes of the testator so far as it

can and it may make an award no greater than is reasonably and properly necessary to repair the breach. The plaintiffs here did not put forward their claim on financial or economic grounds. Mr Borland is unmarried; he has a house worth some $20,000; some cash in the Bank and a motor car and he earns a clear $250 a week. He has no financial responsibilities. Mr .Borland lives in Napier where he is working presently as an insurance agent on a commission basis and hopes to earn a minimum of $15,000 a year. He has a home valued at a little under $90,000 and other assets worth about $12,000 or $14,000. He has one child. On the other hand there are no competing claims such as to require a reduction all around of what would otherwise be proper provision for those to whom recognition ought to be given. The brothers and sisters oppose the plaintiffs' claim not so much because they say they need the deceased's money, although doubtless some of them can do with it, but rather because they consider the deceased's wishes ought to be respected and because they hold the view that he held, that his sons had abandoned him even in the years when they could have given him companionship and support.

Having regard to the circumstances of the named beneficiaries, the estate is quite a substantial one, but the limitations on the Court's right to make an award means in my view that the plaintiffs, although they have made out a case, are entitled only to modest provision which recognises their lack of financial need and the distance of their relationship with their father.

In my opinion a wise and just testator in the proverbial armchair of this testator would have given each of his sons a legacy of $10,000 and that is the award which I make. That sum is to be paid out of the cash assets held by the trustee. This is not a case where there is need for separate provision for the grandchild and none indeed was asked for. It is a case where it would be proper for the costs of all parties to be paid out of the estate. I fix costs at $750 for the plaintiffs and $500 for the beneficiaries represented by Mr Brockett, in each case together with disbursements as fixed by the Registrar, including payment in full of agency costs in New Zealand and Australia.

Solicitors:

Duncan Cotterill & Co, CHRISTCHURCH, for Plaintiffs
Cavell Leitch, Pringle & Boyle, CHRISTCHURCH, for Defendant
G.S. Brockett, CHRISTCHURCH, for Children.