IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A 22/81

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of LYLA MINNIE CHIRNSIDE late of Dunedin, Widow, deceased

BETWEEN BETTY LYLA ANDERSON of Dunedin, Married Woman and MARJORIE FLORENCE ECKHOLD of Alexandra, Married Woman

Plaintiff

A N D RUSSELL FRANKLYN CHIRNSIDE, WYNSTON ALEXANDER CECIL CHIRNSIDE (as Trustees and Executors of the will of LYLA MINNIE CHIRNSIDE deceased)

Defendants

Hearing 16 June 1983

Counsel P B Churchman for Plaintiffs
M M Mitchell for R F and W A Chirnside and their children
R P Bates for I M Simpson and J A Fulton
R V Duell for Defendants

Judgment 24 FEB 1984

JUDGMENT OF HARDIE BOYS J

This application under the Family Protection Act is brought by the two eldest children, twin daughters, of the

late Mrs Chirnside, who died on 6 April 1980 aged 74 years. Mrs Chirnside's husband died on 30 May 1978. The plaintiffs were born on 4 April 1927, and there are four other children of the marriage, Mrs Simpson born in 1929, Mrs Young born in 1933, and the defendant trustees, Mr Russell Chirnside born in 1938 and Mr Wynston Chirnside born in 1944.

The plaintiffs' father, Mr C A Chirnside, devoted much of his working life to a company which he formed in 1962 as Chirnside's Garage Ltd, a name later changed to Modern Caravans Ltd to more accurately reflect the nature of its business. Initially, the shareholders were Mr C A Chirnside and his wife, but later, as the result of gifts, the family was included: at first the sons, who received 500 shares each, and then the daughters, who were given 250 shares each. In about 1972 the plaintiffs each sold their shares to their father for approximately $1000. Subsequently, both Mr and Mrs Chirnside disposed of all their shares, principally by sale to their sons, who had taken over the running of the business. The sons did not pay for the shares, but the purchase price was left owing, it being intended that it should be written off by gifts over a period of years. That intention was not however effectively realised.

When Mr C A Chirnside died, he left an estate of a net dutiable value of $176,770, but the only tangible asset was a half share (presumably with his wife) in a Mercedes motor car, although there was in addition the family home

which the widow took by survivorship. There was still $142,200 owing to him by his sons for their shares, and there was also a sum of $6354 owing to him by his widow. The remaining assets were notional, comprising gifts of $11,000 made to the widow and $14,000 to the sons in 1976 and 1977. Under Mr Chirnside's will, the debt to his widow was forgiven, two charities each received $250, each of his grandchildren, apart from Mrs Eckhold's children, received $100 and all of his daughters, apart from Mrs Eckhold, received $500. The widow received a life interest in the residue. After her death, the debt owing by the sons was to be released and the remainder was left equally to Mrs Young and Mrs Simpson. Finally, there was a direction that the sons bear the estate duty, which amounted to $29,967. The end result was that there was no residue other than the debt, and so Mrs Young and Mrs Simpson received only their legacies.

In November 1979 Mrs Chirnside entered into an agreement with Mrs Young, Mrs Simpson and the trustees of family trusts set up by her sons, to sell them the family home, and a house which she owned in Te Anau, for $43,500. The full price was left owing, but $15,000 of it was immediately forgiven. Soon after Mrs Chirnside's death the Dunedin home was sold for $41,500, but the Te Anau property has been retained as a holiday house for the four families.

Mrs Chirnside left a net estate of $52,980, which consisted of cash of $1573, a debt of $8892 due by Modern

Caravans Ltd for the purchase of a car (presumably the Mercedes), the balance, $28,500, of the debt in respect of the properties, and the notional asset comprising the $15,000 gift made the previous November. Her last will was dated 26 September 1978, and it excluded entirely the plaintiffs and their children. But by a codicil of the same date, endorsed at the foot of the last page of the will, she left each of the plaintiffs $300, and $100 to each of Mrs Anderson's two daughters. The remainder of the estate was divided equally between Mrs Chirnside's four other children, subject to legacies of $500 to each of their children.

Probate of this will was granted on 30 April 1980, and administration was undertaken with considerable dispatch. On 10 June 1980 the debt of $28,500 was repaid and each of the residuary beneficiaries was sent a cheque for $7125. Mr C E Lloyd, the solicitor administering the estate, deposed that this was done to enable the sons to pay the estate duty in their father's estate. This was confirmed by the sons, who were called for cross-examination by Mr Churchman, but it was not explained why these funds, rather than any available from other sources, were used. By 2 October 1980 almost all the remaining assets had been gathered in, and on that day the legacies were paid, including those to the plaintiffs, leaving a balance in hand of some $578, which by the time of the hearing had increased to $933.60. Thus for the plaintiffs' present action to be

anything more than a Pyrrhic victory, they must be able to follow the distributions through into the hands of their recipients.

Surprisingly, the plaintiffs were not informed of the distributions to the residuary beneficiaries until almost three years later. On 2 July 1980 their solicitors, not knowing of Mrs Chirnside's death three months before, had written to Mr Lloyd's firm, which was also administering Mr Chirnside's estate, intimating that a claim under the Family Protection Act was intended against that estate. On 11 September 1980 Mr Lloyd's firm replied with an offer of $500 to Mrs Eckhold, so that the plaintiffs would be put on a par with their sisters, together with a sum to cover costs. It was a condition of the offer that it be accepted in full satisfaction of the plaintiffs' claims in both estates. It was only then that the plaintiffs' solicitors learned that Mrs Chirnside had died. They therefore wrote, on 25 September 1980, asking for details of her estate, the disposal of her houses and car, and the benefits the other members of the family would receive under the two wills. That information was supplied by letter dated 14 November 1980. In February 1981 the plaintiffs decided to bring this action. The originating summons was filed on 14 April 1981 and the estate solicitors were informed of that immediately. On 18 May 1981 the plaintiffs' solicitors wrote again, this time about representation of grandchildren, in order to satisfy a minute by Thorp J on their motion for directions

as to service. That matter was not attended to until 18 September 1981. The plaintiffs' substantive affidavits were finally filed in May and June 1982 but it was only on 8 April 1983, when Mr Lloyd's affidavit was filed, that the distributions were disclosed. It is difficult to escape the conclusion that the plaintiffs were, to use an old saying, being led up the garden path.

Their only way back is through s 49 of the Administration Act 1969, and on 25 May 1983 in compliance with the procedure laid down in Re Hale [1981] 1 NZLR 704 a motion was filed for an order under that section and for an order granting special leave for the application to be brought out of time. Section 49 applies where a distribution has been made "and there is nothing in any Act to prevent the distribution from being disturbed" (which is the case here), and relevantly enables the Court to order a beneficiary to whom a distribution has been made to pay all or part of it to a successful applicant under the Family Protection Act. There are two distinct time limitations on the making of such an order. Subsection (3)(a) provides that the application must be made within 12 months of the grant of administration, but there is this proviso, that "with the special leave of the Court, the application may be heard by the Court on an application made within the time within which the applicant could have enforced his claim in respect of the estate with special leave of the Court if the assets had not been distributed." But subs (4) enables the Court, notwithstanding the

provisions of subs (3), to hear an application if the claimant has commenced his substantive proceedings within 12 months of the grant of probate, if at the time of commencing them he was not aware of the distribution, and if he makes the application within six months of becoming aware of it. These three conditions all apply here in respect of the distribution of residue on 10 June 1980, and accordingly in that respect the time limitation has been met. Mr Churchman conceded that he could not rely on subs (4) in respect of the payment of the legacies, for his clients, being themselves recipients, must be taken to have known that all the legacies were being paid at about the same time. However, he contended that they were entitled to apply for special leave so far as the legacies are concerned, and this I understood Mr Bates, at least, to concede. For there is under the Family Protection Act no limit on the time within which leave to proceed out of time may be sought, provided it is before final distribution (s 9(1)). Therefore - and here I find myself in respectful agreement with Greig J in Re Hale - there is no time limit for an application for special leave under the proviso to s 49(3) of the Administration Act, so long as the estate has not been fully distributed. The protection afforded by the second proviso to s 9(1) of the Family Protection Act to distributions already made is not of course applicable here because the action itself was commenced within 12 months of

the grant of administration; and that afforded by s 47(4) of the Administration Act is irrelevant to an application for a tracing order.

Mr Bates submitted that it is not permissible to deal separately and differently with different distributions and to say, as Mr Churchman did here, that whilst special leave may be required in relation to one distribution, it is not in relation to another. In effect, Mr Bates argued that time under s 49(4) begins to run against a claimant as soon as he becomes aware that any distribution at all has been made. This argument however overlooks both the practical realities of estate administration, it being normal practice to distribute legacies first if only in order to avoid the incurring of interest, and the form in which s 49 is cast. The section is directed to the recovery of assets which have been distributed, and in my view gives clear recognition to the fact that in a great many estates there is more than one distribution. Subsection (4) refers to an administrator having "made a distribution of <u>any assets forming part of the estate</u>", and to the claimant being "not aware of <u>the</u> distribution"; in such circumstances his claim is, under subs (1) (b), to those assets so distributed, and the time for bringing it is, under subs (4), to commence when he became aware of <u>the</u> distribution. The statute thus permits an asset by asset, or a distribution by distribution approach.

The grounds upon which special leave may be granted, which in this case I consider necessary only in respect of

the legacies, are not specified in the Act, but were considered by Greig J in Re Hale. I do not propose to go into them in this case, for as I will later explain, I do not think the plaintiffs have made out a case for the legacies to be disturbed. I therefore need consider only the grounds upon which I should exercise my discretion to make the tracing order itself. These are set out in outline in s 51 as being first whether the beneficiary concerned received the asset in good faith "and has altered his position in the reasonably held belief that the distribution was properly made and would not be set aside"; and secondly whether in the Court's opinion it is inequitable to grant relief or to grant relief in full, as the case may be. As to the first of these matters, Mrs Simpson and Mrs Young (but not their brothers) each filed affidavits, showing that the money they had received from the estate had been expended, in Mrs Simpson's case prior to July 1981 in an overseas trip and the purchase of carpet, and in the case of her sister by September 1980 in the purchase of a car and the repayment of a debt. In view of my final conclusion on the case, I do not need to consider this aspect any further either, and turn instead to the second of the matters referred to in the section. This really puts in issue the merits of the plaintiffs' substantive claim, and accordingly that is the subject to which I now address myself.

Mr Lloyd in his affidavit stated that as solicitor for both Mr and Mrs Chirnside he had for many years been

aware of the rift, apparent from Mrs Chirnside's will if not from that of her husband, between the plaintiffs and their parents. Mrs Chirnside had been resolute that her daughters were not to benefit under her will. They were excluded altogether from wills she made on 27 August 1970 and 17 June 1976, and, as stated, from her last will. It was only when she called to sign the latter that she relented to the extent of adding the small legacies contained in the codicil. At Mr Lloyd's suggestion she wrote a note setting out "some of the incidents that caused a parting of the ways". She expressed her reluctance to do so - "it's just digging up the past, and it's not very pretty" - and I consider it important for the Court to share that reluctance, and to avoid as far as possible adding fuel to the fires of family strife. The troubles, as Mrs Chirnside saw them, arose primarily from differences between Mr and Mrs Eckhold and Mr and Mrs Simpson, in which Mr and Mrs Anderson became involved, and from the attempts Mr Chirnside made to resolve them. She complained of "countless wrangles", abuse and neglect, and blamed the husbands more than the wives and the Eckholds more than the Andersons. The plaintiffs' brothers and sisters also placed the responsibility for the breach on the plaintiffs and their husbands. They all spoke of the development of critical and hostile attitudes on the part of the Andersons and the Eckholds, and a rejection by them of the rest of the family, which caused great distress to Mr and Mrs Chirnside, the more so as their many efforts to heal the rift were rebuffed.

The plaintiffs on the other hand claimed that it was their parents, and their mother in particular, who rejected them. They said that as children they were treated harshly, compared unfavourably with their brothers and sisters and generally regarded as an embarrassment; that their mother in particular took little interest in them or their activities; and that after they were married they were largely ignored by their parents and given no financial help (apart from the gift of shares) even when at times it was most urgently needed. They deposed that they had recently discovered that they were conceived out of wedlock (a fact until recently unknown to their brothers and sisters as well) and had concluded that this was part of the reason for the attitude their mother especially had displayed towards them throughout their lives.

This version of events was rejected by the other members of the family and cannot be reconciled with the description they gave of their parents as loving and caring people or with their account, and Mrs Chirnside's own account, of the distress and hurt the rift in the family caused to the parents, and the attempts they made to heal it. It is, I think, likely that childhood events have been magnified and distorted in the plaintiffs' minds, and that as a result they were too ready to take offence and feel resentment.

The plaintiffs were born in Hastings, and the family lived there until the great earthquake of 1931, in which Mr Chirnside apparently suffered considerable financial loss, when they moved to Dunedin. Life was difficult for them during the depression years and everyone in the family was required to work hard. The greater burden would naturally fall on the plaintiffs for they were the eldest and although Mrs Simpson was only two years younger, Mrs Young was five years younger and the boys very much younger still. The plaintiffs both left school at the age of 13 years with no secondary education, and went straight out to work. Half of their wages went in board and they paid for their own clothing and other requirements. They continued working until they were married.

Mrs Eckhold was the first to marry, in 1946 at the age of 19 years, when her younger brother (with whom, along with the other three, she complained she was not treated equally) was only two years old. She said her parents did not approve of the marriage because of her husband's age - he was 27 and an ex-prisoner of war. There have been two children of the marriage, both now in their thirties. For the first three years of the marriage she saw her mother approximately once a fortnight, and telephoned her daily. Then, she and her husband moved to Seacliff where they ran a shop for some five years. During that period she saw her mother approximately once a month. They then returned to Dunedin for seven years and she visited her mother

regularly, but her visits were returned only twice. They then moved to Alexandra, where they still live. In the 19 or so years they have been there, Mrs Chirnside visited only once, and Mrs Eckhold saw her once on the street. It seems there has been little other communication. For a time, Mrs Chirnside sent her daughter Christmas and birthday cards and small gifts but these came to an end some 15 years before her death.

The only financial provision made for Mrs Eckhold was the gift of 250 shares. Mr Eckhold has had a history of ill health resulting from his wartime experiences. He is now 63, has recently suffered two major heart attacks and is a semi-invalid receiving an 80 percent war disability pension and national superannuation totalling $186.08 per week. Mrs Eckhold has not worked since her marriage, apart from the five years spent helping in the shop. She and her husband own their own home which has a current government valuation of $61,500, and a motor car worth about $9000. She has $2000 invested and he owns 3683 Waitaki shares recently gifted to him. They have no other sources of income.

Mrs Anderson was married on 22 February 1947 and has continued to live in Dunedin. There have been four children of her marriage, sons aged 33 and 28, and daughters aged 31 and 24. Mrs Anderson became very ill after the birth of her second child and was in hospital for almost four months. She said she had no

help from any of her family in this difficult time; and she had none either when she suffered a nervous breakdown after the birth of her third child. In 1967 she commenced work and has continued to do so. She deposed that before she began work she assisted her mother on two occasions when she was ill, helping her with household tasks. After her father's death she said she asked her mother for lunch at least once a month, but quite often her mother would fail to come, explaining afterwards that she had overlooked the invitation. When she did come Mrs Anderson would often give her baking and vegetables to take home.

Apart from Christmas and birthday presents and the gift of the shares, Mrs Anderson has received no financial assistance from her parents. She now earns a little over $9000 a year, and her husband, a clerk with the Dunedin City Council, earns about $1000 more. They own their own home, the current government valuation of which is $73,000, and which is subject to a mortgage of some $19,500. She has her own Mini car, worth about $2500, and her husband has a car worth about $4500. They have about $4000 in bank accounts.

The plaintiffs' two sisters are in much the same situation as they are. Mrs Simpson is married to a plumber who is shortly to retire, if he has not already done so. She has five children, all adult. She has not worked during her married life, except for a short period after the death of her mother. She and her husband own an unencumbered house in Dunedin with a current government valuation of

$48,000. Besides furniture, car and caravan, all jointly owned, she has various investments amounting to about $12,000. She also has the shares in her brothers' company (now representing 2½ percent of the capital) which her father gave to her, as well as her quarter share in the holiday house at Te Anau. She has had no other financial assistance of any signficance from her parents.

Mrs Young has worked for a number of years, and has an adult family by an earlier marriage. She and her husband live in a flat in Christchurch which she owns. It has a current government valuation of $28,000 and a mortgage of $15,000. She has a car worth $8500, shares in the company for which she works, miscellaneous assets of about $4500, a superannuation entitlement, the shares in Modern Caravans Ltd and the interest in the Te Anau house received from her parents. She has had no other significant financial assistance from her parents. Her husband's circumstances were not disclosed.

Mr and Mrs Simpson had lived next door but one to Mr and Mrs Chirnside since 1951, and it was on Mrs Simpson that there fell the greatest responsibility for the care of her parents as they aged and became ill. In the last 10 years of their lives this responsibility was not inconsiderable, particularly after Mr Chirnside was disabled by a stroke. It meant that Mrs Simpson was unable to take employment after her children became independent. Mrs Young did what she could from Christchurch, but the part played by Mrs Anderson and Mrs Eckhold was minimal.

It was not argued that the plaintiffs had become entirely disentitled to relief by reason of their own misconduct. In the end that was not the view of Mrs Chirnside herself. The question is therefore whether such moral duty as was owed to them was discharged by the nominal legacies in their favour. The extent of moral duty in these cases is now well recognised to depend on the need of the particular plaintiff, seen in moral and ethical as well as financial terms, the size of the estate, and the strength of competing claims. It is also well established that the provision to be made in favour of a successful plaintiff should be sufficient to discharge the duty, without disturbing any more than is necessary for that purpose the wishes and the testamentary scheme of the testatrix.

In my opinion, the circumstances that I have outlined show that the duty Mrs Chirnside owed to the plaintiffs was not a strong one. On any view of the matter they must accept the greater responsibility for the estrangement between them and their parents. I cannot credit that two members of an otherwise so obviously harmonious and closely knit family were deliberately excluded by the parents. The evidence is clear that the estrangement was the cause of pain and distress to the parents and that it did not come about by their choice. Whilst they made many attempts to end it, the plaintiffs did little if anything, certainly in their father's lifetime.

Nevertheless, the making of a will gives an opportunity to offer reconciliation, or at least to attempt to prevent further division and continuing bitterness in the surviving family. This is a significant factor in assessing need, in its wider sense, in a case such as this, and I have come to the conclusion that the deceased, although herelf aware of it when she made the codicil to her last will, did not give it enough emphasis. As a result, there was a breach of moral duty.

Whilst Mrs Chirnside had an estate of sufficient size to make quite generous provision for the plaintiffs, she has made the Court's task, in determining what that provision should be, a difficult one in view of the limited provision she has made for her other two daughters. The two sons were preferred in the father's will, no doubt in recognition of the fact that they had made the business theirs and built it up to its present strength. They had no need for any provision in their mother's will, yet she saw the propriety of equal treatment, so that Mrs Simpson and Mrs Young received only modest sums: in the case of the former, especially, affording scant recognition of her services over the years, even allowing for the gift of the shares and the houses. They have accepted that, and do not ask for any increase. The plaintiffs cannot expect to have more than them. Nor, indeed, in view of the distance in relationships and the absence of contribution to the family weal, can they expect equality with them. In my view,

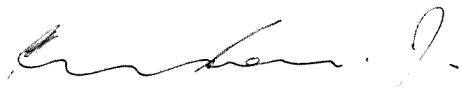
keeping these grounds for comparison in mind, a proper award for each of the plaintiffs is to increase their legacies from $300 to $3000. The appropriate source for this increased provision is clearly the shares of the two sons. They have no strong claim at all in their mother's estate, and there can be no question of reducing the shares of their other two sisters, who do have strong claims. This approach also has the merit of leaving intact the legacies to the grandchildren, and thus preserving the general scheme of the will. This is why it is unnecessary to consider the application for special leave under s 49(3) of the Administration Act, or to consider the position of Mrs Simpson and Mrs Young under s 51(a). There is no basis for invoking s 51(b), and I therefore order under s 49(1)(b) that each of the defendants, in their capacity as beneficiaries, pay each of the plaintiffs the sum of $1350.

Mr Churchman also raised the position of the plaintiffs' children, although I understood him to limit any consideration of a claim by them to the eventuality of a complete failure of the plaintiffs' claims. I have in any event no information at all about the grandchildren, and I do not consider it appropriate for there to be any order.

The plaintiffs ought also to have an allowance towards their costs, and I fix a sum of $1200 together with disbursements as approved by the Registrar. This is to be charged against the interest in residue of the two brothers, but to the extent that the residue is insufficient, is to be

paid by them personally, and equally.

I invite counsel to submit a draft order to incorporate this decision. I reserve to all parties leave to apply for any clarification that may be necessary.



Solicitors:

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Tonkinson, Wood & Adams Bros, DUNEDIN for I M Simpson & J A Fulton
Anderson Lloyd Jeavons, DUNEDIN, for Defendants.

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