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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

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M.208/81

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IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of ALFRED SIDNEY CLARKE
late of Te Awamutu,
Retired Farmer,
Deceased

BETWEEN: LOUIS SIDNEY CLARKE
of Auckland, Engineer

Plaintiff

A N D: MAVIS MARY CLARKE
of Te Awamutu, Widow,
a n d
JUNE MARY HARRIS
of Te Awamutu, married
woman, as Trustees of
the Estate of the late
ALFRED SIDNEY CLARKE

Defendant

Hearing: 12 December 1983

Judgment: 13 February 1984

Counsel: A B Lawson for plaintiff
A L Hassall for Mavis Mary Clarke
(in her personal capacity)
T R Ingram for infant beneficiaries
and children of Mrs June Mary Harris
C M Earl for claimants - Maurice Clarke
and Alma Jean Saunders
J J O'Shea for defendants

JUDGMENT OF BISSON, J.

The deceased, Alfred Sidney Clarke, was a retired farmer who died at Te Awamutu on the 20th February 1981 aged 80 years. A Will dated the 14th June 1978 has been probated, the executors being the widow, Mavis Mary Clarke, and a step-daughter of the deceased, June Mary Harris.

By this Will all furniture furnishings and articles of household or domestic use or ornament and personal effects are bequeathed to the widow. The residue of the estate is left to the executors, upon trust, to pay thereout debts and duties, and the income to the widow during her lifetime. The trustees are empowered in their discretion at any time, and from time to time during the lifetime of the widow, to have recourse to any of the residue to pay it outright or lend it without interest or security to the widow for any purpose they think fit, without having to account to any residuary beneficiary or being responsible for any loss. This power could not be exercised by the widow herself as a trustee alone, but could only be exercised by the trustees for the time being jointly.. On the death of the widow , subject to the power already mentioned, the then remaining residue of the estate is left to be divided equally among Kathryn Harris (now Kathryn Barrowcliffe), Stuart Paul Harris, David Allen Harris and Peter John Innes, step-grandchildren of the deceased, who survive the deceased and attain 21 years of age. The net value of the estate as certified by the Department of Inland Revenue, was \$117,345.57. As some assets in the estate were joint interests and passed by survivorship to the surviving joint owners, it is necessary to refer to the assets individually :

Assets Not Passing by Survivorship:

Prudential Life Assurance policy	\$1,872.50
Debt from Mrs J M Harris, payable on demand	\$25,000.00

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Brought Forward:	\$26,872.50
One-third share with widow and Mrs J M Harris in mortgage from D M and S M Timothy, together with interest at date of death..	\$43,070.77
One-half share with widow in mortgage of Van Der Poel Family Trust, together with interest at date of death..	\$15,539.17
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	\$85,482.44
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Assets which Pass by Survivorship:

One-third share in joint account with ANZ Bank in name of "A S Clarke & Co" passing to the widow and Mrs J M Harris as survivors..	\$2,567.76
Half interest in Waikato Savings Bank accounts passing by survivorship to the widow..	5,083.76
Half interest in ANZ bank accounts passing by survivorship to widow..	\$16,465.89
One-third share with widow and Mrs J M Harris in mortgage from K G and J M Ferris, together with interest to date of death, passing by survivorship to the widow and Mrs J M Harris..	8,516.72
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	\$32,634.13
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Debts, including the funeral account, and tax of \$1500.00, totalling \$2638.00, have been paid by the executors during the course of their administration of the estate. Up-to-date estate accounts have not been produced but on the above figures the net disposable estate was \$82,844.44 less administration expenses.

The deceased married twice. His first marriage was in 1922, ending in a separation about 1938. His first wife remarried in 1950 and later died a widow in 1968. There were three children of the deceased's first

marriage - namely, Maurice Leslie Clarke, now retired, born in 1922; Louis Sidney Clarke, the plaintiff, unemployed, born in 1926; and Alma Jean Saunders, married woman, born in 1934. All three children are claimants for provision to be made for them by the Court, under the provisions of the Family Protection Act 1955.

Maurice Leslie Clarke has one child who is an adult. Mrs Saunders has three children, all of whom are adults. The plaintiff has no children. The four grandchildren of the deceased are not claimants.

The deceased remarried on the 20th December 1948, his second wife being the widow, Mavis Mary Clarke. There were no children of his second marriage, however, his second wife had had two previous marriages. By one marriage she had one child, Brian Innes, whose son, Peter John Innes, is one of the residuary beneficiaries. By her other marriage she had one child, Mrs J M Harris, her co-executor under the Will of the deceased. Mrs J M Harris has three children who are the other three residuary beneficiaries. In her first affidavit, dated the 22nd April 1983, the widow referred to the four residuary beneficiaries as follows :

"The residuary beneficiary described as KATHRYN HARRIS is married and her true name is KATHRYN BARROWCLIFF (sic). Her husband is a Welder. STUART PAUL HARRIS was born on the 25th day of April 1982 (sic). He works for a Service Station in Te Awamutu and lives at home with his mother and father.

DAVID ALLEN HARRIS was born on the 17th day of June 1970 and is a boarder at Saint Peters School, Cambridge.

PETER JOHN INNES was born in April 1959, lives in

"Auckland, is a bachelor, and a Painter and Paperhanger by occupation."

The residuary beneficiaries have all attained 21 years of age except David Allen HARRIS, who was 12 years of age in 1983, so that his interest in the residue of the estate is contingent on his attaining 21 years of age. The Court appointed counsel to represent him, and a Memorandum has been provided by counsel. David attends St. Peter's School at Cambridge, shows some academic ability, being in the top class, and has expressed to counsel a keen desire to become a farmer. When not attending school he resides at home with his parents. The family is close-knit, and David has been and will continue to be encouraged to pursue his education as far as he is capable of taking it. On his behalf his counsel, Mr Ingram, submitted that the clear intention of the testator was to confer the benefits of his estate exclusively on his step-grandchildren and to deny the claim of his own children. Accordingly the claims of the three claimants were opposed by counsel on behalf of David.

Of the other three residuary beneficiaries, only Mrs Barrowcliffe filed an affidavit. It is dated the 2nd December 1983. She and her husband own their own home which has a Government Valuation of \$37,500.00 and is subject to a mortgage for \$31,000.00. Her husband is a welder, earning approximately \$15,500 per annum. They have one child. Mrs Barrowcliffe gives the following particulars of two other residuary beneficiaries, and of the parents of the residuary beneficiaries :

"4. THAT my brother STUART PAUL HARRIS is presently employed as a driver on wages by a firm of agricultural contractors. He has no substantial assets except a Mazda Utility vehicle held on hire purchase.

5. THAT my cousin PETER JOHN INNES is a painter and paperhanger by trade. His most substantial asset is a motor-cycle. He works on wages and has recently been living at National Park in the centre of the North Island.

6. THAT to my knowledge PETER JOHN INNES' father is relatively impecunious. He lives in Auckland and owns no land. He is separated from his wife and lives in a de facto relationship. I know nothing of the whereabouts or circumstances of PETER JOHN INNES' mother.

7. THAT my parents are in relatively comfortable financial circumstances. My mother owns a small farm of 26 acres situated at Puniu Road, which has a Government Valuation of \$135,000 with a mortgage of some \$40,000. My father owns a dairy farm of 136 acres at Pokuru with current Government Valuation of \$470,000. That property is not mortgaged and is farmed by a sharemilker. My parents do not have a large annual income as the dairy farm is sharemilked, although their income is quite sufficient for them to live comfortably.

The plaintiff's case, as presented by his first affidavit dated the 23rd February 1982, was that he had worked very hard from an early age on his father's dairy farm of 112 acres at Pokuru near Te Awamutu, which the deceased acquired in 1928. As the plaintiff was born on the 5th December 1926 he would have been only 2 years of age at the time the farm was acquired. He also referred to living in spartan conditions, and that when his mother and father separated in about 1936/37 he was left on the farm alone with his father and a farm-hand, his elder brother going to live with his grandfather in Te Awamutu, and his sister going with her mother to live in Auckland. He claimed to have worked from this time, when he was only 10 years of age, milking cows and doing other farm-work

as well as cooking, housework and washing. He was not paid any wages and missed some of his schooling as a result. He said that his father purchased a further 50 acres of scrubland at Hanikiwi, between about 1937 and 1942, and he assisted his father to break in, fence and grass this property - as a result of which he said his father told him that he was able to pay off the mortgage on the farm with his help during this time. He added, and I quote :

"I remember my father had a brand-new Chevrolet truck and well recall him saying to me that we three had paid for it - meaning himself, myself and the Clydesdale stallion that he kept at stud. At a later time I believe he put a sharemilker on his farm and bought the farm next door as well. I truly believe the deceased made his real start in life at this time."

In contrast to that team effort by father and son, he said:

"As if living in extremely frugal conditions working virtually all the time and missing my schooling was not enough, my father ill-treated me regularly and in the end it was this ill-treatment which caused me to run away from home at the age of 15 years with the aid of neighbours one night when my father was asleep. I caught the train to Auckland and arrived there virtually penniless and with only what I stood up in."

There was independent evidence that the deceased was not given to ill-treatment and the plaintiff did not elaborate on this initial statement, which I therefore do not accept, but said in his second affidavit, dated the 5th July 1983 :

"My decision to run away came about because my father had kept me away from school for six weeks to help with harvesting and he wanted me to finish school and keep working for him. There was a row about this and I went away in the middle of the night, catching the 3.a.m. "Herald" train to Auckland."

Between 1941 and 1942 he worked as a farmhand in the Thames Valley and Rotowaro areas, seeing his father once when

the deceased wanted him to go back to the farm, but he said he was too frightened to do this and did not go.

He said :

"However, we parted on good terms and he in fact drove me to the station."

He spent two years in the Merchant Navy and obtained a Certificate of Competency as Engineer (Restricted Limits) in 1946. He joined the Air Force in 1948 and then worked for about 2 years as a fitter at Kawerau and then in 1958 became a travelling fitter for the Vacuum Atlantic Oil Company, stationed at Te Awamutu. He said he was with this company for about 3 years, and regularly saw his father and they were on good terms. He did visit him once at the farm but described it as a somewhat strained visit. He left the Vacuum Atlantic job in 1961 and in or about 1967 spent three years as a travelling engineer for J F Hargreaves Limited, which took him all round New Zealand including a stay in Te Awamutu one week in every four, when he said he saw "a lot of my father during this time". He had another job as a travelling engineer for Cory Wright and Salmon, for the Waikato/Bay of Plenty areas, spending every fourth or fifth week in Te Awamutu. This job lasted for about 3 years. In the 10 years between 1970 and 1980 he said he saw his father regularly on his visits to Te Awamutu, staying with his uncles or cousins on those visits. Referring to his mother, he said that she remarried in about 1950 and died in 1968, her second husband pre-decesing her. She had worked from the time she had left the deceased, doing cleaning, catering, work of that type, and so far as the plaintiff knew she did not receive any maintenance from the deceased after she left him.

After the plaintiff separated from his wife he lived with his mother until her death, when he and his brother and sister shared equally in the proceeds of her estate which consisted of her house at Mangere. He said he had done a lot of work on this house himself and had spent a lot of money on extensions, furniture and the like, whilst living there. On hearing of his father's illness in the latter part of 1980 he said he drove to Hamilton and stayed there two or three days, visiting his father twice a day at length during this period, and I quote :

"I still recall the way he held on to me in the Hospital and said things like "that he had been too hard on me" and "that he could never have done it all without my help"."

He stated that his circumstances had deteriorated considerably over the years. He had transferred his house to his former wife, he had been involved in a disastrous business venture on Waiheke Island in the 1970s, resulting in his losing all the capital that he had up to that time accumulated, including the money that he had inherited from his mother. His present assets now consist of a few personal possessions, furniture and some car parts valued at about \$1000.00. He shares a rented house in Onehunga and is unemployed, following his former employer being bought-out and he becoming redundant. He finds it difficult to obtain employment but does some work by way of doing up old cars for re-sale. He claims his health is not the best, requiring regular check-ups for hearing and nasal deficiency. He received no gifts or help from his father in his lifetime.

The widow disputed the extent to which the plaintiff had assisted his father on the farm, relying on information which the deceased, she said, had passed on to her and by reference to certain diaries of the deceased. As a result, in a further affidavit of the plaintiff, he conceded that he did not always milk the cows on his own. The widow also relied on a diary note to establish that the deceased and his first wife separated on the 22nd July 1940 when she left the farm. As the plaintiff would then have been approximately 13½ years of age, he was with his father for a period of only about a year or eighteen months before leaving home. Furthermore, as the other property of 50 acres was purchased by the deceased on the 15th January 1941, the plaintiff would have had little time in which to help his father on the property prior to his leaving home at the age of 15, which age he would have attained in December 1941. This 50-acre property was on the other side of the road from a farm of the deceased's sister, Mrs Tye, and her husband. In her first affidavit she deposed that she never once saw the plaintiff come with the deceased to work on the 50-acre block.

Another deponent, Mr E J Collinson-Smith, who owned a farm three miles away from the 50-acre block, deposed that he never once saw the plaintiff with the deceased when the deceased called at his farm or went past on his way to the 50-acre block. It is to be noted that the plaintiff does not specify in his affidavit the extent to which he assisted the deceased on the 50-acre block, and I must accept that in view of his age at the time and the short time in which the deceased owned this block before the plaintiff left

home, that his contribution in this way would have been slight, and indeed his work on the home farm would merely have been that of a young boy.

In summary, the plaintiff is in needy circumstances, not enjoying good health. His claims to have assisted his father on his farm and in the house are somewhat exaggerated, but he had the misfortune of being a child of a broken marriage, and when left alone on the farm with his father, ran away from home at the age of 15. Thereafter his only contact with his father had been by way of what were apparently chance meetings when he was visiting Te Awamutu, there being only one visit to the farm, and finally his visits to his father when in hospital, not long before his death.

I turn to the circumstances of the eldest child of the deceased, Maurice Leslie Clarke. He described life at home on the family farm as follows :

"THAT we left town to go to the farm when I was about eight (8) - 1929. Things went well for a while but as prices fell things became hard and meant more work for my mother and myself as there was not enough money to employ the labour needed. We were well fed and better looked after than most but things got worse. My sister was born but my mother still went to the cowshed twice a day as I did before and after school or there would have been no farm.

THAT I left school when I turned thirteen (13) to go home to work but there were always arguments and trouble so I left to go and live with Grandfather and work in town. That made it harder for my mother. She left and took my sister to Auckland."

When War broke out, he enlisted at 18 years of age and sent all his deferred pay to his mother to help keep his sister who, he said, was worse off than any of the family as the

deceased was not paying her any money. After the War he said he got on well with his father and was asked to come home to the farm on a sharemilking job with a Mr Dan O'Dowd. He was told by the deceased that if he did a year or two with him he could take over on his own, and that meant he would be able to finish up with a Rehabilitation farm of his own as he had no money or trade and little education. He said he accepted this offer and his father manpowered him out of the Services, but when he arrived home Mr O'Dowd was not there. He then milked cows with his father for a wage and he said that every time he asked when Mr O'Dowd was coming he got no real answer. He found out in the end, from an uncle, that the cows had been advertised for sale before he came home, and the dairy herd was sold soon after he returned. He then went on to hourly work, with wet weather and board being taken out of his wages. At this time he was paying off a car and it was not much of a life and it led to arguments. Accordingly, he left and worked nearby for an uncle, but the money was not much better and as he needed money of his own for a farm, as well as the Rehabilitation Loan, he could see no future in farming so went to town truck-driving, where he received substantial wages for working long hours. He saved nearly enough money to buy a half-share in a truck business but needed another \$1000.00 so went to the deceased and explained he had lost money over the sharemilking deal and had lost valuable time, and sought a loan of \$1000.00 from the deceased. The deceased told him he had no money to spare, so his grandfather guaranteed his account to get him started. As he could not stand the long hours in

the truck business, he sold his share and bought a small metal quarry, which lasted for a long time, until his health failed and he sold out. He then had two jobs over three years but continued sickness made it hard for him to work in populated places. He said he saw his father at regular intervals during his life, and during his final illness while in hospital.

To the best of his recollection, the widow had few assets before her marriage to the deceased. He added that neither he nor his son received anything from the deceased during his lifetime, but he inherited a small sum of money from his grandfather and another sum from the estate of his mother.

In reply to this affidavit the widow, regrettably, saw fit to refer to an incident in the life of the deceased and his first wife before they were married. It is quite irrelevant. She also referred to another matter concerning the first wife, after her marriage. It is pure hearsay, which unfortunately the first wife is not alive to answer, but the deceased's own brother has sworn an affidavit in her defence. In my view these references by the second wife of the deceased to the first wife of the deceased, display prejudice on her part against the first wife and her children. It is also interesting to note that in the affidavit of the widow in reply to Mr M L Clarke's statement that the deceased was not paying any money for his daughter - she says that the deceased used to send one pound per week through a lawyer in Auckland, writing out a cheque every three months. But she adds:

"On one occasion I remember he sent two hundred pounds in one lot".

On this evidence, the deceased appears to have been extremely neglectful of an obligation to support his own daughter while she was his dependant by not making regular payments. The widow in her affidavit also referred to the loan of one thousand dollars (\$1000.00) which Mr M L Clarke had sought from his father. She said in her affidavit as follows :

"On one occasion I remember the deceased's father ringing him up and asking the deceased if he would let Maurice have five hundred pounds. The deceased said "No" as Maurice would only spend it on drink, that he had given Maurice a chance on the farm to start Maurice off and it had got him nowhere."

As the loan was required for business purposes and the deceased could have ensured it was applied in that fashion, the response which, according to the widow, the deceased gave, can only be regarded as an example of a father who could have assisted his son denying him much needed assistance at a crucial stage of his life. The widow lays the blame on Maurice, because of his drinking habits, for the deceased refusing to help him but there can be no real substance in such an allegation when Mr M L Clarke had saved the greater part required to buy into the business. In fairness to the widow and her daughter, I cite the following two paragraphs from the second affidavit of Mr M L Clarke :

"13. THAT once Mrs Innes moved in I felt that I was excluded. My father didn't want to see me at home and he made that plain to me, although whenever we met, when Mrs M. Clarke wasn't there, he was friendly. Mrs Mavis Clarke was always friendly towards me. We were excluded from the funeral. We were told that we were not wanted at the Hospital. My wife and I stayed at the

"Hospital 3/4 hour one time and about 1 hour on another occasion. My father never sent me away or said he did not want to see me or my family. I have never, and will never, say that Mrs Clarke has been a bad person or wife for my father. I agree that they were devoted to each other and that June was good to him.

14. THAT I believe that I have been excluded from my father's life and that my brother, sister and myself have been excluded for the advancement of the children of Mrs Mavis Clarke and yet whenever I met my father he seemed to appreciate talking to me."

In an affidavit dated the 12th December 1983, Mr M L Clarke gave his financial circumstances as being that he and his wife own 30 acres near Te Awamutu, with a recent Government Valuation of \$141,000.00, and a house registered in his name valued at \$28,000.00. His taxable income for the previous year was \$10,100.00, which included his National Superannuation. His wife is working part-time.

The other claimant, Mrs Alma Jean SAUNDERS, deposed that her recollection of family life with the deceased is vague, as she was only 4 years of age when her mother took her from the farm at Te Awamutu to live with her in Auckland. Her early upbringing was in a state of poverty, suffering the stigma of being the child of a divorced woman. She said her whole life revolved around what she could not have, because there was not enough money. She had second-hand books and things, unless her brother Maurice provided her with new things. Her behaviour was restricted by her mother always saying that she couldn't do things because her father could not approve of that behaviour of his daughter, and her mother always said that she had to be a credit to her father. She further deposed

that over her early years she tried to keep the normal father/daughter relationship going, in spite of the distance between her and the deceased. During the school holidays, 1945-46, her brother Maurice arranged with the deceased that she should visit her father. She was told that her father cancelled the arrangements. Then, when she was about 12 years of age, a neighbour took her to see her father and she stayed with him and his second wife. She described this stay as "very tense", the recollection being that she was not welcome by her father's new family. She sent her father Christmas cards and Father's Day cards for many years, but she said he never wrote to her in reply. When 15 years of age her grandfather got her a job in Te Awamutu, where all of the deceased's neighbours and friends would come and talk to her but the deceased, although he had an account with her employer, did not come in to see her at work. When she saw the deceased on the street he would talk to her if he was on his own, but he seemed embarrassed and she never wanted to cause him embarrassment. She sent her father an invitation to her wedding, but he did not reply. Of this marriage, she says :

"THAT because of the insecurity of my upbringing and my mother's unfortunate remarriage I rushed into a marriage that turned out unsuccessful. As set out in the applicant's affidavit, I have three sons, namely :-

- (a) STEVEN DAVIS is aged 28 years, living in Australia, and operating a riding instructors business. From what I have been told and know of my father, Steven is a very similar character.

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"(b) GREGORY DAVIS is aged 23 years, living at home and works for my husband. He is very insecure and has few assets.

(c) MARK DAVIS is aged 21 years, living in Australia, and has no assets.

My first husband is an alcoholic who, when he dies, will have nothing to leave his sons."

She said she sent the deceased news cuttings of Steven's achievements. She saw her father at horse events and if he was on his own he would talk to her, particularly about his grandchildren. She met the deceased on other occasions and he always seemed interested in her and her family. She did not visit her father in hospital as she thought it might upset his wife, but she wrote to him every week while he was in hospital. She has remarried, and has been happily married for the past 4 years. She lives on a property owned by her husband and owned by him prior to their marriage. She is aware that by her husband's Will she is provided with a life interest only, and accepts this as proper, at least at this stage, so that the children of his previous marriage would not be disadvantaged by his remarriage. She has assets worth \$7000.00, and is not working. She is 49 years of age and in good health. She and her children have not been assisted by the deceased during his lifetime.

In reply to the first affidavit of Mrs Saunders, the widow refuted much of what was said in that affidavit - relying in the main on what she says had been told to her by the deceased. For example, she says :

"I am well aware from the deceased's discussions with me that ALMA SAUNDERS did not bother with him and for this reason he showed no interest in her or her family."

And again :

"I am satisfied that the deceased in fact did not know any of the children of ALMA SAUNDERS. He has told me that he would not know them if he passed them in the street."

But, again I am not impressed by the widow's evidence. For example, Mrs Saunders said that she did write to her father every week while he was in Hospital. The widow does not give her the credit of having written at all, but deposes :

"I do not accept that ALMA SAUNDERS wrote to the deceased every week while he was in hospital. If she had done so I would certainly have known of it."

It should be noted that in the second affidavit of the deceased's sister, Mrs D O Tye, she refers to the deceased having, on two occasions when she visited him in hospital, been given by him letters from Mrs Saunders to read. The fact that the widow makes no mention of any letters having been written by Mrs Saunders to her father while he was in hospital indicates that she is not fair in her evidence if she knew of some letters, or that the deceased chose or had reason to conceal from his second wife any communication from or association with the children of his first marriage.

I move on to refer to the financial position of the widow and her daughter, Mrs Harris. The widow does not claim to have brought any assets into the marriage, but deposes that on the death of the deceased she owned the following assets :

"4. AS at the death of my husband I owned the following assets :

"Assets:

House Property - Christie Avenue, Te Awamutu - G.V. 1/7/82	\$70,000.00
Furniture	Not separately valued
Mortgages -	
Timothy -one third share	41,666.66
Van der Poel - one half share	15,000.00
Ferris - one third share	<u>8,333.33</u>
	64,999.99

Bank Accounts:

Waikato Savings Bank		
- one half share	5,083.76	
ANZ Bank - one half share	16,465.89	
ANZ Bank - one third share	<u>2,567.66</u>	
		<u>24,117.31</u>
<u>TOTAL:</u>		<u><u>\$159,117.30</u></u>

The only liability to which she refers is a debt of \$29,000.00 owing to her own daughter, Mrs J M Harris, and it appears from an unsworn affidavit of Mr B E Page, of Te Awamutu, Solicitor, which was put before the Court by consent that the debt of Mrs Harris to her mother came about in this way. A number of transactions are involved. At some stage after his second marriage, the deceased transferred a one-third interest in his farm to each of his wife and her daughter Mrs Harris. He took a debt back from each of them for the purchase money, which debt was repaid over a period of years from the income which they earned as part-owners of the land. That property was sold in 1977 for \$200,000.00, the widow and her daughter each receiving a one-third share of the cash payment of \$50,000.00, and a one-third share in the mortgage securing the balance of the purchase money of \$150,000.00. It can be seen that at that stage both the widow and her daughter, Mrs Harris, benefited to the extent of nearly \$70,000.00 from what appears to be an

estate planning scheme, involving a second wife and a stepdaughter to the exclusion of the three children of the first marriage. In 1970 the deceased and his wife and her daughter purchased a 26-acre block out of funds from the partnership farm account operated by the deceased and his wife and her daughter. One assumes that there was a Deed of Partnership, but it was not produced nor were any partnership accounts, which would have been required for taxation purposes. However, it appears that this partnership account was augmented by the proceeds of the sale of a house property at 27 Roche Street, Te Awamutu, which the deceased had owned for some years and sold in 1970. Again, it can be seen that through this partnership account, both the widow and her daughter benefited directly from the deceased, and neither of them have deposed to having been working partners, but of course, so far as the widow was concerned, she was making a contribution other than financial to the marriage partnership, as distinct from the farming partnership with the deceased. After leaving school in 1951, at the age of 15½ years, Mrs Harris worked as a land girl for the deceased for 5 years, earning \$16.00 per month. In 1956 the deceased and his wife left the farm to live at 27 Roche Street, Te Awamutu, a house property built and owned by the deceased and his wife. Mrs Harris lived there with them for about one year, until she married, and has lived since then with her husband on his farm at Pokuru, about eight miles out of Te Awamutu. According to Mr Page, in October 1980 he received instructions from the deceased to the effect that he wished to ensure that his wife had

complete ownership of a property at Christie Avenue, Te Awamutu. This is the property already referred to in the Statement of Assets of the widow, having a Government Valuation of \$70,000.00 as at 1 July 1982. It is stated by Mr Page that this was a property which Mrs Harris had purchased as a bare section and that a house was then built on it. Mr Page had no knowledge of where the funds came from for the building of the house, but he was aware that after it was built the deceased and his wife went to live there. As there was no evidence that Mrs Harris had provided her own funds for the purchase of this section, or the house which was built on it, the reasonable inference is that the funds were provided by the deceased. To ensure that after the death of the deceased his widow would be entitled to live in this property, the following transactions ensued: the widow purchased the Christie Avenue property from her own daughter at a price assessed by the Commissioner of Inland Revenue at \$54,000.00.

At the same time, the deceased and his wife sold their respective one-third interests in the 26-acre block to Mrs Harris, at a price determined by the Commissioner of Inland Revenue at \$50,000.00. The amount of \$25,000.00 owing by Mrs Harris to her mother for her one-third share was set-off against the sum of \$54,000.00 owing to Mrs Harris by her mother, leaving a balance of \$29,000.00 owing, secured by a Deed of Acknowledgment of Debt by the widow to her daughter, this being the liability deposed to by the widow in her affidavit, and Mrs Harris owed the deceased the \$25,000.00, shown as an asset in the estate accounts, for his one-third interest.

By survivorship, the widow's assets were increased by \$27,091.89, made up as follows :

A.S. Clarke & Co., one-half of \$2567.76..	\$1,283.88
Waikato Savings Bank..	5,083.76
ANZ Bank..	16,465.89
Ferris mortgage, one-half of \$8516.72	4,258.36
	<u>\$27,091.89</u>

Adding this amount to the net worth of the widow, already set out = that is, \$130,117.30 - the widow has benefited from the deceased to over \$157,000.00. Furthermore, it should be noted that her daughter, Mrs Harris, had also benefited substantially from the deceased during his lifetime and by survivorship. Mrs Harris did not give her financial position in her affidavit, but it appears that she has benefited to the following extent :

26-acre block at Valuation in 1980 (equity now \$95,000.00 according to Mrs Barrowcliffe)..	\$75,000.00
Share in bank account of A.S. Clarke & Co. \$2567.76 plus \$1283.88..	3,851.64
Share in FERRIS mortgage \$8516.72 plus \$4258.36..	12,775.08
Debt owing by mother \$29,000.00 LESS debt owing deceased 25,000.00	<u>4,000.00</u>
One-third share of cash deposit on sale of farm..	16,666.66
One-third share in TIMOTHY mortgage over farm..	43,070.77
	<u>\$155,364.15</u>

In striking contrast, the three claimants received absolutely no financial assistance from their father. The only indication of the amount which they received from the estate

of their grandfather is in an affidavit of the plaintiff, that he received a legacy of approximately \$1,000.00 or \$1,200.00. There is no evidence as to the amount the three claimants inherited from their mother's estate, but it consisted of a house at Mangere which had not been provided for her by the deceased.

The first marriage of the deceased lasted some 16 years, three children being born of that marriage. The deceased's second marriage lasted some 34 years and, there being no children born of that marriage, the step-daughter, Mrs Harris, and the step-grandchildren took the place of his own children in the family life of the deceased. The relationship of the deceased and his second wife with the children of the deceased's first marriage is described by them in the following extracts from their affidavits - the plaintiff said :

"I am not surprised if the deceased did not tell Mrs Clarke of our meetings. She frowned upon any contact with me and therefore I feel sure that the deceased would not mention it to her. My father never once mentioned Mrs Mavis Clarke's name to me or that they had married; nor was her name ever mentioned during the time she was his housekeeper."

Mr Maurice Clarke said :

"That once Mrs Innes moved in I felt that I was excluded. My father didn't want to see me at home, and he made that plain to me, although whenever we met, when Mrs M. Clarke wasn't there, he was friendly."

While he was in hospital he seemed to want to be more friendly and I believe that some of his attitude to my sister and myself earlier, may have been because he and his second wife wanted a separate life from his former wife and we children. I have respected that wish, as has my sister..."

Mrs Alma SAUNDERS said :

"I did ring and speak to Mrs Clarke and was always told by Mrs Clarke that he (the deceased) was out. I did not visit him in Hospital out of respect for Mrs Clarke as I felt that she was going through enough trauma at the time and she didn't need the interference from the family, that I believed, she had tried to alienate my father from."

Some further insight into the deceased's first marriage and his subsequent behaviour is gained from the following extracts from the affidavit of his brother, Mr Ian O. Clarke:

"THAT I was close to my brother, particularly in the early years ... I recall that his wife was quite domesticated and a good housekeeper. She helped with the milking and doing a lot of things on the farm...

THAT I do not wish to criticise my brother but I believe that the failure of his marriage to ALICE was caused more by his actions than those of ALICE.

THAT my brother had a habit of making tales to justify what he thought was right or the action he was taking and therefore what he told MAVIS CLARKE may not be true.

THAT the house while ALICE was in it, was always clean and tidy. I don't recall how she was with horses but she was certainly not scared of cows, because she helped milk most days.

THAT I kept in touch with my brother after he remarried and I felt that MAVIS CLARKE was turning my brother against his family and that is why we stopped visiting him."

Mrs Harris described the situation as follows :

"THAT in my view the deceased regarded my family as being his closest family relationship. That is not to say that he regarded his own children or their families as being estranged. However he certainly seemed to spend more time and have a much closer contact with my own family than with his own children. The deceased did see Peter Innes reasonably frequently when he was young, as Peter lived with my family for a period of some months when he was approximately two years old."

In my reading of all this evidence, Mrs Harris has fairly expressed the true position when she says there was not a complete estrangement between the deceased and his children but naturally he saw more of his second wife's family. I accept that when he met his own children he was friendly but embarrassed. I believe his reservation towards them prevented closer ties. Why he shut them out of his life is not clear. He may have visited on them some bitterness he felt towards his first wife, or he may have felt he had to make a clean break and start a new life on re-marrying, his wife having been married twice before and having children of her own. At all events, it is clear that his second wife did nothing to foster any contact between the deceased and his own family, but his neglect of them was his, not hers.

In summary, the picture emerges of a broken marriage, of three children of that marriage suffering in consequence by losing the support and assistance of their father through no fault of their own. The father-son relationship was such that the younger son ran away from home when 15 years of age; and the older son, when he came home, was not settled on the farm as a sharemilker and was refused financial assistance into business by his father. The father-daughter relationship was no better - the father not even attending her wedding nor assisting her and her three sons in any way.

The deceased entered upon his second marriage with land which his first wife and two sons had, in varying degrees, helped him to farm.

He prospered, and shared his wealth with his second wife and her daughter. I have no doubt they were deserving of his generosity, but after providing for them to a substantial extent in his lifetime and by survivorship, as already set out, I am satisfied he was in breach of a clear moral duty to make some proper testamentary provision for his own children.

The deceased was under no moral duty to provide for his step-grandchildren in his Will. The widow gives her opinion of his reason for leaving them all the residue of his estate as follows :

"I believe that the deceased left his Will in the way he did because he realised that my daughter, Mrs Harris, had received some benefits from becoming a shareholder in the farming company but that he wished to provide for her children and Peter Innes because they had all been good grandchildren remembering him on all occasions whereas he had no such relationship with the plaintiff or his other children by his first marriage."

The widow herself is well able to provide for her grandchildren, and the three children of Mrs Harris have a wealthy father, and Mrs Harris has substantial means provided by the deceased. In contrast, the three claimants have no expectation of any inheritance from their stepmother and two of them have very limited means.

The widow has the first claim on the deceased's estate. He recognized she was unlikely to need further capital but gave the trustees a discretion in that regard. He provided her with further income. She has not claimed her own income to be insufficient for her needs, but the

Court must have regard for the testator's own wishes to his widow and step-grandchildren. In my view, the deceased's moral duty to the claimants can best be met by appropriate legacies without defeating the prime claim of the widow and yet preserving the residue for step-grandchildren.

I take into account the size of the deceased's financial contributions to the widow and Mrs Harris and the size of his disposable estate; the deprived and unhappy start in life of his three children when times were hard and due to a broken marriage of the deceased through no fault of theirs; their present relative circumstances; that they received no assistance from the deceased in their lifetime; that they, while not contributing to the financial success of the deceased after his second marriage, did play a small part and had some stake in the original farm as children of the first marriage; that they were not guilty of any disentiing conduct and the degree to which there was an estrangement between them and the deceased was of his making not theirs.

With all those considerations in mind, and with the benefit of able submissions by counsel and without neglecting some affidavits and evidence to which express reference has not been made, and bearing in mind the well established principles of the many cases cited by Mr Hassall, the order of the Court is that the Will of the deceased be varied by the introduction of the following legacies :

- (a) for the plaintiff LOUIS SIDNEY CLARKE
the sum of \$20,000.00.
- (b) for MAURICE LESLIE CLARKE the sum of \$7,000.00
- (c) for ALMA JEAN SAUNDERS the sum of \$15,000.00.

The other provisions of the Will remain unchanged.
Counsel are invited to submit a draft order with costs
for approval.

Morrison J.

Solicitors:

Draffin & O'Reilly, Auckland, for plaintiff L S Clarke
Bennetts Morrison & O'Brien, Te Awamutu, for widow Mrs M M Clarke
Evans Bailey & Co., Hamilton, for Mrs J M Harris and
David Allen Harris

Chapman Cartwright & Co., Hamilton, for M L Clarke and
Alma Jean Saunders

Judd Brown Kay Page & O'Shea, Te Awamutu, for defendants