IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.181/82

IN THE MATTER of the Family Protection Act 1955 and

IN THE MATTER of the Estate of I DE HAAN of Paeroa in the Dominion of New Zealand, Married Woman, deceased

BETWEEN A DE HAAN of Holland, Femme Sole, I DE HAAN of Cambridge, Freezing Worker, G DE HAAN of Holland, Femme Sole, A DE HAAN of Cambridge, Freezing Worker

PLAINTIFFS

AND THE PUBLIC TRUSTEE OF NEW ZEALAND as executor and trustee of the Will of the said LLOMA FRANCES DE HAAN deceased

DEFENDANT

Hearing: 9th April, 1984

Counsel: R.S.Garbett for Plaintiffs
S.P.Williams for Defendant
K.G.Parker for J de Haan

Judgment: 9th April, 1984.

(ORAL) JUDGMENT OF GALLEN, J.

This is an application under the provisions of the Family Protection Act 1955 by four children of the deceased, L de Haan.

Mrs. de Haan died on the 4th May, 1982. She was survived by her husband and five children. Her husband is not a party to the proceedings. The scheme of the deceased's will was effectively to make a small bequest to a friend and to

leave the whole residue of her estate to her son J who is now aged 14 years. No provision was made for the plaintiffs or for the husband of the deceased.

The estate is reasonably substantial, the principal asset in it being a half share in a farm which I am informed is worth in the vicinity of $250,000. The estate is being administered by the Public Trustee. The plaintiffs and the son J , the beneficiary under his mother's will, were also beneficiaries in the estate of their grandmother and are already the owners of the remaining half share in the farm already referred to.

The background indicates a somewhat unhappy childhood for the plaintiffs. It appears that Mr. and Mrs. de Haan separated in 1977. Up until that time they were engaged in what appears to have been a farming partnership. All of the children were required to and did as is normal carry out farming and household chores from an early age. After the separation had occurred, the husband of the deceased returned to Holland from which country he had originally come to New Zealand before his marriage. When he returned to Holland the elder children returned with him, with the exception of P who has remained in New Zealand. A n has returned to New Zealand on one occasion and is now back in Holland. A :e and G e have remained in Holland. The affidavits indicate that none of the children is in particularly good circumstances, although P has made reasonable savings and appears to be in receipt of a reasonable income. It is also clear that none of the children was able to obtain any reasonably significant qualifications which might have assisted them to establish themselves in life.

J , who is only 14, is now residing with a family friend who is in fact the person who received a very small bequest under the will of the deceased. Counsel were faced with a somewhat difficult situation in that, in the case of the plaintiffs, information as to their personal situation and prospects was difficult to obtain because of the fact that three of them were residing out of the country; in the case of J , there were difficulties occasioned by his age and it is, of course, much too early to make any confident predictions as to the future as far as J is concerned.

In submissions in support of the application Mr. Garbett referred to the undesirable situation which exists where there is such a gross disproportion in division as has occurred in this case. He also referred to the needs which are dealt with in the affidavits. Mr. Parker, on the other hand, pointed out that there were three considerations which justified the provisions in the will. He referred to the fact that all the children were beneficiaries under their grandmother's estate and that their mother might properly take that intoaccount in making the provisions which she did. He referred to the particular case of J who is much younger than the others and who was completely dependent on his mother because of his father's residence overseas. He also placed an emphasis on the fact that there had been a lack of contact between the children, other than P , with their mother in the last few years of her life. It seems likely that this influenced the deceased in the provisions which she made because it is not without significance that she changed the provisions of her will comparatively shortly after the children had gone to Holland

with their father, the previous scheme of her dispositions have been an equal provision for her children. As far as the grandmother's estate is concerned, I accept that it was proper for the deceased to take this into consideration. It was also, I think, not unimportant that she should see that J had a special claim on her testamentary bounty because of his age and the fact that he could not call upon the assistance of a father during quite important and formative years. No doubt she was also influenced by the lack of contact, although I think I am bound to say that she changed her will at a time when it would have been exceedingly difficult for the children to have kept in contact with her to any extent and I think it is not unimportant to remember that they were all then comparatively young and I do not think it is reasonable to hold against them attitudes which they had perhaps not really had time to form and which may be of much greater importance in respect of older people who are more in command of their own situation than any of these children were.

In my view there has been a clear breach of moral duty established in this case. The children were at the time the will was made, and at the time of the death of the deceased, not satisfactorily established in life. It is clear that one at least of them sees the need for an additional qualification. They played their part in the accumulation of the family assets, because I expect, although the evidence is not perhaps as full as one would have liked, they were required to work in a reasonably significant way in the family farming enterprise. I think it is also important that the principal asset in the estate of the deceased can be

regarded as being a family asset, presumably obtained by her from her own mother who made provision for her grandchildren in respect of half of the farm. All those are considerations justifying some further provision to be made for the children concerned. Mr. Parker indicated that, if I considered such provision should be made, I should bear in mind the particular needs of J and also the fact that the deceased was entitled to dispose of her estate,at least to the extent that she did not ignore the proper calls upon her, as she herself wished.

I am concerned over the needs of J over the next few years. He is too young to make any confident predictions as to his educational needs or as to whatever particular qualifications he may seek as he matures sufficiently to make decisions about his future. He is also completely dependent upon the goodwill of the family with whom he at present lives. They are under no legal, or perhaps even moral, obligation to provide for him until such time as he is sufficiently independent to stand on his own feet. The income from the estate, supplemented no doubt by J 's proportion of the income which he presumably receives from his grandmother's estate, would on the present disposition be more than sufficient to meet his needs. I think it must be assumed that he will require provision for at least another 4 years. If he is unable to remain living where he at present resides, then consideration would have to be given to some boarding school or some place where he may be able to stay and in those conditions it is likely the income would need to be greater than he at present receives. As against this, I believe that it is important in most families, and

particularly in this family, to preserve a degree of family comity. J will be particularly dependent on the goodwill of his elder brother P who is in New Zealand. While J is in need of support in this case, and indeed is rather less well off than his brothers and sisters because he does not have parental assistance available to him at all, they may reasonably consider that the efforts they have made in the accumulation of what seems clearly to be a family asset should be recognised in an equally clear way. It is, however, also important that the other members of the family should be able to obtain such support as they now need at a time when it is particularly important that they should receive it. They are all young enough to benefit from obtaining additional qualifications and the evidence establishes that one at least of them is concerned to obtain such qualifications. If I were to postpone their enjoyment of such provision as should now be made for them until such time as J has ceased to be in need of support, then it may be too late for them to benefit to the extent which they deserve and to obtain those particular qualifications, the need of which they now recognise. The need to make special provision for J and the need to ensure that the plaintiffs obtain a benefit at a time which is most significant to them, justify provision being made of an unequal nature.

I propose to make an order varying the provisions of the will of the deceased, other than the specific bequests which are not under attack, to the extent that J is entitled to one quarter of the residue and the remaining three quarters are tobe divided equally among the plaintiffs. Because I do not have sufficient information

as to the likely future income and because it is conceivable that J mayneed provision greater than the amount of the income which would be available to him, even bearing in mind his slightly greater proportion in the estate, I also order that the provisions of the will be altered in such a manner as to allow the trustee to make such provision as may be thought desirable at anytime and from time to time for J from the capital of his interest in the estate.

The question of costs is reserved and I invite counsel to submit a memorandum in respect of the costs which they consider appropriate having regard to the circumstances. There will be an order in those terms.

R. G. Galt J.

Solicitors: McKinnon, Garbett & Co., Hamilton, for Plaintiffs
The District Solicitor, Hamilton, for Defendant
O'Neill, Allen & Co., Hamilton, for J .de Haan