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N.Z.L.R. X

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

A. No. 12/81 (3)

IN THE MATTER of the Family Protection Act 1955

A N D

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IN THE MATTER of the Estate of E SHIRLEY late of Nelson, in New Zealand, Company Director, Deceased

BETWEEN D SHIRLEY of Nelson, Clerk of Works and I SHIRLEY of Nelson, Joiner and K , SHIRLEY of Wellington, Funeral Director

Plaintiffs

A N D G SHIRLEY of Nelson, Company Director and I SHIRLEY of Nelson, Dealer

Defendants

Hearing: 1 July 1985

Counsel: J.A. Doogue for Plaintiffs
K.O. Beckett for Defendants
Margaret Lee for G.T. Shirley

Judgment: 11 July 1985

JUDGMENT OF QUILLIAM J

E Shirley died on 1980. He was survived by his wife and four sons, to whom I refer, for the sake of convenience and in order of their ages, as D G , K and I

The testator's last will was made on 26 November 1974. He appointed his sons G and I executors and

trustees. He gave a legacy of $5,000 to his wife and legacies of $100 each to his church and his grandchildren. He left his shares in the company known as E.H. Shirley & Sons Ltd to his wife, G and I in equal shares. That company had however, been wound up prior to his death and so this bequest failed. He left his shares in the company known as Shone and Shirley Ltd to such of his sons in equal shares who "at the date of my death shall be in fulltime employment with the said company." At that time this applied only to G who is accordingly entitled alone to those shares. The residue of the estate was left to the trustees upon trust for sale and conversion with the balance to be held to pay the nett income to the testator's wife for life and to divide the remainder among the four sons in equal shares.

There has been no suggestion that the life interest to the wife or any of the pecuniary legacies should be touched by these proceedings. The matter in dispute concerns the bequest of the shares in Shone and Shirley Ltd to Graham alone.

Having regard to the extreme bitterness which is apparent between G on the one hand and the other three sons on the other, it is necessary to note that the bequest of shares was not made to G by name but to such sons as were in fulltime employment of the company at the date of death. The desire of the testator to try and preserve his business as a family business is a theme which runs clearly through these proceedings. Indeed, it has been argued that it was something which preoccupied the testator to the exclusion of his general moral obligations. In 1974, when the last will was made, those in the fulltime employment of the company were G F and I Don had left the business in 1972 and had then been required by the testator to sell to his three brothers the shares he held in the company. The testator was, however, unaware at the time of his death that I and I had also left the business. He therefore did not know that what he had done was to leave all his shares to G

The estate of the testator, apart from his shares in the family company, was a small one. He had life policies which yielded $15,500 and a current account with Shone and Shirley Ltd of $35,500. His 2,403 shares in the company, upon the basis of a valuation made as at the date of death, were worth $19 each, a total of $45,657. The total value of the estate was therefore $96,657. In terms of the will, and after payment of the pecuniary legacies, G would receive the shares and each of the four sons would receive about $11,300. The total value of G s interest in the will would be about $57,000 so that he will have been preferred over each of the other three in the ratio of about 5:1.

The testator established the business of a funeral director in Wellington in 1958. He formed for that purpose the company of E.H. Shirley & Sons Ltd. The capital was ₤5,000 of which the testator held ₤3,000 and D and G ₤1,000 each. K and I never held shares in this company and F was never employed in it. This business was sold in 1970 and the proceeds used to establish the company known as Shone and Shirley Ltd in Nelson. The shareholding in that company totalled $5,000 which was held equally by the testator and the four sons. Each of the sons was involved in that business although in different ways and for different periods. The wives of two of them, G and I , also did work for the company.

The testator suffered a stroke in 1966 and was not, after that, able to take the same active part in the business that he had done previously. It seems that while he was in active control he was able to keep the business as truly a family business but once he had gone that no longer applied. It is not clear at what stage he went to Christchurch to live, but the outcome was that the three other brothers were unable to work with G and one by one left the business. The blame for this is thrown by each on to the other. It is not possible for me to resolve that and it is unnecessary for the purposes of these proceedings to do so. As at the date of death I held no shares in the company. Each of the other three held 3,199 shares and the testator had retained 2,403.

The question of breach of moral duty is to be considered as at the date of death. It is therefore necessary to examine the circumstances of each of the sons as at that date.

D , the eldest, was then years of age. He was married with three children, the youngest of whom was D had been employed in E.H. Shirley & Sons Ltd from 1958 to 1970 and then in Shone and Shirley Ltd until 1972. Since then he has been employed mainly in the Ministry of Works and Development. His income, as at the date of death, was about $13,500 per annum and his wife's about $1,700, a total of $15,200. They owned a house property with a government valuation of $48,500 subject to a mortgage of $5,200. They owned shares, cash and other assets of a total value of about $25,000. Together, therefore, they had nett assets of about $68,500.

K was years of age. He was unmarried and had no family. He did not join the family business until 1970. He was employed by Shone and Shirley Ltd from then until 1980 when he left to take employment in a similar business in Lower Hutt. K s income, at the date of death, was about $25,400 per annum. Apart from his shares in Shone and Shirley Ltd, which were then worth $60,781, he had investments of about $40,600, making total assets of just over $101,000.

I , the youngest, was . He was married with two children aged months. He had worked for E.H. Shirley & Sons Ltd from 1968 to 1970 and for Shone and Shirley Ltd from 1970 to 1978. Since then he has been self-employed. He has chosen to earn very little and has devoted much of his time to building a home for himself. His income, as at the date of death, was about $7,700 per annum. He owned a yacht valued at $20,000 (subsequently sold and the proceeds applied towards the new home), cash and other assets of about $18,000. With his shares in Shone and Shirley Ltd the total assets of himself and his wife were worth about $112,000.

G was almost at the date of death. He was married with three children, the youngest then being He had been in the continuous employment of E.H. Shirley & Sons Ltd and Shone and Shirley Ltd from 1958, except for about nine months in 1960/61 when he went to Australia and studied embalming at his own expense. His income and that of his wife, combined, was about $35,500 per annum and he and his wife together had assets, including the shares in the company, totalling about $153,000.

In summary, then, it may be said that at the date of death G was the best placed financially and D the least. All had contributed to the family business but G 's contribution had been the longest and no doubt the most significant, but with the reservation that the others may have remained with the business longer had it not been for the inability to work with G (whoever must accept the responsibility for that). In these circumstances it is necessary to determine what the moral obligation of the testator was to each of the plaintiffs. It should be mentioned that while their financial circumstances and contributions to the business were by no means equal, none of them was prepared to argue for any advantage over the other two.

On behalf of G it was submitted that none of the plaintiffs was in any particular need of support, each was an able-bodied son with similar educational qualifications, each had had similar opportunities in the family business and had chosen to leave it, and that the testator's clear intention was to maintain the family business with the result that he preferred not G as an individual but whichever sons were prepared to stay and operate that business. It was therefore contended that the testator had not been in breach of any moral obligation. I do not feel able to resolve the matter on that basis.

I was assisted by the references of counsel to a number of the well known decisions which have been given under

the Family Protection Act, particularly in more recent years. I have gone through them again but I find it unhelpful to set out passages from any of them. The theme which runs through them all is that the question of moral duty must be determined in the light of the particular circumstances including the size of the estate, competing claims, the moral and ethical considerations involved, and changing social attitudes. All these considerations, and such others as are relevant for the moment, must be weighed up so that in the end what is "adequate provision" for the "proper maintenance and support" of the particular plaintiff can be arrived at.

In the present case the most striking feature which emerges is the gross disparity which has resulted between C on the one hand and the plaintiffs on the other. C was appreciably the most comfortably placed of the four financially, both as to income and as to capital. He had therefore the least claim on his father's bounty. He nevertheless received the lion's share of the estate in the proportions of 5:1. If it should be necessary, in accordance with the power provided in the will, for the trustees to have recourse to capital for the benefit of the widow, then this would reduce the residue and so accentuate the disparity. These facts alone need not necessarily mean that the testator failed in his duty if it could be seen that there was a proper basis for such disparity. I am bound to say that in this case I can see no sufficient basis for it. It seems that the testator had a desire, to the exclusion of almost any other consideration, to try and ensure the preservation and continuation of the business which he had founded. However understandable that may be from a human point of view it was pursued with an apparent disregard for the other considerations which ought to have influenced him.

At the time the testator made his will he had reason to believe he was leaving his shares among three of his four sons, all still engaged in the business. He evidently knew that one of them later left the business but was unaware that two others had done so also. It is very difficult to believe that if he had known this, and if he

had turned his mind just before he died to whether his will still represented a proper discharge of his obligations, he would have decided that it did. There is no suggestion in the evidence that he was resolving the quarrel between G: and the other three by showing his support for G . One can only conclude that he was unaware of what had developed. There was then no proper basis upon which he could have justified the very great preference which, in the result, his will showed for G I am satisfied that the testator was in breach of his moral duty to each of the plaintiffs and that something must be done to remedy that.

The question of what further provision should now be made is a matter to be decided upon the basis of the circumstances as they now exist. It is therefore necessary to give some indication of the changes which have occurred in the circumstances of all four.

The income of D and his wife has increased from $15,200 to $25,700. Their total assets have moved from $68,500 to $142,500. This is due in part (that is, nearly $30,000) to the inflationary effect on their house property.

K 's income has increased from $25,400 to just over $40,000 and his assets from $101,000 to about $240,000.

J 's income is still low at about $14,250 compared with $7,700 previously. His assets have increased substantially from $112,000 to $251,000. This is due in large part to the building of his house which now has a value of $163,000.

G 's position also has improved. The income of himself and his wife has increased from $35,500 to $64,000 and their assets from $153,000 to $364,800.

From these figures it seems that the relative positions of the four brothers have remained about the same. All are appreciably better placed but this may reflect largely

the effects of inflation. Don is still the least affluent and his situation no doubt continues to reflect the fact that he alone has no shares in Shone and Shirley Ltd.

The submission made on behalf of the plaintiffs was that the testator's breach of moral duty ought to be remedied by providing that the 2,403 shares in Shone and Shirley Ltd be divided equally among the four sons. This does not, however, seem to me to be appropriate. I may vary the terms of the will only to the extent necessary to repair the breach of duty and regard must be had to all the surrounding circumstances. There are matters which cannot be resolved with an equal division.

It is undoubted that, for whatever reason, G has remained in the employment of the family business for an appreciably longer time than any of the others. To the extent that the shares in the company may have increased in value over the years it must have been he who made the greatest contribution to that increase (apart, of course, from neutral matters such as inflation). It may be, as the others allege, that in effect he drove them out but nevertheless his contribution to the business has been the greatest.

A second factor of significance is that so far as it can be done the wishes of the testator ought to be respected. It was unmistakably his wish that any son who remained in the business should have some preference. As I have said, he clung to this wish in the end to an extent which cannot altogether be justified. He was still entitled to express such a preference, however, and I think regard should now be paid to that. These considerations lead me to the conclusion that the further provision to be made to the plaintiffs ought not to be on the basis of an even distribution.

A further matter must be resolved. It concerns the position of each plaintiff in relation to the others. They have not argued for different treatment but I was told this was a matter left entirely to the Court. I have come to

the conclusion that it would not be proper to treat the three of them in identical fashion. The situation of K and I is somewhat similar, allowing for the fact that K is unmarried and with no dependants, and that I has elected to restrict his income in favour of building himself what is evidently a house of some quality. D , however, is in a significantly different position from either of them. He was the first to leave the family business and as a result was obliged to sell his shares. This was in 1970. He then received for them $2.25 per share. He has said that this was less than their true value but he felt obliged to accept it. In the light of the valuation as at 1980 that belief may well have been correct. The amount he received may be reflected in his present assets but he has at all material times been the least affluent of the four and, of course, the sale of his shares meant that he no longer received any directors' fees from the company. The duty of the testator towards him was correspondingly greater. I think he is entitled to greater provision than the other two.

The only way in which provision can be made for the plaintiffs is out of the shares themselves. I think the proper course is to divide them among the four sons in what I regard as appropriate proportions. I have considered whether I should attach a right for G to purchase those which go to the others, but on reflection I do not think this appropriate. It is likely that the position will rectify itself when the plaintiffs eventually accept that there is no real point in retaining their shares and no doubt Graham will then wish to purchase them. However that may be, I think it better to leave the ultimate disposal of the shares for decision by those who hold them.

There will be an order that each of the three plaintiffs is to receive, by way of further provision from the estate, shares in Shone and Shirley Ltd as follows:

For Don	-	501
For Ken	-	450
For Ian	-	450

This leaves 1,002 to go to G . The odd numbers are simply for the purpose of ease of division.

There will be no order as to costs. The plaintiffs have born the expense of valuation fees for valuations which have been of assistance to all parties. They are content to bear those in the meantime but there will be a further order that the amounts of those fees are to be debited against the shares of each of the four sons equally upon the ultimate distribution of the residue of the estate.

Solicitors: Hunter, Smith & Co., NELSON, for Plaintiffs
Fletcher & Moore, NELSON, for Defendants
Tripe, Matthews & Feist, WELLINGTON, for G.T. Shirley