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IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

A. 40/82

IN THE MATTER of the Family Protection Act 1955 and its amendments

A N D

IN THE MATTER of the Estate of JOSEPH IGNATIUS O'BRIEN late of Mangamutu, Farmer

BETWEEN: ANTHONY MICHAEL O'BRIEN of Pahiatua by his next friend and Guardian Ad Litem ROBERT GARY MINNIS of Pahiatua, Builder

Plaintiff

A N D: VINCENT BERNARD O'BRIEN of Pahiatua, Farmer and RUSSELL RUTHERFORD COOPER of Pahiatua, Post Office, Technician, as executors and trustees of the Will of the late JOSEPH IGNATIUS O'BRIEN deceased

Defendant

Hearing: 11 September 1986 (Held in Wellington)

Counsel: P. Whitehead for Plaintiff
B.D. Andrews for Grandchild S. Steminger
J.A. Walker for Unborn Grandchildren
J.H. Williams for Defendant V.B. O'Brien
Miss H.C. Hoogendyk for Defendant R.R. Cooper

Judgment: 21 OCT 1986

JUDGMENT OF JEFFRIES J.

This is an application under the Family Protection Act by a son for further provision from the estate of his father who died on 13 August 1981, and probate of his last Will and Testament dated 16 March 1978 was granted to the abovenamed defendants on 22 October 1981.

The deceased was a farmer on land in the Mangamutu district near Pahiatua. By a Trust Deed dated 2 August 1974 deceased settled a family trust to make provision for his sons Graeme Joseph Harold O'Brien, born on 18 February 1959, and Anthony Michael O'Brien, born on 11 November 1963 named therein as beneficiaries. The trustees were directed to stand possessed of the Trust funds for such as the beneficiaries as shall be living on 1 July 1984 as tenants in common in equal shares. The Deed provided that if any of the beneficiaries shall have died before 1 July 1984 leaving a child who shall attain the age of 21 years, then such issue shall take the share of the parent. The deceased in his life-time transferred to the family Trust one half of the farmland at Mangamutu and retained the other half share in his own name, each holding as tenants in common. On his death the half share of the farm in his name passed to his estate and thereafter is to be devised according to the terms of his Will subject, of course, to this application.

The last Will of the deceased dated 16 March 1978 appointed the named defendants as trustees and made certain specific bequests which are not in dispute. It is now necessary at this point to recount previous proceedings which were decided by a judgment issued by me on 5 March 1986.

That judgment concerned a case brought against the deceased's estate by Thelma Hartley under the Testamentary Promises (Law Reform) Act 1949. Very briefly the facts were these. The deceased married relatively late in his life to the

sister of Mrs Hartley, and there were born two children, namely, Graeme and Anthony. His wife died in 1964 and very soon after her death the deceased requested that Mrs Hartley come to live with him on the farm and take care of his two young children, and for that she would have a home for the rest of her life. At the time Mrs Hartley was separated from her husband and had two young children of her own. She took those two children to the farm and raised them with the two children of the deceased as one family. It was a successful relationship for all concerned and remained that way until deceased died in 1981. By his Will dated 16 March 1978 the testator bequeathed to Mrs Hartley an equal share in a beach cottage at Foxton together with Russell Rutherford Cooper, who had married Mrs Hartley's daughter by her first marriage. No attack is made on this bequest. The same Mr Cooper is an executor of the deceased's Will. There was a further bequest of furniture and personal effects to be shared equally between his two sons, and the remainder of his property was to be held in certain trusts whereby the annual income was to be paid equally to the two sons during their lives, and the share of the capital of each was to go to their children, respectively. The Will included a gift over in similar terms to that contained in the Trust which will be described shortly. The deceased failed to honour his promise to Mrs Hartley at the time she agreed to go and live with him on the farm, and she brought an action pursuant to the said Act. That was heard before me in Palmerston North on 19 February 1986 and by judgment dated 5 March 1986 I found she had established her promise and made an award of $75,000 to provide her with a home. In that case the plaintiff in these proceedings, Anthony Michael O'Brien, gave evidence in support of Mrs Hartley's claim.

The older son, Graeme, was killed in a motor accident on 12 May 1980 before his father's death. His father made no alteration to his Will as a result of that event. Before his

death Graeme had formed a relationship with Shiralee Steminger, and by her a child was born posthumously at Palmerston North on 26 December 1980. As a matter of record, a paternity order was made in the High Court on 23 February 1984 declaring Graeme father of the child.

To recapitulate the position now in regard to the Trust and estate is as follows. A Trust was established for the benefit of deceased's two sons with a provision that if one son died leaving issue that child would take. That in fact happened for Graeme died in 1980 and he left issue, namely Shaun Graeme Steminger, now aged five years. Shaun, therefore, takes his father's place as beneficiary under the Trust to which he will succeed when he turns 21 years. The Trust was determined on 1 July 1984 and Anthony succeeded to his share. By the Will of the testator executed in 1978 he granted to his two sons a life interest in his estate which comprised half the farm property and after their deaths it was to be divided into two equal parts and each part was to be held for the children of each of his sons living at the date of death of their respective fathers. In fact, in regard to Graeme who predeceased his father, the effect is that his son Shaun takes his father's share and as at today's date Shaun has a vested interest in half the Trust and half the deceased's estate. He is in a better position than Anthony who has the half interest in the Trust but only a life interest in the estate, with the prospect of his issue becoming the ultimate beneficiaries of his share. At the present time Anthony is aged 22 years, unmarried, and has no issue. This indeed is an unusual case.

Anthony makes application to the court pursuant to the Family Protection Act for the provision of further maintenance and support for himself as he, at present, has only a life interest in the estate of his father. It is appropriate here to outline the substance of that life interest. As stated

previously, the estate is a tenant in common with the Trust in the farm land. The 1986 estate accounts were produced to the court which show the farm business operating at a loss. It is considered that the best ultimate use of a farm is as a dairy unit. It is at present being farmed by one of the executors, namely Vincent Bernard O'Brien. Through his counsel, Mr Williams, he informed the court that the accounts indicating a loss are rather pessimistic and come about through the purchase of further stock prior to the end of the accounting period. Since valuations on the farmland were done last year there has been a reduction in value due to depressed market conditions. All counsel agreed that the present value of the estate share of the farm, subject to a reservation to be referred to in a moment, is about $200,000 made up as follows:

Present Value of Land	$128,000
Stock	$ 30,000
Cash	$ 29,000
Investments	$ 9,500
Plant and Vehicles	$ 4,500
	$201,000
Less Overdraft	2,500
TOTAL:	$198,500

Mr Williams informed the court that Mr V.B. O'Brien is of the opinion that is a conservative valuation and it could be worth more. For example, there is apparently a valuable spring on the property which could be leased to a dairy company yielding a good rental. As a matter of background the court was informed that there are differences between the two trustees which probably will result in the appointment of an institutional trustee to take office because on present indications, particularly with Shaun at five years of age, the trusts of the Will seem set to exist for many years to come.

Plaintiff's counsel argued his client should be granted a full vested interest in the estate because, in effect, his nephew by blood through unusual circumstances is placed in a better position than himself in regard to the testator's estate. In short, without alteration to the provisions of the Will, plaintiff is likely to get nothing, or little, as an income beneficiary. Plaintiff's counsel, therefore, argued for an order of the court that he be entitled to a full vested interest immediately in half the estate of his father to put him on equal terms with Shaun, apart from anything else, and to give him some prospect of real benefit from the estate of his father. Mr Williams informed the court it was recognised by plaintiff that it would be impossible for him to liquidate his share of the estate to give him immediate cash benefits. In other words, he accepts the estate must remain as at present structured which, if his application as put forward by his counsel were successful, would mean he and Shaun shared the estate on equal terms.

It is appropriate to dispose of the attitudes of other parties who appeared at this hearing and were represented by counsel. Because of the differences earlier mentioned both executors under the Will were separately represented, and both indicated that they abided the decision of the court on the application by Anthony. Mr Andrews appeared for Shaun Steminger, and although not advancing an argument, his preference was for Anthony to succeed to a vested interest in half the estate because it would ease the decisions which Shaun's advisers must make in future about the farm business.

The position of Mr J.A. Walker, on behalf of the unborn children of the applicant Anthony, was somewhat different, as might be expected. The competing claimants in this application under the Act are the applicant himself and his possible issue should he marry and should he have children. Mr Walker on

behalf of the unborn children of Anthony said he could see the sense in the plaintiff's succeeding in obtaining an order of the court that he take a vested interest in substitution of his life interest, but he had the obligation of protecting the unborn children. Mr Walker's solution to this intractable position was to submit the court could make such an order but should impose a condition that the plaintiff execute a Deed of Covenant whereby he agrees to execute a Will bequeathing his share in the estate to his children in equal shares. As he is unmarried it would further be necessary for him to covenant that should he marry he must then enter into a further covenant that he will conclude an agreement with his future wife that the estate land, to which he would succeed if the court makes such an order, would remain separate property to be devised as previously covenanted for. It was submitted by counsel that the court probably has no jurisdiction under the Family Protection Act to impose such a condition, but could do so under s.64A of the Trustee Act 1956. This was a course adopted by Barker J. in Re Allen (unreported: Auckland Registry A.713/80 - 10 December 1984).

The unborn children of the plaintiff, if they come into existence, would be the grandchildren of the testator as is Shaun Steminger. A grandchild is a claimant under the Act but usually is left to be represented by a parent if the circumstances of the claim are appropriate. Although there are similarities between grandchildren and the unborn issue, the point in this case is that such issue are specifically designated in the Will of the testator as the beneficiaries after the close of the life interest.

The court is obliged to approach the claim of the plaintiff following the statute. As at the date of death could the provisions made for Anthony be described as adequate judged by the standard of the wise and just testator? It is not clear

from the evidence whether the testator knew his son Graeme, who had died, had in fact left a son of his own. He must have realised the son's death would affect the Trust and the Will provisions, but chose to ignore the consequences. At the date of his death Anthony was aged 17 years, and his other son was dead and he left no widow. As stated it is unclear whether he knew of Shaun's existence, but he knew that Anthony had at least a contingent half share in the Trust and the income from the estate for life. Even if both sons had lived it could hardly be described as anything but an awkward and potentially difficult disposition of his property. To divide the one farm as he did in 1974 and 1978 seems from this distance somewhat curious, particularly to make the Will he did after the Trust settlement. By his Will he ensured the estate Trust would continue for perhaps 50 years after his death. Even the selection of his trustees in view of the terms of that Trust seem difficult to follow and trouble has apparently emerged in that area.

The court could continue speculating but no useful purpose would be served. I have little difficulty reaching the conclusion that as at the date of death the testator was in breach of his statutory duty. Of all counsel who appeared in this case not one advanced a contrary argument, including counsel for the unborn children. In a way this case has been made more difficult for the court because there is a marked absence of a strong adversarial situation. Following Little v Angus [1981] 1 NZLR 126 the court is permitted to look at later events in deciding on repair of the breach.

It is customary if the circumstances of the case call for it to examine what are called the competing claimants. In this case they are the plaintiff and his possible issue, but there is something just a little unreal to describe the protagonists in those terms. The practice note whereby a

parent normally represents the interests of his or her children in family protection claims recognises the very close identity of interests.

I have reached the view in this estate, taking into account the rather unusual events of the past, the proper order to make is to vest the remaining half of the estate property in the plaintiff which extinguishes the life interest and, in effect, disinherits the unborn children of the plaintiff. Mr Walker, counsel for those children, recognises the plaintiff should take a vested interest but seeks to retain for the unborn children the provisions of the Will by asking the court to impose the conditions he suggests. I have given careful consideration to that course but, in all the circumstances, reject it. No-one can predict how the relationship between Anthony and Shaun will develop, but the chances are they will probably follow rather separate lives not bound by family relationships, although they are by blood. No-one, of course, can be sure, but as there is no specific statement in the evidence on the possibilities, that seems the course that will be followed. However, there is also the inescapable fact, and it is that they are bound together into one quite valuable property. Added to that is the fact Shaun is but an infant for whom decisions must be made by others for many years yet. It is almost a moral certainty that within a few years, if the conditions requested by Mr Walker were imposed, the court would have to reconsider the situation. Also, such conditions would materially constrain an already difficult set of circumstances. In this balancing exercise the court is entitled to assume that Anthony would in any event make proper provision for his children. If he does not they in turn will have a claim against his estate if it is appropriate. In short there is a limit to which a court is able to follow relentlessly a testator's wishes especially in the unusual circumstances presented by this case.

I had expected a memorandum on costs, but it has not eventuated, and I therefore release this judgment. Counsel may still forward such a memorandum.

<u>Solicitors for Plaintiff</u>:	Jacobs Floretine & Partners, Palmerston North
<u>Solicitors for Grandchild</u>:	Simonsen Gregg Andrews & Co., Palmerston North
<u>Solicitors for Unborn Grandchildren</u>:	Macalister Mazengarb Parkin & Rose, Wellington
<u>Counselfor Defendant V.B. O'Brien</u>:	J.H. Williams Esq., Palmerston North
<u>Solicitors for Defendant R.R. Cooper</u>:	Coles & Hoogendyk, Palmerston North

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