IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

No. A 24/83

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| IN THE MATTER | of the Family Protection Act 1955 |
| A N D | |
| IN THE MATTER | of the Estate of REBECCA TOON of Wanganui, Married Woman, Deceased |
| BETWEEN | TARIHIRA ANARU of Masterton, Married Woman, TE RA ANDREWS of North Sydney, Technician, and MICHAEL JOHN ANDREWS of Porirua East, Minister |
| | Plaintiffs |
| A N D | THE MAORI TRUSTEE at Wanganui, as administrator of the Estate of REBECCA TOON, Deceased |
| | Defendant |

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DWMcM

Hearing: 27 November 1986

Counsel. C J Hodson for Plaintiffs
R W Parry for Riki Allen
I J Hyslop for Defendant

Judgment: 27 November 1986

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ORAL JUDGMENT OF EICHELBAUM J

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These are proceedings under the Family Protection Act 1955 in the estate of Rebecca Toon who died intestate in 1973. The claimants are the five children of her first marriage to Michael Anaru. He himself had had one child by a previous marriage, but she is not concerned in these proceedings. Mr Michael Anaru died intestate in 1967. It seems that the only significant

asset in his estate was a house property which however, was not sold until many years later, indeed not until a number of years after Mrs Toon herself had died. Mr Toon died in 1980. By virtue of the intestacy he had become entitled to the whole of Mrs Toon's estate. However, at the time of her death the estate in fact was in debt. It was not until after the sale of the house property some time in 1982 that the estate came into credit. In the meantime, Mr Toon had died so his own family became entitled to step into his shoes so far as succession to Mrs Toon's estate was concerned. He had no children and his three brothers were themselves all deceased, but there were three nephews and a niece (all living in England) who were served with these proceedings. They have not taken any steps, although my attention has been drawn to a letter written on behalf of two of them to the effect that while they did not agree with all the facts set out in the affidavit served on them, they did not propose to take any formal steps in the proceedings. The estate is a very modest one; on the latest information supplied to me on behalf of the Maori Trustee, who is the administrator of Mrs Toon's estate, the current balance is $6,357.

The first matter with which I have to deal is that the proceedings were filed considerably out of time in relation to the date of the grant of administration in Mrs Toon's estate. However, that no proceedings were then filed is entirely understandable because as the estate then stood it would have been a futile exercise. It was not until the estate had some credit balance, which occurred in or about August 1982, that it would have been worth anyone's while to spend money on taking proceedings under the Act. At that stage an originating summons was in fact filed, a matter of slightly less than a year after the existence of the surplus in the estate became known. There has of course been no distribution and no element of prejudice has been suggested so far as the beneficiaries in England are concerned, nor is there anything in the papers before the Court that suggests that they could have been prejudiced by the

delay. Accordingly I regard it as a proper case for an extension and make an order extending the time for issuing proceedings until the date when the originating summons was in fact taken out.

Next, there is the question whether there was a breach of moral duty on the deceased's part. She died intestate; but the position has to be regarded in the same way as if she had made a will leaving her entire estate to her second husband, to whom she had been married for some four years at the date of her death. At that time she had the five children of her first marriage to consider. Although the information before the Court is not very extensive, it is I think a reasonable inference that at that stage none of them was in better than modest circumstances. I have no doubt that in that situation it was Mrs Toon's duty to make a testamentary disposition which would have the effect of preserving the modest capital available to her for her own children rather than leave matters on a basis where the capital ultimately was "unfairly passed on to strangers in blood", Re McNaughton (deceased) [1976] 2 NZLR 538, 543. The just and wise testatrix in these circumstances would at least have provided for her own children by way of a life interest. It is, I think, a reasonable inference that Mrs Toon would have known about the existence of the house so that although as at the date of her death, literally speaking she had nothing to leave, she would have foreseen that in the end there would be some assets available for disposal. It is clear that apart from her children and the second husband, there were no other persons to whom Mrs Toon owed any moral duty. It cannot be contended that any was owed to the nephews and niece who really by chance became the ultimate beneficiaries.

Coming to the form of the order to be made, I should say first that one child, that is Te Rauna (Duncan) Andrews is neither a plaintiff, nor has he filed any affidavit on his own behalf, although his position is referred to in an affidavit filed by one of the other parties. However, counsel on behalf of the other four children have not taken any issue with his

position and indeed have accepted that he should be treated on a basis of equality. Whatever technical objection might be taken to treating him as a claimant, doing so will not make any difference to the total effect of the order I had in mind so far as the position of the Toon nephews and niece are concerned, because whether there were four claimants or five, I would make an order that had the effect of exhausting the available assets of the estate. None of the five children appears to be in any extreme need but their circumstances are such that clearly the only form of order I could contemplate would be one that would exhaust the assets of the estate in favour of the claimants. As none has contended for anything else other than a basis of equality, that is the just order to make in the circumstances.

One other matter that should be mentioned is that Tarihira Anaru has paid the funeral expenses in respect of Mr Toon and counsel for the Maori Trustee has agreed that it is proper that that payment should be refunded. Accordingly by way of further provision for the five children of the deceased, I make the following orders:

1 An order that the costs of the plaintiffs and of Riki Allen be paid out of the estate. I will fix the amount of such costs on receipt of memoranda from counsel concerned, with sufficient detail to enable me to fix the amount of the fee and in each case a suggestion as to what would be a proper fee in the circumstances. In addition, the plaintiffs and Riki Allen will be entitled to disbursements as approved by the Registrar.

2 The defendant I assume will be entitled to costs out of the estate without any order but if it is necessary for any order to be made or for costs to be fixed, which I would not think was the case, then leave to apply in that regard is reserved.

3 The balance of the estate remaining after repayment of the funeral expenses and discharge of the orders for costs referred to above is to be divided equally among the five children of the deceased.

Solicitors for Plaintiffs: Gawith Cunningham & Co, Masterton

Solicitors for Riki Allen: Hornblow Carran Kurta & Co, Wellington

The District Solicitor, Department of Maori Affairs, Wanganui, for defendant.