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NZLR
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LOW
PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.425/85

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IN THE MATTER of the Estate of
GEORGE HENRY BEACHEN
of Hastings and
Auckland, Retired
Sheep Farmer, Deceased

BETWEEN: CATHERINE FLEMING of
Auckland, married
woman a n d
GILLIAN MARY FARNAN
of Auckland, married
woman

Plaintiffs

A N D

BERNARD GEORGE BEACHEN
of Elsthorpe, Hawke's
Bay, Farmer a n d
ROBERT CHARLES MACINNES
of Hastings, Chartered
Accountant, as
Executors and Trustees
of the Will of the
said GEORGE HENRY
BEACHEN deceased

Defendants

Hearing: 5 February 1986 .

Judgment: 12 February 1986 .

Counsel: A W Grove for plaintiffs
P von Dadelszen for Bernard George Beachen
B H Giles and Cecilia Caughey for Trustees

JUDGMENT OF HENRY, J.

Originating Summons for further provision under
the Family Protection Act 1955. George Henry BEACHEN, of
Hastings, retired farmer (the testator) died on 14 March
1984 aged 72 years, probate of his last will dated 19 August
1981 being granted to the Defendants on 30 April 1984.

The testator was pre-deceased by his wife and left him surviving three adult children, a son Bernard George Beachen (Bernard), and two daughters, Catherine Fleming (Catherine) and Gillian Mary Farnan (Gillian). There are in all seven grandchildren.

The net estate of the testator as at the date of death was approximately \$222,000.00. Following realisation and payment of debts and all expenses there would appear to be approximately \$205,000.00 now available for distribution represented by :

Debt owing by G B Beachen Trust	\$119,500
Interim distribution to Catherine	38,000
Interim distribution to Gillian	38,000
Car transferred to Gillian	5,800
Balance held by trustees (approx)	4,000
	<hr/>
	\$205,300

The relevant substantive provisions of the will result in the debt owing by the B G Beachen Trust of \$119,500 being forgiven, Gillian receiving a legacy of \$2850.00 to compensate her for not having shared with Bernard and Catherine in the devise of a beach property by the testator's wife, and the residue being divided equally between Catherine and Gillian. As has already been mentioned, an interim distribution of \$38,000.00 has been made to each daughter, and the motor car has also been transferred to Gillian. The total residue to be divided would appear to be some \$85,000.00. No claim is made on behalf of any of the grandchildren.

The B G Beachen trust was established in 1977. Mr von Dadelszen, on behalf of Bernard, properly accepted that for all practical purposes in these proceedings the interests of Bernard and of the trust are really identical and accordingly Bernard's financial position is to be treated as including the trust. To do otherwise would be to ignore the reality of the situation.

The brief relevant background is that the testator farmed a property near Hastings known as "Hilldrop". It comprised some 258 hectares, and was farmed in conjunction with a smaller property of some 5 hectares at Elsthorpe. The properties were owned as to one-half by the testator and as to one-half by the G H Beachen trust. That trust was distributed in July 1970, its share in the farm properties being transferred to Bernard. At government valuation, after adjustment for debts taken over by Bernard, the value would have been \$28,921.00. In 1979 the testator sold the remaining one-half share to the B G Beachen trust, for effectively \$121,500.00, payment being secured by an interest-free mortgage for the full amount.

The affidavits disclose that the family life had no unusual features. The children lived on the farm, the two girls went to boarding school and then left home and worked before marrying and settling down with their own families. Bernard remained on the farm and eventually

Bernard is aged 44, married with one infant child aged 4 years. He is farming "Hilldrop". Since the death of the testator he has purchased two other properties (through the B G Beachen trust) and sold the Elsthorpe farm. The combined net assets are approximately \$534,000.00. He is in good health. Of relevance also is the fact that he did contribute to the running of the farm property since leaving school in 1959 and rendered assistance of a general nature to his parents. There is, however, no real evidence that he was responsible to any degree for the accumulation of the testator's assets as they now require to be considered. There can be no doubt that he has benefited substantially by being able to acquire the farm property on advantageous terms. Although farming incomes are presently uncertain, there is no reason to suppose that he cannot continue to live reasonably comfortably as would be expected from an established farm in this area.

Catherine is aged 42 years and is married with three teenage children, all being at home. Unfortunately she has recently suffered from fairly serious ill health which means it is unlikely she will be able to resume her occupation as a district health nurse.

Her husband is a postmaster in receipt of \$29,000.00 per annum. Their assets comprise the home purchased for \$102,000.00 which is subject to a mortgage of \$6,000 - \$7,000.00. They have other assets to a value of some \$30,000, two motor vehicles, and appear to have been able to live reasonably comfortably.

Gillian is aged 38 years, married also with three children. She and her husband operate a business which they own jointly and which yields \$37,000.00 per annum. They own their own home, the business cost \$45,000.00, and there is no evidence of any liabilities. They have two motor vehicles and again would appear to have been able to live reasonably comfortably.

The principles to be applied in such a case are now well settled. Reference need be made only to Little v Angus [1981] 1 NZLR 126, 127:

" The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

The obligation to make adequate provision for children extends to adult children, even those who are not strictly in financial need. The moral and ethical considerations of a particular case are also to be taken into account.

Giving full consideration to all the relevant factors as referred to by counsel, and having regard in particular to the reasonable needs (in the broad sense) of the plaintiffs, and the disparity in financial assistance given as between them and Bernard during the testator's lifetime, I have reached the clear view that there was here a breach of moral duty by the testator in the sense necessary to found the Court's jurisdiction to make further provision. His primary duty in my view was not to ensure the total acquisition of the farm property by Bernard without further financial contribution, and then to leave whatever remained to the daughters, but to ensure that each of the three children were adequately provided for from the assets available for disposal, having regard to how each had earlier benefited during his lifetime. In my view an effective distribution of the order of \$120,000.00 to the son and \$42,000.00 to each of the daughters falls short of that duty.

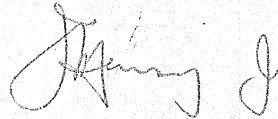
It is then necessary to ascertain what is required to remedy that breach of duty. It is trite law that the Court should not attempt to re-write the will of a testator, nor should it simply make orders so as to achieve what it considers to be a fair result.

Taking all circumstances into account, I consider that in respect of Catherine, a sum of \$25,000.00 in addition to her share of residue would be appropriate. The assessment of this figure is affected by her health problems and by the fact that she received less financial assistance from the testator during his lifetime. In respect of Gillian, I consider a sum of \$20,000.00 is required to remedy the breach. Those sums are to be charged against the forgiveness of debt referred to in clause 6 of the will. Although this will undoubtedly result in Bernard (or the trust) having to arrange finance in order to repay that portion of the debt owing to the estate, I am satisfied this would not create any undue burden, and there is no evidence to suggest that the viability of the farm to which he has succeeded would be seriously affected thereby.

There will accordingly be orders for further provision from the estate of the testator in favour of the Plaintiffs as follows :

- (a) That there be paid to the Plaintiff CATHERINE FLEMING the sum of \$25,000.00.
- (b) That there be paid to the plaintiff GILLIAN MARY FARNAN the sum of \$20,000.00.
- (c) That such sums are to be payable within six months from the date hereof and are not to bear interest meantime.
- (c) That such sums are to be charged against the forgiveness of debt referred to in Clause 6 of the will of the testator, which is reduced accordingly.
- (d) In all other respects the will of the testator is confirmed.

The Defendants require no order as to costs.
In the circumstances, I think it appropriate that all other parties bear their own costs. Leave is reserved to apply for any further directions which may be required.



Solicitors:

Grove & Darlow, AUCKLAND, for plaintiffs
Bannister & von Dadelszen, HASTINGS, for Bernard G Beachen
Russell McVeah & Co., AUCKLAND, for trustees