IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.191/85

2059

IN THE MATTER OF The Family Protection Act 1955

AND

IN THE MATTER OF The Estate of DARIAN ANTHONY BENGE late of Hamilton, Businessman, Deceased

BETWEEN CAROLINE LEE BENGE
of Hamilton (an Infant by her Guardian Ad Litem CHARLES WILLIAM GARLICK)
Applicant

A N D MARIE EDITH BENGE
of Hamilton, Widow
Respondent

Counsel: C.M. Earl for Applicant
P.R. Connell for Respondent
C.M. Grice for M.J. Benge
P.J. Dreadon for Estate

Hearing and Judgment: 8 December 1986

INTERIM ORAL JUDGMENT OF GALLEN J.

The applicant in these proceedings is one of the three children of the deceased and a recital of the facts indicates a tragedy which is by no means uncommon. The applicant brought these proceedings initially by way of guardian ad litem. She has now attained the age of 21 and continues them under her own name.

Of the three children of her father by his first marriage, Deborah who was born in 1960 makes no claim, at least at this stage. Michael who was born in 1962 has applied for further provision and Caroline the applicant in these proceedings, seeks further provision for herself. The background to the matter is as follows.

The deceased and his first wife separated in 1969. It seems that the separation was one accompanied by circumstances of considerable bitterness. It would not now help to go into those matters which are past history, but it is apparent from the papers that there were difficulties over access and no doubt over matters relating to the breaking up of the marriage and the end result of the access difficulties were that the three children were deprived of the support and assistance of their father in the ordinary paternal sense during an important stage of their lives. I do not overlook the fact that the deceased paid maintenance for his three children and that there was a period during which his son Michael resided with him. Generally speaking, it is clear that the difficulties over access and the troubles between the deceased and his former wife created serious problems for these young people during their formative years.

The deceased was the subject of legal proceedings and in 1970 his father died. There seems to have been some consideration given to Family Protection proceedings being commenced in respect of that estate by one or more of the

children of the deceased and a letter was exhibited from the solicitors to the deceased which suggested that Family Protection proceedings might not be desirable and might not redownd to the ultimate benefit of the grandchildren. That letter indicates that it was the intention of the deceased to make substantial provision for his children in his own testamentary dispositions.

I also note that it seems that as a result of the death of the deceased's father, there was a change necessitated in the living accommodation for the applicant and her brother and sister because it seems that the house in which they then resided had to be sold as a result of their grandfather's death.

In 1972 the deceased married the defendant in these proceedings. That marriage lasted for 12 years and appears to have been a happy and successful marriage. During the course of it, the deceased and the defendant built up reasonably substantial assets. It is apparent from the papers that that involved a considerable amount of hard work and no doubt some frugality. I do not overlook Mr Earls' submission that the ultimate size of the estate owed something to inflation. No doubt this is so since it consisted of a property and was at one stage affected by the possession and sale of another property.

Nevertheless, I accept that the estate was in large measure the result of the efforts of the deceased and the defendant. However there is one significant matter in relation to the acquisition of the assets to which reference ought to be made. The father of the deceased had left his estate to his wife. When she died, the deceased was a beneficiary in her estate. From that he received a reasonably substantial sum, between $14-16,000 which was immediately put into the acquisition of a house property which at that stage the deceased did not possess. That therefore formed a not insignificant basis for the accumulation of assets ultimately to be found in the estate of the deceased.

The deceased died in December 1984. The scheme of his Will was to provide that the whole of his estate went to the defendant, his widow. Had she not survived him, then his own children as well as the children of his second wife would have shared equally in the estate and the papers indicate that there was a similar pattern of testamentary dispositions in the Will of the defendant.

The estate has been variously referred to in size by counsel. Mr Earl says that it is to be considered an estate falling into the higher class in In re Allen (Deceased), Allen v. Manchester and Another 1922 N.Z.L.R. 218, because it was worth with notional assets, something like $150,000. The defendant received the family home by survivorship. In addition, there is some $86,473 balance in the estate to which

she is entitled in terms of the Will. I appreciate the strength of Mr Earl's submission, but I think it needs to be said that the classification which was sensible in the times that In re Allen was decided, may need reconsideration in the light of today's conditions. The actual estate is represented substantially by the assets which would not in my view constitute a large estate today.

I think that in considering the matter it is necessary to take into account the moral claims of the various parties on the deceased. The first obligation which he had was to his widow. That obligation arose because of the way in which at least a portion of the estate had been accumulated because the widow had herself given up opportunities for superannuation payments and because he would have known that she was not in good health.

At the same time, I think that there has been a clear breach of moral duty to the children of his first marriage. I think that is so for three reasons. Firstly, through no fault of their own, they were deprived of the advantage of a father at a time when it may have been significant in their growing up. I do not overlook the fact that attempts were made for him to get access to the children and that these seem to have been unproductive. Nor do I overlook the fact that there were some efforts made to bring the parties together but in the case of the applicant in these proceedings, those were unsuccessful. I should say in this regard the incident to which reference has

been made which occurred at the time of her sister's engagement party does not seem to me to be a matter which has any substantial bearing either on the obligations of the deceased or the right of the applicant to claim. The fact that she was confronted with a father substantially unknown to her would have created difficulties for both of them and I do not think either is to be criticised for the outcome of that unhappy event. Because of the separation which occurred, the children were not only deprived of the advantage of having their father available to them in the ordinary sense, but I have no doubt they also sustained a certain amount of financial deprivation. This would be inevitable because although maintenance was paid, I cannot imagine that the maintenance which was paid met the actual needs of the applicant. Indeed, the needs of the parties were such that it is extremely unlikely that this would have been possible.

Secondly, I think it is significant that the estate of the deceased contains to a substantial degree money which he received from his own mother's estate and in which I think represents something that the applicant and her sister and brother might normally have expected to receive at least a share in. I am reinforced in that view by the letter to which reference has already been made and in which it is suggested that pursuing a Family Protection claim against the estate of the grandfather might have been counter-productive. It is at least possible that because that submission was made, no action was taken at that time which might have benefited the applicant

and her brother and sister. I think too that it is impossible to ignore the fact that their residential accommodation seems to have been affected by events at that time. There is ample authority for the proposition that where money is derived from family sources, there are obligations to ensure that family responsibilities and obligations are met in relation to it.

The third factor that I take into account is that at least in the case of the applicant and her brother, the evidence before the Court would indicate that neither are in any very satisfactory financial position. The applicant is now unemployed and dependent for her existence on a benefit. Her brother Michael has been unemployed but now has a job which is providing a reasonable income. He has certain debts to which reference are made in the affidavits which he filed. In neither case are they in good financial circumstances. That I think is a factor which might have been taken into account by the deceased had he seen his way clear to do so. I think that it is not without significance that some responsibilities seem to have been accepted by the defendant towards payment of expenses in relation to the wedding of the applicant's sister. That is the kind of assistance children might have expected to have from a father had he been in a financial position to assist them. In one respect his estate is rather better off than it might have from a superannuation payment which might reasonably be regarded as a fund derived from an insurance policy.

With regard to the money received from the estate of the deceased's mother, I accept what counsel has said that any promises which may have been made at the time became ultimately subject to the obligations which the deceased had assumed in relation to his widow. Nevertheless, I do not think that this is a matter with no significance. It was family money and should have been considered as such.

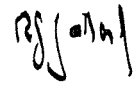
Having regard to the circumstances of this case, the deceased was faced with obligations to his widow and to his children. I think that there is on the papers before me and on the submissions which have been made, grounds for coming to the conclusion that there has been a breach of moral obligation and I propose to make further provision in respect of both the applicant and her brother.

It seems to me that having regard to the circumstances and bearing in mind the position of the widow, that the appropriate provision that I should make is to direct that each of them should be also entitled to a one-sixth interest in the estate of the deceased; that interest to be subject to a life interest in favour of the defendant except that in each case the sum of $4,000 is to be paid to the applicant and to her brother Michael as soon as the Trustees are in a position to make that payment.

I am concerned in this case over the position of their sister Deborah who is not a claimant. It seems to me that the basis upon which both the applicant and her brother are entitled to further provision, is such that she too would have a similar claim, but she is not a claimant before me and I do not have any information as to her means and personal position.

Having regard to that, I propose having indicated in an interim order what it is my intention to do as far as the applicant and her brother are concerned, to adjourn these proceedings for one week to enable consideration to be given if necessary to the sister Deborah to make an application if she wishes to do so.

As far as costs are concerned, counsel may submit a memorandum and leave is reserved to any party to apply in respect of any aspect of this matter.



Solicitors for Applicant: Messrs McCaw, Lewis, Chapman, Hamilton

Solicitors for Respondent: Messrs O'Neill, Allen and Company, Hamilton

Solicitors for M.J. Benge: Messrs Harkness, Henry and Company, Hamilton

Solicitors for Estate: Messrs Bennett and Power, Hamilton