File.

RJS

SET 2.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.223/81

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of HANNAH EDWARDS of Ngaruawahia, Widow, Deceased

BETWEEN ALISON DAWN BEAZLEY of Lower Hutt, Married Woman

Plaintiff

AND MARLENE ELIZABETH PUNCHEON of Ngaruawahia, Married Woman, the Executrix and Trustee of the Will of HANNAH EDWARDS of Ngaruawahia, Widow, Deceased.

Defendant

Hearing: 28 May 1986

Counsel: Mr Perkins for Plaintiff, Dorothy Prudence Fountain, Millie Adair Webster, Verna Gash Hastie
Mr Harding for the defendant as Trustee
Mr Menzies for the defendant as Beneficiary
Mr La Hatte for Raphael Francis Edwards

Judgment: 28 May 1986

ORAL JUDGMENT OF ELLIS, J.

In this case the children of the deceased Hannah Edwards apply for relief under the Family Protection Act 1955. The history of the estate can be traced back to the death of the applicant's father in 1949 when he must have still been a young man and was farming at Pahoia. He left a widow and a young family of seven children and the widow was the administratrix of his intestate estate. The widow

and the family continued to farm the land, but the farm did not prosper and some of the children felt that their mother, the widow, was not the best person to continue to run the farm. All the children, bearing in mind their respective ages assisted with the running of the farm and it appears that none was paid although the two boys John and Frank may have received some remuneration in later years as they did most of the work on the farm.

Unhappily the family was unable to agree on rearrangement of the management of the farm and in 1968 some of the children sought the assistance of this Court, as a result of which the Jensen Brothers, experienced farmers, were put in charge of the estate and the management of the farm. In the end the father's estate was distributed in 1975 on the basis of intestacy, the widow received one-third and each of the children received one-seventh of the remaining two-thirds. This involved a distribution of approximately $8,000 to each child and a distribution to the widow of approximately $28,000. At the date of distribution the children received varying amounts because some had drawn more than others against the estate, in particular Frank's entitlement was taken up entirely with repaying drawings, that is all but $155.00.

The widow continued to live in Ngaruawahia and for the last 12 years of her life she lived with Marlene. She died on 1 June 1981 aged 79. In the last year of her life in particular she had been entirely dependent on Marlene's care. Up to the time of her death her contact

with her other children had been affected by the disputes of 1968 and it is plain that she harboured resentment against those of her children who had taken what was admitted before me as, necessary action. I do not consider on the evidence before me that any of the children should be criticised for the degree of contact each maintained with his or her mother under all the circumstances. As all counsel acknowledged the position of Marlene is exceptional.

These proceedings were issued in 1981 and the son John is not a claimant as he was able to purchase half of the farm from his father's estate and in the context of the present dispute is reasonably comfortably well off. Frank on the other hand was unable to take advantage of the offer of purchase of the other half of the farm and he is now living in Western Australia. He is a taxi proprietor purchasing his own business. He is separated from his wife and has maintenance obligations. He can be considered to be in modest circumstances. He is aged now 45 years and is apparently fit and able to work. The four daughters represented by Mr Perkins are all in very modest circumstances with the exception of Verna who lives in the South Island and she and her husband have a small rural property and her husband is in steady employment as a welder. It was not contested before me that each of these four daughters should be treated equally for the purposes of the present litigation. It was suggested too that their position was not materially different from that of Frank whose position I have already mentioned.

Marlene is perhaps a little better off than her sisters, but not really any differently placed than her sister Verna. Her special position is a reflection of her care for her mother for a period of 12 years.

The scheme of the Will reflected against the schemes of two prior Wills that were exhibited to me is that Marlene's special services to her mother were to be recognised and that Frank was treated as a favourite child. I have already noted that he was the youngest. It appears that his mother considered that he had not received his share in the 1975 distribution and that she considered it her obligation to make provision for him by way of equality. She, therefore, made a specific bequest to him of $6,000 and he and Marlene shared in the residue. The size of the estate is modest indeed, represented by cash investments now in the order of $24,000. The scheme of the Will, therefore, would provide Marlene with approximately $8,000 and Frank with $14,000. Presumably the balance would be absorbed by expenses. Those expenses of course will be increased by the costs of this litigation.

I am satisfied that the deceased had a moral duty to make some provision for each of her five daughters and for her son Frank, but bearing in mind the modest nature of her resources she was not entitled to prefer Frank as a favourite son to any substantial extent. I also consider that she misconceived her obligation to Frank in respect of the 1975 distribution and that he in fact did receive the same benefits as each of his sisters

and brother.

This estate is a small one and there is not enough money to provide properly for the maintenance of all of the children. I must, therefore, review the testamentary disposition with what has been called "distributive justice". In my view the primary obligation on the deceased was to provide some recompense and reward for Marlene. I consider she was entitled to make some modest preference for Frank if she so chose, but otherwise her obligations rested equally in respect of the other children, John of course excepted. I am advised by counsel that the total of solicitor and client fees in this case may well be $5,000 to $6,000. It is important to bear this in mind when redistributing such a small estate. I, therefore, make orders as follows which in effect will replace the provisions of the Will in its entirety.

1. Marlene is to receive a specific legacy of $10,000.
2. Frank is to receive a specific legacy of $3,000.
3. The total costs of this litigation on a solicitor and client basis are to be paid out of the balance of the estate, if the parties are unable to agree as to those costs they can be submitted to the Registrar for taxation.
4. The residue of the estate is to be divided equally among Dorothy, Alison, Millie and Verna.

Solicitors: Lee & Boyer, Lower Hutt for Plaintiff
Maltby Hare & Willoughby, Tauranga for D.P. Fountain, M.A. Webster, V.G. Hastie
Norris Ward & Co., Hamilton for the defendant as Trustee
Harkness Henry & Co., Hamilton for the defendant as beneficiary
Raine Collins Armour & Boock, Wellington for