LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

M 30/84

1894

IN THE MATTER of the Family Protection Act 1955

IN THE MATTER ESTATE OF EVA ANNIE GAIN

BETWEEN TREVOR JAMES GAIN

Plaintiff

A N D MALCOLM ARTHUR HODDER and others

First Defendant

INA CATHERINE MURPHY

Second Defendant

ELIZABETH ANNE WEDDERBURN

Third Defendant

EDWARD WEDDERBURN and others

Fourth Defendants

CAROLYN GAIN and others

Fifth Defendants

Hearing: 28 November 1986

Counsel: C J Hodson and Jane Grice for plaintiff and fifth defendant
Mary Peters for first defendant
J P Clapham for second, third and fourth defendants

Judgment: 9th December 1986

JUDGMENT OF EICHELBAUM J

This is a claim under the Family Protection Act 1955 in the estate of Eva Annie Gain who died in 1983 at the age of 90. Her first husband, Herbert Murphy, who died in 1927 was the

original owner of the farm property now the principal asset in the estate. By that marriage there were two children, Ina Murphy the second defendant, and Elizabeth Wedderburn the third defendant. The testatrix's second husband, George James Gain, predeceased the testatrix by about two years. He had not however lived with her during the last 10 years of his life. By that second marriage there was one child, the present plaintiff.

The estate was valued for death duty purposes at $252,150. For purposes of that figure, the value of the farm itself was based on a 1981 Government valuation. The most recent balance sheet shows the net value of the estate at $221,698. The accounts show the land value based on the same Government valuation as previously; the difference with the earlier figure lies largely in the value assigned to the livestock. Since neither side thought it necessary to obtain any current valuation, I must take the figures at their face. In any event, having regard to the vicissitudes of farming in recent times it would be unsafe to assume that the 1981 valuation was necessarily out of date. One aspect however on which I can comment in endeavouring to obtain a realistic picture of the available assets, is that the cattle account for the year just ended shows the average sale price at $455 per beast, whereas in the balance sheet the item livestock on hand, comprising 165 cattle, is shown at a total value of $6,600.

The current accounts show that in the last financial year the net profit of the farming operation was $6,542. The estate has not at any stage had any significant liquid assets; the current balance sheet shows investments totalling $4,003.

Under the testatrix's will, made shortly before her death, she left a legacy of $5,000 to each of her children which so far it has not been possible to pay. As to the residue, there was a life interest to Ina with remainder to the surviving children in equal shares and provision for substitution of the children of any child who predeceased the survivor of Ina and the testatrix. Clause 6 of the will recorded the testatrix's

desire that if at all practicable the farm property should not be sold during Ina's lifetime and that she should be entitled as long as she wished to make her home in the house on the farm property and have the full use of the furniture and effects. The testatrix added that the life interest bequeathed to Ina was in recognition of the services she had provided to the testatrix and her disabled grandson Edward Wedderburn.

The plaintiff is now aged 56. He first worked on the farm at the age of 14. On leaving school a little later, he commenced to work on the farm full time, being paid five pounds per month. He continued to work there, taking a certain amount of outside employment as well. At that time the farm was run as a dairy unit with a run off and the plaintiff did the milking. At the age of 23 the plaintiff married and a few years later bought his first house in Featherston. His wife has worked for the greater part of their married life and with the assistance of her earnings the plaintiff was able to purchase a car and in 1968 build a new home in Featherston. They are still living in the same home, which the plaintiff said was now valued at around $60,000. It is subject to a mortgage of about $900.

The plaintiff deposed that in 1973 Mrs Wedderburn's son Allan, who had been attending to the milking, left. At this stage the testatrix decided to sell the run off and thereafter the farming business was confined to that of a beef fattening unit. The plaintiff stated that he wished to purchase the herd and carry on dairy farming or alternatively buy the farm, but was unable to reach terms with the deceased. He said that from 1973 onwards he ran the farm as well as working as a stock and station agent. For his services on the farm he was paid $20 a week gross. It should be added however that during the same period the farm engaged a livestock buyer who attended to the purchase and sale of stock. The buyer in question has deposed that this is a viable operation, sufficient to maintain the farm and provide a modest income for the life tenant. The herd remained constant at around 100 to 120 head until the

testatrix's death, since when it has been built up to its present figure of about 165. Mr Gain expressed the opinion that with more attention the capacity could be increased yet further, although the effect of Mr Jaine's evidence was that the present regime of about one beast per acre was a reasonable number for the farm to carry.

Reverting now to the plaintiff's position, he has three adult children, none of whom is now dependent on him. He is employed as a stock and station agent at an annual salary of $20,700. I have already referred to his home, which he owns jointly with his wife. He deposed that he had some savings, amounting to less than $10,000, and a small amount of insurance. Because of mergers and changes in the field in which he is employed, there is a degree of uncertainty about his future. He has deposed that in any event he will have to retire by age 60, that is in less than 4 years time. He stated that there was no certainty about receiving any superannuation or substantial redundancy payment.

The plaintiff deposed that since 1973 he has never averaged less than 10 hours a week in respect of work on the farm, tending the cattle, cutting lawns and hedges and as well carrying out shopping for the testatrix until her death. Both the testatrix and Miss Murphy relied on the plaintiff for transport. The plaintiff maintains that his services have resulted in the farm remaining a viable unit over the years, providing the deceased and Miss Murphy with a sufficient income, and a home.

Miss Murphy is a spinster aged 59. Her financial position is simply that she has savings of $4,000 plus her life interest under her mother's will. She has lived with and cared for her mother all her life. In her affidavit she has brought out the fact that although the plaintiff's father worked on the farm for some years, he did not contribute any capital to the farm. I mention that aspect so that it is not thought to have been overlooked; but having regard to the length of the marriage

between the plaintiff's father and the deceased, I do not think that it has any present relevance to the merit or otherwise of the plaintiff's case. Miss Murphy has deposed that she assisted on the farm from the age of 12 or 13 onwards; the family circumstances did not allow her to attend secondary school. For over 40 years she helped her mother with all domestic and farming duties. Apart from two periods in hospital she has had only a few days break away from the farm in over 40 years. Bearing in mind that her mother was 90 when she died I have no doubt that Miss Murphy has been a more than dutiful daughter, who has devoted her latter years, in particular, to the care of her mother. In addition, since 1966 she has cared for her paraplegic nephew, Edward Wedderburn, who, except for the lengthy periods from 1981 to 1985 when he was in hospital, has lived on the farm with his aunt and grandmother since 1966. Clearly, Miss Murphy's devotion to members of her family at the sacrifice of any fuller life of her own deserved the greatest recognition possible and it is fair to say that the plaintiff and his advisers have been at pains not to detract from her merits or position in any way.

It has to be added that unfortunately there is a degree of dispute regarding the extent of the plaintiff's contribution to the farm work. In particular Miss Murphy has denied that the plaintiff was the sole operator of the farm at any time, pointing out that she herself helped to milk the cows from an early age, that an outside buyer was responsible for overseeing the stock fattening operation, and that she assisted with many aspects of the farm work, for which incidentally she agrees that in recent years at any rate, she has been paid wages.

I had the opportunity of seeing the plaintiff in the witness box. I do not believe that any party has endeavoured to mislead the Court or even consciously to exaggerate the extent of his or her own contributions. As is so often the case in these situations, each party has presented the position as seen through their own eyes. While as already noted I am entirely satisfied that Miss Murphy has devoted her adult life

to the care and assistance of her mother and nephew, I am equally satisfied that the plaintiff has been more than a dutiful son, and that while others have made their contributions, without his own constant efforts it would not have been possible to preserve the farm as a home and source of income for his mother and step-sister. I also accept that within the limited means at her disposal, the testatrix during her lifetime did her best to compensate her children for their assistance in an even-handed fashion.

Mrs Wedderburn is a widow, now aged 61. She has seven adult children, all of whom except Edward are independent. She states that she owns her own house in Featherston, and is a superannuitant with a small personal income as well. In her affidavit she vigorously defends her sister's position and attacks the plaintiff's claims. She states that Miss Murphy cared for and devoted her life to her mother and to Edward. She said that her mother's intention was to care for Ina during her lifetime and that she, Mrs Wedderburn, fully supported that intention. She did not make any claim for herself.

Before turning to deal with the plaintiff's claim, I need to refer to a preliminary aspect. The plaintiff maintains that at a meeting on 9 October 1985 between himself, Miss Murphy, Mrs Wedderburn and solicitors on each side, an agreement for compromise of the proceedings was reached. The effect of this was that a designated area of about 20 acres was to be subdivided from the farm property and transferred to the plaintiff. Thereafter there was a meeting between the legal advisers and the trustees and a deed of family arrangement giving effect to the proposal was prepared by the plaintiff's solicitors and circulated. It was signed by the plaintiff and his children but in the end, because of the opposition of the second and third defendants, the proposal did not proceed.

The question of the ability even of adults to compromise family protection proceedings without intervention of the Court poses well known difficulties. Here, there are additional

problems arising out of the admitted desire of the parties to reduce the proposal into detailed written form and the fact that the scheme involved the transfer of an interest in land. No doubt in recognition of these difficulties Mr Hodson did not feel able to contend that there had been a binding enforceable compromise. Had he wished to do so a different procedure would have been required, see Kontvanis v O'Brien [1958] NZLR 502.

Even on the limited information before me, it is clear that there was no binding agreement, if only for the reason that it was inherent in the proposal that the eventual distribution of the estate would be in specie pursuant to a partitioning of the farm in a particular way, an arrangement that required the concurrence both of the plaintiff's children and of the trustees who in neither case were present or represented at the 9 October 1985 meeting. Nevertheless, Mr Hodson contended that evidence of the negotiations was admissible as showing that at one point at any rate the second and third defendants were prepared to assent to the proposal which the plaintiff now advanced as the basis of an award in his favour. Mr Hodson sought to make use of this evidence as an admission on the part of the second and third defendants. Mr Clapham objected on the ground that the negotiations were without prejudice.

It was common ground that the meeting of 9 October 1985 was held on a without prejudice basis. The subsequent correspondence was not marked without prejudice. However, those letters were written in furtherance of the proposal raised at that meeting with a view to carrying it to a conclusion. The situation, in my opinion, is covered by the principle that where an initial letter is marked without prejudice, that is sufficient to bring all subsequent parts of the same correspondence on both sides within the umbrella of privilege, even if subsequent letters are not expressed to be without prejudice, unless there is a clear break in the chain of correspondence to show that the ensuing letters are open: 17 Halsbury 4th ed para 212. Of course, if a binding agreement is reached, the contents of without prejudice communications

become admissible, Halsbury para 213; but for the reasons already given that situation did not arise here. On these grounds therefore, I hold that the evidence of the meetings in question and of the subsequent correspondence, including the proposed deed, is not admissible as an admission against the second and third defendants.

Coming to the plaintiff's claim, the principles applicable were not in contention and I need do little more than refer to their restatement in Little v Angus [1981] 1 NZLR 126. The enquiry is as to whether there has been a breach of moral duty, judged by the standards of a wise and just testatrix, and if so, what is appropriate to remedy that breach. If a breach of moral duty is established, the Court should do only what is sufficient to repair it. However, the concept of the wise and just testatrix allows a degree of flexibility; Re Z [1979] 2 NZLR 495, 506. And today the question of a claimant's "needs" can be interpreted broadly, see Re Swanson [1978] 2 NZLR 469, 470. The obligation to make adequate provision for "proper" maintenance is not to be judged solely on a narrow basis of economic needs; moral and ethical considerations require to be taken into account as well, Re Young [1965] NZLR 294, 299.

There can be no doubt that the deceased was under a moral duty to make proper provision for the plaintiff. He had been a dutiful son throughout, and for the reasons already stated in greater detail, his efforts had played a significant part in preserving the family farm as a home and a source of income for the benefit of his mother and his step-sister. He had never had a well established career of his own; his present occupation dated back only to 1973 and the testatrix was or should reasonably have been aware that as he approached retirement age, his prospects were not secure and his means of livelihood after retirement, uncertain. Although possessed of some savings as a short term protection against ill health or unemployment, he was certainly not in a position to support himself in any comfortable style in his retirement unless he

obtained other employment in order to supplement his national superannuation.

The principal provision made for the plaintiff in the will was as remainderman following his step-sister's life interest. Clearly the problem about that provision is that having regard to the fact that the life tenant is only three years older, the plaintiff may not see the fruits of that bequest in time to provide for him in his years of retirement, if at all. It may have been in recognition of this difficulty that the testatrix made provision for a legacy of $5,000 as well; but she was unable to provide the resources for it to be met.

The plaintiff has not challenged the paramount nature of Miss Murphy's claim; indeed all parties desire to respect their mother's wishes to retain the farm as a home and source of income for Miss Murphy. However, even after making all proper allowance for the weight of that claim, the means available to the testatrix were in my opinion sufficient to enable her position to be preserved while at the same time giving more adequate recognition to the plaintiff's needs. After all, the farm which until the testatrix's death had sufficed to support three people, should now be more than sufficient to support the needs of two. The only other provision of substance ever made for the plaintiff, it should be stated, was an insurance policy, said to be worth $4,375, which was matched by equal provision for the other two children.

While the motivation behind the simple scheme of the plaintiff's will is understandable, I am satisfied that in the circumstances there was a breach of her moral duty towards the plaintiff in not making more adequate provision for him by way of a cushion for his retirement years. Had the will made no provision for the plaintiff, the result would have been self evident; yet as the will stands there is no certainty that the plaintiff will see any benefit from it in his lifetime.

Coming to the question of remedy, I am now faced with the position that the only proposal directly advanced by the plaintiff was that contained in the abortive settlement. That involved subdividing the area of 20 acres for transfer to the plaintiff on the basis that when the time came for the farm to be sold, it would be subdivided into two halves; one including the 20 acre block would be allotted tc the plaintiff, the other which contained the homestead and other farm buildings, would go to the third defendant in satisfaction of her share. The inclusion of the farm buildings without compensation in the block to be allocated to the third defendant presumably would be to counter-balance the earlier vesting of part of the plaintiff's share in him. The will does not made provision for any such eventual subdivision. The duty imposed upon the trustees does not go further than sale and conversion at the appropriate time, followed by a division of the proceeds.

For the assistance of the parties, I think I should now indicate that on the information before the Court, and subject to any matters of detail which still required to be worked out, such as who was to bear fencing costs, the proposal advanced on behalf of the plaintiff seems entirely appropriate and sensible. I think it is a pity that it was not carried into effect. However, consonant with the admonition that the Court should not do more than is necessary to repair the breach, I do not think it is appropriate to grant that remedy by way of an order that in effect would partition the farm and require detailed consequential orders as to how that was to be carried out, followed by further provisions restricting the trustees' powers upon eventual distribution. While the law has gone far beyond the strict concept of "need" laid down in early cases under the Family Protection Act, in my opinion - at any rate on these facts - it does not yet extend to giving recognition to a son's wish, understandable though it is, to own a piece of the former family farm. In my opinion that would go beyond any question of repairing a moral breach; it would literally involve rewriting the will. The parties, all of whom are adult, have been and are still free to do that if they wish.

I propose simply to make a monetary order in the plaintiff's favour appropriate to repair what I regard as the breach of moral duty. In lieu of the legacy of $5,000, I make an order for further provision in the plaintiff's favour in the sum of $25,000. I will direct however that the formal order shall lie in Court until 9 June 1987 when the life tenant attains the age of 60 years. I further order that to the extent of $20,000, the amount of this award shall be taken into account and regarded as an advance against the entitlement of the plaintiff (or in the event that he predeceases the life tenant, his children) in remainder. The direction that the order lie in Court for that period will give opportunity for the parties, if they are so minded, to reach their own agreement, whether on the basis previously contemplated or otherwise. In the absence of any such agreement, the trustees will have to decide how the terms of my award can be met. The parties were unanimous in their desire to avoid the necessity for a sale of the property as a whole; with good sense on all sides I am sure this can be achieved. Failing agreement, a portion of the farm may have to be sold. Despite the reservations expressed by Mr Jaine I am satisfied that the balance is capable of providing a sufficient income for Miss Murphy; but the stay will protect her position until her income is supplemented by national superannuation. Mrs Wedderburn's position is not affected.

Leave is reserved to all parties to apply generally. Having regard to the practical problems, there will be no order for costs.

Solicitors for plaintiff and fifth defendants: Macalister Mazengarb Parkin and Rose, Wellington

Solicitors for first defendants: Gawith Cunningham & Co, Masterton

Solicitors for second, third and fourth defendants: Clapham Gaskin & Allan, Masterton