IN THE HIGH COURT OF NEW ZEALAND
Rotorua Registry

M No 269/85

IN THE MATTER of The Family Protection Act 1955

A N D

IN THE MATTER of a proposed action against the estate of ALBERT JOHN HEMMINGS Late of Rotorua, Forestry Worker, deceased

BETWEEN K of Rotorua, School Pupil

Plaintiff

A N D ROBYN FRANCES HEMMINGS as the proposed administrator of the estate of ALBERT JOHN HEMMINGS late of Rotorua, Forestry Worker, deceased

Defendant

Hearing : 28 July 1988

Counsel : P T Birks for plaintiff
P A Morten for Mrs Mildenhall and Mr Mark Hemmings
R. Ronayne for the widow Mrs R.F. Hemmings
W P Cathcart for the estate

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ORAL JUDGMENT OF ONGLEY J

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There are two applications before the Court. The first proceeding which I deal with relates to the estate of Albert John Hemmings of Rotorua, Forestry worker, who died intestate on 15 August 1985. Letters of Administration in his estate were granted to the defendant Robyn Frances Hemmings his widow on 26 May 1986.

The deceased was married twice, the first on 31 December 1959. He was separated from his first wife in January 1977 and divorced from her on 24 March 1981. There were two children of that marrige, a daughter I aged 25 years at the date of the death, and a son, M aged 24 at the date of death.

The deceased was married to the defendant on 24 September 1981 having lived in a de facto relationship with her for a period before that. There were no children of the marriage. For a period of about two years prior to February 1979 the deceased lived with Susan That is the present name of that person and she is the nominal plaintiff in the Family Protection Proceedings being the mother of the deceased's child born on 1979.

The deceased having died intestate no testamentary provision was made by him for his children. There is some dispute about the size of his estate. Whatever view is taken on that issue the whole of his estate would be taken by his widow under the provisions of the Administration Act. All three children therefore seek orders that provision be made for them under the Family Protection Act 1955.

The assets in the estate at the date of death were as follows :

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| Countrywide share account | 5,346. 36 |
| Motor vehicle valued by the defendant at | 19,000. 00 |
| Provident Life Insurance policy yielding | 6,695. 60 |
| Bank of New Zealand account in credit to the sum of | 3,427. 35 |
| NZ Insurance Investment account | 7,249. 94 |
| | $41,719. 25 |

The deceased had owned assets jointly with his wife which passed to her on his death by survivorship. They included in the main,joint account with Countrywide showing a credit of $6,638, a house property, Government valuation somewhat later than the date of death, $72,000, a section of land at Makatu, Government valuation $14,000 furniture and chattels $4,740, a total of over $97,000. There is a mortgage on the house property of an amount at this time of about $23,000 making the net value of the assets going to the defendant of $74,000 or thereabouts. Of the estate assets the car was transferred to the defendant before these proceedings were issued. She subsequently traded it on the purchase of another vehicle for a sum of $18,000. No application has been made to follow that asset in the hands of the administrator and on the face of it it must be treated as having been distributed and not subject to the jurisdiction of this Court in these proceedings.

The defendant has kept the Countrywide account open as a matter of convenience I take it as it was required to be operated in conjunction with the repayments under the mortgage on the house property.

The funds of the estate now consist of the moneys in that Countrywide account some of which in fact have been contributed by the defendant from her own funds since the date of death but I treat the whole of that account as being an estate asset as no attempt has been made to discriminate between any of the lodgments in it. The other funds held in the estate solicitor's trust account and amount to $24,371.04. I treat that latter amount as being available to satisfy any Order of the Court in these proceedings so that the funds of the estate for the purposes of the applications before me total a sum of just under $30,000.

On the evidence before the Court I accept that the defendant genuinely owned an equal share of the assets in the joint names of herself and the deceased and that there was no element of gift involved in the acquisition of those assets.

I turn to the claims of the three children. The first is the plaintiff who is now aged nine years. She lives with her mother and stepfather at Rotorua. The deceased during his lifetime paid maintenance for her at the rate of $15 per week under a Court Order but otherwise had no contact with her during his lifetime other than seeing her on one occasion shortly after her birth. The guardian ad litem, the child's

mother married her present husband in January 1985. He is a plumber receiving $700 per fortnight as take home pay. The couple are aged 42 years and 39 years respectively. They have two children of their marriage aged five years and three years respectively. They own a house subject to a mortgage. It can be said, I think, that they are in reasonably comfortable but not affluent circumstances. The mother does not appear to have any separate assets or any separate income at the present time although she has been in employment in the past. The child uses the stepfather's surname but for reasons explained in the affidavit there has been no application by the couple to adopt her.

The deceased's daughter D deposes in the affidavit that the relationship between her parents was such that it made for less than a completely happy childhood. They were separated I think on five different occasions before the final separation and the family life thereby suffered considerable disruption. On the separation finally the daughter went to live with her grandmother. When aged 15 she had become pregnant and the birth of the child was aborted. That angered her father and a relationship which does not ever seem to have been close was further affected by that incident. After the separation the deceased appears to have shown little interest in his daughter's well-being and he did not contribute anything towards her advancement in life except for a sum of $250 which was paid to her to assist in the enjoyment of her twentyfirst birthday to which he was invited but at which he did not attend. She was married in September 1982 to her present husband and they live in Queensland. They have their

home valued at $60,000 but subject to a very heavy mortgage of $55,000 so the equity in it is very small. They have a car of small value and a van used in connection with the business in which the equity is not very large. So she is said to be in moderate circumstances.

The son M lived with his father for a period after the separation. The relationship between them does not appear to have been very good. The mother encouraged M to complete his school certificate and he obtained a job in forestry which unfortunately has terminated and he is now unemployed other than for the work which he has in a local body scheme I take it to be. However he has been able to acquire a section at a cost of $6,000 with assistance of a sum of $3,000 advanced by his mother which he still owes and he has built a bach on that section in which he resides.

Much in the affidavits of the members of the first family is recriminatory in tone and I do not propose to traverse the evidence in detail.

There is sufficient in the affidavits to lead me to accept the view that their father, the deceased, provided a minimum of financial and emotional support for the two children during the period of the marriage and virtually nothing afterwards.

The question in the proceedings so far as all three claimants is concerned is whether having regard to the primary

obligation of the deceased to his widow he should have made some provision out of his estate for his ex nuptial child, plaintiff,and the two children of the first marriage.

The widow gave evidence and showed herself to be an intelligent and apparently competent person. I would have no hesitation in accepting that she was of considerable assistance to the deceased and played a significant part in the acquisition of their joint assets. She is in full employment receiving a salary of something over $300 per week and she receives as well a payment of $105 per week from the Accident Compensation Corporation as compensation for the death of her husband. That, of course, is a factor in their affairs that he could not have anticipated but it is a relevant factor in determining what is a proper order to be made in these proceedings. The widow also received some capital sums from Accident Compensation and from some source within the forestry industry but they do not affect the assets available for distribution in the estate. They do not form part of the estate and they are hers to do with as she pleases. The deceased would have been aware that much of his estate would go to his widow by survivorship and that she would then own the whole of those joint assets. That would be a circumstance relevant to the consideration of his obligation to provide for her as well out of his separate estate on death. It did not in my view exclude such an obligation but I believe that the overall circumstances were such that he was able to fulfil the obligation which he clearly had to his widow and to provide as well

for his children in some manner. In failing to do so I find that he was in breach of his moral duty to them.

The Court must now devise an appropriate way in which the failure of the deceased can be remedied. I find that an appropriate award for each of the three claimants would be a sum of $8,000.

The widow has had a distribution of $19,000 out of the estate by receipt of the motor car. She has also had the benefit of some interest from the assets of the estate in the time since death although that benefit has not been accurately computed in the proceedings nevertheless it is a factor that I take into account. Those bequests or equivalent of bequests would absorb the remaining funds in the estate which are held by the solicitors and would still leave in the estate untouched the sum of $5,000 odd, some of which as I have indicated may have been contributed to that account by the defendant herself. However I am not in the position to differentiate between any amounts in that connection and I treat it as being wholly an estate asset.

That is the Order of the Court that provision be made for each of the three claimants in the sum of $8,000.

The other proceeding before the Court is application on behalf of the infant plaintiff under the Status of Children Act, for a declaration as to paternity. There is ample evidence on the Court file to establish that the plaintiff was the child of the deceased and I make the Order sought under s 10 of the Status of Children Act. I have some doubt as to whether the Order is necessary but Mr Birks wants it made as a precaution and I do so accordingly.

The only question that remains to be dealt with is the question of costs.

Do counsel wish to make submissions on that?

What I propose to do is rather unusual. There will be an order that costs in the sum of $1,000 be allowed out of the estate to each of the parties inthe proceedings who are separately represented so that covers two of the claimants in one sum, it being understood of course that it is not intended to fix a fee or to limit in any way the costs which the solicitors respectively may charge their own clients.

Jacobs J.