

NZLR

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

**NOT
RECOMMENDED**

CP 117/87

IN THE MATTER of THE ESTATE OF L.J.
PORTEOUS deceased

BETWEEN A.J. PORTEOUS

Plaintiff

AND THE PERPETUAL TRUSTEES ESTATE
& AGENCY COMPANY OF NEW
ZEALAND LIMITED

Defendant

Hearing &
Judgment:

18 August 1988

Counsel:

R.D. Guy and Mrs R.A. Dewar for Plaintiff
A.F.S. Vane for Defendant
J.H. Olphert for Mere Nai Kacuwani Porteous
F.P. Hogan for Ronald James Porteous

ORAL JUDGMENT OF ANDERSON J.

This matter comes before the Court as a Testamentary Promises proceeding and a claim pursuant to the provisions of the Family Protection Act 1955. The proceedings are brought in respect of the estate of Leonard James Porteous who died intestate in February 1986. Letters of administration were granted to the defendant on 28 August 1986.

At the date of his death the deceased was married to Mere Nai Kacuwani Porteous with whom he had formed an affectionate relationship and whom he had married in May 1985. Mrs Porteous is presently about 39 years old and the children of the deceased are Diane Harding, Gayle Helen

Penberthy, Alan James Porteous, Ronald James Porteous. Mrs Harding is now in her mid 40s and Mr Ronald James Porteous in his mid 30s. Thus, the widow and children are more or less of the same age and, it would seem, in reasonable health.

The deceased inherited some of his estate from his first wife, the mother of the plaintiff and the plaintiff's siblings. No doubt recognising that aspect of the origin of his bounty and also recognising both the status of his children as such and their dutiful conduct to him and his first wife throughout their lifetime, the deceased made a will in 1982 dividing his estate equally amongst his four children. Subsequent to the making of that will, the deceased's relationship with the present Mrs Porteous developed and following the marriage to the present Mrs Porteous, the deceased omitted to make any further will. Hence he died intestate. He left behind him various grandchildren, none of whom can demonstrate any moral duty to them by the deceased so that in terms of the Family Protection Act proceedings issues of moral duty remain within the family which, of course, includes the present Mrs Porteous.

The estate is relatively modest. It comprises a house property to which the deceased had reverted in his retirement, a car of modest value, household effects, and 100 shares in a private company called Domestic Utility Ltd. These shares have a nett asset backing of approximately \$13,000

but their true value is somewhat speculative as they are very much a minor part of the total shareholding.

The claim under the Testatmentary Promises Act was brought by Mr A.J. Porteous on behalf of himself and his siblings. His two sisters have not demurred in relation to that action on their behalf yet they have not taken any particularly active part in the proceedings.

The matter came before me today under some constraints as to time relating in no small part from my directing that the proceeding be set down for hearing. Although conscious of the inconvenience that might be faced by the plaintiff in consequence of that ruling I was equally conscious of the desirability of bringing to conclusion a dispute which was causing some division amongst a previously close and affectionate family. This affection was not limited to the siblings themselves but embraced the present Mrs Porteous whose devotion to the deceased is recognised in the papers.

After certain submissions had been taken, counsel retired to discuss the situation with their respective clients with a view to resolving this matter amicably as is always desirable in cases involving families. They have now placed before me for consideration and, if appropriate, Court approval a proposal in the form of a draft judgment which draft appears

on the file verified by my signature. This proposal envisages a dismissal of the Testamentary Promises proceeding and certain orders in terms which I shall elucidate shortly arising from the Family Protection Act proceeding. The proposal contemplates orders affecting the position of the two sisters who, as I have indicated, have appeared to abide some claim on their behalf in the Testamentary Promises proceeding but have taken no particularly active part in the proceeding. Nevertheless their position can be ascertained from the document before me. The effect of the proposed orders is likely to increase their share slightly compared with their entitlement under the provisions of the Administration Act. It is unlikely to reduce their entitlement but if so then that reduction is in consequence of orders affecting the active parties which are warranted on the papers. I am, moreover, conscious of the desirability that this matter be disposed of on a basis which leaves all parties with a sense that justice has reasonably been done. The closeness of the family in the past explains and justifies the provision to be made for the sisters in the event that such provision should be slightly more than would otherwise have been the case. In approving the draft, I take into account that the widow's claim is paramount as authorities have always recognised, that the marriage was of relatively short duration and the widow is young, in reasonable health and must be regarded as having both the capacity for and prospects of independence in the future. Moreover, I think it in no-one's interests, least of all Mrs

Porteous', that she should, against her desire, take a benefit under the intestacy which she has plainly seen to be divisive in family terms. All of which, of course accounts for her, along with other parties, having had the benefit of learned counsel and time to consider the matter in detail, asking the Court to approve a compromise which is generally accepted.

In relation to the plaintiff I take into account the fact that although he and his wife are employed and do not have the responsibilities of children they are nevertheless in no more than secure circumstances as long as their employment subsists.

The plaintiff, along with his siblings, stands as a consistently dutiful child of the deceased, which qualities the deceased himself recognised in his previous will. Mr R. Porteous is in a similar position in terms of status and conduct but his financial circumstances are by no means good in consequence of covert fraudulent offending by his wife which left Mr R. Porteous with the responsibility of three children and the handicap of very limited means.

The daughters are in reasonable circumstances but also as the papers indicate deserve to be recognised in terms of status and dutiful conduct.

I have mentioned that the estate is relatively small

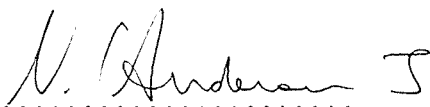
and, as is so often the case, inadequate to relieve difficulty suffered by any of the plaintiffs. The best that can be done is to mitigate the economic exigencies which will affect those who will gain most under this proposal. I therefore make orders in terms of the draft filed herein which may be summarised briefly as providing for the 100 shares to be divided equally amongst the widow and the four children, for the vesting of the modest motor vehicle and personal effects of the deceased in the present Mrs Porteous and for the sale of the dwelling occupied formerly by the deceased and Mrs Porteous and now by the widow, with the nett proceeds thereof after all usual and necessary costs including legal costs, divided on the basis of ten 25ths to Mrs Mere Porteous, five 25ths to Ronald James Porteous, four 25ths to Alan James Porteous, and three 25ths each to Diane Harding and Gayle Helen Pemberthy.

I allow costs to the plaintiff in respect of the proceedings in the sum of \$4,950 inclusive of GST together with disbursements and costs to each of Mr R.J. Porteous and Mrs Meri Porteous in the sum of \$3,850 inclusive of GST together with disbursements in each case.

I grant leave to any of the parties to apply for such further or better directions as to the implementation of the orders I have made. The claim pursuant to the Testamentary Promises Act is dismissed with no orders as to costs thereon. All of the orders made herein relate to the Family Protection

Act proceedings.

It remains only for me to congratulate the parties and their counsel for resolving this disruption in a just and sensible way.


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Solicitors for the Plaintiff:

Perry Castle
Wellington

Solicitors for the Defendant:

LePine & Co
Taupo

Solicitors for the Widow

Dennett Olphert Sandford
Dowthwaite
Rotorua

Solicitors for R.J. Porteous

Price Voulk Hogan &
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Manukau City