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IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.104/87

NOT RECOMMENDED

1938

UNDER	The Family Protection Act 1955
IN THE MATTER	of the Estate of DAVID GEORGE HIBBERT late of Whakapirau in New Zealand Retired Manager, deceased
BETWEEN	
	HIBBERT by his Guardian ad litem FREDA ALICE BERTHA GOUGH of Whangarei
	Plaintiff
AND	THE PUBLIC TRUSTEE a Corporation sole
	Defendant

Hearing: 8 March and 20 October 1989

Counsel: Mr J. W. Watson for Plaintiff
Mrs D. N. Ayling for Defendant

Judgment: 10 November 1989

JUDGMENT OF WYLIE, J.

The plaintiff claims under the Family Protection Act 1955 further provision from the estate of his deceased father.

The deceased died intestate on 12 July 1986. The plaintiff is his youngest child born 1974 and the only child of a second marriage. There were four children of the deceased's first marriage which ended in divorce. Their ages

range from (now) 36 to 26, they are all resident in the United Kingdom and are unknown to the plaintiff. The plaintiff's mother predeceased the father by one year. She too died intestate. Her only estate was a half share in a property which passed by survivorship to the deceased. Nothing is disclosed as to the extent to which she contributed to the property.

Administration of the deceased's estate was granted to the defendant The Public Trustee on 29 August 1986. An affidavit filed in March 1989 shows the estate at date of death to have consisted of a bank account $921, a motor-car estimated $2,000, a house property $45,000, and a sundry item $72 - a total of $47,993. There were liabilities of $15,511 leaving a net balance of $32,482. As at 28 February 1989 all assets had been realised and liabilities paid. The Public Trustee was holding cash of some $32,750. There will be some further administration expenses and the costs of these proceedings to be met, but there will also be some further accrued interest.

The plaintiff, now aged 15, is in the care of a Mr and Mrs Orr. By order of the Family Court they and Mrs Gough, through whom the plaintiff sues, were appointed guardians. (Mrs Gough was a former senior employee of the Department of Social Welfare.) Their humanity in taking this orphaned boy under their care is much to be commended. He must have had a sad childhood, both his parents, having had serious health problems and not a great deal in the way of material assets, dying and leaving him very much alone in the world.

On intestacy, subject to any order in this proceeding, the five children of the deceased share equally. An order was made for service of these proceedings on the four children in the United Kingdom. They were served. They took no steps. An order was also made for service on a son of the plaintiff's mother by a former marriage, although he could not be entitled on the intestacy, and he too has taken no steps. When the case came before me in Whangarei on 8 March, Mr Watson for the plaintiff, who had not initiated the proceedings there having been a change of solicitors, had recently become aware that the claim had been brought out of time, having been commenced on 10 December 1987, outside the year from grant of administration prescribed by s.9 of the Family Proceedings Act. He sought before me then to obtain leave to proceed out of time on an ex parte basis, no steps having been taken by those directed to be served. I declined to deal with that application ex parte. I could not assume that the persons served would not have taken steps had they realised there might be another ground on which they might have opposed the claim. Accordingly, I directed service of notice of the application in a form containing an explanation of reasons approved by me. Service of this notice has been effected and still no steps have been taken. On 20 October, the date set for hearing of the application, Master Gambrill sitting in Whangarei adjourned the application and directed it be placed before me in Auckland, as I had earlier indicated that if no steps were taken I would deal with the application and the

substantive claim without further appearance, Mr Watson having addressed full submissions to me on 8 March. Mrs Ayling for The Public Trustee had not opposed this course and raised no opposition to the plaintiff's claim.

On an application for leave to proceed out of time the factors to be considered are well settled: Re Magson [1983] NZLR 592 at 598. Here there has been no distribution of the estate which is affected. Although there is nothing before me to explain the reasons for delay in commencing the proceeding I think in the absence of opposition I can infer that there was an honest lack of appreciation by the guardians of the plaintiff's rights. Certainly I cannot conceive of any ulterior motive in the delay. No one is prejudiced by it. The delay was only three and a half months. Had the administrator brought the claim on the minor's behalf the time limit would have been two years from the grant of administration: s.9(2)(a). The plaintiff has, I think, a strong case which should not be defeated by the delay. Justice requires the claim to proceed.

I turn to the merits of the claim. In the circumstances it is not surprising there should be nothing before me about the position of the four children in the United Kingdom. But they are all of full age. There is nothing to suggest any incapacity on the part of any of them. There is nothing before me as to the extent, if at all, to which their father may have made any provision for or otherwise assisted them in

his lifetime or as to the extent to which he kept in touch with them, although the availability of their addresses indicates some degree of contact. In the absence of evidence I cannot regard any one of them to be a competing claimant showing need. The plaintiff on the other hand is still a minor and dependent on the social welfare system for his material support and the interest and help of Mr and Mrs Orr and Mrs Gough for the nearest approach to a family life he can now have. According to Mrs Gough's affidavit sworn in April 1988 his background has contributed to difficulties in his schooling and he was then enrolled in a special class at his High School. He needed special tutoring which would cost $10 per hour. Any provision from his father's estate would assist in this. Whether there has been any subsequent change in the plaintiff's circumstances is not revealed on the papers but one imagines there has been little improvement such as to obviate the need for some reasonably substantial provision to give this boy a better chance in life by way of further education or training.

I am satisfied that a wise and just father considering the needs of his family immediately prior to his death would have seen the needs of the plaintiff as substantially greater than those of his older children in the United Kingson and I conclude that by leaving his affairs in such a way that the rules as to distribution on intestacy would apply he failed to make adequate provision for the proper maintenance and support of the plaintiff. However, I do not think that

failure justifies an award of the whole of the estate to the plaintiff. The other four children should not in this case be deprived of their patrimony in its entirety. Although the plaintiff has needs now during his minority he is approaching an age where, subject to being able to obtain employment, he can become largely self-supporting and within a relatively short span of years he is likely to be in no worse position than one may reasonably suppose the other children of his father now are. So it is largely in respect of the next four or five years that special provision should be made out of this very modest estate. I think an award of three fifths of the estate in lieu of the one-fifth to which he is entitled on the intestacy is sufficient to remedy the breach of the moral obligation of the father, bearing in mind that I should interfere with the statutory mode of distribution no more than is necessary to remedy that breach, notwithstanding the absence of competing claims by the other children.

Counsel for the plaintiff submitted it would be appropriate that the sum awarded should be vested in Mrs Gough and The Public Trustee during the plaintiff's minority, but I see no reason to depart from the normal consequences of the grant of administration to The Public Trustee on the intestacy. I have no doubt The Public Trustee will consult closely with the plaintiff's guardians as to his needs and in exercising his discretionary powers will keep in the forefront the need adequately to provide for the proper educational and other needs of the plaintiff.

There will be orders granting leave to proceed out of time and awarding three fifths of the net estate to the plaintiff to be held on the statutory trusts under s.78 of the Administration Act 1969.

Counsel may file a memorandum as to costs which should be borne by the estate generally.

Solicitors: Johnson Hooper, Whangarei for Plaintiff
Public Trust Office, Whangarei for Defendant