IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

6/1

M 366/90

LOW PRIORITY

UNDER the Family Protection Act 1955

IN THE MATTER of the Estate of **NGATOKORUA GREEN**

2008

BETWEEN **PUKE GREEN**

Plaintiff

AND **MICHELLE ROBSON**

Defendant

Hearing: 16 December 1994

Counsel: G W O'Brien for the Plaintiff
M H McIvor for the Defendant

Judgment: 16 December 1994

ORAL JUDGMENT OF HAMMOND J

SOLICITORS:

Bennetts Morrison & O'Brien (Te Awamutu) for the Plaintiff
Edmonds Judd (Te Awamutu) for the Defendant

This is a claim under the Family Protection Act 1955. The claimant is 69 years of age, the only living issue of Mrs Ngatokorua Green ("the deceased"). The deceased died at Te Kuiti on the 18th June 1981. She was 87 years old. She left a will dated the 14th April 1989. Probate of that will was granted on the 22nd December 1989 out of this Registry under number 1074/89.

By that will, the deceased made the following dispositions:

(a) To her foster son, Tuhi Green, all her personal chattels and her interest in certain Maori land known as Taumatatoatara.

(b) To her son, Puke ("the plaintiff") her interest in certain Maori land (Awaroa A6B1).

(c) To her grandson, Roy Green, and her "son", Ronnie Green, (equally) her interest in certain Maori land (Awaroa AA1A2). I pause here to note that Ronnie Green was a mokopuna who had been raised at Awaroa AA1A2.

(d) All the deceased's other interests in Maori land were to be divided equally between the plaintiff, her grandson Roy Green, Tuhi Green, Matekino Green, Tipare Tukoakoa, Jimmy Hepi and Michelle Robson.

(e) The residue of the estate was left to the trustee on trust to convert, pay the debts and executorship expenses of the deceased, and to transfer any balance then remaining to Michelle Robson.

As to the assets in the estate, the deceased in fact had the following interests in Maori land at the date of her death:

1. 0.200/3.850 shares in Awaroa A6B1 Block, valued at $2,857.14;

2. 370.74/76062 shares in Taumatatoatara A5 Block, valued at $882.23;

3. The entire shareholding in Awaroa AA1A2 Block ("Awaroa"), valued at $30,000.00.

At the date of the death of the deceased there was $1,811.27 in a Post Bank account which was used to pay funeral accounts, and the balance of $53.27 has

gone towards administration expenses. Mr McIvor was able to advise me this morning that there are the following further liabilities in the estate:

(a) Total rates owing, $897.71;

(b) The estate's solicitor's costs in relation to this action up to and including a half day hearing today, and inclusive of GST, amounting in all to $3,270.65; and

(c) An account has not yet been rendered for solicitors' costs and disbursements in the administration of the estate.

So this is a small estate of around $34,000.00, comprising almost entirely interests in Maori land. The values I have stated are taken from a determination application to the Maori Land Court in the Waikato-Maniapoto District. Awaroa A6B1 is only part of the shares in a larger block. Awaroa, on the other hand, is 54 hectares, and the deceased was the sole owner. The valuation (as at 1 July 1985) is made up of land value $26,500.00, improvements $3,500.00, or $30,000.00 in all. The valuation is ten years out of date.

The deceased had been married to Tautiti Green. The deceased's interest in Awaroa had come to her through Tautiti Green. He had predeceased the deceased. She did not remarry. The plaintiff is the only living natural issue of that union. The plaintiff, as I understand it, received no provision from his father's will. Awaroa passed to his mother.

The plaintiff was married on the 20th May 1992 to Jean Joanna Green. There are ten children of that union:

Aroha Martin (204 Killarney Road, Hamilton);
Elaine Kana (6 Sheehan Street, Kihikihi);
Peter Green (2 Racecourse Road, Te Awamutu);
Stella Tuteao (69 Montgomery Crescent, Hamilton);
Tewhine Green (Waikeria Village, Waikeria);

Louise Crawford (1 Wellington Street, Fielding);
Neil Green (6 Sheehan Street, Kihikihi);
Murray Green (30 Dickson Street, Hornby, Christchurch);
Raewyn Green (3 Wellington Street, Fielding);
Roy Green (6 Sheehan Street, Kihikihi).

All are of age.

The plaintiff has the following assets: a property at Oparau (Government Valuation as at 1 July 1989, $14,000.00); a property at 77 Williams Street, Te Awamutu (Government Valuation as at 1 October 1990, $90,000.00); a motor vehicle valued at $6,000.00; and investments of $1,300.00. The plaintiff has no liabilities. Both he and his wife are in receipt of National Superannuation and have no other source of income.

The plaintiff's claim, as expressed in the affidavits, is only lightly couched in terms of need. Rather, he emphasises that the Taumatatoatara lands had belonged to his mother and that she had inherited them from her parents; the Awaroa lands, on the other hand, had come to his father from his family. Hence, as the lands "are significant to my family" the plaintiff is greatly concerned that the deceased would wish to pass them to foster children who had taken the Green name. Essentially the plaintiff's position is that Awaroa should come to him, and would then in turn pass (he says) to his children. However, the issue of "need" on the part of the plaintiff was (understandably) enlarged upon before me today in submissions.

Some further history is necessary here. The plaintiff, in accordance with Maori custom, was brought up by his grandmother from birth until he was about nine years old. Then he went and lived with his parents at Awaroa. He went to school for a year but then left to work on this family property. A few years later his father started bringing foster children into the family. Something like

20 children were brought into the family. Some stayed for only a year or so, others stayed longer. The plaintiff left home when he was 21 and worked at various jobs. In 1960 or 1961 his father asked him to return to the family farm at Awaroa. He did so. The plaintiff was by then married, and he worked the farm for about five years. He and his wife were not paid for this work. They "survived on $15.00 a month from the sale of cream from the farm." And, there were eight children. The plaintiff did get a little part-time work to supplement the income. Subsequently the plaintiff purchased a house at Oparau. It was in a very decrepit condition, and is still owned by the plaintiff. He worked in Te Awamutu from that house. His parents then moved back to the Awaroa farm. In 1968 the plaintiff and his wife moved to the home they still own in Te Awamutu. His parents were still trying to foster children, but the farm was difficult to get to access-wise and the condition of the house had deteriorated. So the plaintiff's parents then moved into his Oparau house. They paid for the electricity but did not pay any rent. The plaintiff paid the rates. Awaroa became grazing land. The farm was being grazed until recently by a daughter of the deceased, and she was to attend to the paying of the rates. The house on this farm was somehow burnt down and was not rebuilt. It is unclear to me what condition Awaroa now is in; at best it could be described as run-down, but I fear the practicalities are that something close to "abandoned" might be a more accurate description.

The plaintiff's own affidavits are supported by an affidavit by his wife, who confirms the difficulties the plaintiff and his wife had in endeavouring to keep the farm going at Awaroa during the time they lived there. Much (if not most) of the work they did to bring the farm into production has been lost. The plaintiff's account is also supported by an affidavit from one of his daughters, Elaine Hariata Kana, which deposes to some effort on the part of she and her husband to see that this property was kept going.

I have no affidavits from any of the other persons named in the will, save Michelle Robson (in her personal capacity) and Ronnie Green. Mrs Robson was a foster child of the deceased and her husband. She was fostered at the Oparau property. Michelle suggests that the Oparau property was purchased by the plaintiff in part through the deceased having allowed a sale of some of the stock at Awaroa to finance the Oparau purchase. Mrs Robson suggests that Mr Green's endeavours on his late mother's behalf were not so great as the plaintiff has deposed. She clearly had a close relationship with the deceased. Indeed, the deceased lived with her and her husband for 14 months until she died in June 1989. Mrs Robson says that Puke Green only visited once during that time. Mrs Robson suggests that on one occasion the plaintiff visited his mother and asked her to sign the Awaroa farm over to him, "however [the deceased] said no [because] she felt that he had never really supported her and my foster father in later years and especially after her husband died."

Ronnie Green was a mokopuna raised at Awaroa. He left the farm at 15 and became an apprentice in carpentry. He claims that when the plaintiff and his wife took over Awaroa in the early 1960s, "Puke wanted ownership outright of Awaroa but was refused so he left." Ronnie Green suggests that had the plaintiff been patient and developed Awaroa, "he would certainly have acquired the farm, but he wanted to run before he could walk. Mum did not like that as he was not proven a good farmer or manager." He also claims that in March 1989 the deceased asked him to come back to New Zealand (he is now a builder in Australia) and that she discussed Awaroa with him and others "as she wished to make us guardians of the farm and have us initiate a roll or register of all the mokopunas and their offspring so that we could have access for a kainga for future development. This was her last wish." He also deposes "Mum felt that Puke had 'lost the plot' and he as our kaumatua was losing the respect of the mokopuna. She felt that we were better educated for the twenty-first century as we had pursued

our own careers." Apparently there were discussions between Ronnie Green and the plaintiff at the time of the deceased's unveiling. Ronnie Green suggests that he "explained Mum's wish" at that time but the plaintiff disagreed and said he expected full ownership of the farm "and nothing less".

Against this background, it is convenient now to refer shortly to the general legal principles applicable to claims under the Family Protection Act by adult children. These are now very well established and I need not rehearse the principles at any length. Perhaps the most widely cited authority today is ***Little v Angus*** [1981] 1 NZLR 126 (CA). I am charged with enquiring whether there has been a breach of moral duty, judged by the standards of a wise and just testator. Whether there has been a breach of moral duty is tested at the date of the testator's death. If there has been a breach, the Court has to consider what is appropriate to remedy that breach. In deciding how a breach should be remedied, regard can be had to later events. The Court is not to remake the will in the event that there is a breach of moral duty but should do what is sufficient to repair it. "Needs", in the context of the Family Protection Act, is a term which has acquired judicial definition. It is not to be judged solely on the narrow basis of economic needs but, particularly in larger estates and other circumstances, moral and ethical considerations require to be taken into account as well. (See ***Re Swanson*** [1978] 2 NZLR 469). But "need" remains the basic linchpin of the statute: ***Dillon v Public Trustee*** [1941] NZLR 557; ***In Re Blakey*** [1957] NZLR 875 *per* North J at p 876.

How far, if at all, the recognition of Maori custom (if established) should affect the concept of a moral duty under the Family Protection Act 1955 is a matter of some difficulty. The question has not received a great deal of judicial attention. In ***Re Stubbing*** [1990] 1 NZLR 428, Eichelbaum J (as he then was) held that competing claims based on Maori custom cannot override a claim by a claimant who had made out a case for relief under the Act. As to that, the learned authors of

Patterson, *Family Protection and Testamentary Promises in New Zealand* (2nd ed) at p 30 comment: "It is however unclear whether the Courts will regard the 'competing claim' in such circumstances as a competing moral claim, the result of which is an order in favour of the applicant which may be less than might otherwise have been the case." Those authors also suggest that where a child of the deceased has been treated as such by virtue of customary adoption, "it seems unlikely that the Court would decline to recognise a moral duty in those circumstances despite the fact that the defendant could not have brought a claim under the Act." (p 31). And, in ***Re Ham*** (1990) 6 FRNZ 158, Richardson J said: "[It] is accepted, and the Judge recognised this, that when dealing with Maori families the Court must pay regard to the strong attachment of the Maori to the land and to closely held, deeply felt feelings within the family in that respect." (p 162).

It is relevant to note also that the New Zealand Parliament has itself begun to adjust further the position of Maori in relation to the Family Protection Act by providing that a Maori customary marriage which was entered into prior to the 1st April 1952, and which is still subsisting at the date of death is, unless either party was also legally married at the date of death, recognised for the purpose of the Family Protection Act 1955 (Te Ture Whenua Maori (Maori Land) Act 1993, s 106(4)).

I remind myself also of the importance of the principle of freedom of testamentary disposition in New Zealand. Indeed, it is really the starting point for an enquiry in this area, and I should perhaps have mentioned it earlier. That is, the Family Protection Act (along with the Testamentary Promises Act 1949) are exceptions to this general principle. And, I do not think it unrealistic to say that this general principle is of importance to both Pakeha and Maori. I have no evidence on the matter, but I would have thought that how best to handle the problem of the devolution of Maori land, or interests in land owned by Maori,

is one in which very great respect must be paid to the judgment of those actually making such decisions, unless there is very good reason to interfere. The Family Protection Act is not a general equity vehicle. Nor was it designed for the general readjustment of perceived injustices.

I return to the instant case. I have no documentary evidence as to the reasons for these dispositions. I have only Ronnie Green's suggestions. There is no evidence of any note left with the will. As far as the land is concerned, the deceased left her small Awaroa A6B1 interest to the plaintiff; the former family farm she left equally to her foster son Ronnie and her grandson Roy (a son of the plaintiff). The reasons for the deceased so proceeding are not really apparent to me. It would be wrong to speculate. Neither do I have any evidence of Maori custom, let alone anything therein which would clearly explain this bequest to a foster child now living in Australia, and one grandson (out of ten grandchildren). There is really only the somewhat vague notion that this deceased became somewhat disaffected with her son in later life.

This is a case which must be dealt with on the entirely conventional and well established principles under the Family Protection Act. The plaintiff is the only natural child of the deceased; and hence the only possible claimant under the statute. He and his wife are, in reality, in modest circumstances. He is elderly, and in poor health. The asset came into the deceased's estate by inheritance. But I accept the evidence of the plaintiff and his wife that in earlier years they actively endeavoured to build up that asset, and that the plaintiff supported his late mother. It is plain enough that she looked on him with less favour in later years, when she was well into her 80s. But common experience is that that is not an unusual reaction. There is nothing near any disabling behaviour in this case. The plaintiff had the overwhelming claim to these assets, on the basis of need. There are no competing claims of an economic variety in this case. There may

have been claims of a moral variety on the part of foster children, but they are clearly outweighed by the particular circumstances in this estate. I am not at all sure that there is much present economic value in Awaroa. But to the extent there is such, I think the plaintiff is entitled to it. In my view, there was a breach of moral duty in this particular case.

As to the quantum and form of relief, one way of effecting that would be to give the plaintiff Awaroa only. That could be effected by deleting clause 3.3 of the will and providing in its place: "To my son Puke Green my interest in Awaroa AA1A2." That approach would be consistent with disturbing the will to the least extent possible. But the other interests are so small, and there would then be complications of apportionments, that in the end I think the better solution is that proposed by counsel for the plaintiff, namely that the plaintiff should have the whole of the estate, but subject to the suggestion by counsel for the trustees that the plaintiff be responsible for the outstanding debts in the estate. I notice that that course was adopted by Greig J in ***Re Smith*** (1991) 8 FRNZ 650.

I therefore order that the whole of the estate of the deceased is to vest in the plaintiff, subject to his meeting the following liabilities:

(a) The outstanding rates of $897.71.

(b) The costs of the solicitors to the estate on the administration of the estate on a solicitor and client basis. Such have not yet been fixed. However, the plaintiff has the usual mechanisms for protection of his interests if he considers the account rendered in that respect to be in some manner inappropriate.

(c) Payment of the costs, disbursements and GST of the estate's solicitors and counsel in these proceedings, amounting to $3,270.65.

I make it clear that payment of those costs and expenses is a condition precedent to the vesting of the estate in the plaintiff under this order. There will be

no order for payment of the plaintiff's costs out of the estate. He will need, for obvious reasons, to attend to that matter directly *vis-a-vis* his solicitors.

I leave it to counsel to settle an appropriate form of order. However, I reserve leave to apply, if necessary by telephone conference, in case there is anything I have overlooked or if there are any matters arising in that connection.

R G Hammond J