22/7

IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

A 15/83

1070

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the will of JAMES NICHOLAS MacDONALD deceased

BETWEEN IWINGARO MILTON MacDONALD

Plaintiff

A N D HAUA DETOMO MacDONALD variously known as JACK DETOMO MacDONALD, MUGWI MacDONALD and JAMES MacDONALD, PETER COLIN MacNAB, JOHN ROGER BALDWIN, PHILLIP MacDONALD and BRIGHAM MacDONALD, RIRIA PUAIA HART also known as LYDIA HART, REATHA KARARAINA CLARKE and KAHURANGI GORDON Executors and Trustees of the Will of the abovenamed JAMES NICHOLAS MacDONALD deceased

Defendants

Hearing: 18 July 1994

Counsel: A.D.G. Hitchcock for the plaintiff
M.B.T. Turner for the estate
G.L. Turkington for P. & B. MacDonald and N.K. Carey
R.D. Crosby for grandchildren and great grandchildren
P.J. Radich for Mrs Mains, Mrs Dennison and Mrs Joseph

Minute: 18 July 1994

MINUTE OF DOOGUE J

These proceedings have at last come before the court in a substantive form.

The deceased died on 4 March 1980 leaving a last will dated 7 April 1978. Probate of the will was granted on 14 April 1980. The Church of Jesus Christ of the Latter Day Saints had been nominated as a co-trustee in the estate and as responsible for the administration of the residuary estate. On 27 April 1981 it declined to accept that nomination. Leave was ultimately given to commence the present proceedings out of time.

When the deceased died, he left 19 surviving children. Two children of his two marriages had died in infancy. There are approximately 78 grandchildren.

The will contained within it the following provisions:

Clause 5 provided that pending the distribution of the estate the trustees should not sell any of the lands owned by the deceased but they should be leased first to sons, secondly to daughters, thirdly to grandsons and fourthly, if none of those groups were willing to take the same, then to such other persons as the trustees deemed fit. Preference was go be given in such leasing to any sons who might be working on the land at the date of death. The provision was for a lease of a term not exceeding five years but it "may be renewed". There was a rental basis of 5% of the government value of the lands from time to time "plus an allowance to cover outgoings". A particular son was enabled to continue occupying a house during his lifetime.

Clause 6 of the will provided that until the death of the last child the net annual income arising from the

estate was to be divided in four parts. Three of those parts are at the present time payable amongst the 17 children surviving in equal shares. The fourth of such parts is available for the trustees to make grants as need be for the welfare of any child or descendant of the deceased. From and after the death of the last child and until the date of distribution the grandchildren are entitled to share the income between them in equal shares.

Clause 7 provides that the date of distribution shall be 21 years after the death of the last surviving child.

Clause 8 provided for the Church already named to manage the residue of both capital and income as a charitable trust for certain widely expressed purposes which are not germane to the present proceeding, except indirectly. There was a request that the farm land should not be sold and that the area at lower Wairau should be retained and developed as a Maori community. In the event of there being competing claimants then there was a request that preference be given to descendants of the deceased.

Clause 11 of the will expressly stated:

> "I state that I have not made outright gifts in this my will to any of my children as to do so would fragment my estate without conferring on any child sufficient to be of lasting benefit unless I were to treat them unequally."

When the deceased died, he owned substantial parcels of land. The estate at present owns approximately 180

hectares. Most of that land is freehold land but some of it is Maori land. At that time three of the sons occupied the farm lands which they were farming in partnership. In March 1982 one of the sons withdrew from the partnership.

At the date of death the estate of the deceased was valued at a little under $590,000. At the present time its value is in excess of one and a quarter million dollars.

In March 1983 it was necessary for the estate to meet certain estate duty. To enable that to occur, some 60 hectares of land in three titles was sold but to the two partners farming land of the deceased.

The present proceedings were commenced in the same year. Since then there have been various steps taken in respect of the proceedings. It is not really helpful to traverse each of those steps. It is, however, important to note that the proceedings came before the Court in November 1989 when approval was given to the proceedings being brought out of time and the substantive hearing was adjourned sine die. The day before there had been a family meeting when the majority of the family had reached agreement. The Court ordered that all children put information before the Court as to their circumstances. There was an acknowledgment that legal costs on a solicitor and client basis would be paid out of the estate in respect o the children's representation. Subsequent to that there were certain other steps taken

in respect of these proceedings. Other proceedings, CP 12/94, have been commenced to remove the trustees.

When the matter was presented before me today by counsel, five of the children who have filed affidavits in the proceedings, four of whom appear on the face of those affidavits to have claims against the estate, were not represented. The grandchildren have been represented by Mr Crosby, who has appropriately recognised that there are grandchildren in separate categories so far as the will of the deceased is concerned but, even more importantly, that there are grandchildren of two children of the deceased who have died who have no direct interest in the estate other than the deferred interest in respect of income.

It is apparent from the representations made today and from the affidavits filed on behalf of the children that the majority of the children would wish to see the underlying motives of their father in his last will carried into effect, namely that they should be treated equally but that as far as possible the lands of the deceased should continue to be held. All present today recognise through their counsel that as the will stands, if it is to remain in place in its present form, the provisions of clause 8 will inevitably give rise, whoever the trustee or trustees of the estate might be, to further litigation as to the form, if any, that the charitable trust provided for by that clause is to take. There is, as already indicated, the additional litigation commenced as to the removal of the trustees. Unless the

parties are able to reach agreement, there is no method by which that litigation both as to the proper interpretation and application of clause 8 of the will and the removal of the trustees can be avoided. Unless the family can reach agreement, it is inevitable that some of the children of the deceased and almost inevitably the grandchildren whose parents have died since the death of the deceased will be entitled to relief from the estate. Such relief cannot, in accordance with the law, result in equal awards to those members of the family who would be entitled to relief. It is also inevitable that if there is to be relief from the estate it will result in some or all of the lands of the deceased having to be sold. It is certainly inevitable that the partners who at present are farming a substantial portion of the land of the deceased would not be entitled to continue in occupation as the land would almost definitely have to be sold to meet any awards out of the estate.

It is thus not in the interests of any of the claimants or the two brothers who have leased the land from the estate that the claims should have to be dealt with by awards under the Family Protection Act 1955. It will inevitably result in the children being treated unequally, which is not their wish and not the wish of their father. It will inevitably result in the farm lands of the deceased being sold to meet the awards that would be made, which is not again the wish of the

majority of the children and certainly not the wish of the two sons who farm those lands.

During the course of the submissions for three of the children, including the two sons who farm the lands, Mr Turkington suggested one appropriate solution was to see the estate vested in the children as tenants in common in equal shares including the representatives of the two deceased children so that the grandchildren arising in respect of those two children could take the share that their parents would otherwise have received. That seemed an eminently sensible course. His submissions did not suggest any conditions in respect of such a solution. After an adjournment he indicated he had been instructed by his clients to suggest that it should be conditional upon some form of lease to them. That is certainly not something which would seem to me to be likely to give rise to a possible solution to the problem. It may well be that, if there is vesting in the manner suggested by Mr Turkington, the vesting would be able to take place in such a way that the children who had an interest in the farm lands were those who would be agreeable to them remaining leased to the farm partnership of the two sons. It is not something that the Court could possibly achieve if it was required to make orders under the Family Protection Act 1955. The solution posed in Mr Turkington's submissions was one which had the general support of Mr Radich's clients, notwithstanding that there were certain differences between them as to the ultimate outcome of any such

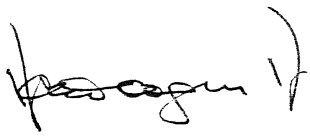
vesting, and of Mr Hitchcock's client. If the lands were vested in the manner originally proposed by Mr Turkington, that would result in there being other solutions possible either by agreement between all the children or different blocs of the children and those representing the grandchildren or, if need be, by court order in respect of either the Maori land or the freehold land which is not Maori land.

It was also recognised by counsel that, quite apart from the five members of the family who had filed affidavits but were not represented, there were other children who are not represented today who may well have been represented if there had been better notice as to the present proceedings. All counsel are agreed that it is desirable that there be one further and last adjournment of these long drawn out proceedings, not for the purpose of delaying the matter but to endeavour, if possible, to obtain a family settlement which would benefit all members of the family without the inevitable detriment which would occur to all members of the family if the Court is forced to make orders under the Family Protection Act 1955. It is also regarded by counsel as desirable that there should be clear notice to all members of the family of any adjourned hearing. It is also regarded as desirable that there should be a family meeting convened by the solicitors for the trustees. Whilst there may be certain criticism of certain actions by the trustees, some of those criticisms would appear to have been met by information before the Court. Whether

there is any merit left in any of the criticisms is beside the point in respect of whether the solicitors for the trustees can appropriately convene a meeting as they have acted impartially so far as the Court can see.

I will therefore further adjourn these long-standing proceedings sine die upon the following bases:

1. Copies of these remarks are to be forwarded to the parties;
2. The trustees' solicitors are to ensure that all the children of the deceased other than those represented here today do receive copies of these remarks and not leave it to the court registry, because of the problem that that would give rise to as the court registry does not have the addresses of all the children of the deceased as not all have taken steps in the proceedings;
3. The trustees' solicitors are to convene a meeting of the children and those representing the two families where the children are dead at an appropriate time after the distribution of these remarks;
4. A fixture is to be made before me for the further hearing of this proceeding after the family meeting has been held. The trustees' solicitors should request the court to convene such a hearing at an appropriate time after the family meeting or meetings.



Solicitors for plaintiff:
Arthur Watson Savage, Invercargill

Solicitors for estate:
Wisheart Macnab & Partners, Blenheim

Solicitors for grandchildren and great grandchildren:
Gascoigne Wicks & Co., Blenheim

Solicitors for P. & B. MacDonald:
David Dew & Co.

Solicitors for Mrs Mains, Mrs Dennison and Mrs Joseph:
Radich Dwyer Hardy-Jones Clark, Blenheim

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