EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2019-019-000829
FAM-2019-019-000191
[2020] NZFC 6896

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	THE ESTATE OF ALFRED ANDREW MORELAND
BETWEEN	TONI MARIE GROWDEN Applicant
AND	ELIZABETH ADRI MORELAND First Respondent
AND	STEPHAN KEITH COE Second Respondent
AND	ROBIN ANN QUINN Third Respondent
AND	FAY DAWN DEVLYN Fourth Respondent

Hearing:	29 July and 12 August 2020
Appearances:	J Hunter for the Applicant K Fyers on behald of D Venter for the First Respondent No appearance by or for the Second Respondent M Twentyman for the Third and Fourth Respondents G Brant for the Estate of Alfred Andrew Moreland
Judgment:	24 August 2020

RESERVED JUDGMENT OF JUDGE R PAUL

[1] These proceeding were filed under the Law Reform (Testamentary Promises) Act 1949 (the "Act").

Parties

[2] The deceased is Alfred Andrew Moreland who passed away on 8 August 2017 at the age of 77. Mr Moreland had three children Robin Ann Quinn and Fay Dawn Devlin ("the first applicants") and Grant Moreland.

[3] Mr Moreland was survived by his second wife Elizabeth Moreland ("Mrs Moreland"). Mrs Moreland is also the primary beneficiary and one of the executors of the estate of Mr Moreland.

[4] The second applicant Toni Marie Growden ("Ms Growden") is a stepchild of Mr Moreland. She is not a beneficiary of his estate.

The Will

[5] Mr Moreland had a will dated 13 June 2016 admitted to probate on 6 July 2018. The Will provides for Mrs Moreland to receive Mr Moreland personal possessions, vehicles, and half of the farm. The Will leaves the other half of the farm to be divided equally between Mr Moreland's three biological children. The Will does not provide for Ms Taylor or Ms Growden.

[6] Mrs Moreland also inherited other property by way of survivorship, including bank accounts and a residential property in Hamilton.

Application

[7] Ms Growden filed an application under s 3 of the Act to receive provision from Mr Moreland estate and an application for an extension of time pursuant to s 6 of the Act dated 29 October 2019.

[8] Ms Devlin and Ms Quinn the first applicants and half-sisters of Ms Growden were served with the application and filed a notice of defence dated 30 January 2020.

[9] The application for provision and leave were lodged against Elizabeth Moreland, the deceased's second wife, and Stephen Coe as the executors of the deceased's estate as respondents. They intend to abide by the decision of the Court in respect of the application for extension of time as referred to in the memorandum of counsel for respondent dated 19 June 2020.

Statutory requirements

[10] Section 6 of the Act is the relevant provision. Section 6 provides:

> **6 Limitation of Actions**
>
> No action to enforce a claim under this Act shall be maintainable unless the action is commenced within 12 months after the personal representative of the deceased took out representation:
>
> Provided that the time for commencing an action may be extended for a further period by the Court or a Judge, after hearing such of the parties affected as the Court or Judge thinks necessary, and this power shall extend to cases where the time for commencing an action has already expired, including cases where it expired before the commencement of this proviso; but in all such cases the application for extension shall be made before the final distribution of the estate of the deceased, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court, and after every notice (if any) of an intention to make an application under this Act has lapsed in accordance with subsection (6) of section 30A of the Administration Act 1952, as inserted by section 2 of the Administration Amendment Act 1960, shall be disturbed by reason of the application for extension, or of an order made on that application, or of any action or order that is consequential thereon.

Extending time

[11] The legal test to be applied to s 6 is set out in *Bearman v Hardie Boys*.[1] In that decision, McCarthy J held that:[2]

> If a prospective claimant under this Act wishes to have time extended we believe that he should not only show reason why in the circumstances of this case the delay should not count against him, but also should be required to persuade the Court he has a claim which, if it be allowed to be prosecuted, will have some reasonable chance of success.

[12] Extending time is at the discretion of the Court. The only absolute restriction is that the estate must not be finally distributed. *Lilley v Public Trustee*[3], affirmed by the Privy Council in *Lilley v Public Trustee*[4].

[13] Factors relevant to the Court's exercise of discretion to extend time were articulated in *Bearman v Hardie Boys*[5] and *Re McTavish*.[6] They are:

(i) extent of delay;

(ii) reasons for the delay;

(iii) prejudice to others; and

(iv) merits of the applicant's case.

[14] In *Bell v Ehlers*[7] the Court granted the application to extend time because the delay was not excessive and was caused by the solicitor filing defective proceedings. The respondent was aware of the claim because the defective proceedings had been filed within the time limit. There was no detriment to others because estate distribution was delayed in any event by the deceased's daughter filing a Family Protection claim. As to the merits of the claim, the claimant had provided sufficient evidence in support of her claim which, if proved, would meet the requirements of a testamentary promises claim.

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[1] *Bearman v Hardie Boys* [1973] 2 NZLR 204 (CA).
[2] At 206.
[3] *Lilley v Public Trustee* [1978] 2 NZLR 605 (CA).
[4] *Lilley v Public Trustee* [1981] 1 NZLR 41.
[5] *Bearman v Hardie Boys* [1973] 2 NZLR 204 (CA).
[6] *Re McTavish* (dec'd) (2001) 21 FRNZ 523.
[7] *Bell v Ehlers* FC Dunedin FAM-2008-012-122, 5 May 2009.

[15] Similarly, in *Neville v Foy*[8] the Court granted an extension of time to add the Testamentary Promises Act as an additional cause of action to the applicant's pleadings filed under the Property (Relationships) Act 1976 and the Family Protection Act 1955, because the deceased's family disputed that the applicant and the deceased had a de facto relationship and that she was his surviving de facto partner. The four-month delay was not excessive; the applicant did not realise the testamentary promises claim had been omitted because she was unwell following a serious assault. That was a reasonable explanation for the delay. As there were other causes of action still to be dealt with, there was no prejudice to the respondents and the applicant had a reasonably arguable case, which is a higher test than a prima facie case. The Court rejected the test in *Re McTavish* which puts the onus on the respondent to establish that the applicant's case has no reasonable chance of succeeding. The applicant in *Neville v Foy* had done work on the deceased's property and the deceased had made promises.

[16] In *Van Uden v Van Uden*[9] the deceased's daughters applied for leave to bring proceedings ten months out of time against themselves and their brother as executors of their father's estate in an attempt to enforce an alleged promise of their father to equalise on death the inter vivos gifts he had made to them and their brother. Their brother had received substantially more, and the daughters claimed to have provided financial and non-financial services to their parents in the expectation that their father would amend his will to leave them a greater share of his estate as a reward for their services. Applying the principles articulated in *Bearman v Hardie Boys,* the Court granted leave to bring the claim out of time. The delay fell just short of being inexcusable and the applicants had tried to resolve the matter in negotiations with their brother. There was no prejudice to any of the parties because the Canterbury earthquake had delayed distribution and the applicants' claim had a reasonable chance of succeeding. The overall justice of the case required the granting of leave.

Accepted factors

[8] *Neville v Foy* FC North Shore FAM-2010-044-972, 30 August 2011.
[9] *Van Uden v Van Uden* [2013] NZHC 520.

[17] The applicant accepts that her proceedings were filed three months and 23 days out of time.

Matter at issue

[18] The matter at issue is whether the Court should exercise its discretion to grant leave to extend the time for filing the application pursuant to s 3 of the Act to be filed.

Background

[19] Mr Moreland was married to Dawn Alice Moreland from December 1961 until her death on 5 November 2009. She had five biological children:

(a) Linda Taylor;

(b) Ms Growden;

(c) Ms Devlin;

(d) Ms Quinn; and

(e) Grant Moreland.

[20] Ms Taylor and Ms Growden are children of Dawn's previous relationship and are not biological children of Mr Moreland.

[21] The first applicants and Ms Growden, and Grant Moreland grew up on the farm at [address deleted], Pukemoremore. Mr Moreland had inherited the farm from his father and was residing there when he passed away. Mrs Moreland, the second wife, still resides there. The first applicants and Ms Growden have all provided affidavit evidence setting out the work they each did during their adolescent and adulthood. They all claimed that this included extensive farm work in their teenage years.

[22] The extent of the work undertaken by each is in dispute and is not a matter which can be determined today.

[23] Mr Moreland met Elizabeth Moreland in around 2013 and were married on 14 July 2015. They were married for two years. The relationship ended when Mr Moreland passed away on 8 August 2017.

[24] Counsel for the first applicants submit that proceedings under the Act must be treated with caution and refers me to the words of Turner J in the case of *Toon v Plumber*:

> Having regard to the kind of claim to which the statute opens the door, it is not surprising that the legislator considered that that door, once opened, should remain open only for a limited time. It must only in exceptional cases, and not on the generality of cases, that of the time is extended.
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> (Unreported, Auckland 8 December 1959, A261/59)

Extent and reason for the delay

[25] It was accepted by counsel for the first applicants Ms Twentyman that the issue in this case was not the extent of the delay in and of itself but the reason for the delay. It was accepted that there were other cases where leave had been granted for longer periods but that there had been reasons to justify the same. It was her client's position that there was no justification for such delay in this case.

[26] Counsel for Ms Growden submitted that her client had been brought up until the age of 16 believing that she was the biological child of the deceased. It was not until her biological father attempted to make contact that she became aware that she was not. Sometime later an altercation occurred between the deceased and Ms Growden and she was told to leave the property. However, following a period of time, the relationship resolved, and Ms Growden deposes that she continued to be part of the family.

[27] It was her understanding that following the death of the deceased she would be advised to attend the reading of his Will. She deposes that she first became aware that she was not a beneficiary of the deceased's Will in June 2019 when her brother Grant Moreland showed her two documents filed by the first applicants. In those documents she was referred to as a family friend. This comment and other areas of the first applicants' affidavit was upsetting for her. She contacted Mrs Elizabeth Moreland and

offered to file an affidavit in support of Mrs Moreland's at defence. She deposes that no one turned their mind to any claim she may have, nor did she have any understanding of the time limits to a claim against the estate. By the time she decided to take action the time for filing an application had already lapsed. She instructed a lawyer who then referred her to her present lawyer, Ms Hunter. Ms Hunter needed an opportunity to accumulate evidence for the filing of her application. I was also reminded by counsel that the first applicants had not filed their application until March 2019.

[28] In summary, the basis for the delay are as follows:

(a) not being aware of the contents of the will until June 2019;

(b) the ignorance of the time constraints;

(c) the former lawyer not appreciating the time constraints on these types of proceedings and referral to present counsel; and

(d) the time required to accumulate the detailed evidence for the application.

[29] In response, Ms Twentyman submitted that as an unmaintained stepchild Ms Growden was not eligible to make a claim under the Family Protection Act. Therefore, there was no need to serve her with those proceedings. She further submitted that Ms Growden's response was an emotional reaction to comments made by her clients regarding family relationships and that if she could file an affidavit in support of Mrs Elizabeth Moreland then she could file an application. She submitted that it is unreasonable to suggest that Ms Growden was still waiting some 22 months following the death of the deceased for the reading of the Will. She also submitted that it is unlikely Ms Growden was not aware of the contents of the Will based on her relationship with Mrs Elizabeth Moreland.

[30] I put to Ms Twentyman the proposition that had her clients referred to Ms Growden as a sibling, a half sibling or even an estranged half sibling the Court

would have made directions for her to be served with the proceedings. Ms Twentyman had to concede that this was correct. It therefore raises, for me, an issue of credibility in respect of the first applicants' evidence.

[31] To describe Ms Growden as a family friend as opposed to half-sister is at best a representation of the feelings about Ms Growden and at worst a misrepresentation to the Court. There is no evidence to suggest that Ms Growden was aware of the contents of the Will any earlier than she has deposed. The suggestion that she should have known is supposition only. The proposition that Ms Growden should have known that a will would be read earlier presumes that she understands how estates are processed and there is no evidence of that.

[32] Given the evidence and submissions, I am not satisfied that the delay in filing within time would exclude Ms Growden's application. The period of the delay is not extensive, and the explanation provided is reasonable given the circumstances in this particular case.

Prejudice to others

[33] Counsel for the first applicants submit that there will be a prejudice to her clients on the basis that the application before the Court requires no further evidence and to join Ms Growden would cause delay.

[34] Ms Hunter expected that if the Court granted Ms Growden's application for extension of time then the ambit of litigation would be increased. However, she submitted that the first applicant's case was not ready to progress to a hearing and there was delay in any event. She submitted that Ms Growden had little evidence to file and the only prejudicial effect would be that the first applicants would need to respond to Ms Growden's application. She submits that the claim is a modest and realistic one and may well be resolved at mediation.

[35] In response, Ms Twentyman advised that an independent review of the value of the estate had taken place, that her clients were of limited means and that a response would incur further time and costs for her clients. She accepted the interrogatories

had not been resolved, but once resolved the case was ready to proceed to a judicial settlement conference. She was still waiting for information from the estate and then her clients position as to progress would be clearer.

[36] Given that Ms Twentyman was not in a position to clearly state whether there would be a delay in time should the application of Ms Growden be granted I am not satisfied that there is sufficient prejudice to the first applicants to deny the extension requested.

Merits of the applicant's case

[37] Counsel for the first applicants at paragraph 27 states that to successfully argue a substantive claim under the act the following elements must be established:

(a) services rendered to all work performed, for the deceased during the deceased's lifetime;

(b) an express or implied promise by the deceased to reward the applicant; and

(c) a nexus between the work or services and the promise.

[38] It is Ms Twentyman's submission that there is no evidence of any promise and therefore no evidence of a nexus between a promise and services provided. On that basis, she submits the basic elements required under s 3 of the Act are not present and Ms Growden's claim has no prospect of success.

[39] Ms Hunter referred me to her client's affidavit dated 29 October 2019. She refers to her client's evidence from paragraph [8] through to paragraph [10] inclusive as to the extent of the work she undertook as a child and teenager on the farm without pay. The work deposed is extensive and between the age of 15 and 16 she worked full-time on the farm for the deceased and the family. She worked in the milking shed undertaking heavy physical labour-intensive work she deposes without pay. The extent of work undertaken by Ms Growden is denied by the first applicants. However I am

not required to determine that dispute but find that there would be reasonable grounds for an argument to be had in regard to that aspect.

[40] The issue is whether there was an implied or express promise and, secondly, whether there was a nexus between the work undertaken and the promise given.

[41] Ms Hunter accepts that there was no express promise made but an implied one. It is Ms Growden's case that following the death of her mother she enquired as to whether her mother had left a will and she was told by the deceased "that gets read when I die". Ms Growden's case is that this comment should be considered against the context that she believed her mother would have made provision for her and that her mother would have ensured that her father did so as well. She took from the words of the deceased that her mother and step fathers estate was joined until he died so she did not give it another thought.

[42] In summary, it is her case that she had worked hard, she believed her mother's estate would provide for her, therefore, there would be provision for her when the deceased passed. She had played a role on the farm and believed she was entitled to provision after the death of the deceased for her service to the farm and to her family.

[43] In considering Ms Growden's proposition I note that there was no discussion deposed about the work she had undertaken on the farm within the context of the conversation. There does not appear to be any nexus between the work and the words spoken by the deceased.

[44] Looking at the words deposed there is no clear promise. These words could just as well be viewed as a way of dismissing the conversation. I also take into account the submissions of Ms Twentyman that there was no corroboration of any such statement end to agree that this comment on the evidence of work undertaken in the past would open the floodgates to claims under the Act made out of time which is directly contradictory to the legislation and case law as I have referred above.

[45] The evidence provided to the Court which is untested indicates that Ms Growden was a young woman who worked very hard on the family farm, loved

her parents and had a strong belief in her duty and loyalty to her family. Notwithstanding the fallout that occurred when she left the family farm, the evidence would indicate an ongoing and caring relationship between herself and her mother, the deceased and her other siblings. The fact that Ms Growden was not provided for in the deceased's Will is no doubt a source of pain and sadness for Ms Growden. In addition, the first applicants' comments would also have caused her great distress.

[46] The Court can only consider the application before it, consider the evidence, apply the law and determine the outcome based on the law. In this case, I am not satisfied that the evidence provided establishes a sufficient promise and a nexus between the alleged promise made and work undertaken. On that basis, the application for extension of time is declined and these proceedings are concluded.

R Paul
Family Court Judge