Bulkheads.

IN THE SUPREME COURT OF NEW ZEALAND
TARANAKI DISTRICT
NEW PLYMOUTH REGISTRY

A.No. 18/71

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of ROY EVERISS late of New Plymouth Insurance Manager, deceased

BETWEEN ROGER ELTON EVERISS of London, Laboratory Technician

Plaintiff

A N D JOAN MARGARET EVERISS of New Plymouth Widow as executrix and trustee of the will of the said Roy Elton Everiss deceased

Defendant

Hearing: 24 October, 1972.
Counsel: Laurenson for plaintiff
Fitzgerald for defendant

Judgment: 27 October, 1972.

(ORAL) JUDGMENT OF ROPER, J.

This is an application under the Family Protection Act 1955 for further provision from the estate of Roy Elton Everiss, late of New Plymouth, Insurance Manager, now deceased.

The plaintiff, who is now 24, and resident in Holland, is the only child of the testator, who died on the 9th December 1970 at the age of 50. The plaintiff's parents were divorced in May 1970 and in that same month the testator remarried. The testator was survived by his second wife who is now aged 42. She had not previously been married. Pursuant to the testator's last will which was made on the 16th April 1970 "in contemplation of marriage" the widow took the whole of the estate. The will contains the following provision:-

5. "I expressly declare that in this my Will I make no provision for my son Roger Elton

> Everiss because his affections have become alienated from me and he has failed to maintain a filial relationship with me since his departure from New Zealand in 1967 to reside in the United Kingdom."

At death the testator had assets of $39,898 and liabilities of $11,196 leaving an excess of assets of $28,702, but of these assets the proceeds of a life policy and certain accrued wages, totalling $17,364 have already been paid to the widow in her capacity as widow and not as executrix. It appears that the election to so pay rested with the insurance company which had employed the testator.

I was informed that a freehold dwelling, where the widow now resides, was valued for death duty at $9,100 but has a present value of about $16,000 so that the assets now available in the estate have a value of about $18,000 with liabilities of approximately $670 for legal costs to date.

In view of the testator's express declaration of his reason for excluding his son from the will it is necessary to consider the circumstances of the testator's first marriage and its breakdown.

The testator met the plaintiff's mother when he was on war service in England and they married there in 1945. The testator returned to New Zealand in January 1946 and his wife joined him in July 1946. The plaintiff was born in 1948. According to an affidavit by the plaintiff's mother the marriage was not a happy one with the result that in 1966 she resolved to return to England. It is irrelevant to this enquiry what caused the breakdown, and in any event I have insufficient information to be able to reach any conclusions, except perhaps that family finances entered into it. It was decided that the plaintiff should remain with his father in New Zealand so that he could try for a second time to pass the University Entrance examination and then obtain employment

in New Zealand. The plaintiff was accredited University Entrance at the end of 1966 and obtained employment as a laboratory technician at the New Plymouth Public Hospital. The plaintiff and his father did not get on well together.

There are conflicting reasons for this given in the opposing affidavits. The plaintiff alleges indifference, penny pinching and a complete lack of understanding on his father's part, while a sister of the testator and one of his close friends - a Mr Girdwood - rather blame the plaintiff for taking an uncompromising stand, and his mother for the influence she exercised over her son. I think Mr Girdwood probably comes close to the truth when he refers to the commonplace difficulty of communication between teenager and parent. The rights and wrongs of such a conflict are virtually impossible to determine, let alone resolve.

The plaintiff decided to leave New Zealand and join his mother. Both parents tried to persuade him to remain in New Zealand where he could turn his educational qualification to advantage but to no avail. He left for England in June 1967. Once there the difficulties which both his father and mother had foreseen became a reality. He obtained employment with a firm in England with a view to becoming a laboratory technician but found that he could only work for the duration of his "Visitor's Permit."

Despite what on the evidence could only be described as most strenuous efforts by his mother and his then employers to obtain a "Work Permit," which would have permitted him to remain in England, the plaintiff was ordered to leave England by January 1968. He could have remained in England but only as a full time student having full financial support, which was beyond the means of the plaintiff and his mother.

His desire is to become a qualified laboratory technician, the certificate for which could be granted after a three year course at The London Polytechnic, although presumably a similar course is available in New Zealand.

Faced with the alternative of returning to New Zealand, which presumably cost would have prevented in any event, and remaining somewhere near his mother, the plaintiff went to Holland where he now works for a cosmetic laboratory at a salary of about $N.Z.1320 per annum. He has virtually no savings. The disturbing aspect of this case is that the testator was apparently aware of his son's problems but did not lift a finger to help. In paragraph 11 of the affidavit of Mrs Binnie, the testator's sister, which affidavit was filed in opposition to the plaintiff's claim, the following appears:-

> "THAT in furtherance of this objection to the plaintiff leaving New Zealand the said deceased made it clear to me that by offering no financial help it was hoped to make it difficult for the plaintiff to embark on what the said deceased, I and other members of the family regarded as an impracticable scheme at that stage of the plaintiff's life, he having no financial reserves or suitable educational qualifications. After the plaintiff left New Zealand, the said deceased indicated to me that if he did anything to support the plaintiff in England or elsewhere the date of the plaintiff's return to New Zealand would become more remote."

The general principles to be applied by the Court in a case such as this are well settled. The Court must place itself so far as is possible in the position of the testator and consider whether or not the testator has been guilty of a manifest breach of that moral duty which a just husband or father owes towards his wife or children. All of the surrounding circumstances must be considered. The Court must first enquire as to the need for maintenance and support and then as to the property the testator has left.

Mr Fitzgerald's first submission was to the effect that at the time of his death the testator was under no obligation to provide maintenance and support for his son. The son was of age, in employment, able bodied and without dependants. Mr Fitzgerald also referred to the fact that

claims by adult sons are viewed critically by the Courts.

I have no doubts at all that the plaintiff is very much in need of maintenance and support and was at the time of his father's death. His earnings are such that he cannot be much beyond a hand to mouth existence. He is virtually marooned in a foreign country, having neither the means to return to New Zealand should that be his wish, nor establish himself in a course of training in England where his mother resides.

Mr Fitzgerald's second submission was that if need for maintenance and support be shown then the plaintiff had disqualified himself by his conduct pursuant to Section 5 (1) of the Act. By conduct Mr Fitzgerald meant the plaintiff's actions in voluntarily, and against the wishes of his parents, leaving New Zealand in 1966, when to remain would have meant that the plaintiff could have put his educational qualification to full use. I reject that submission with even greater alacrity than the first. At the time he left New Zealand the plaintiff was only 19. He had been subjected to the stresses and strains of living alone with his father and the absence of his mother. I am not prepared to judge him too harshly. In my view the testator took an unreasonable stand over his son's conduct. After the parting there was little communication between them but in the light of Mrs Binnie's affidavit I am inclined to think that the testator must bear the major part of the blame for that state of affairs. It seems that the testator's aim was to force his son to return to New Zealand. Clear proof of misconduct is required and the onus of establishing it is on he who alleges it. I find no misconduct here which would disqualify the plaintiff.

Mr Fitzgerald then went on to consider the financial positions of the only two possible recipients of the testator's bounty - the widow and the plaintiff. It has often been said that a widow's claim is paramount and over-ride all else but that is not always the case. It depends on all

the circumstances. Not the least of the circumstances relevant here is that the widow was a second wife of only about 5 or 7 months' standing. That would certainly be relevant if she were a claimant and I see no reason why it should not be relevant when she is the defendant. If the value of the dwelling is taken as $11,000 then she stands to receive from the estate, on the normal basis of widow, assets to the value of about $35,000. The plaintiff on the other hand is resident in a foreign country, has no assets, an ill paid job, and no chance stand a pretty bleak future.

I conclude that this is a clear case for further provision.

My inclination is that the quantum of the further provision should be governed by what it would cost for the plaintiff to undergo a 3 year course of full time instruction as a laboratory technician in England, namely about £10,000, but I do not think that can be the test. I have no doubt that such a course would be available in New Zealand at much less cost and where the plaintiff could put to advantage his present educational qualifications. Problems such as this cannot be weighed in golden scales as Mr Fitzgerald tended to do and having regard for all the circumstances I think justice would be done if the plaintiff received the sum of $5,000 from the estate and that is the order of the Court. I reserve leave to the parties to apply for further directions should it be necessary.

I reserve the question of costs.

Solicitors for the plaintiff: Vercoe, Truett, Sullivan & Co. (New Plymouth).

Solicitors for the defendant: Vercoe, Jones & Co. (New Plymouth).