IN THE SUPREME COURT OF NEW ZEALAND

CHRISTCHURCH REGISTRY

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of HENRY ROBERT SMITH late of Christchurch, Motor Camp Proprietor

Deceased

BETWEEN MARJORIE ISOBEL SMITH of Christchurch, Widow

Plaintiff

AND JOHN FRANCIS SMITH of Christchurch, Retired Clerk as surviving Executor and Trustee of the Will of the said HENRY ROBERT SMITH Deceased

Defendant

NO.

504

Hearing: 28 August 1973

Judgment: 14 DEC 1973

Counsel: McVeigh for plaintiff
Hall for defendant (trustee and life tenant)
Pankhurst for remaindermen

JUDGMENT OF MACARTHUR J.

Introductory

This is a widow's application under the Family Protection Act 1955 for provision out of her late husband's estate. The application is out of time. The originating summons issued by the plaintiff includes an application for extension of time pursuant to s. 9 of the Act.

Delivery of this judgment has been delayed for several weeks while counsel made further inquiries in an endeavour to find out the reasons which prompted the testator to execute a codicil to his will shortly before his death. The codicil deprived the plaintiff altogether from any benefit under her husband's testamentary dispositions.

As regards the hearing before me it should be mentioned that counsel for the defendant required the plaintiff to be produced for cross-examination upon her affidavits. There was some difficulty in this connection because the plaintiff is stone-deaf and has difficulty in appreciating what she is asked unless the question is reduced to writing. The hear-

ing was adjourned for a time to enable counsel to prepare a series of questions. Upon resumption these were presented in typewritten form to the plaintiff and her answers were recorded. Counsel were in agreement that, having regard to the desirability of avoiding further delay, this was about the best procedure that could be devised.

Particulars

The testator Henry Robert Smith, a motor camp proprietor, died at Christchurch on 14 August 1965. He was then 68 years of age. The plaintiff was 65. The testator left a will dated 22 June 1962 and a codicil thereto dated 17 July 1965. The will and codicil were both drawn by Pepprill Frampton & Hadfield, solicitors, Christchurch. Probate of the will and codicil was granted to the defendant, the testator's brother John Francis Smith of Christchurch retired clerk, on 9 September 1965. The final balance of the testator's estate was certified for the purposes of assessment of estate duty at $36,360. For convenience I will throughout this judgment state all amounts of money in terms of decimal currency.

By his will testator appointed his sister Eileen Annie Campion and his brother John Francis Smith to be executrix and executor, and trustees of his will. He gave the whole of his estate to his trustees upon trust for sale and conversion and (after payment of debts) for investment of the residue. He then directed his trustees firstly to pay the sum of $4 per week to his wife (the plaintiff) during her life or until she should re-marry; and then to divide the balance of the income from his residuary estate in equal shares between his said sister and his said brother during their lives (the survivor of these two to take the whole of such income); and from and after the death of the survivor to divide the said balance of the income in equal shares between the children of his said brother who should be living at the death of the survivor of his said brother and sister.

By the codicil to the said will testator revoked the legacy of $4 per week in favour of his wife and he directed

his trustees to pay to the wife of his said brother during her life "the income from my residuary estate that my said brother was entitled to up to his death."

In the event the testator's sister Mrs Campion predeceased him. The testator's brother John Francis Smith is the sole trustee of the estate and the life tenant entitled to the whole of the income from the residuary estate. The remaindermen are the five children of John Francis Smith.

Application for Extension of Time

Counsel for the defendant and counsel for the remaindermen did not consent to an extension of time but they did not actively oppose the granting of an extension. The facts in connection with this aspect of the matter can be stated very shortly. In November 1965 the plaintiff consulted Weston Ward & Lascelles, Solicitors, Christchurch, and they opened a file for her. On 3 December 1965 they wrote on her behalf to Pepprill Frampton & Hadfield giving notice of a possible claim under the Family Protection Act. The file shows that on 14 October 1968 the plaintiff complained about delay and that she announced her intention to consult other solicitors. She did in fact consult Mr McClelland in March 1969. He then conducted correspondence with Pepprill Frampton & Hadfield concerning the estate. It was not until September 1970 that he was in possession of all the information that he required. The originating summons was ultimately issued on 22 June 1971. In terms of s. 9 of the Act the time within which the summons should have been issued expired on 9 September 1966 (twelve months from the grant of probate). The delay which actually occurred beyond that date was 4 years and 9 months.

The principles governing an application for extension of time are set out in the following passage from the judgment of O'Leary C.J. in In re Brown (Deceased) (1949) N.Z.L.R. 509 at 510: -

> "The application must be considered on its merits, and the Judge hearing the application, applying principles which have been enunciated in respect of such applications, has a discretion to grant or disallow the application. From 1909 onwards there

> has been a succession of reported cases dealing with such applications, and these were reviewed and applied by Kennedy J. in Shahan v. Public Trustee (1930) N.Z.L.R. 1. His Honour summarized the effect of these judgments as follows: "There has, in my judgment, been long and inexcusable delay, and the application for extension of time should, as in Milne v. Cunningham (1917) N.Z.L.R. 687, be refused unless it clearly appears that to refuse it would, in the circumstances, result in manifest injustice. "
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> I respectfully adopt this statement, and I am of opinion that, although the delay may be long, if it is excusable the application should be granted; and, even if the delay is inexcusable, the order should still be made if to refuse it would, in the circumstances, result in a manifest injustice. "

In the present case I think it must be held that there has been long and inexcusable delay. Nevertheless to refuse an extension of time would, in the circumstances, result in a manifest injustice. It may be added that the other parties do not appear to have been prejudiced by the delay. I therefore make an order extending the time.

Marital History

The plaintiff and the testator were married on 29 December 1926. There was no issue of the marriage. They lived in Wellington for approximately 21 years. For some nine years of that period, according to the plaintiff, she ran her husband's "Evening Post" paper round while her husband worked as a carpenter. She asserts that she had a hard time. In 1947 they came to Christchurch. The testator had sold the paper round. At first they had no house or other premises of their own in Christchurch and the plaintiff was obliged to live with her mother for fifteen months while her husband lived with his mother. During this period the testator bought an old house and five acres of land in Cranford Street with the money he had brought with him and he began to keep fowls on that property. The plaintiff joined him and worked with him on the property. The plaintiff asserts that during the whole of their married life her husband, who was "a very hard critical and nasty natured man", treated her very badly and was always extremely mean. After she had been with him for only a short time at Cranford Street she left him. The exact date of her leaving is not clear. She says that it was "about 1950". According to the plaintiff

she approached the Social Security Department in an attempt to obtain some financial assistance, but was refused it on the ground that her husband was obliged to support her. In 1954 she consulted Bell & Taylor, solicitors, Christchurch, and as a result of a request by them her husband ultimately agreed to pay her $4 per week although without admitting any liability. His payments began on 1 April 1954. It would appear therefore that the plaintiff was without any financial assistance from the testator for about four years, i.e. from 1950 to 1954.

As time went on the testator had cabins and motels built on the five acres of land in Cranford Street and he developed the site into a motor camp and motel area known as the Meadow Park Motor Camp. The plaintiff says that the testator visited her regularly every two or three weeks until he died. She says that he often asked her to return to live with him, but that she refused because he continued to be a critical and hard man and showed no signs of change. The plaintiff also says that until the time of her husband's death he promised her he was leaving her an interest of $4 per week under his will. Although he continued to visit her until a few weeks before his death he never gave any indication that he was considering changing his will. It appears that her payments at the rate of $4 per week continued until 25 November 1964, i.e. they extended over a period of some 10½ years.

The defendant gives a different description of the testator's character and general disposition from that put forward by the plaintiff. Defendant says that the testator was "a friendly man and not nasty or mean"; and that he took a close and affectionate interest in the defendant's five children not having any children of his own.

Alleged Disentitling Conduct of Plaintiff

The defendant says that he has always understood that the plaintiff deserted the testator in 1950. The onus of proof of disentitling conduct rests upon him who asserts it: Re Greene, Zukerman v. Public Trustee (1951) N.Z.L.R. 135. It is clear that the testator was of the opinion that the plaintiff had

deserted him. This appears from some letters and other written communications to him in the year 1954 from his then solicitors, Weston Ward & Lascelles. In these documents there are several references to his wife's desertion. These documents are not admissible in evidence against the plaintiff on the issue of desertion by her, but they are admissible pursuant to s. 11 of the Act in order to ascertain the reasons for the testator's testamentary dispositions. When these documents are examined the testator's reason for giving his widow only $4 per week under his will dated 22 June 1962 becomes apparent. He considered that she had deserted him and he decided that he would do no more for her than to direct the continuation of the payments which he had been making to her since 1954. His reason for revoking this provision by the codicil dated 17 July 1965 is obscure. I stated a little earlier that the documents to which I then referred were not admissible against the plaintiff on the issue of desertion. But in connection with the issue of desertion there was other evidence which is certainly admissible against the plaintiff. In the course of the hearing before me the plaintiff admitted that she had consulted Bell & Taylor with a view to obtaining some financial assistance from her husband. It is surely to be inferred that Bell & Taylor properly investigated the facts and that if the plaintiff had had a legitimate claim to be paid maintenance by her husband they would have asserted that claim on her behalf. But as a result of steps taken by Bell & Taylor the testator offered to pay to his wife $4 per week on an ex gratia basis. Under cross-examination the plaintiff admitted that on her instructions Bell & Taylor had expressed her gratitude to her husband for agreeing to assist her in this way. On the whole matter I think that the evidence does show that the plaintiff deserted the testator. I think that is the proper conclusion notwithstanding the plaintiff's statements to the effect that she was justified in leaving her husband and justified in not returning to him.

In <u>In re Jackson (deceased) Jackson v. Public Trustee & Anor.</u> (1954) N.Z.L.R. 175, Turner J. held that even in cases where it is proved that the wife had left the husband and

had remained apart from him without just cause or excecuse and had, therefore, deserted him in law, she does not necessarily forfeit all claims to provision under the Family Protection Act; and that the circumstances must be examined in every case to see (a) whether they absolutely disentitled the plaintiff, and (b) if not, to what extent they would lessen the relief to be awarded. In that case Turner J. held that the plaintiff's conduct did not completely disentitle her to relief but that it furnished good ground for diminishing the amount of any award. In my opinion the principle of that case is applicable in the present case, and should be applied to it.

Plaintiff's Circumstances

At the date of her husband's death in August 1965 the plaintiff's financial circumstances were as follows. She owned a very small house in Christchurch (present day Government valuation $2,500) and also a property comprising a large house and 6 acres of peat land situated in Grassmere Street, Christchurch. She had been left both these properties by her mother who died in 1955. She sold the latter property about 1966 for $8,000. Putting the matter shortly, her assets at the date of her husband's death comprised a very small house which she could occupy, and other assets worth $8,000. I am not informed whether she was able to undertake any employment at that time. She was 65 years of age. Her hearing had deteriorated but it appears that she was otherwise in a reasonably good state of health. She was in receipt of a Social Security benefit. The testator was not entitled to take that into account when considering his moral duty to the plaintiff, except in so far as the benefit included a superannuation benefit: see s. 13 of the Act. I may add that what occurred in fact is that the plaintiff has been living on the benefit she receives under the Social Security Act (now $22.50 per week). She must have lived very frugally for many years. She has saved no less than $10,000 and now has in her Post Office Savings Bank account the total sum of $18,000 (which includes the $8,000 referred to earlier). Her desire, especially since her health has now deteriorated, has been to save as much as possible so that she may be able to go into an Aged Home at which the

charge is $35 per week.

Conclusion

In my opinion the testator was under a moral duty to make some provision for the plaintiff under his will. The extent of that moral duty is the question which I must now decide. It is true that there was no one else who could have made a claim under the Act. Neither the defendant nor his children qualify as persons entitled to claim. The plaintiff had lived with the testator as his wife for twenty-one years, but she had deserted him some fifteen years before his death and she had not returned to him. She herself regarded the allowance of $4 per week as being a generous act on the part of the testator. The Court is not bound, of course, by the amount of maintenance which has been paid by a testator during his lifetime, e.g. under a separation agreement: see Plimmer v. Plimmer (1906) 9 G.L.R. 10 per Edwards J. at 24. The duty of the Court is to determine the extent of the moral duty owed by the testator to his widow, and in general, the practice is to order provision of adequate maintenance to a widow during widowhood: see in re Crewe (Deceased) (1956) N.Z.L.R. 315. But in the present case I think that the amount which was paid by the testator to the plaintiff on an ex gratia basis for more than ten years does provide a guide to the extent of the testator's duty to make provision for her under his will. He should also, in 1965, have taken into account the decreased purchasing power of money as a relevant factor in deciding upon the amount to be left to the plaintiff under his will. Considering all relevant factors as at the testator's death - including the age of the plaintiff, her financial position, and standard of living, her state of health, and her conduct - I think that notwithstanding the fact that no other person had a claim upon his bounty the testator would have fulfilled his moral duty to his widow if he had left her the sum of $5 per week during her life or until her remarriage. In my opinion the appropriate order to be made now in favour of the plaintiff is one which makes provision for her to that extent.

Order accordingly that the will and codicil of the testator be read as though they contained a gift of $5 per

week to the plaintiff during her life or until her remarriage. The arrears under this provision should be paid out of capital; but in case there are any difficulties in this respect liberty to apply is reserved. The costs of all parties will be paid out of the estate. No order is required by the defendant. If it is preferred that the costs of the other parties be fixed rather than taxed counsel may submit a memorandum thereon.

Solicitors

for plaintiff - McClelland, Wood Mackay & McVeigh, CHRISTCHURCH.

for defendant - Weston, Ward & Lascelles, CHRISTCHURCH.

for remaindermen - Raymond, Donnelly & Co., CHRISTCHURCH.