

IN THE SUPREME COURT OF NEW ZEALAND  
OTAGO AND SOUTHLAND DISTRICT  
DUNEDIN REGISTRY

A.65/71

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IN THE MATTER of the Family Protection Act  
1955

A N D

IN THE MATTER of the estate of STANLEY WILLIAM  
EASTON late of Oamaru, Butcher,  
deceased

BETWEEN EILEEN EASTON of Oamaru, Widow,  
suing as Guardian ad litem for  
JENNIFER ANN EASTON, HEATHER  
ELIZABETH EASTON, ALAN GEORGE  
EASTON, JOHN CHARLES EASTON  
and MARTIN DAVID EASTON

First Plaintiff

AND ELEANOR MARY EASTON, JOSEPHINE  
EASTON, STANLEY LAWRENCE EASTON  
MICHAEL JOHN EASTON, SHARON  
EILEEN EASTON, WILLIAM JAMES  
EASTON and FRANCIS PATRICK EASTON

Second Plaintiffs

AND KEVIN JOHN EASTON, RAYMOND HOLT  
STEPHENSON and DOUGLAS EARL REID

First Defendants

AND KEVIN JOHN EASTON and KATHERINE  
ROSE MILLER

Second Defendants

Hearing: 20 December 1972

Counsel: Main for the first and second plaintiffs  
Alty for the trustees (first defendants)  
Fogarty for the second defendant, Kevin  
John Easton  
Ross for the second defendant, Katherine  
Rose Miller

Judgment: 22.4.73.

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RESERVED JUDGMENT OF WHITE J.

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This is an application for further provision out of the estate of the late Stanley William Easton who died at Oamaru on 2 July 1970. The first plaintiff is the widow of the testator's son, Stanley Francis George Easton, and the guardian ad litem of her five infant children. The second plaintiffs are the adult children of Stanley Francis.

No Special  
Consideration

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The testator's will was executed on 12 June 1970 following the death of his son, Stanley Francis, who died on 28 May 1970. The residuary beneficiaries are two surviving children of the testator, Kevin John Easton (who is also a trustee) and Mrs. Katherine Rose Miller. Another surviving daughter, Mrs. Leone May Young, was left a legacy of \$2,000. There was no attack on this provision and she made no further claim. A daughter-in-law, Mrs. Olive Easton, received \$1,000 under the will. There was no attack on this legacy either. Her husband, Alan Francis, predeceased the testator. The only son of Alan Francis received no benefit under the will and no claim was made on his behalf. The value of the disposable estate after deducting pecuniary legacies and administration expenses was \$45,577 as at 28 November 1972. The value as at date of death was \$49,792.

Some nineteen affidavits have been filed in this case. A number of them were filed very late in the day but the various motions for leave to file them were consented to. I have now had an opportunity of reading them all and considering the evidence in light of the submissions of Counsel. Having done so, the impression I gained at the hearing has been confirmed, that the evidence as a whole shows quite clearly that the testator considered his primary duty was to his children who had played a full part in helping him in the business and at home. Broadly, therefore, the question is whether in the circumstances of this case he failed in his testamentary duty to grandchildren, or at least to some of the children of his son, Stanley Francis, who had died only a short time before the death of the testator himself. In considering this question the fact that an earlier will made in 1968 provided that in the event of Stanley Francis predeceasing the testator all the children of Stanley Francis were to take the share of their parent is of some significance. There was no evidence that the circumstances of the grandchildren had changed to any marked

degree in the period between the two wills. There was some evidence as to the testator's reasons for not providing for the children of Stanley Francis but the full import of what he said regarding assistance during his lifetime to the family of Stanley Francis is far from clear. Unfortunately the testator gave his instructions to an accountant employed by the firm of solicitors who prepared his last will and the impression left with me was that, having referred broadly to assistance given to the family of Stanley Francis, the testator's duty to the claimants may not have been fully considered.

This was a case where the testator had built a business and worked in it all his life despite ill health in his later years. There was some conflict of evidence as to the part played by Stanley Francis and Kevin John in the business but there is no dispute that they both worked in the business over a long period. It was following the return of Stanley Francis to the business some fifteen years before his death that a company was formed in which the shares were held equally by the testator, Stanley Francis and Kevin John, the testator gifting the shares in part. Accordingly on the death of Stanley Francis one third of the shares in the company passed to his estate. It was suggested by Mr. Main that it was open to question whether the testator possessed testamentary capacity at times but it was not submitted that he lacked testamentary capacity when he signed his last will. In fact the evidence was to the contrary. It is proper, however, to take into account that the untimely death of Stanley Francis had naturally upset the testator and I think it is also likely that the testator was concerned over the future of the business. These matters and the deterioration in his own health may well have had an effect on his judgement and led to his acting without a full and careful consideration

of the position of Stanley Francis' family.

The claim made by Mr. Main was that each infant claimant should receive \$2,000 and each adult claimant \$500. Since the proceedings were issued one adult grandchild had indicated that she did not wish to claim so that the total proposed was \$13,000, as compared with \$15,000 to which these grandchildren would have been entitled under the substitutionary clause in the 1968 will. Mr. Main conceded that the claims of the residuary beneficiaries as dutiful children of the testator were unassailable but that their claims to the bounty of the testator did not justify the disinheritance of the children of Stanley Francis. Counsel were agreed that the principles to be applied are laid down in In re Wright, Willis v. Drinkwater (1954) N.Z.L.R. 630 (C.A.). In delivering the principal judgment F.B. Adams J. referred to the position of grandchildren as remoter issue and said, at p.638:

"There is no difference in kind between one sort of claim and another, the words of the Act applying with equal force in all cases. Viewed affirmatively, what the Court is to do, in the case of grandchildren as in the case of other claimants, is to determine whether, having regard to all the circumstances of the case, the testator has made adequate provision for their proper maintenance and support."

I must consider what a wise and just grandparent's duty was at the date of his death and ask the oft quoted question, for example, in In re Green (deceased), Zukerman v. Public Trustee (1951) N.Z.L.R. (C.A.) 135, "What is the need for maintenance and support in the case of the claimants before the Court?" That a claimant is not in necessitous circumstances does not disqualify him or her in considering a provision for "proper maintenance and support." Each claim must be considered "having regard to the means and deserts of the several claimants" and all the circumstances including the value of the estate. I must bear in mind also that the Court will

alter a testator's disposition of his property only so far as it is necessary to provide for the proper support of the persons concerned where adequate provision has not been made. As Cooke J. pointed out in In re Partridge (deceased), Partridge v. Perpetual Trustees Estate and Agency Company of N.Z. Ltd. & Others (1956) N.Z.L.R. 265 the duty does not stop at making adequate provision for maintenance and support until the age of self support has been reached but extends in appropriate cases "to the provision of something to assist a grandchild towards becoming established in life."

In light of these principles I turn now to consider the circumstances and claims of each adult claimant. Josephine Easton was the second child of Stanley Francis. She was aged 25 at the date of death. She lives in Australia, is employed as a secretary in a company engaged in marketing services and earns A\$148.00 every four weeks. Stanley Lawrence Easton, the eldest son, was aged 25 at the date of death and employed then in the family butchery business at a wage of \$40 a week. He has since gone to Australia, is married with a child and now earns A\$73.00 a week. Michael John Easton, aged 23 at the date of death, is described as a trainee manager employed by the Oamaru Licensing Trust and earning \$2,700 a year. He lives at home with his mother, paying \$10 a week board. Sharon Eileen Easton is described as a registered nurse. She was aged 22 at the date of the testator's death. She has recently had some ill health but has fully recovered. She receives a gross salary of \$2,820.39. She hopes to obtain a diploma of education and become a tutor in nursing. William James Easton, aged 21 at the date of death, is a butcher employed in Dunedin at a weekly wage of \$57. He is married. Francis Patrick Easton, aged 19 at the date of death, is a taxation clerk in the Inland Revenue Department earning \$2,827.00 a year. There are

no special circumstances in his case.

In my opinion the circumstances of the adult children show that at the date of death a wise and just grandfather would be justified in coming to the conclusion that they were all self supporting and that they were not in need of further assistance to establish them in life. All these adult grandchildren were able-bodied and in satisfactory positions. I have not overlooked that Stanley Lawrence suffered ill health but the evidence does not suggest that he was not in good health at the date of death or since. In my view, in the circumstances and having regard to the amount of the estate, none of the adult claimants has established a "need" within the meaning of the Act for further provision.

In considering the infant grandchildren I think the position is different. As the evidence shows, the testator himself was conscious of the needs of a child of Kevin John. It is clear that Stanley Francis had heavy responsibilities in educating a large family at Catholic schools. It is interesting to note that Sharon Eileen says in her affidavit that "all the older members of the family were given the best possible educational opportunities" and she added that this was why her father did not die a wealthy man. While his widow has been able to continue to bring up the family, I consider she has faced difficulties of the kind for which a wise and just grandfather in the position of the testator could have made some provision. The position of the infant children can be summarized as follows: Jennifer Ann Easton, who at the time of the hearing was aged 18, has suffered from a spinal complaint and foot trouble. As a result she has been handicapped in taking and keeping employment. Further, she has not been able to take part in sport. Nevertheless she is at present employed as a clerical worker by a Hamilton newspaper. She has become engaged to be married early

in 1973. Heather Elizabeth Easton was 16 at the date of death and a boarder at St. Dominic's in Dunedin. Because of the cost she was sent to live with her elder sister in Upper Hutt where she attended a day school. At the time of the hearing she had left school and will commence a school dental nursing course in Christchurch in 1973. Alan George Easton was 15 at the date of death and was in form IV at St. Kevin's College. At the time of hearing he was in Form VI. John Charles Easton was 12 at the date of death and was in Form I at St. Patrick's School in Oamaru. At the time of hearing he was in Form III at St. Kevin's College. Martin David Easton was 10 at the date of death and was in Standard III at St. Patrick's School. He is now in Standard V at a local school.

It is clear that the needs of the infant claimants are in their education and establishment in life. Having regard to their various ages and considering their needs in those respects in the circumstances of the case I have come to the conclusion that further provision in the sum of \$8,000 should be made, the trustees to hold the amount as a class fund under and with the powers contained in s.6(2) of the Act. While there is a statutory right to apply to the Court, I reserve leave specifically to apply as to any special provision that may be desirable in the administration of the class fund. There will be orders accordingly.

A memorandum or memoranda as to the form of the order or as to costs may be submitted within twenty-eight days.

Solicitors:

Hislop, Creagh & Main, Oamaru, for the first and second plaintiffs  
 Hjorring, Tait & Farrell, Oamaru, for the trustees  
 (first defendants)  
 Solomon, Gascoigne, Quelch, McKewen & Fogarty, Dunedin,  
 for the second defendant, Kevin John Easton  
 Ross, Dowling, Marquet & Griffin, Dunedin, for the  
 second defendant, Katherine Rose Miller