

IN THE SUPREME COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A.13/74

IN THE MATTER of the Family Protection
Act 1955

A N D

IN THE MATTER of the Will of LEONARD RICHMOND
ELLIS late of Dunedin, Retired
Schoolmaster, deceased

BETWEEN IRENE MAUD ELLIS of Palmerston
North, Widow

Plaintiff

AND JOHN IRVINE BRENT and MICHAEL
HUNTER NORMAN HAGGITT both of
Dunedin, Solicitors, as execu-
tors and trustees of the Will
of the above named LEONARD
RICHMOND ELLIS deceased

Defendants

Hearing: 12 March 1975

Counsel: J.R. Callander for the plaintiff
M.R. Radford for Dunedin Diocesan Trust Board
M.H.N. Haggitt for the defendants

Judgment: 12 March 1975

ORAL JUDGMENT OF WHITE J.

While Counsel have had the opportunity of discussing this matter, I have also had the opportunity of reading the papers and the correspondence which was produced by consent today. Having heard the proposal now made and explained by Counsel, who are in agreement, I feel able to agree and make an order but it will be necessary for me, I think, to state the facts in brief in doing so.

This is an originating summons issued by the widow of the testator for further provision out of his estate. He died on 25 June 1973 leaving a will dated 16 March 1972. Probate was granted to the defendants on 3 July 1973. The beneficiaries under the will are three nephews of the testator and the Dunedin Diocesan Trust Board. The testator had two children of his earlier marriage who predeceased him without leaving issue. The nephews received pecuniary

legacies under the will, the residue going to the Diocesan Trust Board for the purposes of St. Mary's Anglican Church. The legacies to the nephews have not been challenged by the plaintiff.

In view of the discussions that have taken place and the proposals that are placed before me I do not find it necessary to refer to the facts in any detail. We are concerned in this case with a second marriage late in the testator's life during which the parties lived together somewhat spasmodically for approximately twelve years. During that period the testator contributed to the household regularly and he continued to do so for a time after he returned to Dunedin in 1962 (when he was in his 80's). The plaintiff did not come to Dunedin, the parties having lived previously in Palmerston North in a house belonging to her. There was considerable correspondence between solicitors during the period of separation and proceedings were at length taken, as a result of which there was a consent order for the payment of maintenance at \$3 a week. That amount was duly paid until 1968. At that point the testator ceased paying maintenance and the plaintiff accepted advice not to take further proceedings. As the years advanced the testator became frail and suffered some illness and he had been in a home or in hospital for some years before he died - then in his 90's. In these last years it appears that the Vicar and other members of the Church to which he has left the residue of his estate had provided pastoral care both before and after he became frail and ill.

As has been pointed out by Mr Callander, there has been a period of years during which no maintenance has been paid to the plaintiff and I have before me the facts as to her present financial situation. In applying the principles of the Act, maintenance and support is not to be judged solely on a narrow basis of economic needs and moral considerations are to be taken into account. Having regard to that

principles, I consider that this is a proper case for some further provision to be made for the plaintiff in this case and that is the matter which has been discussed by Counsel who have proposed the following provision: That there be paid to the plaintiff from the residue the sum of \$4,000 as a lump sum and that the sum of \$5,000 be held on trust to pay the income to the plaintiff from that fund during her widowhood; the fund after her death or re-marriage to be applied in terms of clause 4 of the testator's will. The effect of this proposal will be that the larger part of the estate will become available at once to the residuary beneficiary and that is a factor which I take into account in agreeing to the proposal for the payment of a lump sum in this case. Accordingly, the proposal as I have recorded it is approved. There will be an order accordingly, the form of which will require drafting and may be submitted to me if necessary.

There will be an order for costs, as proposed by Mr Callander and Mr Radford, with disbursements to be fixed by the Registrar.

Solicitors:

Fitzherbert, Abraham & Co., Palmerston North, for the plaintiff
Gallaway, Son & Chettleburgh, Dunedin, for the Dunedin
Diocesan Trust Board
Brent, Haggitt & Co., Dunedin, for the defendants