Recd: 17/3/78 [illegible]

A.387/74

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

107

IN THE MATTER of the Family Protection Act 1955

BETWEEN SUTTON

Plaintiff

AND SMITH and HOLMES

Defendants

Application by widow of testator for further provision out of his estate

Hearing: 2 February 1978

Counsel: W.V. Gazley for Plaintiff
J.A.L. Gibson for Defendants
G.S. Tuohy for Miss C.M. Sutton
R.A. Heron for the children of Plaintiff and Testator
A.A.T. Ellis for the child of Miss C.M. Sutton and Testator

Judgment: 15-3-78

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JUDGMENT OF O'REGAN J.

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The plaintiff is the widow of [illegible] Sutton late of Wellington, Coffee Bar proprietor (hereinafter referred to as "the testator") who died on [illegible] March 1974. Probate of his last will, made on June 1973, was granted on May 1974. The will, after the appointment of the defendants as its executors and as trustees of the estate went on to provide:

" 2. I give devise and bequeath (sic) free of all duties my real property situate at Road, Khandallah, Wellington to my friend

3. I give devise and bequeath ll the rest of my estate real and personal . . . after payment of my just debts funeral and testamentary expenses and all duties upon the whole of my dutiable estate unto my children who shall survive me in equal shares absolutely upon their attaining the age of twenty-one years."

changed her surname to Sutton by deed poll on 21 March 1974. She is the mother of N Sutton who was born on 1974. The testator was the father of this child. He had also four children of his marriage with the plaintiff namely :

born on January 1963;

born on December 1966;

born on 15 December 1966;

born on May 1968.

The net value of the estate of the deceased is $19,292.80. Notwithstanding the specific devise of the property situate at Khandallah the defendants in the course of administration found themselves obliged to sell that property and the final balance of the estate represents but part of its proceeds.

The testator and the plaintiff were the joint owners of their erstwhile matrimonial home situate at

Ngaio. The plaintiff took the property subject to a mortgage of $16,000, by survivorship.

The testator and the plaintiff agreed to separate on November 1971. By an agreement executed by them on that date:

(a) the plaintiff became entitled to possession of the matrimonial home to the exclusion of the testator who engaged himself to pay the outgoings and to keep the property in reasonable repair.

(b) the plaintiff became the sole owner of the furniture and other articles of household use and ornament in the property.

(c) custody of the children was ceded to the plaintiff with a reservation of reasonable access to the testator.

(d) testator agreed to pay $50 per week for the maintenance of the wife and the children with a reduction of $5.00 per week when each child attained the age of 18 years or earlier ceased a course of full-time education or training.

In early 1972, the testator commenced an association with Miss Sutton who was then employed by him. Later that year, the testator purchased and he and Miss Sutton lived there until the testator's death. In her affidavit, Miss Sutton deposed to various payments she made from her own resources some towards the purchase price and legal costs in respect of the property and others for the deceased's benefit. The pay-

thereafter on other days between that date and September 1973. Papas was subpoenaed to give evidence before me and I must say that he left a poor impression with me. He denied the allegations of adultery under examination and cross-examination and proof of the allegations was not advanced through his evidence. The defendants exhibited a report furnished to the testator by one Carpenter, a Private Inquiry Agent, who had been commissioned to obtain evidence of the plaintiff's adultery. Carpenter himself did not go on affidavit. Mr Gazley objected to the admissibility of the report on the ground that it is hearsay and does not fall within any of the exceptions thereto. I uphold the submission and hold that the allegations of adultery by the plaintiff have not been established.

The plaintiff is a granddaughter of Hallam who died on March 1976 and the daughter of Hallam who is also dead. The date of his death is not disclosed. The plaintiff is a beneficiary under the wills of both of them. One of the trustees of the estate of Hallam, Quirke, has sworn a very full affidavit concerning the assets of the estate. For present purposes it suffices to say that the trustees are beset with many and unusual difficulties which makes it difficult for them to forecast with accuracy the extent of the estate. Mr Quirke making the best of the data available and paying due regard to the probable outcome of the unresolved difficulties, estimated that the nett value of the estate will be to the order of $320,000. He anticipates that it will be some two years before the trustees can meet the death duty payable. The plaintiff is a beneficiary but it is difficult to discern precisely

the extent of her interest. I do not propose to embark upon the difficulties as to interpretation or indeed the other difficulties that I foresee. It will suffice, I think, to record the main provision which reads :

"4. . . . To Hold the residue (hereinafter referred to as "my residuary estate" Upon Trust to distribute the income arising from such residuary estate equally between my sons and such income shall be paid to them for their lifetime subject to the condition that any properties held by either or both of my sons in trust for me or for which I have paid the purchase price shall be transferred to my trustees as soon as practicable after my death.

5. That upon the death of each of my sons and the said income shall be distributed.

(a) Equally amongst the surviving children of such deceased son

(b) That should both my sons predecease me then in such case I direct my trustee to distribute the said income equally among my surviving grandchildren.

6. I finally direct that as each of my grandchildren shall die the share of the income which that grandchild would have received shall be paid to the children of that grandchild in equal shares to the intent that when the last of my grandchildren shall have died my Trustees are to take the whole of my residuary estate and all accumulation thereto and divide the same equally between my then surviving great grandchildren. "

The only things that can be said with certainty about these provisions are that they are uncertain and are likely to be the subject of proceedings in this Court for their interpretation. With the difficulties of administration and the likely time it will surely take to have the difficulties of interpretation resolved, it is clear that the plaintiff will not receive any payments for a considerable time. The likelihood is that she will have a substantial interest in income and it is possible that she will in the end succeed to capital either directly or through her father's estate - but not in the immediate future.

The Public Trustee estimates that the nett value of the estate of the plaintiff's father is to the order of $69,500. His will provides a life interest to his widow with remainder to such of his six children (one of whom is the plaintiff) who were living at the date of his death. The affidavits do not disclose whether his widow or which of his children survived him.

The data I have, however, shows that the plaintiff has a substantial interest in both estates but little or no immediate prospect of benefitting from them.

In Coates v. National Trustees Co. Ltd 1956 95 C.L.R. 494, the High Court of Australia on a consideration of a case based upon the statutory provision in the State of Victoria akin to s.4 of the New Zealand Act - the operative words in them are identical - it was held that the question whether the provision made in a will is inadequate for the proper maintenance of the applicant is to be determined according to the circumstances existing not at the date of hearing of the application but as

at the date of death of the testator; but if that question is answered in the affirmative, the Court, in exercising its discretionary power to make further provision, must take into account the facts as they exist at the time of making the order. Dixon C.J. at p.508 put it thus :

> "But the very question what is proper maintenance and support involves the future of the widow and children to be supported. It is however, the future stretching forward from the date of the testator's death and therefore considered as from that date. It involves what is necessary or appropriate prospectively from that time. To determine that question contingent events must be taken into account as well as what may be considered certain or exceedingly likely to happen. "

Coates case was approved by their Lordships of the Privy Council in Dun v. Dun 1959 A.C. 272. The point I am presently considering, however, was not reviewed. It is recorded at p.281 of their Lordships' opinion that :

> "It was not disputed that if the latter (the date of death) were the correct date, the courts should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died."

The approach laid down in Coates' case had earlier been adopted by Gresson J. In re Short 1954 N.Z.L.R. 1149. In accordance with those principles, then, I hold that regard must be had to the provisions made for the plaintiff by her grandmother and her father. Such provisions, however, do not provide for the maintenance of the plaintiff either now or in the immediate future. They are warrant, I think, for capital provision to be denied her. The lack of provision for her maintenance, in the circumstances, can best be met by an order that she be paid the nett income arising from the residuary estate of the testator until her death or remarriage.

The testator clearly owed a moral duty to his children and indeed he met that duty by leaving them the residue of his estate. It has turned out, however, that such provision will be nugatory if the provision made for Miss Sutton is allowed to stand. The actual estate is now such that the devise must needs bear the incidence of orders for the proper maintenance and support of the plaintiff and the testator's children. I do not think that the breaches of moral duty can be adequately repaired by the making of orders in respect of less than the whole estate.

In practical terms, the provisions I have decided upon are achieved by the deletion of paragraph 2 from the will and the insertion in paragraph 3 after the words "my dutiable estate" the words "Upon trust to pay the nett income arising thereon to Sutton during her widowhood and from and after her death or remarriage upon trust for".

I think that the present case is one where the costs of the defendants should either be taxed or fixed by the Court. The first affidavit filed on their behalf contains a mass of irrelevant data which should not have been presented to the Court and costs in respect of it will be allowed only in part. The defendants may submit a memorandum or be heard on the topic.

I fix the plaintiff's costs in the sum of $400; the costs of the interests represented by Mr Ellis and Mr Heron each $150 and of Miss Sutton $125, in each case together with witnesses' expenses and disbursements, in each instance to be paid out of the estate. Mr Heron sought a further order in respect of the affidavit of Mr Quirke, who is a solicitor of this Court. I recognise immediately that his affidavit obviously involved a great deal of work. However, in these proceedings he cannot be elevated above the status of a witness and the allowance to him cannot be other than under the head of witnesses' expenses.

Solicitors:
Gazley, W.V., Black G.J., Wellington, for Plaintiff
Stacey Smith-Gibson & Holmes, Wellington, for Defendants
Buddle Anderson Kent & Co., Wellington, for Miss C.M. Sutton
Swan Davies McKay & Co., Wellington, for children of plaintiff and testator