NZLR

IN THE SUPREME COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

M.37/77

407

IN THE MATTER OF The Family Protection Act 1955

A N D

IN THE MATTER OF The Will of CHRISTINA ANN CLEMENTINE PALMER of Invercargill, Widow, deceased

BETWEEN BEVERLEY ANNE EVANS
of Invercargill,
Housewife

Plaintiff

A N D THE PUBLIC TRUSTEE
a Corporation Sole
under the Public Trust
Office Act 1957 as
executor and trustee of
and under the Will of
CHRISTINA ANN CLEMENTINE PALMER
late of Invercargill, Widow,
deceased

Defendant

Hearing: 31 May 1979

Counsel: T.L. Savage for Plaintiff
T.G. Sullivan for Defendant
G.S. Noble for Infant Grandchildren
P. Johnson for Barry Wayne Evans

Judgment: 18 June 1979

JUDGMENT OF BAIN J.

The testatrix died on or about 14 January 1976 leaving a Will appointing the Public Trustee executor of her estate. She was survived by her only child (her daughter, the plaintiff) and her daughter's three children named and aged respectively -

Barry Wayne Evans aged 21 as at 29 December 1978
John Darrell Evans aged 17 as at 1 September 1978
Darren Lee Evans aged 12 as at 28 March 1979.

By her Will, she left to the plaintiff certain chattels including a motor car and china and silver ware - the total value of these was said to be about $6,800. After distribution to her of these and after payment of debts and outgoings, the residue of the estate is left to the plaintiff and the plaintiff's three children (four beneficiaries in all) in equal shares. The plaintiff protests in these proceedings as to the adequacy of the provision made in respect of her proper maintenance.

The Public Trustee as executor, filed affidavits as to the assets and liabilities of the estate at relevant times and his counsel took a neutral position as regards these proceedings. He did, however, inform the Court through the affidavit of Ronald Frederick Asher Anthony, District Public Trustee, Invercargill, that according to a note made on 25 September 1970, the testatrix referred at that time to an association the plaintiff had formed with another man by reason of which she wished to cut down her daughter's (the plaintiff's) potential share in the estate and to make her grandchildren substantial legatees and beneficiaries in the residuary estate. She in fact executed a Will a few days later, on 1 October 1970. Following that, she reconsidered the disposition of a few items of household and personal effects and finally, on 1 June 1971, wished to leave china ornaments and German silverware to her daughter with a wish that her daughter dispose of these items in accordance with wishes she would communicate to her. There were no other instructions and a fresh Will, that now the subject of these proceedings, was executed on 6 July 1971. The Will in respects other than the specific bequests of chattels mentioned, follows her instructions given in September 1970. (Counsel for Barry Wayne Evans in his memorandum of 30 May 1979, mentioned the testatrix' apprehension expressed on numerous occasions

lest her estate fall into the hands of one Noel Barlow who had a de facto relationship with the plaintiff.

The plaintiff in her affidavit of 31 May 1979 refers to the association which seems to have attracted the disapproval of her mother, the testatrix, reflected in both the former Will of 10 October 1970 and that of several months later, the Will now under consideration dated 6 July 1971 and explained by the District Public Trustee. The plaintiff delayed until the date of this hearing before answering the District Public Trustee's information. She acknowledged the acquaintance with Barlow which started in 1970 and matured, as she indicated, into what she indicates was a sporadic de facto relationship which endured through to August 1975, at which time it reverted to a friendship. It cannot resume because Barlow now resident in Australia, married another in March 1978. However that may be, the unpalatable situation for the testatrix did endure right through from the time before the making of her Will of October 1970 to the date of her death. The plaintiff says in her affidavit that her children were subjected to some discipline at the hands of Barlow, a matter of resentment on the part especially of Barry, the eldest, the affinity between whom and his grandmother was very close.

It seems clear that the words "cut down" mentioned above are simply the marking of displeasure. It seems further that the apprehension of the testatrix was of somewhat secondary importance in her mind, for means were available to her so to dispose of any part of her estate for the benefit of her only daughter during the latter's lifetime only, with the capital to fall for eventual distribution to the three grandchildren of the testatrix or the next of kin of any who might predecease his or her parent. Even at this day and age

there are those whose moral code rejects extra-marital associations. As at the time of the making of the Will now before the Court and thereafter until her death, the testatrix was clearly torn three ways between her very real and enduring affection for her only daughter, her disapproval of the state of affairs prevailing and the affinity and affection she held for her grandchildren, who were additionally the product of the plaintiff's broken marriage. It would have been of concern to the testatrix that her only daughter and natural successor was only 38 years of age as at the date of her death, but with three children was to be still of an age to form alliances such as had been formed with Barlow, with possible alienation of the estate away from the testatrix' lineage.

Moreover, the testatrix' marriage had been an unhappy one, leading to a parting of the ways but not, it seems, to such estrangement as to produce disinheritance as far as she or their only child, the plaintiff and her children were concerned. The net value of his estate when he died on 16 April 1975 appears to have been some $60,000, including a half share in a home at 12 Kereru Street, Invercargill and a half share in a farmlet at West Plains. There were legacies of $5,000 each to the plaintiff and her three children, leaving about $40,000, less administration costs and estate duties, for the present testatrix; the figure stated in para.3 of Mr Anthony's affidavit of 7 September 1977 was $39,654.83. In respect of the farmlet at West Plains, the testatrix herself owned the other half share in her own right, so that the two half shares coalesced to form part of her estate at the date of her death.

It appears that this farm property is now partly within the Invercargill City and has potential sub-divisional value which must affect the value at which it is brought into the estate accounts, that is to say, the special valuation

of $87,000 obtained for estate duty purposes. Subject to that, the testatrix' estate on the latest accounts is $98,737.63, less administration charges of $2,400.00 suggesting an excess of $100,000 depending on the West Plains farmlet's potential realisation.

It does seem that even after taking the abovementioned detracting circumstances into consideration, the plaintiff fared rather less than was her due when the circumstances of her father's dispositions are looked at in conjunction with those of the testatrix. The testatrix' own estate apart from that inherited from her late husband, came mainly from the testatrix' aunt and uncle's estate to which both the testatrix and her husband had contributed with services after going to live on the testatrix' relatives' farm at Dipton. The testatrix herself had lived like a daughter with her aunt and uncle from a very early age.

The evidence before me is that there was a very strong bond of affection existing between the testatrix and her grandchildren, especially the eldest of them. Great respect must be paid to the testatrix' wish to deal generously with her grandchildren in these circumstances and yet to do justice to the plaintiff whose affinity, after all, as an only daughter is so much closer than the echelon once removed. It was urged upon me that provision might justifiably be made on the basis that the plaintiff receive two thirds of the residue of the net estate, leaving one third to go for equal distribution to the three grandchildren so that each of the latter group would receive on coming of age about $10,700 to add to the $5,000 already received from their grandfather's estate. The result for the plaintiff would sound in some $64,000.

I am disinclined to this generosity having regard to all the circumstances. I did consider the possibility of making further provision for the plaintiff in the way of a life interest in part of the estate, but on the whole, I have come to the conclusion, taking into account the size of the estate, the testatrix' own desires, the needs of the plaintiff at the age now of 41 and her health, that a reasonable thing would be to acknowledge her entitlement to be twice that of any of her children. To produce this, the trust set out in para.4 of her Will could provide for the estate to be divided into five parts instead of four as at present, with two parts to go to the plaintiff and one part each as provided for in favour of each of the testatrix' grandchildren. Assessing the net value of the estate to be worth $100,000, the result would be $40,000 to the plaintiff plus her specific legacy, with $20,000 to each of the named grandchildren to add to the $5,000 received from their grandfather's estate.

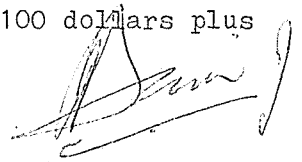
An appropriate draft order may be submitted for approval to give effect to this distribution and for payment of the costs hereof, all of which are to be paid from the estate:-

To the plaintiff - 400 dollars plus disbursements

To the Public Trustee - 150 dollars plus disbursements

To Counsel for the two youngest grandchildren - 150 dollars plus disbursements

To Counsel for Barry Wayne Evans - 100 dollars plus disbursements.



Solicitors for Plaintiff: Messrs French, Savage, Hurd and Company, Invercargill

Solicitors for Defendant: Public Trust Office, Invercargill

Solicitors for Infant Grandchildren: Messrs Preston, Evans, Noble and Early, Invercargill

Solicitors for Barry Wayne Evans: Messrs Broughton, Henry and Galt, Invercargill