18/6

IN THE HIGH COURT OF NEW ZEALAND A. 3/78

GREYMOUTH REGISTRY

No Special Consideration

359

IN THE MATTER of the Family Protection Act 1955

- a n d -

IN THE MATTER of the Estate of WALTER SCOTT late of Karangarua, farmer, Deceased

BETWEEN EVA KATHLEEN SCOTT

PLAINTIFF

A N D THE PUBLIC TRUSTEE OF NEW ZEALAND

DEFENDANT

Judgment: 13 JUN 1980

Hearing: 24 April 1980

Counsel: S.C. Barker for Plaintiff
D.L. O'Rourke for Defendant
D.J. Tucker for W.A. Scott
C.A. McVeigh for J.P. Scott
A.D. Orchard for minor children of W.A. Scott

INTERIM JUDGMENT OF CASEY J.

Walter Scott ("the deceased") lived and farmed all his life at Karangarua in South Westland. He died on 17 August 1977 aged 78, and left his widow (the Plaintiff) who is now 83 and likewise spent all her life in that district. They were married in 1920 and had four children, of whom one son, Walter Arnold (called "Arnold" in this judgment) survived, and he is separated from his wife, and has seven children whose ages range from 33 to 12. Among them is James Patrick (23) (called "James") who is the residuary beneficiary under the deceased's Will. His other three children predeceased him - two without issue, but the third (Phillip Clyde) left four surviving daughters - all minors - who live with their mother at Oamaru. Under his Will made on 19 May 1976 the deceased left his estate on trust for his widow for life and thereafter to his grandson James absolutely. It consists of the farm at Karangarua which the deceased acquired from his father at 21, and which (along with other property) he worked with his son Arnold. About 1947

the latter built a house on part which is now occupied by his separated wife and the children living with her. Apparently it was understood this house would be surveyed off into a separate lot, but that was never done and stricter subdivisional policies would make it virtually impossible now. There was a loose arrangement between father and son for sharing the farm income and he says he received nothing in 1977, and only $1,423 in 1976. In 1962 Arnold says the deceased bought 700 acres adjoining in his name to avoid any question of undue land aggregation, and the price of $9,700 is considered by the Trustee to be a debt still owing from him to his father. That the latter clearly believed he had provided this land for his son is borne out by the comments he made to officers of the Public Trustee, who kept commendably full records of the instructions and discussions they had with the deceased about His Will and estate over a number of years. It seems clear that he was disappointed in Arnold, and there are references to his alcohol and other problems in these notes as well as in the restrained affidavit of his own son James, whom the deceased believed was the only one of the family interested and capable enough to keep the farm going. The latter had been (and still is) a helicopter pilot and makes a good income from it, but he has also worked with his grandfather on the farm and since his death he has leased it from the estate and bought the stock etc. and is clearly making an effort to run it properly. He and his wife and infant daughter live in a house built on Arnold's 700 acres. The latter, on his sporadic appearances (according to his son's affidavit) lives in a bach behind his mother's house and apart from a car and the 700 acre block he has no assets. After a period of unemployment he now works as a bushman. Counsel inform me the latest Government Valuation of that 700 acre block is $17,000.

The Plaintiff lives in an old cottage on the farm in which the deceased was born and does not want to move. She is obviously upset that after 57 years of marriage she has no capital - only the right to live in the cottage and receive the estate income. James pays the Trustee $4,000 per annum rental on his yearly lease of the farm (which excludes her house and grounds), and if he still retains the property after this action he intends a more stable arrangement, probably at a

higher rent. Although not obliged in terms of the Will to do so, under the lease he also pays rates on her house and is obliged to keep its grounds tidy. Mrs Scott complains bitterly about his offhanded assumption of ownership of the farm and the way he treats her. He denies such conduct and says that since her husband's death she has become very cantankerous, and the District Public Trustee also mentions difficulties in dealing with her. James said he would be only too willing to work in partnership with his father, Arnold, but he knows from experience that it would be impossible. Although the Court has reservations about accepting criticism of this nature between members of a family disputing a Will, the serious allegations James makes against his father have not been answered, and indeed are supported by the deceased's own comments to the officers of the Public Trustee.

Orders were made for service on Arnold for himself and his three children under 20 and on Mary Scott (the widow of the deceased's son Phillip) for herself and her four infant children. Just before the trial I appointed Mr Orchard to represent Arnold's infant children at Mr Tucker's request, and in the short time available he has helped me with submissions. Nobody else appeared, so the only claimants for further provision were the Plaintiff, Arnold, and his three infant children represented by Mr Orchard. Mr Barker submitted that the deceased had failed in his duty to his widow by not leaving her a capital sum sufficient for a new home, a car to provide independent transport and enough for her security and to meet any emergencies for the rest of her life. However, it was also clear from the Plaintiff's affidavit that her principal grievance was the preference shown to James and that she wanted capital so she could leave money to other members of the family whom she thought her husband had unjustly ignored. I agree with Counsel that the estate is adequate to meet all proper claims and that James, although no doubt rightly chosen by his grandfather as the one most likely to succeed with the farm, has no competing moral claim. But the Act does not exist to enable a Will to be remade to suit the wishes of beneficiaries; nor may the Court at second-hand exercise on behalf of a testator charitable intentions which he has seen fit to ignore. There must be shown a need for maintenance and support in the

broad sense embracing moral and ethical considerations as well as economic; and also a failure by the deceased to meet his moral obligation to satisy those needs, assessed by reference to what a just and reasonable testator would have done in his situation at the date of death. His wife was then 78 and it must have been clear to him (as it now is to me from the affidavits) that she wants to spend the rest of her days living in the farm cottage. She seldom went out of the district during all her married life and according to James' affidavit she does not drive. I therefore do not accept that she needs money for a new house or car as her Counsel submitted. She has received about $3,000 per annum from the estate and there is no suggestion this is inadequate for her present and future needs. According to the affidavit from the District Public Trustee (which I accept as correct) any problems she had over money stem from her own suspicions or inability to co-operate, and this also seems to be at the root of her difficulties with James. Having regard to her age, her way of life and present intentions, I think the deceased acted quite properly in giving her a life interest, which will enable her to continue in the chosen life-style to which she has always been accustomed. However, I think some capital should have been provided for emergencies and as a form of security for any lengthy illness or other problems, and I increase the provision made for her by granting in addition a legacy of $7,500.

I now turn to Arnold's situation. An able-bodied son (he is now in his mid-fifties) usually experiences some difficulty in persuading a Court that he has need for further maintenance or support. The impression I have is of a drifter addicted to alcohol, which seems to be the reason for his father by-passing him, and for his son's conclusion that he could not work satisfactorily on the farm. The deceased was obviously concerned to see property remain in the family and, subject to the fulfilment of his moral obligation, that wish should be respected. Arnold claims a breach of that obligation by the failure to recognise his years of work on the farm in what his Counsel has described as a semi-feudal relationship with his father. One strikes often enough in these cases a history of an adult son who has stayed on the family farm and worked for low wages in the expectation he will succeed to the property. I find that

while one can see the outline of such a picture here, the criticisms voiced in James' affidavit - supporting the deceased's opinion of his son - suggest that his omission from the Will was not due to caprice or passing favouritism, but to a settled conclusion that Arnold had failed his father's reasonable expectations. He accepted what he was paid for the work he did from the partnership arrangement, and also engaged in other work such as whitebaiting. He makes no suggestion in his affidavit that he stayed on because of any promise or expectation of inheriting the farm. Indeed, the other evidence suggests that for a number of years before his death, his father's view about him must have been well known to Arnold. Having been given his chances, it is difficult to see any further moral claim; but whatever claims he had, the deceased regarded them as satisfied by what he intended as a gift of the 700 acre block, now valued at some $17,000. The debt of $9,700 never seems to have been mentioned by him, and I believe he regarded it as written off, and I order that there be a provision forgiving this debt accordingly. Obviously Arnold and James will have to come to some arrangement about either the purchase or lease of this property, and the curious housing situation of their respective families will have to be sorted out.

That unencumbered block gives Arnold an adequate capital security and having regard to all the circumstances apparent from the other affidavits (which remain uncontradicted) I am unable to see that a wise and just father in the deceased's position at his death would have done anything more. Indeed, he might well think that any capital sum would be promptly frittered away and, having regard to the provision I propose for Arnold's children, the deceased is in effect shouldering that responsibility on Arnold's behalf. There is nothing about maintenance in his affidavit, but his Counsel tells me he pays something to the Social Welfare Department. His separated wife and children receive a Domestic Purposes Benefit. Apart from the order I have made I see no justification for further provision for Arnold.

I think this is a case where the deceased owed a duty to Arnold's minor children and possibly to those of his dead son Phillip. No steps were taken on behalf of the latter

by their mother, and by the time Counsel for the immediate parties realised the position it was too late to have anyone appointed to represent them, without causing further delays to the hearing of this application. However, I am not prepared to dispose of it finally without some information and submissions on their behalf. Their mother seems disinterested, so I will make an order at this late stage appointing Mr Orchard to represent them as well (on the assumption that he is willing to do so) and direct that he submit a report on their situation and needs. No doubt he can arrange this quickly through suitable Oamaru agents. He may also make written submissions on their behalf, and serve them (together with copies of the report) on Counsel representing the other parties, who will then have one month to submit any reply. Thereafter I will make a final order in respect of the grandchildren. I have in mind an appropriate class fund. Counsel may also indicate appropriate allowance for costs to be met from the estate.

Solicitors:

Young Hunter & Co, Christchurch, for Plaintiff
Public Trust Office, Christchurch, for Defendant
Guinness & Kitchingham, Greymouth, for W.A. Scott
Roy Twyneham & Son, Christchurch, for J.P. Scott
A.D. Orchard, Westport, for minor children of W.A. Scott