Butterworths (2)

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A 458/78

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of THOMAS ARNOLD AUSTIN late of Christchurch, Retired Foreman of Works, deceased

BETWEEN ROY LAWRENCE AUSTIN of Christchurch, War Pensioner

Plaintiff

A N D COLIN RICHARD HARMAN and ANNESLEY BRIAN HARMAN both of Christchurch, Solicitors as trustees and executors of the will of the said Thomas Arnold Austin, deceased

Defendants

Hearing: 3 March 1981

Counsel: B. McClelland, Q.C. and S.L. Kaminski for plaintiff
C.R. Harman for defendants
D.J. Boyle for residuary beneficiary
Brooks for Arnold Allington Austin
J. Cadenhead for Beryl Audrey Turner
G.A. Young for Lilian Nora Oakley
D.J.R. Holderness for grandchildren (except Mrs Stolzenberger)

Judgment: 6 APR 1981

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RESERVED JUDGMENT OF WHITE J

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This is an originating summons issued by the plaintiff for further provision out of the estate of his late father, Thomas Arnold Austin.

The testator died on 19 September 1977. Probate of his will was granted on 7 November 1977. The testator's wife predeceased him, dying intestate. There were three children, A.A. Austin, now aged 60 years, the plaintiff, now aged 59, and Beryl Audrey Turner, now aged 58.

In his affidavit in support the plaintiff described the family as a "close" one. They had lived through difficult times economically. He said the boys left school

at 14 to go to work, their wages becoming part of the family income. The daughter also worked after leaving school at 16, and her wages were also part of the family income.

The plaintiff served overseas in the Air Force as a fighter pilot in Europe and later in India as a test pilot. He is now in receipt of a war disability pension following mental illness. After the war he served in the police force and later became a primary school teacher. It was in 1958 that he suffered a nervous breakdown and received a 50 percent war disability pension. He endeavoured to carry on as a teacher but eventually gave up teaching and was reassessed at 70 percent for his war pension. Since 1970 he has received a war service pension as a person incapable of holding any employment. He now receives also National Superannuation.

The plaintiff and his wife have seven children; only the youngest, aged 15, is dependent on them and, unfortunately, she was recently very seriously injured in an accident and is in the intensive care unit at the Christchurch Hospital.

The plaintiff states that there was a close relationship between his wife and children and the testator and his wife. He states that the latter were in the care of the plaintiff and his family for periods during the closing years of their lives when both were in ill health. The testator suffered a stroke or strokes. The plaintiff states he was then "able to do very little for himself and that he became very embittered and difficult to deal with". He also states that he remained "strongly independent" and that after he had been with the plaintiff and his family for about nine months he decided to move to the Retreat Rest Home in Avonside. When the testator left the old family home he sold it. Then the plaintiff records that about two months after he went there the testator was found away from the rest home walking down the road and was taken back to the plaintiff's home. A prefabricated bach was

purchased at a cost of $1400 for one of the plaintiff's sons to provide a room for the testator in the home. The testator paid board at the rate of $25 a week. About a year later the testator moved out again, on this occasion to the Langford Rest Home.

The plaintiff and his wife own a house property in Christchurch. The Government valuation is $20,900. There was $1000 owing on mortgage on 27 February 1981. They have a 1962 PAX Vauxhall car. He states that they have no savings, his income having been used at all times on the family and the home. He says that he is under constant medication for paranoid schizophrenia. The plaintiff states his income is war pension $86.50; superannuation $24.50; wife's car pension $52.50: a total of $163.50 a week.

The plaintiff's brother and sister have filed affidavits which support the evidence of the plaintiff. Mrs Turner can depose only as to details prior to her marriage in 1949, since when she has lived in Auckland. In a brief affidavit Mr A.A. Austin, who lives in Christchurch, confirms the plaintiff's affidavit "in so far as the matters traversed in his affidavit are within my knowledge". The first-named defendant, Mr C.R. Harman, provides the history of the wills prepared by his firm and executed by the testator. The variations made over a relatively brief period are of some significance.

In a will dated 31 June 1972 Mr A.A. Austin was named as sole trustee, there was a bequest of $1000 to a granddaughter, Pauline Stolzenberger, and the residue of the estate was divided between the testator's three children.

The testator made another will on 12 February 1974 which was prepared by Mr C.R. Harman. Mr Harman deposed that the testator had sold his property in Christchurch on 2 February 1974 for $18,438.90, the proceeds being deposited on term deposit at the Bank of New Zealand on 11 February 1974. In the will of 12 February 1974 the bequest to Mrs Stolzenberger was $3000 and there was a

bequest to a sister, Mrs Oakley, of $500. The remaining provisions of the will remained the same as the will of 31 June 1972. Mr Harman recalls that this will was signed at the home of the plaintiff.

The third will exhibited was prepared by Mr C.R. Harman and executed on 16 July 1974. Mr Harman deposes that Mrs Stolzenberger was present when instructions were given (apparently against her wishes but on the testator's insistence). While Mr Harman was aware that the testator had had a stroke "about a year earlier", he considered the testator was "medically and physically fit and capable of making a will". In the will of 16 July 1974 Mr C.R. Harman and Mr A.B. Harman were appointed executors and trustees. Bequests of $10,500, $10,000 and $3,000 were made to the testator's daughter, Mrs Turner, Mrs Stolzenberger and Mrs Oakley respectively. The residue of the estate was left to Mrs Stolzenberger. Mr Harman records that the testator gave his reasons for omitting his sons, as follows:

> "He said that both his sons owned their own homes and were in good health. He said that Roy was on a full war pension and teachers superannuation and that his wife was neurotic and causing mischief all the time among the family. He said that recently his son Alan had questioned him about his wife's will and other matters, which he resented. He said that Madge Austin was jealous of her daughter Pauline (Stolzenberger) and was trying to keep Pauline away from him. He said that Pauline visited him and was good to him and that his sister Beryl Turner wrote to him quite often. His final comment about his sons was 'neither of my sons has done anything for me and they are both a selfish lot'."

A fourth will was executed by the testator on 14 April 1975. The bequests were amended to include $5000 for each of the testator's sons and Mrs Stolzenberger was to receive a Singer Vogue motor car and an oak tallboy wardrobe. The residue of the estate was again left to Mrs Stolzenberger absolutely. Mr C.R. Harman prepared the will

and stated the reason the testator reinstated his sons as beneficiaries was as follows:

> "My attitude to my sons has not changed but I feel I should leave them something. Mrs Stolzenberger has bought a house at Diamond Harbour and I haven't seen them (the Stolzenbergers) since Christmas. Her attitude is wrong. She is too busy to take any interest in me."

Mr Harman states that on 3 March 1977 he received a letter from the testator purporting to alter his will by two handwritten documents dated 3 January 1976 and 1 March 1977. They read as follows:

> "94 Retreat Rd
> 3/1/76
>
> This is an alteration to my will that was made on the 14th April 1975 (it alters clause 4). I leave my Singer Vogue motor car to Stanley Oakley of 43 Tabart St and any expenses... (illegible)
>
> Signed by T.A. Austin
> Witnessed by Diana M Haselden Reg. Nurse
> -- Haselden "

> "7 Tancred Street
> Linwood
> 1st 3rd 1977
>
> This is another alteration to my will under clause 5 section (b) eliminate the words the sum of five thousand $5000 dollars to my son Laurence Roy Austin.
>
> Yours in ... (illegible)
> T.A. Austin
>
> Witnessed by 1/ -- (illegible)
> Co Proprietor
> 213 Cranford St
> Christchurch
>
> 2/ G.J. Durrant
> 4 Tancred St
> ChCh 1 "

At this stage Mr Harman obtained a medical report from the testator's doctor who, in a report dated 12 April 1977, stated:

> " Concerning Mr Thomas Arnold AUSTIN, 80 years.
>
> I visited this man at Langford House on 11 April 1977 and spent some time in discussion and consultation with him.
>
> He converses freely and intelligently on matters of his past life, past medical history and circumstances leading up to his admission to Langford House. He has weakness of the left arm and left leg, the result of a stroke about three years ago. However, he is able to use the left hand to feed and dress himself and with the aid of a leg brace and a stick he is able to get about very easily, going for walks every day.
>
> He readily recalls the extent of his assets and is able to name his family and those others who might benefit from his estate. I did not discuss the nature or extent of his will, but without doubt he is of sound mind and of full testamentary capacity.
>
> The Matron of the Nursing Home has at no time observed him other than of intelligent and sound mind. "

Mr Harman says that he communicated with the testator on several occasions regarding the execution of the will as the testator had said he wanted "to come to town". Eventually, however, Mr Harman called on the testator at Langford House on 15 June 1977 when the will was executed. Prior to execution Mr Harman deposed that he asked the testator whether "he was still determined to cut his son Roy out of his will and he said that he was". That in fact was the only variation made in the will dated 14 April 1975.

It is significant, in my opinion, that the period the testator was in Langford House began, according to the plaintiff's evidence, when he left the plaintiff's home for the second time.

I turn now to the evidence of Mrs Stolzenberger, the residuary beneficiary under the testator's last will, dated 30 April 1979. She is the plaintiff's eldest child, now aged 34, married on 23 December 1966, with three children. She claims to have left home at the age of 16 because her father, the plaintiff, was an alcoholic. She also states that she and her mother "did not get on together" and that there were "frequent arguments and rows in the home" so that her childhood was "an extremely unhappy one". Mrs Stolzenberger describes her time away from home and her return and continuation of fights and arguments and extreme unhappiness for her until her marriage. After her marriage she and her husband lived in various places in Christchurch and its vicinity and spent 2½ years in Australia. She claims to have attempted to see her parents but that they "had no interest in my 3 children". She deposes that from 1973 she suffered from ill health leading to surgery and that later she was receiving treatment from a psychiatrist. A report from the psychiatrist exhibited to her affidavit, dated 23 April 1979, refers to "a mental breakdown". He states that "the nature of the breakdown is somewhat obscure", but that he felt it was "related to chronic family difficulties especially in the unhappy relationship with her parents as well as prolonged physical difficulties...." Mrs Stolzenberger claims that she "maintained a close relationship" with her grandfather the testator and she goes so far as to claim that she regarded her grandparents as her "true parents". She says, "My grandparents were the people I turned to for emotional support prior to my marriage and after".

The evidence of Mrs Stolzenberger must be weighed having regard to the evidence of the plaintiff, the plaintiff's wife, Mrs M. Austin, and the evidence of two

of Mrs Stolzenberger's sisters, Mrs Gail M. Foster and Mrs B.H. Martin. Mrs M. Austin states with regard to the affidavit of her eldest daughter, Mrs Stolzenberger, that "in so far as it relates to her father and her grandfather much of it is untrue". I do not find it necessary to refer to Mrs Austin's evidence at length. It is sufficient to say that, read with other evidence, I find it convincing both in reply to Mrs Stolzenberger and in support of her husband the plaintiff. I do not overlook, of course, that she is the plaintiff's wife. Her evidence is supported, however, by the evidence of her other daughters, Mrs Foster and Mrs Martin. The firm impression I have from the evidence is that the evidence of Mrs Stolzenberger is unreliable. It is to be noted also that it stands alone and has not been brought up to date. It may well be that her recollection of earlier days and her attitude towards other members of the family have been affected by her ill health. It is also a reasonable inference, in my view, that Mrs Stolzenberger's attitude was likely to have influenced the testator's actions at a stage of his life when he had been affected by the breakdown in his health.

In my view, having regard to the testator's behaviour towards the end of his life, as deposed to by those members of his family whose evidence I prefer, the reasonable inference to draw from the evidence, including the frequent alterations to his will, is that it was more probable than not that the testator's age and health were affecting his attitude to his relatives.

These findings are in accord with the submissions made by Mr McClelland and other counsel supporting the plaintiff's claim. In reaching these conclusions I do not overlook Mr Boyle's submission that it is clear that Mrs Stolzenberger had a special place in her grandfather's affections following her association with him. I accept, of course, his submission that

before the Court can make further provision for the plaintiff the primary onus is upon him to satisfy the Court that there was a failure of the moral duty by the testator. Mr Boyle relied on Re Green (1951) NZLR 135, where it was pointed out by the Court of Appeal that there is a primary onus on an applicant to satisfy the Court that there has been a failure of moral duty on the part of the testator. It is important to note that it was also pointed out in that case that where a testator has treated one of his children very differently from the others the Court must consider whether there is anything in the child's circumstances or conduct to justify complete exclusion. In my view, Mrs Stolzenberger's evidence cannot be accepted as providing reasons for excluding her father.

Mr Boyle relied on Re Baker, deceased (1962) NZLR 750, 761, in support of his submission that the effect of Mr McClelland's proposal that there should be equal division between the testator's children was to invite the Court to rewrite the will. That was a case where the testator's son was able-bodied and in regular employment. The son had four children to whom the testator left the residue of his estate. It was held there was no breach of the moral duty, as the headnote states correctly, "having regard to the indirect relief afforded to the plaintiff arising from the gift to his children and the consequent availability of the income in the shares in the residue of the estate for their maintenance and education." The facts of that case are very different from the facts in the present case where only one grandchild receives the residue and the plaintiff alone among the testator's children was disinherited.

Mr Boyle also submitted that as the testator's three children were nearing retiring age and were in reasonably comfortable circumstances the Court should regard the testator as free to treat them as not in need of provision out of his estate. In short, Mr Boyle submitted that no breach of moral duty had been

established and that the will should not be disturbed, but that if the Court came to the conclusion that the plaintiff should receive a benefit it should be limited to a legacy of modest proportions.

I return then to the submissions of Mr McClelland and other counsel who contended that there was a clear breach of the moral duty of the testator as a wise and just father fully aware of all the relevant circumstances.

I accept Mr McClelland's submission that the plaintiff was a dutiful son, affected to some extent by his own health difficulties following war service. I accept the evidence of the help given to the testator by the plaintiff and his family. I agree that the effect of the plaintiff's service in war was a factor which should have been taken into account by the testator. It is to the plaintiff's credit that he did not suggest that he should be treated more generously than his brother and sister. That, no doubt, is a realistic attitude, however, in a case where all the testator's children can be regarded as in reasonably comfortable circumstances. Further, the plaintiff and his wife have the advantage of pensions which are payable for life and, by statute, are increased at intervals having regard to the purchasing power of currency.

I am satisfied that the history of the wills is important in weighing the actions and attitude of the testator as a wise and just father. In my view, the history of the wills did reveal changes which seemed to arise from the mood of the moment unrelated to a responsible consideration of a testator's duty of making "proper and adequate provision" for his children "having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty" - words of Salmond J in Re Allen (1922) NZLR 218, 220, quoted with approval in the opinion of the Privy Council in

Bosch v Perpetual Trustee Co (1938) AC 463, 479. In my opinion, a breach of the moral duty of the testator was established.

The next question to consider is the need for maintenance and support in the case of the claimants before the Court - see Re Green (1951) NZLR 135. The Court must decide what is proper and adequate having regard to the relatively small estate and the deserts of the claimants and to the relative urgency of the moral claims upon the bounty of the testator. In doing so the Court must also give effect to "moral and ethical considerations". - See Re Harrison (1962) NZLR 6, and Re Young (1965) NZLR 294.

The modest estate and the claims of the testator's children were sufficient reason, Mr McClelland submitted, to lead to the conclusion that there was no room for providing for grandchildren. Mr Brooks and Mr Cadenhead supported this contention and it was submitted that there was no duty to the grandchild, Mrs Stolzenberger, who did benefit under the will. Mr Holderness, on behalf of the grandchildren, other than Mrs Stolzenberger, supported the submissions that the benefits the latter received were unjustified in the absence of reliable evidence to provide a reason for singling her out to such a marked degree. In favouring her as had been done, it was submitted there was a breach of duty as far as grandchildren as a class were concerned. Having interviewed a number of the grandchildren and communicated with others, Mr Holderness was able to say that it was clear they supported the plaintiff's claim for further provision. Having regard to the circumstances Mr Holderness submitted that no claim on behalf of any grandchild could properly be made. Brigid, whose special position arose after the testator's death, would be protected, it was pointed out, if the plaintiff succeeded in his claim. I agree that this is not a case where a claim under the statute in respect of any grandchild is justified.

These conclusions regarding the testator's moral duty to children and grandchildren lead on to a consideration of the deserts of other claimants and the urgency of the various moral claims.

Mr McClelland submitted there should be an equal division of the estate between the testator's three children: that while it was not correct to describe the plaintiff as an able-bodied son in the sense normally ascribed to that description, nevertheless equal division among the children without provision being made for Mrs Stolzenberger or Mrs Oakley would be fair and just in accordance with the testator's duty.

Mr Young's general submission was that Mrs Oakley's pecuniary legacy should be protected. He pointed out that she had been named as a pecuniary legatee in the first will in the series. The amount then was $500, increased to $3000 in the second will that year and the amount remained the same in successive wills. Mr Young submitted the evidence of the wills established consistency based on the testator's affection for his sister rather than "a mere quirk of a cantankerous old man". Accepting the wider basis on which need is interpreted, Mr Young did not dispute that there were grounds for a claim by the plaintiff but he submitted the claims of the plaintiff and other children of the testator were not so compelling as to leave no scope at all for a bequest to another member of the family. He suggested that if the will of 1975 had been the testator's last will, in which Mrs Oakley received $3000, Mrs Turner $10,500 and each son $5000 and Mrs Stolzenberger certain bequests and the residue, the testator's moral duty to his sons would have been fulfilled.

I think there is some force in Mr Young's submissions in giving prominence to the question of need and the right of a testator to benefit persons other than his widow and children. Having regard to

Mrs Oakley, however, while Mr Young submitted that other counsel had gone too far in claiming that Mrs Oakley was not in any need of assistance, the fact is that no affidavit has been filed by her or on her behalf. Mr Young accepted that the position was unsatisfactory in that respect but he said that his instructions were that Mrs Oakley's wish "was not to become involved". In my view, the evidence supports Mr Young's earlier submissions on the facts that the testator in his later life had enjoyed the company of his sister Mrs Oakley and her husband. I consider that a legacy to mark that fact was appropriate provided the amount takes into account the size of his estate and the absence of evidence to establish any pressing need.

While mindful of the principle that it is not for the Court to rewrite a testator's will, once there is a finding that there has been a breach of the moral duty of a kind which affects the pattern of the will as a whole, the revising power of the Court has sometimes to be exercised in a way which affects pecuniary legacies as well as the division of the residue. In my view that is necessary in the present case bearing in mind my findings of fact as to the reasons which led to a series of wills and what I consider substantial and entirely unjustified provisions in the disposition of a relatively small estate.

In my view the proper course in the present case in making further provision is to divide the residue equally between the testator's three children and I consider the testator's wish to benefit Mrs Oakley and Mrs Stolzenberger should be given effect to by providing for pecuniary legacies of $1500 in each case. Memoranda may be submitted regarding the form of the order and as to costs.

This case had a number of unusual features and I am grateful to all counsel for their careful submissions

Solicitors for appellant: Wood, Hall & Co (Christchurch)

Solicitors for defendants: T.D. Harman & Son (Christchurch)

Solicitors for residuary beneficiary: Cavell, Leitch, Pringle & Boyle (Christchurch)

Solicitors for A.A. Austin: Duncan, Cotterill & Co (Christchurch)

Solicitors for B.A.Turner: Gill, Coutts & Co (Auckland)

Solicitors for L.N.Oakley: R.A. Young, Hunter & Co (Christchurch)

Solicitors for grandchildren: Weston, Ward & Lascelles (Christchurch)