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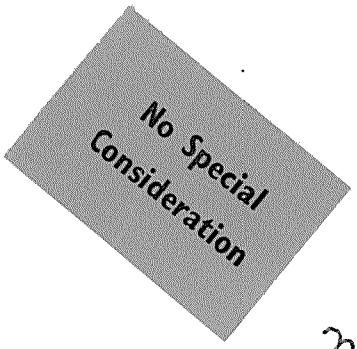
N2LR

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

A. No. 24/81



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IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of LUCY MURIEL CHEYNE of Napier in New Zealand, Widow, Deceased

BETWEEN LUCY FLORA BURGESS of Napier, Widow

Plaintiff

A N D THE PUBLIC TRUSTEE OF NEW ZEALAND as executor of the will of the said Lucy Muriel Cheyne, Deceased

Defendant

Hearing: 28 July 1982

Counsel: J.D. Donovan for Plaintiff
Rosaria Lyndon for Defendant
R.P. Wolff for A.D. Macdonald (son)
L.H. Chisholm for Mrs Voss (daughter)

Judgment: 13 August 1982

JUDGMENT OF QUILLIAM J

The testatrix died on 21 June 1980. She had been married three times. The first two marriages ended in divorce and her third husband predeceased her. There were three children of the first marriage and none of either of the subsequent marriages.

Her last will was made on 3 February 1975. She appointed the Public Trustee executor and trustee and, apart from some minor bequests of chattels, left the whole of her estate to her younger daughter, Mrs Voss.

The estate is a small one. At the date of death it comprised cash of some $7,100 and a half-share in the house property which the deceased had occupied. That half-share was valued at $10,000. The other half-share in that property had previously gone to her third husband's family. The nett value of the estate for duty purposes was $16,541.

Following administration the trustee holds the interest in the house and about $4,400 in cash. A recent valuation of the house property discloses a value of $41,000. On behalf of the Public Trustee it is deposed that when the testatrix made her will the provisions of the Family Protection Act were explained to her and that her explanation for the dispositions she made was, "Daughter Muriel is looking after mother who has been very ill whereas the other two children have not given any assistance at all."

The plaintiff is the oldest child of the testatrix. She is now 62 years of age. She had been married but her husband died in 1970. There were four children of her marriage, three of whom are still living. They are all adult and self-supporting. Following the death of her husband the plaintiff became the owner of the matrimonial home and the mortgage then existing was repaid by the proceeds of an insurance policy. The Government Valuation of that house, made in 1977, was $22,500. She has not been in employment since her marriage. Her only income is a widow's benefit. She has to meet rates and insurance premiums on the house which total $318 per annum. Apart from the contents of her home she has no other assets. Her health is indifferent.

The son of the testatrix, Mr Macdonald, is also a claimant. He is 60 years of age and is married with one child who is adult and independent. His income comprises only an invalid pension and a war pension. He owns his home situated in the Marlborough Sounds, the value of which he states to be $22,000. It is unencumbered. He has a car valued at $3,000, the contents of his home, and no other assets. He suffers from the effects of injuries received in the Korean War.

Mrs Voss is 56 years of age. She was married to an American but has been divorced. There were three children, two of whom survive and are adult and independent. Since her marriage she has lived mainly in the United States where she has a one-room apartment. She has made several trips to New Zealand since her marriage but is now back in the United

States where she is in employment. She has no assets of any consequence and was required to borrow $1,500 in order to come to New Zealand on the last occasion.

The plaintiff's case is based on the assistance she says she gave the testatrix from childhood down to the date of death. The details she set out in support of that claim started an avalanche of affidavits of a highly conflicting nature, so much so that one is left with the clear impression that each side is referring to an entirely different testatrix. There has been an unusually virulent series of personal attacks which, even for proceedings under the Family Protection Act, have assumed quite alarming proportions, particularly in view of the very small estate involved. To resolve all the matters in dispute would require an action of considerable length.

I put aside the matters of conflict and proceed upon the basis that none of the children has been shown to have been guilty of disentitling conduct.

I must approach the case upon a consideration of the obligation owed by the testatrix to these children viewed as at the date of death in the light of their respective financial positions and accepting that each of them had a somewhat similar background, although inevitably the son was less involved than the daughters as he lived for a time with his father and was in a Home for a while. The testatrix had been deserted by her first husband when the oldest child was only 7 years of age. There can be no doubt that she had a very difficult time to provide for her family. Eventually she resolved the matter by operating boarding houses which provided accommodation for them and also an income. Inevitably both her daughters were required to assist with the work. This went on for a considerable time and the contribution each daughter made must have been substantial, although that of the plaintiff will have gone on longer because she was several years older. During much of this time the son was not with his mother, although he did provide some assistance for her in various ways and more particularly in the later years.

On behalf of both applicants it was argued that they did nothing to justify the testatrix in excluding them altogether but, on the contrary, earned a proper recognition for the part each of them played over the years. On behalf of Mrs Voss it was said that she is the only one of the three children who has no home, that the testatrix plainly intended her to have the property, and that the will should remain undisturbed.

It is necessary to consider whether the testatrix, as at the date of her death, has failed to carry out the obligations of a wise and just parent towards either of the claimants. Imputing to her at that time a knowledge of her children's circumstances and a recollection of the assistance each had given her, I am satisfied that she has. The testatrix was faced with a difficult task. Her estate was very small and it was plainly impossible for her to have recognised in full her obligation towards any of her children. Both claimants had unencumbered homes but little else. Each was dependent upon a state pension and each had problems of health. Plainly each of them was entitled to expect that if the testatrix had any ability at all to help them she would do so.

The main difference between the two claimants and Mrs Voss was that the latter had no home. It is not easy to compare incomes because of the difference of currency and of the cost of living, but Mrs Voss' income was probably not greatly different from that of the others. There was undoubtedly an obligation owed by the testatrix towards Mrs Voss. She chose to discharge it by leaving virtually the whole estate to her and here I am persuaded that she erred. The obligation to Mrs Voss was a real one, but it was not so profound as to justify a total exclusion of the others. I am, therefore, satisfied that there has been a breach of moral duty towards both claimants and so I must go on to consider what provision should be made for them. That provision must be only such as will remedy the breach of duty so far as that is possible, and which will leave the will as little disturbed as possible.

The nature of the provision to be made must be considered in the light of the estate as it is now. Upon the basis of the recent valuation of the house property the amount available for distribution is about $24,900. Of this $20,500 represents the interest in the house and there is cash of about $4,400. If the provision to be made is to exceed the available cash then it would seem inevitable that there will need, in the end, to be a sale of the house. Mrs Voss is strongly opposed to this as she claims that her right to come to New Zealand and occupy the house should be preserved. I am informed that her solicitors have been able to arrange mortgage finance to enable her to purchase the other half-share. While I recognise that there may be some sentimental attachment to this particular house it must, I think, be accepted that it is not really necessary that Mrs Voss should be enabled to acquire it in preference to some other place.

The matter is, however, resolved by the need to make some reasonable provision for the others. I can see no means of doing that and at the same time leaving Mrs Voss' interest in the house untouched. I am satisfied that I must treat the estate as a single fund and decide what proportion of it each should have.

It was argued for the claimants that the assistance given by them to the testatrix over most of the period involved must have been greater than that given by Mrs Voss if for no other reason than that they were in New Zealand and she was not. I think this is an argument which must be approached with some care. While the actual assistance given by a child to a parent is plainly a matter of relevance it is not proper to penalise a child who has, for good reasons, been away from the country. In this case regard must also be had to the fact that Mrs Voss made a number of visits to New Zealand, some quite lengthy, and this must have involved her in considerable expense. She seems to have made such contribution as she could in this way. The testatrix intended her to be preferred over the others and I think this must still be recognised.

It is not easy to determine the respective positions of the plaintiff and her brother, Mr Macdonald. The help given by the plaintiff to the testatrix was much greater in the earlier years than that of Mr Macdonald, although this was through no fault of his. There is great conflict over the part which he played but it at least appears that he devoted some time towards his mother and had her in his home at a time when she was unwell and difficult to manage. He also provided her with money on occasions. I do not think that the obligation of the testatrix to him was as great as it was to the plaintiff and provision in differing amounts should be made accordingly.

Assessing as best I can the various factors involved I have determined that provision should be made in this way. In place of the terms of the will there will be an order that the residue of the nett estate after providing for the bequests contained in clause 3 be held by the trustee upon trust to divide it into 25 equal parts. The plaintiff is to receive 8 of such parts and Mr Macdonald 4. The remaining 13 parts are to go to Mrs Voss.

The costs of the parties are to be met out of the estate. Having regard to the size of the estate those costs must be on a modest basis. I have been concerned at the great volume of affidavits directed to matters which simply could not be resolved in a case of this kind. Having regard to the observations of Wild CJ in Re Meier [1976] 1 NZLR 257, most of them ought not to have been filed and I exclude them from consideration in fixing the costs. The plaintiff will be entitled to $400, Mr Macdonald to $250, and Mrs Voss to $400, together in each case with disbursements.

Solicitors: Langley, Twigg & Co., NAPIER, for Plaintiff

District Solicitor, Public Trust Office, NAPIER, for Defendant

Wisheart, McNab & Partners, BLENHEIM, for A.D. Macdonald

Buddle, Anderson, Kent & Co., WELLINGTON, for Mrs Voss