13/9/82

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

N.Z.L.R.
no special consideration.

A. 64/80

X

No Special Consideration

208

IN THE MATTER of the Family Protection Act 1955 and its amendments

A N D

IN THE MATTER of the ESTATE OF CHARLES ECKHOLD late of Whakatane Retired Chief Station-master, Deceased

BETWEEN : CHARLES REX ECKHOLD of Whakatane, Taxi Proprietor

Plaintiff

A N D : THE PUBLIC TRUSTEE of New Zealand a Corporation sole pursuant to the Public Trust Office Act 1957

Defendant

Hearing : 18th March 1982

Counsel : MR J.D.M. SPARKS FOR PLFF
MR M.J. TAYLOR FOR DEFT.
MR L.H MOORE FOR SALVATION ARMY.

Judgment : 18th March 1982

(ORAL) JUDGMENT OF BISSON, J.

The plaintiff is the only child of the deceased whose wife pre-deceased him. The last will and testament of the deceased makes no provision at all for the plaintiff. The estate is made up of savings in the form of the government stock and there is a freehold house property at Whakatane and the nett value of the estate was $50,319.59. Since that time there has been income and

that has resulted in an increase in the estate to some $53,881.74. The deceased in his will made a number of specific bequests or legacies some of which were of a charitable nature and the total amount of cash involved there is some $4,000.00. The whole of the residuary estate was left to the Arthritis and Rheumatism Foundation Incorporated. None of the charities are contesting the plaintiffs claim but abide the decision of the Court. The plaintiff does not seek to have the specific bequests and legacies affected by any order which this Court might make but he seeks the house property which is valued at $29,500.00 according to a Government Valuation in 1979 which would still leave a substantial sum of approximately $20,000.00 for the charity which is the residuary beneficiary. In his latest affidavit the plaintiff discloses his present position as comprising a caravan worth $7,000.00; a motor vehicle worth $9,000.00 and his taxi worth $3,000.00. He has $5,000.00 held in the Bay of Plenty Savings Bank and $300.00 in the Bank of New Zealand and sundry furniture and effects. In an earlier affidavit he exhibited a statement of account prepared by his accountant in respect of his taxi business and that revealed that his taxi licence and the goodwill of that amounted to some $4,000.00 which has not been mentioned in his last affidavit but was probably omitted by over-sight if indeed that asset still remains, as, no doubt, it does because he deposes to still operating his taxi business and also is employed as a school bus driver. One can see that his financial position is not by any means substantial and although he is an able-bodied son of 53 years of age and in full employment Mr. Sparks has stressed that a claim of this sort goes beyond a narrow consideration of a claimants economic position and moral and ethical considerations and the size of the estate and whether there are competing claims must also be taken into account. One must of course immediately inquire why the why the deceased saw fit to completely exclude his son from his will and a very helpful affidavit has been filed in this respect by the Deputy District Public Trustee for Tauranga and it reveals that the deceased

made seven wills in all with the Public Trust Office and in the usual efficient manner of that Office a record was kept of the reasons for a testator ignoring what would appear to be a moral duty on his part to provide for his own family and these reasons refer to the plaintiffs domestic situation, his way of life, his living in a de facto relationship and in particular with members of the maori race. On one occasion the deceased left a lengthy document addressed "to whom it may concern" giving some history of his relationship with his son and this refers to various occasions on which his son sought financial assistance from him which was given by the father and then repaid by the son. The wills also disclose that from time to time the deceased did see fit to provide a legacy of $2,000.00 for his son and then on other occasions he would change his mind in that respect and exclude his son from his next will. Although the deceased did not appreciate some aspects of his sons way of life it would seem that his sentiments were prompted rather by prejudice than by anything of substance and certainly the sons behaviour does not disentitle him from making a claim under the Family Protection Act. Indeed it would seem that the deceased was prepared to assist his son financially from time to time and he appears to have completely overlooked that his son might well need further financial assistance after his death and to have made no provision at all for him in his estate, in my view, is a breach of a moral duty which he owed to his only child. The deceased was 74 years of age when he died and had made a number of wills displaying changes of mind and one rather draws the conclusion that in the later stages of his life he became a little obsessed with the strong feelings which he held but which in my view were based more on prejudice than on fact. The plaintiff has no children of his own so that there is not a situation where grandchildren need to be considered but the plaintiff does appear to have assisted in the care of children of his de facto wife and that being the case showed a sense of responsibility

and which the deceased seems to have completely ignored. So, looking at the extent of the estate as a whole and taking into account that the son is not in necessitous circumstances and has no dependents, nevertheless his position is one not in any way substantial and could well be affected in the future for various reasons when one takes into account the vicissitudes of life and that he is only 53 years of age. There are no competing claims and it is still possible from the estate to respect the charitable intentions of the deceased. There will be no interference with the bequests and legacies under Clause 3 of the will but the plaintiff seeks to have the house property vested in him which seems to the Court a reasonable provision to be made for him and yet at the same time leave quite a substantial amount in the residuary fund for the charitable residuary beneficiary. That being the case the order of this Court is that the will be amended by a specific devise of the freehold property at 137 James Street, Whakatane to the plaintiff and that otherwise the will be not varied. There will be an order for costs in the sum of $800.00 with disbursements as fixed by the Registrar to be paid out of the residuary estate to the plaintiff.