17/5/82

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

A.37/78

285
(1)

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the estate of ROBERT HENRY WILLIAM SCOTT of Geraldine, Dairy Farmer, Deceased

BETWEEN COLLEEN GLORIA HYDE of Ashburton Married Woman and ROBERT PATRICK SCOTT of Christchurch, Clerk

Plaintiffs

A N D GEORGE HENRY SCOTT of Geraldine, County Council Employee and ROBERT PATRICK SCOTT of Christchurch, Clerk, as Executors and Trustees of the will of the said Robert Henry William Scott

Defendants

Hearing: 5 March 1982

Counsel: R. B. Walton for Plaintiffs
I. G. Mill for Defendants
N. C. Shannon and P. C. Dalziel for Life Tenant and Remainderman

Judgment: 16 March 1982

JUDGMENT OF HARDIE BOYS J.

This action under the Family Protection Act is brought by two of the children of the late Mr Scott, who died on 12 August 1977. He was survived by his widow and by the three children of the marriage, all of whom were then themselves married with families. The eldest, George Henry, was 48 and he had one married son. The second was Robert Patrick, one of the plaintiffs, who was aged 41 and had three children aged 18, 16 and 14. The third, the other plaintiff, Mrs Colleen Gloria Hyde, was 35, and she had four children aged between 11 and five. There was thus an age range of 13 years between the eldest and youngest of the family and I suspect

that this disparity has been a factor in the attitudes and recollections that emerged from the affidavits and the evidence.

Mr Scott had lived all his married life on a farm near Geraldine, which had earlier belonged to his own father. It had two cottages on it and he and his wife lived in one. His last will was made on 23 July 1974. By that will he gave a life interest in his whole estate to his wife, with a specific direction that she be permitted to reside in the home so long as she wished. After her death the estate is to be transferred to the eldest son, Henry, subject to him paying the sum of $1,000 to each of the other two children, Robert and Colleen. After payment of funeral expenses the estate comprised some $1,500 in cash and the farmlet itself, which now, for all practical purposes, represents the sole asset. A Government revaluation was in progress during 1977 but had not been published at the time Mr Scott died. Consequently the then current Government value of the farmlet was that fixed in 1972, which was $9,900. The 1977 valuation, which the Inland Revenue Department treated as that pertaining at the date of death was $41,000. According to a registered valuer who gave evidence, that was close to the market value at the time. Since then, the strong upward trend has continued, for this is good land. The valuer assessed the property to be worth $64,000 in April 1981 and $104,750 at the date of hearing. As a consequence of course the share of each plaintiff in the estate expressed as a proportion of its total value has dramatically decreased: from 20.20% when the will was made to 4.88% when Mr Scott died to 1.91% at the present time.

There emerged from the affidavits and the oral evidence a most regrettable family conflict. There were allegations of influence both on the deceased in respect of his will and on his widow in respect of her

affidavit. Not only was this the not unusual situation where the claimants on the one hand and the principal beneficiary on the other assert the significance of their own contributions to the family life and fortune and belittle those of the others. The evidence went further, and comprised such contradiction that one must conclude either that memories have become very dim or that the truth has not been fully told. This is all a sad reflection on any family and I express the hope that with the finalisation of these proceedings the acrimony can come to an end and the parties realise that family bonds mean much more than family money.

Where there is such a conflict in the evidence, so much of it related to events long ago, it is extraordinarily difficult for the Court to determine where the truth in fact lies. Fortunately that invidious choice is not usually necessary, for the essential issues under the Family Protection Act are frequently rather different from those that are the subject of dispute in the family itself. So it is here.

Mr Scott ran a milking herd on the farm but it was not an economic unit and that is still the case, although it is now farmed differently. Mr Scott had to supplement the family income by taking casual work elsewhere. The eldest son Henry remained at home until he was about 17. There was no living for him on the farm, so he moved away and took up other work. At that stage his brother was about 10 and his sister about four. He remained away until 1953 when he married and brought his wife back to live in the second cottage on the property. This had earlier been occupied by one of Mr Scott's sisters but it had long been empty and had become very dilapidated. Henry set to work to renovate and improve it to make it fit to be his family home. It seems he came there at his father's suggestion and the arrangement was that the improvements he carried out to the house and its surrounds and any casual work he was called on to do about the farm would be accepted in lieu of rent. He earned his living by working for the

local County and he has remained in that occupation down to the present time. The deceased continued to farm the land himself until the late 1960s and then, being unable to manage any longer, sold his herd. Two or three years later it was arranged that Henry would take a lease of the whole property and run his own small farming operation on it in conjunction with his ordinary employment. There were obvious taxation advantages for him in this arrangement. It was agreed that he would pay a rent of $350 a year together with the outgoings and that his parents would continue to live without payment in their cottage. This has arrangement continued down to Mr Scott's death and carried on since under the terms of the will.

Robert, who according to Henry stepped into his shoes in doing the boy's work about the farm when he left home, left school a year or two before Henry returned. He went to work locally in Geraldine, in a job which he held for the next 18 years. He lived at home until his marriage in 1958, when he acquired a place of his own. In 1969 he joined the Post Office and at about the time of his father's death was being transferred to Christchurch.

Colleen was taken away from school before she was 15 in order to look after her parents, for her mother had become seriously ill and spent two years in hospital and her father could do very little in and about the house. She lived at home until she was married and did only casual part-time work of a housekeeping variety in the district. Following her marriage she went to live in Ashburton.

Whilst this summary may not be entirely accurate as to dates and times it fairly portrays the family history. The conflict in the evidence related to what each child did or did not do by way of assistance in and about the farm and by way of care and attention of the deceased and Mrs Scott. Despite the conflicts, it is clear to me that throughout the relevant period, the parents needed and called on the help of whichever member of the family was most available and willing to give it. Thus

Henry made his boyhood contribution until he left home and then Robert took over. The extent to which Robert was needed at one stage is demonstrated by the fact that Mr Scott obtained exemption for him from military service. But Robert developed other interests, and of course when he left home following his marriage he had other responsibilities too. In order to provide for his family he had to take secondary employment. The time he had available to his parents was much curtailed, but he still assisted as he could. Colleen played a very significant role during her mother's illness. The need for her help is demonstrated by the sacrifice that was made of her schooling. Mrs Scott acknowledged that she was a very competent girl about the house and obviously was relied on to a considerable degree even after her mother had recovered from illness. Then she married and moved away. That left Henry and his wife. No doubt there was no great call on them whilst Robert and Colleen were at home. They had their own work and interests too. But after Colleen and Robert had set up their own homes, there was a greater dependence on Henry and his wife, and they assisted as and when they were needed. There is probably a danger of overstating what everyone did. For although Mr Scott was not robust in his later years, there is no suggestion that either he or his wife were constantly dependent on their children for help in the house or on the farm.

After having listened to the witnesses, read their affidavits and considered the likelihood of the matter, I have concluded that with one exception, in terms of contribution to the family fortunes as well as in terms of personal care of and attention to the deceased and his wife, over the whole span of the family history, all three did what they could, having regard to their age and ability, the need to live their own lives, the availability of help from the others and the family attitudes and relationships generally. I can see no real ground for differentiating between them in this respect.

The one exception is this. By going to live on the farm, Henry was not only more available to help when needed, but he was also in a position to make and he did make a more tangible contribution to the actual improvement and preservation of the family asset. There seems no reason to doubt his mother's assertion that by living on the property he enabled his parents to continue to live in their home, and to avoid the eventuality of having to sell up and endeavour to buy elsewhere. Had the property been sold, it is likely that Henry would have bought his own home and thereby benefitted himself from increasing property values, whilst it is perhaps unlikely that the value of the estate would have increased to the same extent as has occurred by reason of its asset being a farm rather than a town property. (These considerations are of course to be offset to some degree by the fact that for many years Henry paid no rent, whilst in more recent times he has paid what has been increasingly only a nominal rent. On the other hand, neither his brother nor sister paid any board whilst they were living at home.) The deceased's choice of Henry as his principal beneficiary is no doubt a recognition of these matters, although there may well have been present too a desire that the family asset should be kept intact and should be passed on to the eldest son. But irrespective of the fact that he was the eldest, Henry had made his home on the property and was thus the obvious recipient if the farmlet was to be kept intact and in the family. It is no function of this Court to question that intention nor to disturb it, unless and except insofar as the plaintiffs are able to show that the deceased has been in breach of the moral duty which he owed to them.

A recent summary of the principles to be applied in Family Protection cases is contained in the judgment of the Court of Appeal delivered by Cooke J in Little v Angus /1982/ 1 NZLR 126, 127 :

> "The enquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

This summary should be amplified for the purposes of the present case in three respects. First, in taking the date of death as the time at which the breach of duty is to be tested the Court is not limited to circumstances actually then pertaining, but is obliged to consider what the testator at the time of his death should have foreseen. (Dun v Dun /1959/ 2 All ER 134). Secondly, a plaintiff alleging a breach of moral duty is required to demonstrate a need for maintenance and support. For it is a testator's failure to provide that, which in terms of s 4 of the Act gives the Court its jurisdiction. See the joint judgment of North P and Turner J in Re Young (deceased) /1965/ NZLR 294, 299:

> "In short, it must be shown in a broad sense that the applicant has need of maintenance and support."

This judgment went on to make it clear that the matter is not to be judged solely on a narrow basis of economic needs. Moral and ethical considerations require to be taken into account as well. Thirdly, "good conduct and honest worth are not to be rewarded by a generous but secondhand legacy at the hands of the Court". "The jurisdiction .... is to provide for deserving persons according to their requirements, not to reward past services". These extracts from the

joint judgment of Fullager J and Menzies J, and from that of Windeyer J respectively in Blore v Lang (1960) 104 CLR 124, 137 were approved by North P and Turner J in Re Young p 299.

At the date of his father's death Robert was in the process of moving from Geraldine to Christchurch. The Geraldine house was sold for $20,000. I gather that the house in Christchurch cost $30,000. $10,000 was borrowed on mortgage. Robert had some furniture and a 1973 Holden car, together estimated to be worth $8,000. His salary in his new position was in the vicinity of $8,000 a year. The children were either self-supporting or about to become so. His wife had not worked. Whilst he had worked hard to bring up his family and acquire modest assets, the worst of the struggle was over by 1977.

Mrs Hyde was married to a farmer who owned his own property. Even in 1977 he was clearly a man of some substance, at least in terms of the book value of his land, a fairly theoretical thing so long as the asset remains unrealised. There were four young children but the family was able to live in a reasonable standard of comfort. Mrs Hyde had nothing in her own right, her assets consisting of her share in matrimonial property. Before the present Matrimonial Property Act was passed, North J in In Re Harrison (deceased) /1962/ NZLR 6, 16 said this:

> "It would be a curious result if the statute was interpreted in a way which would enable a father to regard his moral duties as discharged simply because another person, by marrying a daughter, has also undertaken obligations to maintain and support her."

Despite the current legislation, I think this observation still holds good. A wife's property rights are inchoate, and to an extent indeterminate, whilst the marriage subsists. Thus Mr Hyde's circumstances, whilst they cannot be totally disregarded, have only limited relevance.

By the date of Mr Scott's death the disparity between the provision he made for Henry on the one hand and Robert and Colleen on the other had as a result of inflation already increased to a very great degree, so great as to really defeat whatever scheme or intention lay behind the will when it was executed. The valuer's evidence satisfies me that at that date the deceased ought to have foreseen the likelihood of a further increase in value during the lifetime of his widow. I am sure he would not have foreseen the magnitude of the increase that has in fact occurred, but nonetheless he ought to have foreseen the likelihood of an increase that would have had the effect of increasing the disparity to an even more marked degree by the time his children came into their inheritance.

Had values remained as they were at the date of the will the plaintiffs might have had some difficulty persuading me that there had been a breach of their father's duty towards them. However, his choice of a testamentary scheme which he ought to have known would have resulted in them receiving an ever-diminishing sum, both in real terms and in relation to the total value of his estate, constituted in my opinion a breach of his moral duty towards them both. Whilst neither was in poor financial circumstances, having regard to all the relevant circumstances neither was sufficiently well off to be adequately provided for by a gift of the order which was in fact made. This is a case where it is necessary to have close regard to the moral and ethical considerations which arise out of the family history. These called for a more generous recognition of the plaintiffs, who had given much in service to their parents, and who had received little other financial reward from them, and for a less marked preference for the eldest son at their expense.

Having thus determined that I have jurisdiction to make an order in respect of both plaintiffs, I must now consider in light of present circumstances what a wise and just testator would have done. Robert has a house worth

perhaps $50,000 and which is now unencumbered by reason of the fact that he has been able to repay his mortgage partly from savings and partly from cashing in his superannuation entitlement. He is now on a salary of a little under $16,500. It is quite clear that he is in reasonably comfortable circumstances although he is by no means well off by present day standards. Mrs Hyde's husband's farm is now worth $400,000 but it is not clear what his equity in it is. She still has no independent means. Her only asset is her interest in the matrimonial property, which is likely to be quite substantial should the unfortunate eventuality ever arise where it has to be assessed.

This is not a case where the principal beneficiary has a competing claim and the estate is insufficient to satisfy all claims in full. Despite the advantages of not having had to purchase his own home and of having paid such a small rent over the years, Henry has not accumulated assets of any great substance. His income is a maximum of $12,000 a year and his wife works part-time. He owns the plant and stock on the farm and an old van. I was given no values. His wife owns a modern car. Both have cash savings. Henry displayed a considerable reluctance to be frank with the Court and disclose the amount of these savings, but I gather that between them he and his wife have something of the order of $20,000. He, too, is obviously self-sufficient and able to live, according to the standard of life he has chosen to adopt, in relative comfort.

In my opinion a wise and just testator would wish his eldest son Henry if at all possible to keep the farmlet which is and for many years has been his own home as well as the family's home. I think the method adopted in the will to achieve that result is a proper one, namely that Henry should have the farmlet provided he raises the funds necessary to pay out the fair share of his brother and sister. They suggest that as between

themselves they should be treated equally and balancing all relevant considerations I see no reason to differ from that view. On the other hand I do not consider they are entitled to share equally with Henry. That would be to disregard the wishes of the testator and to apply a vague and general notion of fairness, instead of the correct approach which is to determine the provision necessary to discharge the deceased's moral duty to the plaintiffs.

If there were to be an immediate distribution, I would prefer to fix a cash legacy for each of the plaintiffs. But as it is agreed, and indeed necessary, that any further provision for them must remain subject to the widow's life interest, there is no alternative but to fix a share in remainder. To fix a cash sum now would continue the same injustice which the will has created.

It can I think fairly be said that both Colleen and Robert are in a sounder position now than they were when the will was made. I think justice in the case will be done if I award to each of them a proportionate share in the estate more or less equivalent to the share their legacies represented at the time the will was made. Possibly that share may have been a little low at that time. But in view of all the changed circumstances, I think it is the proper basis upon which the matter should be dealt with now. I accordingly hold that each of the plaintiffs is entitled to a 20% share in remainder, leaving Henry with 60%. With his own cash resources and with reasonable borrowing he will be able to buy out the plaintiffs' shares at the appropriate time. His right to retain the property conferred by the will is to be preserved.

In order to give effect to these conclusions, I order that in lieu of the provision made by clause 6 of the will, the trustees shall upon the death of the widow hold the estate on trust for the three children in the proportions stated; and that Henry shall have the right, to be exercised by notice in writing delivered

to the trustees within three months of the date of death of the widow, to purchase the farmlet at its fair market value as at the date of the widow's death; that value to be fixed by a registered public valuer agreed upon by the parties, or failing agreement appointed by the Court; the cost of the valuation to be met by Henry.

The estate has insufficient ready cash to meet the costs of these proceedings, but after the costs of administration and the trustees' costs of the proceedings have been satisfied, there may be a small surplus. Any such surplus is to be divided in half. One half is to be applied towards the costs of Henry and Mrs Scott, the other towards the costs of the plaintiffs. Over and above that contribution, the parties must meet their own costs.

Leave is reserved generally to all parties to apply further.

Solicitors:

Kennedy, Mee & Co, ASHBURTON, for Plaintiffs
Blakiston, West & Dorman, GERALDINE, for Defendants
Shannon & Harrison, TEMUKA, for Life Tenant and Remainderman.