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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A 19/80

IN THE MATTER of The Family Protection Act 1955

A N D

IN THE MATTER of the Estate of EVELYN DORIS LEE late of Dunedin, Widow, deceased

BETWEEN LYNEECE EVELYN MOSES of Port Chalmers Housewife and ROBYN EILEEN WATSON of Dunedin, Travelling Saleswoman

Plaintiffs

A N D DORIS EILEEN PALMER of Auckland, Housewife and CLARENCE HENRY SOMERVILLE STEVENS of Dunedin, Solicitor

Defendants

Hearing: 29 October 1982

Counsel: D L Wood for plaintiffs
M M Mitchell for Mrs Palmer
C S Withnall for trustees
J K Guthrie for Palmer children
D A Wilson for G R O'Connor and J A Lee

Judgment: 29 October 1982

ORAL JUDGMENT OF GREIG J

This is a claim by two grandchildren in the estate of their grandmother who died on 20 March 1979, aged about 81. At the date of her death her estate was valued at just over $36,000 and at to-day's date I am told from the Bar is valued at about $42,000. That in to-day's terms must be considered a modest estate and the considerations which apply to such an estate have to be applied here.

The persons at the date of death who had a claim on the testatrix were the first defendant, the sole surviving daughter, the plaintiffs, the two grandchildren of a deceased

daughter, three children of the defendant Mrs Palmer and two children of a deceased son. That is to say, there is one daughter and seven grandchildren. By her will the deceased, after a small bequest to her brother which is not in any way under attack left half the residue to the daughter, the defendant and the other half to all the other grandchildren.

The plaintiffs claim that they are entitled to further provision and it is made clear in their counsel's submission that not only is the bequest to the brother not under attack but likewise there is no attack made on the residuary bequest of one-half to the defendant daughter.

There is a dispute on the facts as to certain aspects of the association between the grandmother (the deceased) and the members of the family. What is plain is that the defendant and her children, the Palmer family, have lived for many years in Auckland and the deceased's son and his two children, the Lee family, have lived in Wellington for many years. It was the plaintiffs and their mother and father, the Watson family, who have at all times lived in Dunedin and in close proximity to the grandmother. There can be no doubt that the Watson family have given assistance to the grandmother, particularly the mother (the deceased's daughter) but I am satisfied that at least in the last three years approximately before the deceased's death the plaintiffs themselves were attentive in their care and assistance to their grandmother. In that time she was ill,and it appears severely ill, so that she required a considerable amount of attention, almost amounting to nursing care. The granddaughters apparently provided that.

The daughter, Mrs Palmer, because of the distance and her obligations to her own family has, of course, not been able to provide the assistance that she might have. I am quite satisfied, however, that she was a dutiful daughter and on a number of occasions visited her mother and gave her such assistance and help that she could. That view that I have made will be reflected in the fact that the plaintiffs, as I have said, do not attack the provision made for that daughter.

What is clear, on the other hand, is that the other grandchildren, whether Palmer grandchildren or Lee grandchildren, have not had the same association with their grandmother. No blame can be attached to them for that and there can be no suggestion in respect of any possible claimant that there is any disentitling conduct.

The plaintiffs in their second affidavits have both deposed that, at least in respect of Christmas presents and other gifts, the grandmother treated the grandchildren equally and it is obvious that in her will she purported to do that again. It is relevant to consider the previous wills made by the deceased and copies of these were exhibited to an affidavit of Mr Thomas, the solicitor who had prepared the last will and testament. I do not need to describe the provisions made in these wills in detail but progressively and in acknowledgment of the sad fact that two of her children predeceased her the deceased made provision for her children and, in substitution, for her grandchildren. In the will before her last will, that being in 1975, the residue was left to her two daughters who were then living, with substitution to the grandchildren. If that will had remained in force then the defendant Mrs Palmer would have received one-half the residue and, by substitution, the plaintiffs would have shared the other half. It is interesting to note that in that will the Lee family, the son having then died, were not included in the will at all. However, what is particularly interesting in my view is that in 1977 after the plaintiffs' mother had died the deceased, by codicil, altered the appointment of executors but otherwise left the will as it was. It seems then that at that date she was acknowledging the provision of one-half of her residue for the plaintiffs and at the same time was acknowledging that the Lee family were not to obtain any provision.

Some reference has been made to the possible benefit to the plaintiffs during the deceased's life. The only matter of any substance which can be given consideration is the fact that one of the plaintiffs purchased the deceased's house. She had to borrow money commercially

to finance that so that there was no benefit from the grandmother in that respect but it may be that the price of $14,000 was $1,000 less than the market value. That, in my view, is an insignificant benefit and I do not take that, or indeed any other possible lifetime benefit, into account in my consideration of this case.

I was referred to a number of cases and I mean no disrespect to counsel if I do not refer to them. The principles which are applicable are well known but I do mention the recent case of Little v Angus (1981) 1 NZLR 126, which reaffirms the settled principles applicable in Family Protection cases. The other parties and their counsel put some particular stress on a number of observations which have been made and which are referred to particularly in Re Young (deceased) (1965) NZLR 294, which warn against the inclination that may arise to reward a claimant for good conduct, past services, monetary or otherwise and efforts which have added to the deceased's estate. There is no doubt that that is a matter which has to be borne in mind but it should be remembered that in that case the comments made by North P in delivering the majority judgment of the Court of Appeal are in light of the observations that such a circumstance is not to be the sole ground for granting relief when the applicant is already well provided for in his own right.

I do not believe, and indeed I think it would be impossible, to consider a case without having some regard to the services provided to the deceased whether in money terms or not in the same way as disentitling conduct can be taken into account.

As far as need is concerned, the plaintiffs are not in any impecunious state. They are both young women, one of whom is married, and while by no means affluent cannot be said to be in any pressing need for assistance. There is no substantial difference between their situation and any other of the grandchildren. It was pressed upon me that the plaintiff's mother had over a number of years provided assistance and services to her mother (the deceased) and that that should be taken into account in favour of the plaintiffs. No counsel was able

to point to any case which either supported that or did not support it. In my view, that parental service is not to be taken into account in favour of the plaintiffs. It is rather their services alone and their need which have to be taken into account to decide the crucial question as to whether the grandmother has failed in her moral duty to them.

One matter which I have not yet mentioned is the question as to whether and how far the plaintiffs' expectations from their own father may be taken into account. He is in comfortable circumstances at least in comparison with any other member of the family of the deceased. His wife, as I have mentioned, died in 1976 and he has since remarried. Clearly his estate will be subject to a primary claim by and an obligation to his present wife and while there may be some expectation in the somewhat distant future it is not, in my view, such as can be given any great weight in dealing with this claim.

I think I have now mentioned all the circumstances in a broad way which I consider to be relevant and I can come at once to my conclusion that in this case the testatrix (the deceased) did fail to meet the moral duty to the plaintiffs and that in all the circumstances adequate provision has not been made for them. I have given some careful consideration to the appropriate measure of that failure and how best to deal with it. As I have said, this is a modest estate and because of the way in which the claim has been put any provision must come from half the residue at the expense of the other grandchildren. As I have already said, the factor of services performed by the plaintiffs is limited to their own and that, in my view, limits itself to the three years approximately before the deceased's death.

In my conclusion, then, there is to be a somewhat modest award, particularly because it is my view that the deceased had a moral duty to all of her grandchildren which she attempted to acknowledge and recognise. I consider then that some provision must remain for the other grandchildren but at the same time some further provision is

to be made for the plaintiffs. Giving it my best consideration, it is my decision that the plaintiffs should be awarded $5,000 each and that in lieu of or to include the amount which they have been provided in the will. The order then will be for a payment of $5,000 each to the plaintiffs and that will be charged against the half of the residue left to all the grandchildren, leaving then that residue to be divided among the five grandchildren excluding the plaintiffs.

Counsel for the trustees is entitled to its costs. I allow costs, $700, to the plaintiffs and $350 each for the other counsel, in each case plus disbursements to be fixed by the Registrar.

Eichelbaum J

Solicitors for the plaintiffs:	Gallaway, Son & Chettleburgh (Dunedin)
Solicitors for the trustees:	Sim, McElrea, O'Donnell & Thomas (Dunedin)
Solicitors for Mrs Palmer:	Mitchell & Mackersy (Dunedin)
Solicitors for Palmer children:	Anderson, Lloyd, Jeavons & Co (Dunedin)
Solicitors for G R O'Connor and J A Lee:	Chapman Tripp (Wellington)