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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

A 15/81

494

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of JOHN DUNCAN MEIKLE late of Invercargill, Labourer, now deceased

BETWEEN RUTH JEMIMA MEIKLE of Invercargill, Supervisor Cook

Plaintiff

A N D JAMES ROSS McILWRICK of Invercargill, Chartered Accountant and JOHN GIBSON FRENCH of Invercargill, Solicitor as executors and trustees of the Estate of the said John Duncan Meikle

Defendants

Hearing: 4 November 1982

Counsel: R G R Eagles for plaintiff
C E French for defendants
J D Strettell for A B Meikle, A L Wilson, A Winter and J W A Young
A R Jones for M L Takitimu
S Harrop for P M Rurehe and children

Judgment: 10 NOV 1982

RESERVED JUDGMENT OF GREIG J

The deceased died on 30 May 1980, aged about 65. By his will dated 18 April 1978 after two legacies and a bequest he left the whole of the residue to be divided equally among his five children, who include a step-son. The legacies have been paid and there is a residue held by the trustees of approximately $75,000 which remains subject to payment of costs and income tax.

The plaintiff is the widow of the deceased and being

left without any benefit under the will claims some provision by way of a capital sum. The widow does not in any way attack the legacies or bequests. The plaintiff and the deceased, who were previously married, married each other on 2 April 1976. They separated in March 1978 and a formal separation agreement was completed in January 1979. There were no children of that marriage. The residuary beneficiaries are the deceased's children of a previous marriage.

The plaintiff when she married the deceased owned her own home and furnishings but in contemplation of marriage sold that home and lived with the deceased. She retained the proceeds of the sale of that home and disbursed some of it in presents to her own children and in the purchase of a car and a television set. The balance, which was not disclosed in the affidavits, was retained by her and invested.

There is some dispute on the affidavits as to the domestic and matrimonial conduct of the plaintiff in the relatively short marriage. I have concluded that although the marriage was not a success and was in some disarray by the end of 1977 the plaintiff did adequately carry out her duties as a wife and housekeeper. It is plain that she made no, or no substantial monetary contribution to the marriage partnership although it does seem that at least part of her investment income was used for day to day household expenses.

The separation agreement which was exhibited to the plaintiff's first affidavit settled all matrimonial property questions on the basis that each of the parties retained their own assets. The plaintiff thus did not make any claim in respect of the matrimonial home, nor did she make any claim for maintenance. The plaintiff was separately advised in the drawing up and execution of that separation agreement.

The plaintiff is now aged 61 and works as a cook for the caterers to the Smelter at Tiwai Point. She owns her own home subject to a mortgage and is in receipt of the National Superannuation and a small pension from the estate of a previous husband. At the moment her net weekly income is approximately $235, although that may be subject to some tax liability in respect to the pensions she receives. In

those circumstances it cannot be said that the plaintiff is in a impecunious situation and she is in no pressing need at present for any further maintenance or support.

The plaintiff does, however, suffer from some ill health, particularly from asthma and bronchitis and has in the past had some episodes of angina. For her age it appears that she is well enough to continue working but having regard to her age and her health problem the prospect of any long term continuation of work is doubtful.

The beneficiaries of the residue in the will are all adult. One of them is in a relatively strong financial position but the others are in weaker financial positions and will certainly be able to make good use of any money they received from their father's estate. There appears to have been a lack of close feeling between all but one of the children and their father. This has been complicated by the fact that a number of the children live at considerable distance from the deceased's home in Invercargill and have been unable, for that reason alone, to visit him or to give him support. At the same time there seems to have been a rather tenuous association, at least in latter years, in the family and even the daughter who appears to have been closest to her father had occasions of estrangement, at least while the marriage with the plaintiff was in existence.

There is no doubt that a separated wife is entitled to make a claim and has successfully made claims in numerous cases over the years. I refer to three older cases in which a separated wife was granted some provision under the Act or the previous corresponding enactments. They are Toner v Lister (1919) GLR 498; Re Wilton (1942) GLR 246, and Re Cairns (1950) GLR 409. The cases to which I have been referred are nearly all cases where the marriage has been of some considerable period and presumably it was easier to define a moral duty notwithstanding the separation before death. In Re Cunningham (1936) NZLR 69, the widow's claim was refused. In that case the marriage had subsisted for some five years. There were nine adult children of the deceased's first marriage who remained beneficiaries and the estate was a relatively modest one. One important matter

which distinguishes that case from this is that the testator in what was described as "a carefully drawn will" had made a provision for an annual payment by way of rent charge to the widow. She was not therefore, as in this case, entirely excluded from the testator's disposition. What was taken to be relevant in that case was the length of the marriage and I consider that that is a relevant consideration in this case as well.

It was not suggested that the separation agreement and the settlement as to matrimonial property ousted the jurisdiction of the Court in this application. Indeed that could not be argued because any such purported arrangement is contrary to the policy of the Act. It was suggested, however, that that settlement at the time of the separation should be taken into account. This matter has been the subject of consideration in Re Churchill (1978) 1 NZLR 744, in which case Chilwell J in a careful judgment, if I may say so, compared and distinguished the policy and purposes of the matrimonial property legislation and the Family Protection Act. His conclusion, with which I respectfully agree, was that the Court was free to consider the claim under the Family Protection Act unfettered by the provisions of the separation agreement. The reason for that is that the matrimonial property legislation relates to the property of the parties in life but the Family Protection Act enforces the moral duty of the testator to make adequate provision from the testator's own separate property.

In this case the testator did have a moral duty towards the plaintiff, notwithstanding her relatively secure position, because a just and wise testator would have taken into account the future difficulties she will face in continuing work and maintaining her home and the change to her life and financial position and her services because of and during the marriage. Since the marriage was of such short duration, and as a happy marriage was even shorter, the plaintiff's entitlement must be much less and must be put in the balance with the testator's wishes and his moral duty in respect of his children. It was not suggested that

this was a case where the widow should receive the bulk or even a large proportion of the estate. It is a case rather, in my view, in which a modest provision should be made for her.

The reluctance to give capital sums to widows manifested in earlier decisions is nowdissipated. At the same time some regard must be given to the fact in this case that provision for the plaintiff must be at the expense of the children and without any real likelihood that they will obtain any future benefit from the plaintiff's estate. On the other hand any provision by way of annuity or life interest will unnecessarily tie up this estate, or a substantial part of it in some way. At least four of the children have need of their benefit immediately.

I have concluded that in the circumstances of this case the proper provision to make for the plaintiff is a lump sum payment of $10,000 and I so order. The trustee is entitled to costs. The plaintiff will have an order for costs in the sum of $750 plus disbursements. As the residue of the estate is to be divided among the other beneficiaries I make no order for their costs.

Solicitors for the plaintiff:	R G R Eagles (Invercargill)
Solicitors for the defendants:	French, Sons, Burt & Co (Invercargill)
Solicitors for A B Meikle, A L Wilson, A Winter and J W A Young:	Russell & Russell (Invercargill)
Solicitors for M L Takitimu:	Cruickshank, Pryde & Co (Invercargill)
Solicitors for P M Rurehe and children:	Parry Field van Rij & Lord (Christchurch)