15/10

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 571/80

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE ESTATE of ERNEST LAWSON NIBLETT late of Auckland, Wages Clerk, Deceased

715

BETWEEN JEANETTE ROSEMARY CROSSLEY of Auckland, Scientist

Plaintiff

A N D KENNETH PASCO WILSON and JAMES CLIFFORD CHAMLEY both of Auckland, Solicitors, as executors of the estate of the said ERNEST LAWSON NIBLETT, Deceased

Defendants

Hearing 24 June 1982

Counsel C J Allan for Plaintiff
J C Chamley for Defendants

Judgment 8 OCT 1982

JUDGMENT OF WHITE J

This is an application by the plaintiff under the Family Protection Act 1955 for further provision out of the estate of her father who died at Auckland on 6 March 1979, aged 77.

The testator's last will was dated 3 May 1966 and was identical in terms with a holograph will executed on 17 April 1966. The will left his estate to one Mrs Ailsa

Marion Barr and appointed her sole executrix and trustee. Mrs Barr survived the testator but died on 10 May 1979, her husband becoming sole beneficiary in her estate.

The testator was married twice. His first wife had died prior to the second marriage. There were no children. The plaintiff was the only child of the second marriage. Her mother died in February 1979.

The plaintiff's first affidavit was dated 29 May 1980. She is now aged 33.

The plaintiff's parents were married in Sydney in January 1946. They came to Auckland and lived for about six years in a house at Ellerslie owned by the mother. The property had been inherited from the plaintiff's grandparents. The plaintiff was born on 17 April 1949. Later the family moved to a house in Greenlane; the section was bought and the house was built largely from the proceeds of the Ellerslie home. A mortgage from the Auckland Savings Bank for $2000 was paid off in 1956.

The plaintiff's parents separated in 1960. The plaintiff aged 11 was quite aware at that time of her father's alcohol problem which she said seemed to be "the major cause of disharmony". She deposed to arguments and assaults, the absence of any father-daughter relationship. After the separation the plaintiff saw the testator only once - on a bus - and they did not speak to one another. A decree absolute was granted on 16 September 1963. Later on 24 September 1964 a consent order for the maintenance of

the plaintiff and her mother was made. From that date the order was complied with and never varied from £3 a week for the mother and £1 a week for the plaintiff. There was no order as to access, but that matter was left to be decided by the parties or, if necessary, the Court. The matrimonial home had been a joint family home. In 1961 the testator transferred his interest in the property as a joint tenant to the plaintiff. On the death of the plaintiff's mother in February 1979 the plaintiff became sole owner of the property by survivorship.

The plaintiff was educated at St Cuthbert's College in Auckland. Her very successful career at school and later at Auckland University was assisted by the scholarships she obtained. She graduated BSc, MSc and obtained a PhD specialising in children's diseases. During the time the plaintiff and her mother lived together the latter had full time employment.

In 1971 the plaintiff married Peter Coates Crossley, a technician at Auckland University. On her mother's death the plaintiff inherited the whole of her estate.

In a second affidavit, dated 4 June 1982, the plaintiff brought her evidence as to her assets and earnings up-to-date. The value of the former unencumbered matrimonial home which had become her property was estimated to be worth approximately $70,000. She and her husband own a ten acre property at Waimauku the value of which was estimated at approximately $100,000. She owns a 1971

Volkswagen valued at $2500. The plaintiff and her husband own a 1974 Golf motor car worth about $3000, household effects, furniture and $10,000 each in Government inflation proof bonds.

The plaintiff's success in life has been attained despite a very severe disability known as "auto-immunity", a condition which causes the body to reject certain of its organs. It was first diagnosed when the plaintiff was seven. I need not refer to the details which show a progressive deterioration and serious loss of functions. The progress of the condition is non-reversible and she is also susceptible to other diseases. In particular, as events have shown, her health can be suddenly and seriously impaired by undue stress. In recent times the plaintiff had to resign, on medical advice, from her position at the Auckland Medical School because the stress resulting from her work was affecting her health. She has turned to research work at the DSIR and receives a salary of $25,000 a year gross. Her husband is earning about $17,000 gross as a technician. Clearly the plaintiff has achieved much despite her disability. It is indeed an understatement when she deposes that healthwise she is at risk and that but for her serious handicap it would have been possible to have undertaken more demanding and lucrative work.

The affidavit of a specialist Dr Frengley confirms the medical evidence and states there is a "significant possibility" that the plaintiff's career will be interrupted or brought to a premature end.

As it was fairly put the summary of the plaintiff's assets shows that she benefited from her mother's estate and from her father as a result of the transfer of his share in the house property to her.

As my notes show both counsel have carefully analysed the evidence. Having reconsidered it and the submissions of counsel I have reached a number of conclusions.

This is a case where the testator made capital contributions to the plaintiff during his lifetime and paid maintenance regularly from the date of the separation. It is not possible now to judge precisely the testator's contributions to the property at August Place or to the plaintiff's education beyond the maintenance for her which was continued while she was being educated. The reasonable inference, however, in my opinion, is that the testator did make contributions to the matrimonial property and that he surrendered his entitlement at the date of separation in favour of his wife and daughter. That conclusion is supported by the evidence of the testator's purchase of the house property at Boakes Road.

In the result the testator's estate at the date of his death was represented by the house property and savings which it can be inferred resulted from his earnings after the separation. Again it is impossible to be precise on the available evidence but it appears that after, and perhaps because of the separation and his illness, the testator made a fresh start unaffected by alcohol in a new

life style which in no small measure was due to the action of Mr and Mrs Barr. This was indeed a case of "the stranger" being befriended with great kindness. There has been no suggestion to the contrary. In the circumstances it was not surprising that in gratitude for having been given a new lease of useful life the testator left his post separation estate to Mrs Barr. Earlier I have referred to Mr and Mrs Barr and I agree with Mr Chamley that both deserved the credit and the gratitude.

This is not a case where the plaintiff can claim to have made any contribution to the building up of the testator's estate. That was a natural result of events. In my opinion the estrangement between father and child was certainly not the fault of the plaintiff. In Re Cross (A 261/74 Wellington, judgment 19 May 1975), Cooke J was able to find that an estrangement justified some diminution in the amount of an award to children on the basis that "with tact and determination they could have achieved some relationship with him in his later years". It was not suggested in the present case that the testator made any attempt, even by writing to the plaintiff, to bring about some reconciliation. The fact that there was a lengthy estrangement is a factor but, bearing in mind the age of the plaintiff when the separation took place, it is not, in my view, a factor of weight in the present case.

I agree with Mr Allan's submission that "the central feature" in this case is the plaintiff's health. At the time of the separation the testator may not have

appreciated fully the plaintiff's problems and from that date he knew little if anything of his daughter's health. Her ability to succeed despite her disability would have left the impression that she was in no need of any material assistance. The Court, however, must consider the position as it was at the date of the testator's death. It is fair to say, I think, that had the testator been in that position he would have made provision for his only child. In any event I am in no doubt that in making no provision for the plaintiff the testator failed in his moral duty to act as "a wise and just father" would have done.

It is helpful in this case to refer to the general principle stated by the Privy Council in Bosch v Perpetual Trustee [1938] AC 463, 479 (adopting the language of Sir John Salmond) that "the Act is...designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make...is that which a just and wise father would have felt it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances." In applying the later cases, In re Harrison [1962] NZLR 6 and In re Young [1965] NZLR 294, 299, it is clear that there can be an obligation to make provision for a child even if that child is comfortably

situated financially. The explanation given in the latter case, however, must be noted, namely, that while the moral obligation to provide "proper" maintenance and support "...is not to be judged solely on a narrow basis of economic needs, that moral and ethical considerations require to be taken into account as well....", it must be shown in a broad sense that the applicant "has need of maintenance and support". That, in my opinion, is the position in the present case; that there was a clear moral duty at the date of death to take into account that the plaintiff's health could deteriorate to a stage which would cut short her active life and that in the broad sense she had "need of maintenance and support". At that point, applying the general principles restated recently in the Court of Appeal in Little v Angus [1981] 1 NZLR 126, "later events may be considered in deciding how a breach should be remedied".

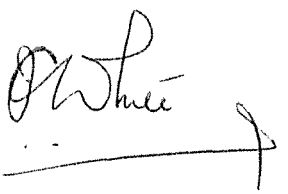
I have considered other recent cases referred to, including Fryer v Bennett (A 119/80 Hamilton, unreported decision of Greig J, judgment 17 December 1981) and Swanson v Public Trustee (A 502/76 Wellington, unreported decision of Jeffries J, judgment 17 September 1979). There are similarities in these cases but when the facts are fully considered they illustrate the difficulty there is in comparing the application of the principles to individual cases.

"Later events" as referred to in Little v Angus (supra) affect the present case due to the death of Mrs Barr soon after the testator.

In the Estate of Benson (A 693/78 Auckland, judgment 19 March 1980) Speight J considered the principles applicable where a claimant dies after the testator and before a claim is brought. In that case, as in the present case, it was the beneficiary who had died. Speight J came to the conclusion that as "in any given case the discretion to award and the amount of the award are assessed on a merit versus merit basis" and that "an award if made...is a personal one", the "same situation of modification or extinction of need" should apply to a beneficiary who had died. He went on to say, "And if such a person does not have surviving dependants to whom a duty was also owed...I do not see why any provision should remain". Speight J then referred to Re A L Pichon (dec'd) (1947) 47 NSWSR 186. That was a case where a daughter claimed against the estate of her mother who had left her whole estate to one Moe who was also her executor. Moe died before the application was heard and Roper J held that the competing claim on the testator's bounty had been removed by the death of Moe and awarded the estate to the daughter less the costs incurred in the administration. Some aspects of the reasoning in that case have been doubted but Speight J pointed out that Pichon's case had been referred to with approval in Dun v Dun [1959] AC 272 as to the abatement of the claim. In the latter case Lord Cohen said at p 2891, "In exercising his discretion as to the amount of further provision to be made Roper J would clearly have been entitled to take into account the fact that the only beneficiary named in the will was dead."

I propose to adopt the dicta to which I have referred, first that I should take into account the fact that Mrs Barr has died and, secondly, Mr Barr succeeded to his wife's estate, a situation envisaged by Speight J. In considering these "later events" in deciding how the breach should be remedied I consider that the plaintiff's share should be greater than it would have been if Mrs Barr had lived. But in my view justice requires that the testator's wish to reward his benefactors should not be extinguished as a result of later events bearing in mind that Mr Barr has survived. Further, it is "in the broad sense" that the plaintiff has need of maintenance and support and, in my view, moral and ethical considerations affect both the plaintiff and the interest of the beneficiary under the will. I have considered the careful submissions of counsel as to what further provision should be made having regard to all the circumstances. Looking at the matter somewhat broadly, for the reasons I have given, my conclusion is that the plaintiff is entitled to two-thirds of the estate.

If necessary I shall hear counsel as to the form of an order and as to costs or memoranda may be filed.



Solicitors

Rudd Garland Horrocks Stewart Johnston, Auckland, for Plaintiff
Thorne Thorne White & Clark-Walker, Auckland, for Defendant

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BETWEEN	JEANETTE ROSEMARY CROSSLEY Plaintiff
AND	KENNETH PASCO WILSON and JAMES CLIFFORD CHAMLEY Defendants

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ADDENDUM TO JUDGMENT OF WHITE J

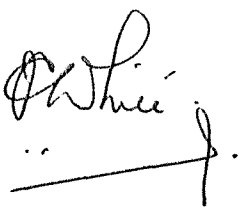
In this case I had completed my reasons for judgment which was despatched to the Auckland Registry on 10 September 1982

On 7 September 1982 counsel for the defendants filed a memorandum and on 10 September 1982 counsel for the plaintiff filed a memorandum in reply.

The case was heard on 24 June 1982. At the time I was considering my reserved judgment I did not recall that at the hearing I had given counsel the opportunity to file memoranda. I did note that my notes revealed little argument on the topics which have now been covered in the memoranda supplied after the lapse of more than two months. On receipt of the first memorandum

Iwas able to recall my judgment before it reached the Registrar in Auckland for delivery and I have considered the memoranda.

Had I received them earlier the submissions made would have been referred to in my judgment. I have come to the conclusion, however, that my reasons for judgment embrace the matters raised in the memoranda and that my further consideration of the submissions of counsel do not persuade me that my conclusions should be varied. Accordingly my judgment is confirmed for delivery.



25 September 1982

A No 571/80

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AUCKLAND REGISTRY

IN THE ESTATE of ERNEST LAWSON NIBLETT

BETWEEN JEANETTE ROSEMARY CROSSLEY

PLAINTIFF

AND KENNETH PASCO WILSON and JAMES CLIFFORD CHAMLEY

DEFENDANTS

ADDENDUM TO JUDGMENT OF WHITE J
