19/7/82

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

No Special Consideration

454

A. No. 718/81

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the estate of SYDNEY ERNEST RANDELL formerly of Auckland, now deceased

BETWEEN JANNETTE RUBY GRACE BEST of Auckland in New Zealand Married Woman

PLAINTIFF

A N D PHYLLIS MARIE RANDELL of Auckland in New Zealand, Widow

DEFENDANT

Hearing : 14th July 1982

Counsel : J.N. Bierre for Plaintiff
R.S. Chambers for Defendant

Judgment : 14th July 1982

ORAL JUDGMENT OF CHILWELL J.

The plaintiff, Jannette Ruby Grace Best, who is the sole child of the deceased, Sydney Ernest Randell, claims provision from his estate for her proper maintenance and support.

The deceased died on the 26th April 1981 leaving a Will made on the 6th September 1971. He was married twice. His first marriage was entered into in about 1939. The parties separated in 1942. A decree absolute was made in 1947. The only child of that union is the present plaintiff born on the 11th May 1942 who is, as of today, 40 years of age.

The deceased entered into his second marriage on the 13th April 1968. He married the present defendant Phyllis Marie Randell. She was 48 years of age at the time and the deceased 53 years of age. This was her second marriage as well. Her first marriage came to an end in 1962 and was subsequently dissolved by decree absolute.

By his last Will the deceased left the whole of his estate to his widow subject to her surviving him for a period of one calendar month. There was a gift over in favour of the plaintiff in the event of the widow not so surviving.

The deceased had been a small farmer in Taupaki at the time of his second marriage. The parties lived on that property until about 1975 when it was sold. A house was purchased in Royal Road, Massey. The parties went to live there and it appears that that was regarded as the husband's retirement from active work. He left an estate which, as of today, is represented by cash totalling $12,654.98. That sum has been invested in an interest bearing bank account. The amount of interest now owing is $1,134.11 so that the total amount in issue in this action is $13,789. It is, therefore, by any account, a small estate save and excepting that in 1977 the deceased made the Royal Road house a joint family home to which the widow succeeded by survivorship. In addition a car was jointly owned to which the widow succeeded by survivorship. That car was subsequently sold for $9,200. The widow purchased a Honda Civic in substitution for the Cortina as the jointly owned car was.

So far as the Royal Road property is concerned, its value at the date of death of the deceased is not established but it was sold by the widow in about August 1981 for $59,000 which sum included $5,000 for chattels. That sale

price so soon after the death of the deceased is probably representative of its value at the date of his death. When she sold the home she was able to purchase a replacement property for $52,000 indicating, prima facie, that she was able to retain $7,000 in cash for investment purposes. There have been subsequent sales of houses and one in the process of settlement at the moment. It is possible, by making calculations based on sale and purchase prices of the various properties, to ascertain that with the $7,000 to which reference has already been made, the widow might have built that figure up to $22,000 for investment purposes. However, she said in her affidavit that the figures mentioned by her were gross figures, that there were substantial costs involved in all the transactions and that the amount of cash at present invested by her is $8,422. A submission was made to me that that smaller figure ought to be looked at critically having regard to the higher figure of $22,000 but although the widow was called for cross-examination in the end she was not cross-examined. This Court, I am satisfied, is bound to accept what she said in her affidavit and find as I do that the present value of her savings is that figure of $8,422.

I want now just to look at the widow's position at the date of death of the deceased which is the relevant time for assessing whether the testator has properly discharged his moral duty towards those who have legitimate claims upon him. There is no reference in the affidavits to her having any savings. I suppose I can take judicial notice of the fact that she is likely to have had some money but it must be of a limited amount otherwise it would have been stated in the affidavit. She had no other assets of her own apart from the interest in the joint family home which I assume included the household contents and her interest in the motor car. She was in receipt of National Superannuation. The present day amount is $87.50 per week and was probably

in that vicinity at the relevant time. The deceased was also in receipt of his National Superannuation. It would be convenient at this stage to mention that when the parties married, the widow's own house was sold. She is unable to remember precisely how much was obtained. She has obviously had difficulty in deciding whether the figure in her mind was expressed in pounds sterling or in dollars. So she is not sure whether $4,000 or 4,000 pounds or $8,000 was the amount obtained. Whatever it was was put towards the building of a new home on the farm and doubtless the Royal Road property, subsequently purchased, reflects in part her contribution.

The widow's present position appears to be that she owns a house worth somewhere between $42,000 and $43,000 depending upon whether the current transaction has been completed. She has a Honda Civic motor car described as a second hand one. I suppose one can assume it would be worth about the figure she paid for it which I infer was $9,200. She has the savings of $8,422. That money is at present invested at 3%. It could be invested at a much more lucrative rate than that. If invested at 10% she would receive approximately $840 interest per annum: if invested at 15% $1,260 per annum. She is 62 years of age, is not working nor is it suggested that she ought to be. She is in receipt of National Superannuation, $87.50 per week.

I now turn to consider the daughter's position because it has to be weighed up alongside that of the widow. I refer first of all to her background. She was brought up by her father following the split up of the first marriage. The father was assisted in that by his mother. She married on the 15th December 1962. There are 7 children of the marriage. Sharon Dell, born 22.10.63 (now aged 18), Stephen John, born 29.10.64 (now aged 17), Clifford Harold, born 8.6.66 (now aged 16), Daniel Lyle, born 3.12.67 (now aged 14),

Dennis Craig, born 12.2.69 (now aged 13), Timothy Brett, born 10.4.70 (now aged 12), Sandra Marie, born 2.2.72 (now aged 10). She said in evidence at the hearing that she had to ask her husband to leave because of his conduct. In the result a separation order was made in the lower Court on the 16th September 1976. Subsequently, on the 8th June 1977 custody and maintenance orders were made against her husband. Maintenance was fixed at $6. per week for her and $5. per week in respect of each child until such child attains the age of 16 years. Accordingly, the total figure for maintenance when the order was made was $41.00 per week. In addition she was given the right to the exclusive occupation of the matrimonial home situated in Mangere and also of the furniture therein until further order of the Court.

She said that she could fix the date when her husband left the home at her request, or perhaps command. She fixed it by reference to Timothy's birthday. She said he left on the 10th April 1976. I accept that as established. It is relevant to the question of a de facto relationship entered into with a Mr. Cooper. She established that relationship some 4 - 5 months following the 10th April 1976. Although, in cross-examination, she described it as a stable de facto relationship until it terminated in November 1981 it does not appear to have been as stable as many such relationships. This is a matter that I will return to later. The position is that at the time of her father's death she was living in a de facto relationship with Mr. Cooper.

Her financial situation at the date of her father's death was that she had a half interest in the Mangere home to which reference has already been made. She also had the occupation order to which I have referred. She had no savings. She was working at the time and she was also in receipt of maintenance. Maintenance for herself had ceased

some time previously but she was still receiving maintenance for the children and it may well have been in the vicinity of $30 at the time of her father's death.

At present the plaintiff still owns the half interest in the house, still has occupation of it, has no savings, is not working, is in receipt of a Social Welfare benefit and some maintenance. She produced a budget which is the sort of budget one sees in maintenance proceedings in the domestic jurisdiction of the Court. It shows her Social Welfare benefit as $114.28, Family Benefit at $21, maintenance at $25, a total income of $160.28. It shows outgoings of $177.75 from which it follows that she is not living within her income. I note, for the first time, a liability of $1,000 which has not been mentioned. I really do not think I can take that into account because counsel have not debated that particular debt issue with me.

In addition it would seem that she has a motor car. Its type and value is not known. One draws an inference that she has a motor car from a passage in cross-examination when she was asked why it was necessary for the son to have a car as well and the answer given suggested that there were to cars in the family, and the budget shows a figure of $20 for petrol and oil.

Up to this point so far as the plaintiff and the widow are concerned I think I have stated their relative positions particularly their relative financial positions from which comparisons can be made.

Counsel for the plaintiff based his submissions on two propositions: the <u>first</u>, in the circumstances can it be said that a wise and just testator has made proper and adequate provision for the only daughter of the first marriage?

Secondly, in the circumstances can it be said that the testator during his life, made proper provision for the widow who is the only beneficiary in the estate? So far as the first proposition is concerned counsel was rather inclined to look at the plaintiff's present position referring me to her budget, the deficit in her budget, to the fact that she is now unemployed, is in receipt of a Social Welfare benefit, that she has 6 children at the moment dependent upon her and that the only assets she has are an interest in the joint family home already mentioned with the right of occupation. He submitted that the evidence establishes that this daughter is in difficult financial circumstances and was also at the date of death of the testator and that a wise and just testator would have made some provision for her. He would not have made no provision at all.

As to the second proposition he referred to the purchase of the Royal Road house, the fact that it was settled as a joint family home some two years after purchase, that the Cortina motor car was jointly owned, that the widow was in receipt of the National Superannuation and had at least $8,422 in savings which would provide an investment income. He submitted that the widow is in a better financial position than the plaintiff, that she has adequate income and assets which will tide her through for the remainder of her life. The testator, he submitted, recognised before he died that his primary obligation was to his widow and made that provision by settling the home as a joint family home and putting the motor car in their joint names. He concluded by drawing a comparison between the financial positions of the two, the standard of comfort of the two, their respective ages and the degree of dependency of children upon the plaintiff and submitted that the wise and just parent, had failed to make adequate provision for the plaintiff for the maintenance of herself and her 7 children. He invited me to award the

full cash sum of $13,789.

Counsel for the defendant also had two propositions but they proceeded from a different premise, as one might expect. The first proposition is that the plaintiff is an adult claimant and that by certain conduct of hers she has forfeited any claim that she might have had to the testator's bounty. The second proposition is that the estate, being worth only $13,700, is too small to allow for any distribution to a child when there is a widow who herself has limited financial means.

So far as the first proposition is concerned, it contains a submission of conduct disentitling which I ought to deal with straight away. In her affidavit the widow said that the deceased was very disappointed with the plaintiff's lifestyle. She was represented by the deceased as being a very rebellious girl. She became pregnant to a man at a rather early stage and that the child had to be adopted out. She went on to say that the cause of the breakdown of the marriage with Mr. Best was that she was having liasons and relationships with other men. She said that her husband was a good-living man, popular with everyone and highly respected in the community. The inference is that a father with a high moral attitude could not accept his daughter's apparent loose lifestyle.

Because this affidavit was very late filed and the plaintiff had had no proper opportunity of replying to it and being advised that there was to be cross-examination in order to avoid adjourning the proceedings so that an affidavit could be filed, I permitted the plaintiff to give viva voce evidence in reply. I accordingly had the advantage of assessing her in the witness box. So far as her pregnancy early in life is concerned she said that she became pregnant

to her boyfriend, a boyfriend of some 6 years standing, that when the child was conceived they desired to marry but were prevented from marriage by the boyfriend's mother. Well, frankly, that does not seem to me to be a particularly serious instance of unfilial conduct. She denied that she had been a rebellious girl. She denied that she was unfaithful to her husband, Best. Indeed, she blamed him for the breakdown of the marriage. Well I am satisfied that the widow's allegations just have not been proved.

The widow then went on to refer to other factors. Her affidavit gives the impression that visits were not frequent between the families, that the plaintiff's visits were motivated more by the desire to receive presents which are set out in the affidavit and the affidavit concludes on this note:-

> "Had she behaved differently, such a relationship might have developed as there was immense goodwill towards others on my husband's part, but he always felt badly let down by the Plaintiff."

Well, the plaintiff's evidence is entirely to the contrary. According to her she maintained a much closer relationship with her father. The visits were much more frequent and I feel obliged to find on the balance of probabilities that the widow's account is not correct. I further find on the balance of probabilities that the plaintiff had a satisfactory relationship with her father and that she was a dutiful daughter as far as circumstances would permit having regard to her own family situation, bringing up seven children, and to the fact that neither Mr. Best nor Mr. Cooper appeared to have been satisfactory partners.

There was criticism made of her for failing to mention her relationship with Mr. Cooper but I can understand

why she did not do so because it was one of those "on/off" arrangements. One must put in its proper context the particular concession made in cross-examination that it was a relatively stable de facto relationship until the final split with Mr. Cooper. Earlier in cross-examination one finds reference to the fact that she lived with him on and off, that they had arguments over finances, she felt that he was not supporting her and the children and in the end told him he would have to get out. In re-examination there appears this (page 7) :-

> "You said that you and Mr. Cooper had disputes about financial matters. Did he ever continuously support you? No he has never continuously supported me.
>
> His reluctance to do that, was that the cause of the disagreement over finances? Yes."

Accordingly as far as Mr. Chambers' first proposition is concerned, in so far as it alleges conduct disentitling, I find it not proved and indeed I find on the balance of probabilities, as I have said, that there was a satisfactory relationship between these two and the girl was as dutiful a daughter as the circumstances would permit and those circumstances include what appears to be a certain animosity on the part of the widow.

So far as the second proposition is concerned, Mr. Chambers commenced his submissions by drawing my attention to the authorities which are to the effect that the Court ought to pay regard to the testator's intention as expressed in his will, that the function of the Court is not to reform wills and where the testator has expressed his opinion in his will the Court ought to be guided by that in approaching the task imposed upon the Court under the Act. He went on to submit that the testator in this case had properly assessed the financial position of the widow and his daughter and had

properly financially assessed their needs and it just cannot be said that he was guilty of a manifest breach of that moral duty which a just but not loving husband or father owes towards his wife or towards his children.

He compared the position of the two parties in much the same way as I have done earlier in this judgment. So far as the daughter's situation is concerned he stressed the importance of her de facto relationship which, at the time of the testator's death, was stable. He observed that Mr. Cooper was a bulldozing contractor. He invited the Court to take judicial notice of the fact that bulldozer contractors are capable of earning substantially better than other employed persons in the community. I think that is a fair enough matter for the Court to take judicial notice of. He correctly submitted that it is crucial to ascertain just how stable the relationship is in all cases of de facto relationship. In particular, here the testator would have been justified in considering the relationship was sufficiently stable to relieve him from his duty to his daughter. He would also be entitled to assume that Mr. Cooper would be providing for the plaintiff and her children. Then there is the question of the husband, Mr. Best. He was a boilermaker when he left the family home. The deceased would have known of the 1977 Court order. He would have known that Mr. Best had observed the terms of the order and was still observing them. He would have known that under the laws of the country it is possible to have maintenance orders reviewed from time to time. Mr. Chambers also mentioned that at the date of death the plaintiff was in fact in employment. The testator was entitled to take that into account. He was entitled to take into account she was only 40 years, apparently then in good health and the time was not far distant where she would be able to work as a full time employee uninhibited by having to care for children

because it is not so far in the distance that the youngest child will attain the age of 16 years.

The submission proceeds that the estate here is a very small one, an estate of $13,789. The testator had a primary duty to his widow, a woman of 62 years of age who no longer works. The testator was entitled to sum up the needs of these two taking into account their respective ages, ability to work and the other factors mentioned and when these are properly weighed in the balance this testator showed a proper degree of wisdom and justice in leaving all of his small estate to his widow.

There is a comment which ought to be made at this stage on the smallness of the estate and that is this, and I think it has appeared from what I have said earlier in the judgment, that I am not dealing merely with an estate worth $13,789, I am dealing with a situation in which the deceased made substantial provision for his widow in his lifetime by putting two substantial assets into joint ownership so that she succeeded by survivorship.

The proper approach to claims under the Act has been re-stated recently by the Court of Appeal in Little v Angus [1981] 1 N.Z.L.R. 126. The headnote reads :-

> "The following principles are now well settled in Family Protection cases. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator; 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."

I propose to follow the principles ennunciated in that headnote.

The relevance of the de facto relationship in this case is a matter of some importance. In Re Z (Deceased) [1979] 2 N.Z.L.R. 495, the Judges took varying attitudes towards the place which a de facto relationship has in considering the principles to be applied under the Act. I think it is a fair summary to say that all the Judges considered that as a question of fact such a relationship is a relevant factor but how relevant must depend upon the facts of each particular case. In particular Woodhouse J. at page 504 said this :-

> "In any event I think there are strong reasons for accepting Mr Fisher's contrary submission that usually this kind of relationship should be ignored when decisions have to be made whether a testator has failed to discharge his duty to a widow or the extent of the failure.
>
> It is obvious that the woman in a de facto relationship could claim no right to support from the man concerned even during its existence and the future would always be quite uncertain. For practical reasons of this kind I doubt whether it would be right to regard a de facto relationship whether apparently stable or not, as a modern variant of marriage."

I am, of course, conscious that in that case that was a claim by a widow for greater provision out of the eatate, she having formed a liason and there arise questions there which are different from a case such as this where it is a daughter who is making a claim and is living in a de facto relationship. In my judgment the facts are of importance. Mr. Chambers said it was crucial to ascertain the degree of stability and that sort of thing. Well, I have come to the conclusion for reasons earlier given in this judgment that this was quite an unsatisfactory de facto relationship and in particular it bears out what Woodhouse J. had to say about financial support as a legal right. It certainly did

not exist as a legal obligation so far as Mr. Cooper was concerned nor in fact did it exist because the evidence is quite clear that he did not make proper provision and that was the root cause of the relationship coming to an end. I say, with respect to the particular testator in this case, who must be presumed to know the same facts as have been revealed to me, that he ought to have taken the view that his daughter was not in a satisfactory financial position in terms of support from a male partner.

I now turn to the relevance of National Superannuation. The impression I have from reading Re Z is again that it is something to be taken into account depending upon the facts of the particular case. For example, Woodhouse J, at page 504, said :-

> "In more general terms I have some reservation as to whether such an automatic and universal welfare benefit as national superannuation ought to be taken into account, except perhaps in the unusual case, to relieve what otherwise would be regarded as an obligation owed by a testator to his widow."

The trend of authorities since then is that National Superannuation has been taken into account and I refer to Re Guest digested in [1980] Recent Law 44, a decision of Ongley J. and Re August digested in (1980) 3 Capital Letter part 33, page 6, a decision of Hardie Boys J. I think here, where the issue is between two competing claimants, then the fact that either or both might be in receipt of income from the Social Welfare Department must be relevant. In the present case both the plaintiff and the defendant are in receipt of income. If you ignore it the whole inquiry, in my judgment, becomes somewhat unreal.

The question in this case is, having regard to all the circumstances, has there been a breach of moral duty

in this case? I have come to the conclusion that the answer is in the affirmative. I have come to that conclusion because the plaintiff is an only daughter. She has, in my judgment, been as dutiful as the circumstances over her lifetime have permitted. She is financially on the bread line with seven children, six of whom she is obliged to support fully at the moment. There is no known prospect of provision for her from any other source. The widow is in reasonably comfortable circumstances. She is at the stage in life where her requirements are not as great as those who are struggling with the affairs of bringing up children. The daughter's circumstances are not as comfortable as those of the widow. She is at the stage in life where expenditure is high and the difficulties of bringing up a family of seven are still upon her and will be with her to a lessening degree for another 6 or 7 years.

I think that the wise and just testator, weighing up his duty to his widow and his daughter, would have made some provision for his daughter by way of legacy recognising that it would have to be less than he would want to provide had he had a bigger estate and had his primary duty not been to his widow. In my view he should have left his daughter a legacy of $8,000. Accordingly, it is my judgment that the plaintiff is entitled to provision for her maintenance and support by awarding her a legacy of $8,000.

I want to say something that I omitted to add and that is this, that the testator also had a moral duty towards his grandchildren of whom there were seven and he would be entitled to discharge that duty by making provision for his only daughter. In the award made I have taken into account the fact that his duty encompasses his daughter and her seven children.

So far as costs are concerned Mr. Chambers does not need an order because he represented the defendant in her capacity as a trustee as well as a beneficiary. However, should there be any difficulty in the matter he has liberty to apply for a Court order. So far as the plaintiff is concerned she is entitled to costs on a party and party basis which I fix at $300. plus disbursements to be fixed by the Registrar.

Solicitors :

Robinson & Morgan-Coakle, Auckland for Plaintiff.

Gill, Coutts & Co., Auckland for Defendant.