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IN THE HIGH COURT OF NEW ZEALAND A. 391/79

CHRISTCHURCH REGISTRY

[redacted]

IN THE MATTER of the Family Protection Act 1955

- a n d -

IN THE MATTER of the Estate of FREDERICK JOHN SMITH late of Christchurch, Contractor, deceased

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BETWEEN CLARA ROWENA MARGARET SMITH of Christchurch, Widow

PLAINTIFF

A N D THE PUBLIC TRUSTEE OF THE DOMINION OF NEW ZEALAND as executor of the Will and Trustee of the Estate of the said FREDERICK JOHN SMITH deceased

DEFENDANT

Judgment: 14-9-82

Hearing: 8 September 1982

Counsel: A.A.P. Willy for Plaintiff
T.G. Sullivan for Defendant
S.R. Maling for Residuary Beneficiaries

JUDGMENT OF CASEY J.

Mrs Smith, the widow of Frederick John Smith, seeks leave to bring proceedings out of time and further provision from his estate. He died on 30th June 1953 aged 69 and probate of his Will made in 1944 was granted to the Public Trustee. He was married to the Plaintiff in November 1936, who was then 25 years his junior and is now 74. There were two children of his previous marriage, Mr Murray Smith aged about 63 who is virtually retired and lives in Christchurch; and Mrs McKay who is about the same age as the Plaintiff, lives in Wellington, and is disabled with a stroke. She did not appear in these proceedings, but Mr Smith said in his affidavit

he believed she relied upon him to take the necessary steps in opposition.

In his Will the late Mr Smith directed that the Plaintiff was to have the free use and occupancy of the family home at 117 Deans Avenue until her death or remarriage, with a gift over to his children in equal shares. She pays the outgoings and has lived there ever since. The residue of the estate (with the exception of some specific gifts) was divided two-thirds to her and one-third to the two children and has been distributed, leaving the house property as the only remaining asset. It was valued at $45,000 in 1980 and I imagine it is now worth rather more. It is a big house standing on a large section and has become too much for Mrs Smith to manage. She wants the place sold and a smaller and more convenient dwelling purchased to replace it. Although there is a power of sale in the Will there is no provision for a substitute property. However, there is a Clause allowing Mrs Smith to convert the house into two flats at her own expense, but I accept this is impracticable. The hearing took the usual course of submissions on the merits prior to a decision on the application for leave.

I was favoured with lengthy affidavits and a full record of correspondence, making up a documentary record going far beyond anything necessary to resolve the simple question at issue in these proceedings. In spite of Mrs Smith's approaches, it proved impossible for her to reach any agreement with her step-children whose present view (through Mr Smith) is that they would be agreeable to the house being let and for the rent to be made available to her so that she can obtain a tenancy of another property in its place. I do not regard this as a very satisfactory solution; on account of its size and the extent of the grounds it may be difficult to let at a rental sufficient to provide suitable alternative accommodation for Mrs Smith, especially after normal outgoings are met. There is provision in the Will for its maintenance to be met by the Trustee, but there are no funds in the estate and interest on any amount borrowed for this purpose would have to

be paid by Mrs Smith also. There is nothing in the personal circumstances of her or the two children calling for any special consideration affecting Mrs Smith's situation under the Act as the testator's widow. Mr Smith would like to see the property retained because of its present and potential value, and has a sentimental attachment to it as their family home. However, as Mr Willy points out, this must be viewed in the light of his affidavit of 5th December 1980, where he said (after a long period of indifference or opposition) that he was agreeable to the sale of the property and the purchase of a more suitable alternative, and to the balance of capital being invested for Mrs Smith's benefit during her lifetime. He changed his mind in a letter dated 9th June 1982.

Mr Willy referred me to the summary by Cooke J., delivering the judgment of the Court of Appeal in Little v. Angus (1981) 1 NZLR 126:-

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry 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."

In this case Mr Willy faced a formidable task in seeking to persuade me that the testator had been in breach of a moral obligation in what, on any ordinary view, would appear to be sensible dispositions to provide for his widow and his two children. The actual sum she received from the estate was $7,200 - a very respectable figure in the early 50's and according to the estate accounts, then equivalent to the value of the house property. His difficulty is compounded by the long period during which Mrs Smith was apparently satisfied with the position; it was not until 1976 that she

first attempted to raise the matter with the Trustee and the other beneficiaries. There is no dispute that she has kept the place in very good order over the years and has used her own funds in maintenance and upkeep, the benefit of which will also enure for her step-children. Both of them are also advancing in years and, in the nature of things, if Mrs Smith lives to her full life expenctancy it may be that the persons who will eventually enjoy the testator's bounty will be his grand-children.

The objections to Mrs Smith bringing a claim under the Act at this stage and in these circumstances are obvious, but nevertheless the problem is a very real one for her, getting worse as each year goes past and she becomes more incapable of living the kind of life in this house that I have no doubt the testator intended she should enjoy. Mr Willy submitted that a wise and just husband would have recognised (as he did) an obligation to ensure that his widow enjoyed the same standard of living and lifestyle to which she had been accustomed during the 17 years of marriage. Such a testator would have accepted that in her old age she would find the house and grounds getting beyond her ability to keep up to an appropriate standard, and should have made provision for the purchase of a substitute dwelling in which she could pass the remainder of her life free of such cares and in reasonable comfort. Alternatively, he sought an order directing the winding up of the estate, with Mrs Smith being paid the present value of her life expectancy (he thought about $16,000) and the remainder divided equally between Mr Smith and Mrs McKay. As I intimated at the time, this is going far beyond anything the Court can do under the Family Protection Act.

Mr Maling emphasised that I was not empowered to make a new Will for the testator simply to achieve what is now seen to be a more reasonable result. He submitted there had been no breach of moral obligation by the provision made and, having regard to the delay and the surrounding circumstances, leave to bring the action out of time should be refused. The Public Trustee abides by the Court's decision.

The issue is finely-balanced, but I have come to the conclusion that Mr Willy's submission about the absence of any substitutionary provisions can be supported. It is significant that the late Mr Smith appears to have given this matter some thought, as shown by the provision he made for Mrs Smith to convert the house into two flats. As I have said, this is not practicable, but it does indicate that measured by the testator's own standards, a change in living arrangements for his widow left on her own in this way was foreseeable as an appropriate development. The sale of this property and the purchase of a substitute need not result in a loss of value to the investment which Mr Smith and Mrs McKay expect will be theirs in the fullness of time. I cannot give much weight to the former's concern with preserving the family home, in view of the attitude I have referred to in his affidavit of December 1980. However, as Mr Willy says, he would have the option of buying the property himself if he now feels so strongly on this point.

The Plaintiff has established her case on the grounds put forward by Mr Willy and I will make an order varying the provisions of the Will to allow for the purchase of a suitable property for the Plaintiff's occupation in substitution for the house at 117 Deans Avenue. I appreciate the concern of the residuary beneficiaries to maintain the value of the estate against the ravages of inflation. The sale price from Deans Avenue might be sufficient to purchase a block of two ownership units or town houses, allowing one to be occupied by Mrs Smith and the other to be kept as an investment. Alternatively, if a cash surplus does result, the net income could be accumulated and added to it, forming part of the residue for distribution on the termination of Mrs Smith's occupancy. In the circumstances I see no need to go as far as Mr Smith suggested in his affidavit and pay such income to the Plaintiff. According to her affidavit made in 1979 she had savings of some $31,000. On the other hand, if the residuary beneficiaries wish, I see no objection to paying them any balance and would be prepared to make such an order. In this event I would expect them to agree with Mrs Smith and

the Public Trustee over the cost and standard of the substitute accommodation, but if there is any difficulty the matter can be referred to the Court for directions pursuant to the leave reserved.

Having found in her favour on the merits, I see no prejudice to the other parties by granting the motion for leave to bring the action out of time. Leave to bring the action is accordingly granted. Counsel will submit a draft order for approval. The Plaintiff will have $300 costs and disbursements payable from the estate when there are funds available for this purpose. The Trustee needs no order. I am not prepared to award any costs to Mr Smith, as a defended hearing would have been unnecessary had he maintained the reasonable attitude adopted in his affidavit of December 1980. Leave is reserved to any party to apply for such further orders as may be necessary to give effect to this judgment.

McCasey J.

Solicitors:

Cavell Leitch Pringle & Boyle, Christchurch, for Plaintiff
Public Trust Office, Christchurch, for Defendant
Lane Neave & Co., Christchurch, for Residuary Beneficiaries