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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.157/80

49

X

No Special Consideration

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of JOHN EDWARD WHITE, Deceased

BETWEEN JUDITH ANN STONEMAN

Plaintiff

A N D THE PUBLIC TRUSTEE OF NEW ZEALAND

Defendant

Hearing: 2 December 1981

Counsel: C.A. McVeigh & R.B. Leete for Plaintiff
D.C. Ruth for Public Trustee
A.A.P. Willy & R.J. Scragg for J.E.D. White

Judgment: 12 FEB 1982

JUDGMENT OF COOK J.

This is an application by Mrs Judith Ann Stoneman, a grand-daughter of John Edward White, deceased, for further provision from his estate.

The late Mr White and his wife who died before him, had two children; a daughter, Elaine Patricia Stevens, the mother of the plaintiff, who died in 1949 when the plaintiff was approximately eighteen months old and a son, John Edward Dacre-White, who is still alive. The son has three children and he and his family and Mrs Stoneman are the only persons who could have any claim under the Family Protection Act against the estate.

Following her mother's death, the plaintiff was looked after by her grandparents for 11 or 12 years.

She then came back into the care of her father, who had married again, and his wife for approximately four years. This seems to have been an unhappy time for her, however, and she returned to her grandparents and lived with them until she was 21. Since then she has married and now has two children.

From Mrs Stoneman's own evidence, given by affidavit and supported by affidavits from others, I am satisfied that she must have been treated by her grandparents very much as their own daughter. Her uncle, Mr White, has sworn a lengthy affidavit in which he seeks to paint a different picture; one in which the relationship between the grandparents and the plaintiff was not as close or as happy as appears from her own affidavit, the only one filed at that time in support of her application. He was critical of his niece and stressed, in particular, that she had not gone to see her grandparents during the period when she was living with her father and step-mother; indeed, one gets the impression that nothing, however trivial, which might place an obstacle in the way of her claim has been left unsaid. Neither was called for cross-examination and, had the two affidavits stood alone, it would have been difficult to decide where the truth might lie. However, Mrs Stoneman's own reply to her uncle's affidavit and the affidavits of others in her support, who, as mentioned, knew her and her grandparents and saw them when they were together, are sufficient to satisfy me that, while Mrs Stoneman may not have been perfect in every respect or behaved properly on every occasion, there was a loving and caring relationship between her and her grandparents and that, for many years at least, she was regarded almost as their own daughter.

Subject to a consideration of the respective financial positions of the plaintiff and her uncle, I am satisfied equally that the testator did have a moral duty to make some provision for her and that there was not conduct on her part such as should disentitle her.

By his will the testator left a legacy of $1,000 to each of his grand-children and the residue of his estate to

his son with the substitutionary provision, which, of course, did not operate, that should the son pre-decease him the residue would be divided between the four grand-children equally. Accordingly, he did recognise some obligation to make provision for the plaintiff. The estate has been administered to the point where assets have been realised, administration and other expenses paid and,by consent of the parties concerned, the legacies to the grand-children. There remains in the hands of the Public Trustee a net amount of $17,833.50, subject only to the payment of further administration expenses including the Public Trustee's remuneration.

The son, who received the furniture and chattels pursuant to the terms of the will, has sold them for his own benefit and the value is not known. It was shown in the accounts of the estate at $1,000. The son makes no reference to the amount the items fetched, so it is reasonable to presume that it was not less than that amount.

The picture of the plaintiff's finances and of her husband is not entirely clear. In her first affidavit she stated that she and her husband were "very much on the bread line" a statement which clearly cannot be taken literally. She and her husband own a house property in Christchurch which, at the 1st July 1979, had a Government valuation of $19,500. When she made her affidavit in March 1981, there was a first mortgage, initially $10,000 but reduced to $9,400, and the monthly payments in respect of that as from the 31st December 1980 were $108.33. There is a second mortgage, raised to enable a garage to be built, and this is being repaid at the rate of $33.10 per month. She describes the house as being badly in need of painting and says a new fence is required. Her husband is employed by the Waterfront Industry Commission and estimates that his income over the year to November 1981 to have been $19,854 gross. In his affidavit he states that the mortgage payments which he and his wife presently have to make, together with the insurance on the house and contents and life insurance come to approximately $100 per week, a figure which is very difficult to reconcile with the detailed figures given. They have furniture and a car. In his affidavit Mr Stoneman says that recently they have had to take

their eighteen month old son to an orthopaedic specialist for a check in connection with his hips and that expenses such as this are causing a real strain on their budget.

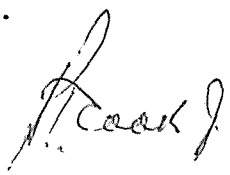
What possibilities there are of the plaintiff inheriting from her father are not clear. The uncle suggests that she is likely to be a beneficiary, as there are no children of her father's second marriage and her step-mother had no children of her own. The plaintiff only says that she does not know what provision her father may have made for her. There is no evidence of what the father's means may be, but I suspect that, if there were any outward indication of wealth, the uncle would have said so.

Mr White is 52, he is married, the age of the children of the marriage being now 29, 26 and 24, or thereabouts. He expects to retire when he is sixty. His income at the time of swearing his affidavit in November 1980 was $192 gross per week and his wife works part-time. One of the three children still lives at home but is in full time employment. They own their own home, which is apparently built on leasehold property, the Government valuation of the freehold being $29,000. He believes that the maximum market price for the property sold as a leasehold property would be only $24,500 from which, I assume that, he owns the improvements. There is a mortgage to the Housing Corporation with approximately $1,300 owing under it and, apart from that, he has no debts. The value of the contents of the home are estimated at $12,000 and he and his wife have a car, a caravan, some life insurance and some $1,200 in a bank account. He does not belong to any superannuation scheme and has no investments.

Of the two families, while the asset position of the uncle is somewhat stronger, as one would expect of a man who had been earning for a much greater length of time, his earnings are less than that of Mr Stoneman and, while his responsibilities may be less, in eight years or so he may wish or have no option but to retire. The mortgage on the house may be low but the land being leasehold, he will always have rent to pay. While the Stonemans may have substantially greater outgoings, they also have the greater income

receipts and, as indicated, one cannot accept that their position is as precarious as they have suggested.

Overall, taking all factors into account, I am satisfied that the testator was under a moral obligation to his grand-daughter, who was so close to being a daughter to him, and that this was not discharged, as was suggested, either by taking her into his home when she was young and being put to expense accordingly, or by the legacy of $1,000; that a wise and just testator would have provided more. As to the further amount she should receive from the estate, I think something not far removed from the inheritance which would have come to her, had her uncle predeceased the testator, would be appropriate. Accordingly, it is ordered that by way of further provision from the estate, the plaintiff receive a legacy of $4,000, to be in addition to the legacy of $1,000 already received and that, in all other respects, the provisions of the will remain unchanged. She is to have her costs and disbursements out of the estate and, if these cannot be agreed, submissions may be made.



Solicitors:

Messrs Goodman Leete & Cordner, Christchurch, for Plaintiff
The Solicitor, Public Trust Office, Christchurch, for Public Trustee
Messrs Taylor Shaw & Anderson, Christchurch, for Mr J.E.D. White.