22/3

IN THE HIGH COURT OF NEW ZEALAND A. 113/82

CHRISTCHURCH REGISTRY

No Special Consideration

IN THE MATTER of the Family Protection Act 1955

- a n d -

IN THE MATTER of the Estate of D PARKIN

BETWEEN I JONES of Christchurch, Cycle Mechanic

PLAINTIFF

A N D THE PERPETUAL TRUSTEES ESTATE AND AGENCY COMPANY OF NEW ZEALAND LIMITED

DEFENDANT

120

Judgment: 22 FEB 1983

Hearing: 2 December 1982

Counsel: P.F. Whiteside for Plaintiff
D.J.R. Holderness for Trust Company
G.M. Brodie and Miss Riddiford for residuary beneficiaries (except Aberbank School)
Mr Archibald for Heart Foundation
J. Cadenhead for Grandchildren

JUDGMENT OF CASEY J.

This action for further provision is brought by Mr Jones, the son of D. Parkin who died on 1981 leaving an estate then worth about $70,000 and now of a net worth of some $78,000. Under her Will made a few days previously she gave $6,000 each to the Plaintiff and his three children, and legacies totalling $7,500 as follows:- $1,000 each to the Nurse Maude Association and the National Heart Foundation, and $500 each to four other charities and seven persons. She gave a small piece of land in Wales (perhaps worth up to $1,500) to the Bangor Teifi Church there and a ring to a niece. The residue of her estate (after payment of debts etc.) is divided equally among that church and two others, a school and four nieces or nephews (all in

Wales) and a niece in England. On present figures each is likely to receive about $4,500.

The late Mrs Parkin is described as an intelligent and forthright woman; her son says she had a dominating personality. She was born in in Wales, coming to New Zealand shortly after her first marriage to Mr Jones in 1927. The Plaintiff was their only child, adopted in They separated in 1933 and thereafter the Plaintiff lived mainly with his mother, who remarried in 1944 following her divorce, and she was widowed in . Mr Jones (the Plaintiff) had a very elementary education leaving school in 1939 from Standard 3. He suffered various nervous disorders, requiring a spell in Sunnyside Hospital in ; he returned to live with her and served a 7-year apprenticeship as a until 1949 when he went to live at working as an odd-job man and hospital porter until He then suffered another break-down requiring admission to Sunnyside for a further six months. After that he returned to live with his widowed mother and worked at different unskilled jobs, marrying in 1964 and he and his wife then lived in their own (or rented) houses. He apparently gave up regular employment in 1967 and since then has done only odd jobs, and makes a small income (about $1,500 p.a.) from reconditioning second-hand articles in a shed built at his present home in Addington, bought in 1973. He is on an Invalids Benefit, he and his wife receiving $235 fortnightly. She has never worked outside their home.

They have three children, the eldest ( ) being now , and twins (who are 17. Mr Jones annexed a medical certificate to his affidavit to the effect that he is schizophrenic and has not held a job with an employer for years, being "incapable of working for a boss." His daughter A is handicapped, living permanently at home and unable to earn her living independently or care fully for herself. She receives a benefit of $60 per week, and will always require assistance. The twin boys seem reasonably adjusted; both have left secondary school and had jobs as process workers, but one

went to Australia and is presently unemployed, while the other earns $100 per week, living at home and paying board.

In spite of this unpromising background Mr Jones and his family appear to have managed their limited finances efficiently. He and his wife no doubt had to live frugally, as borne out by the details of weekly expenditure for the household in his affidavit of 19th May 1982, totalling $106.70 - well within their benefit. The house at Addington is in poor condition and its present value is $16,500. He owns tools worth $1,000 and a 1958 vehicle which he values at $200. He has savings of over $17,000, and he and his wife have savings certificates of $820 given to them by the deceased, who also set up a trust for their three children during her lifetime and made investments for their benefit maturing in 1985. Counsel estimate that each child will ultimately receive about $6,000 from these provisions. There are no others with competing claims.

Virtually up to the end of her life the deceased was on close terms with her son and his family, although she disapproved of his marrying a Roman Catholic and made no secret of her feelings. However, this did not seem to affect her interest in them, nor her son's sense of duty towards her, particularly after she was widowed. She was an independent woman and insisted on giving Mr Jones and his wife money for the help they gave in and around her house. With many of the elderly, small differences are magnified into major grievances and ordinary acts of generosity come to be viewed as major benefactions. I believe the late Mrs Parkin was no exception. In June 1981 she ordered the Plaintiff's wife from her home while she was doing housework for her and told her never to come back. Her health was deteriorating and she was critical of her son for not allowing her to live at his place. Having regard to his family circumstances, the state of the house and the strained relationships with his wife, I think this expectation was quite impractical.

As a result of her differences with Mrs Jones and the conviction that she was influencing the Plaintiff against

her, Mrs Parkin changed her Will made in 1980 to revoke a legacy of $6,000 for her. Mr Richardson took her instructions when the earlier Will was made and pointed out the provisions of the Family Protection Act. She explained that the five legacies of $6,000 each then being given to the family meant $30,000 for them, which was half the value of her assets. She added that she was giving the legacies to the Plaintiff's wife and children instead of all the money to him because if he received the lot she feared he would leave his wife and children "as he has threatened to do so in the past." There is not the slightest support for this in the affidavits or the history of the marriage as disclosed to me. After such a demonstration of concern for her daughter-in-law, Mrs Parkin's action just over a year later in cutting her out entirely strengthens my view that age was taking its toll of her good judgment. Mr Richardson also discussed this later alteration with her, and was met with the adamant belief that Mrs Jones was influencing the Plaintiff away from her. Her last Will was made accordingly, a few days before she died.

Mrs Parkin had made only one visit in 1959 to Wales since she left to settle in New Zealand. She seems to have kept in touch with early friends such as the nephews and nieces named in the Will. All are now elderly and in relatively poor circumstances. Apart from corresponding at intervals there has been no close contact between them. However, some have deposed to receiving occasional small gifts of money from her. There is no doubt that their shares in residue will come as a welcome assistance. The Churches have indicated through Mr Brodie that they press no claim and will abide the decision of the Court. Presumably the school has the same attitude. It was duly served but has not entered an appearance.

Mr Cadenhead was appointed to represent Plaintiff's children and I agree with his view that no further provision need be made for the two boys. Ann is in a different situation needing support for the rest of her life and there is little prospect of her parents providing anything substantial, although there can be no criticism of their care to date. In the

absence of any other claims on her bounty outside this immediate family, I think Mrs Parkin should have acknowledged the special needs of her granddaughter by making some extra provision beyond that for the other children. She certainly had the assets to do so, and Counsel accept Mr Cadenhead's suggestion of an increase in her legacy to $15,000 to be held in trust. I regard this as appropriate. Mr Jones made it clear he did not attack the bequest of the ring or the specific legacies, with the exception of that to June Johnston, who apparently acted as Mrs Parkin's solicitor for a short time. She did not appear. He also thought $500 would be more appropriate for the Heart Foundation. His real complaint was directed at the substantial gift of residue to distant kin and charities, with whom Mrs Parkin had no real ties, at the expense of her own family.

Mr Brodie took me through the family's financial situation and submitted that overall they were more than adequately provided for. He was in some difficulty with income, having to accept that I could not take into account the benefits being received under Part I of the Social Security Act, but said that in another three or four years Mr Jones would be receiving National Superannuation. Looking at his capital position and the help and provision already made by the testatrix, he felt that he was in no need of further support from her. I cannot agree. While an applicant's financial position is important, his case is not to be judged solely on economics, and moral and ethical considerations must also play their part. With his handicaps Mr Jones has done well to reach his present level of assets and savings. It reflects frugal management and a relatively spartan life for him and his family, no doubt recognised by Mrs Parkin in the help she gave during her lifetime. The Valuer's report on the family home at Addington demonstrates a poor standard of accommodation. Mr and Mrs Jones may have become accustomed to this life-style; if so, it still affords no reason for his mother's action in by-passing the obvious need for a more acceptable standard of housing and future capital security - a need occasioned by his inability to engage in reasonably paid employment. He is now 56 and approaching those years where health or other emergencies could make unexpected

demands on his savings. His mother had the means to relieve his situation, exacerbated as it was (and will be) by his need to care for A I can see little justification for her disproportionate generosity to the residuary beneficiaries. She was under no obligation to them warranting anything beyond the token of gratitude or affection which seems to have prompted the specific legacies outside the family. I think a wise and just testatrix in her position would have accorded more generous recognition of the needs of her son and handicapped granddaughter, and have dealt with the school, Churches and overseas kin connected with her early years by modest gifts to remember her by.

Mr Brodie submitted that if I made any provision for the Plaintiff, it should be shared pro rata by the other beneficiaries outside his immediate family. On the approach just indicated I think the specific personal legacies should be preserved and the other dispositions reduced to something more in line with them. I therefore make the following orders and directions by way of variation to the Will:-

(i) Delete the devise of land to the Bangor Teifi Church in Clause 5(i).

(ii) Delete the legacy to T Jones in Clause 6(i).

(iii) Increase the legacy of $6,000 to A Jones to $15,000, to be held by the Trustee to pay the income and capital as it in its sole discretion thinks fit for or towards her maintenance, advancement and benefit, with the usual power to pay to the parent, guardian or other person appearing to be responsible for her maintenance and/or welfare without being required to see to its application. After Ann's death any balance to be held on the same trusts as the residue, as varied hereunder.

(iv) Delete the dispositions of residue in Clauses

7(a) to (l) inclusive. Substitute legacies of $500 each to the school and the three Churches mentioned in subclauses (a) to (d) and legacies of $1,000 each to the persons mentioned in subclauses (e) to (i).

(v) The residue to the Plaintiff, after payment of debts, funeral and testamentary expenses, duty, costs on this action and administration expenses, excluding those in connection with the administration of Ann's legacy, which will be met from that fund.

I see no reason to interfere with the legacies to the Heart Foundation or to June Johnston. They are what the testatrix wanted and are modest enough gifts, insignificant against the total involved. The costs of all parties appearing will be met out of the estate, and Counsel will please submit a draft order for my approval together with their suggestions for costs. Presumably the Trustee will not require an order.

McCasey J.

Solicitors:

Wynn Williams & Co., Christchurch, for Plaintiff
Weston Ward & Lascelles, Christchurch, for Trust Company
Anthony Polson & Co., Christchurch, for residuary beneficiaries
Luke Cunningham & Clere, Wellington, for Heart Foundation
De Goldi & Cadenhead, Christchurch, for grandchildren