IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 11/82

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of C MOSS-MASON also known as CI MOSS late of Auckland in New Zealand, Newspaper employee, now deceased

BETWEEN G MOSS of Auckland, Programmer Analyst

Plaintiff

AND SI LUCAS of Auckland, Femme Sole in her capacity as sole executrix of the last Will of the said C Moss-Mason

Defendant

Hearing: 7th February, 1984

Counsel: Parmenter for Plaintiff
Hill for Defendant as beneficiary
Sara for Trustee

ORAL JUDGMENT OF SINCLAIR, J.

This is an application under the provisions of the Family Protection Act 1955 brought by a son against the estate of his late father.

The deceased died on the 1981 having made a will on 20th February, 1981 which makes no provision for the son but which leaves the whole of the estate to the Defendant, being a person who had been living with the deceased for some months, probably about a year prior to his death.

The deceased's wife had died in and from what I am able to ascertain from the affidavits it would appear that any entitlement she may then have had in the family assets became vested in the deceased, so that of a marriage which had subsisted for some 30 years the deceased ended up as the owner of the whole of those assets. I pass that comment because had there been any action taken by anyone as at the date of the death of the Plaintiff's mother, and in the absence of a will, there may have been a claim in respect of her estate under the Matrimonial Property Act which might have resulted in her estate receiving one half of those assets. I merely make that as an observation and, it not having occurred, I must face up to the situation that it was this deceased who succeeded to the whole of the family assets and that is what he was dealing with when he made his will.

At the time of his death the deceased for some time had been suffering from cancer and it is evident from the affidavits which have been filed that that reliance on his part had somewhat of a profound effect on his outlook to life. It prevented him from working for some time prior to his death, but he had carried on a relationship with the Defendant which may have had its ups and downs brought about by the illness. However, suffice it to say that on the evidence which is before me I am satisfied that that relationship still subsisted up until the date of his death. I think that is borne out by the report which was obtained by the solicitors who prepared the will from the hospital shortly prior to Mr Moss-Mason's death and it is also borne out to a certain degree by the conclusion which

I came to that as at the date of death Mrs Lucas was still living in the house which forms the now really sole asset in the estate.

Mrs Lucas met the deceased in and it is somewhere about that they began living together. That relationship resulted in a house at Mathesons Bay being bought in the joint names of the deceased and Mrs Lucas and that house passed to Mrs Lucas by way of survivorship upon the death of the deceased. Each put in $3,000 to that purchase, the balance being secured by a mortgage back to the vendor. Following Mr Moss-Mason's death the property was sold and Mrs Lucas received the benefit of that which had been put in by the deceased, namely $3,000. That is a factor which I must bear in mind having regard to this present application.

After all debts were paid the only asset now remaining is a house property which, according to the affidavits, and particularly that of D Jull, has a value of $42,000. That is in accordance with a Government valuation which was made as at 1st July, 1982, a date subsequent to the death of the deceased. A valuation was obtained by the solicitors for the Plaintiff which became available only this morning, but it is not before the Court and counsel for Mrs Lucas has really had no opportunity to peruse it and he observed from the bar that the report which he had read indicated the valuer had not been able to make an inside inspection. Therefore I am left in a somewhat unenviable situation in that for the moment I can but with certainty deal with an estate valued at $42,000 although I am of the view that probably on a sale basis it is worth something more than that.

However, just how much I am unable to say.

The Plaintiff is unmarried; he is years of age and he has a modest salary. He lives in a house of which he is part owner and it has a mortgage on it. The property has a capital value in the region of $120,000, but his liability under the mortgage which is on it is $11,000. Other than for that he has a car which is valued at some $7500. He appears to be in good health and there are no remarkable circumstances so far as he is concerned which would warrant the Court approaching his claim other than on the basis of a person who is able to earn his own living and who is in a comfortable situation with very modest assets.

On the other hand Mrs Lucas, who has a handicapped son, had been living with the deceased first of all in a flat at Green Bay and then from approximately Labour Weekend 1980 to the date of his death in the Moss-Mason family home in , Mt Roskill. Precisely what Mrs Lucas' position was before she met up with the deceased I do not know. There is nothing set forth in the affidavits and I do not know whether she was living in rented accommodation or whether she gave up a house in which she had an interest or just precisely what her housing arrangements were. Therefore I am not in a position to judge whether she lowered or increased her standards by going to live with the deceased.

I have no doubt that that relationship, at least initially, probably brought some benefits to the deceased, but just exactly what the benefits were towards the end is somewhat difficult to guage. There is evidence from a Mrs Harrison who is not related in any way to any of the parties

which suggests that Mrs Lucas at least in January 1981 was not giving the deceased the sort of attention which one would have thought from a normal housewife and she relates to finding rotting kleensacks on the premises and to food being in a state where it was not fit for human consumption. That is largely uncontradicted and I feel compelled to say that at that stage the evidence which is available suggests to me that Mrs Lucas was not doing what one would have expected had there been a normal domestic relationship still subsisting between her and the deceased, but it may not have been all her fault.

There are also allegations made as against the Plaintiff by the deceased round about this time, particularly in one affidavit which was to the deceased's brother T suggesting that the Plaintiff had never done anything for his father to others. On the other hand to another brother, R and his wife B , there is evidence to suggest that the deceased realised that he had an obligation to the Plaintiff and that towards the end of his life he became, as was described by R , "anti-G , showing a distinct change in his attitude probably brought about by his illness. R 's affidavit also relates to complaints as against Mrs Lucas at or about that time. It may well be that by reason of the progress of the illness the deceased's judgment did become clouded and he is not to be criticised for that because the type of debilitating disease that he suffered from has, as one of its characteristics, an effect upon the personality of the person who is so suffering. That may well be what has happened here.

Suffice it to say that having regard to all of the evidence which is available I can find nothing anywhere which would justify a finding that this Plaintiff in any way had done anything which would disqualify him from consideration in his father's will. Indeed, on the other hand I am satisfied that when he realised the depth of his father's illness he did visit as frequently as he could and as is referred to in his affidavit, at least twice a week. In other words I am satisfied that here there was a situation where the deceased had a moral obligation to his son, an obligation which he recognised because in 1970, before he had commenced his association with Mrs Lucas, he recognised where his moral obligation lay as he made a will leaving everything to his son. Indeed, when he made a will in 1980, which was in contemplation of his marriage to Mrs Lucas, he must have still had that obligation in his mind because that will did not take effect as the marriage never took place and he must have been aware of what was in his earlier will.

It is somewhat noteworthy that the last will under which everything was left to Mrs Lucas was made but three days before his death at a time when he must have been very ill indeed although not to the point where he lacked testamentary capacity. In those circumstances how does the Court approach this particular claim? The principles to be applied under the Family Protection Act were re-stated by the Court of Appeal in Little v. Angus (1981)1 N.Z.L.R. 126 and I do not need to re-state them now. I accept Mr Parmenter's submission, and it is not challenged by Mr Hill, that the onus of establishing any conduct on the part of the Plaintiff so as to disentitle him from consideration rests upon the Defendant. If any

authority is required for that it is in Re Mercer (1977)1 N.Z.L.R. 469, but that case also is of some assistance in coming to a determination of this particular claim because at page 473 the Court had this to say:

> "While the widow and the daughters are not in necessitous circumstances that does not disqualify them in considering a provision for 'proper maintenance and support', having regard, however, to the size of the estate in giving effect to 'moral and ethical considerations': see Re Harrison (1962) NZLR 6, and Re Young (1965) NZLR 294."

Thus in the present case I am satisfied that the Plaintiff has established a claim to a share in this estate and under the provisions of this statute.

This is not a case where the Court is dealing with competing claims as between members of the same family. Here the claim is by a son with a competing claim of a stranger who had known the deceased less than 18 months from his death and who had been living with him for about one year prior to his death. No doubt there were benefits for both in that relationship, particularly at least up until the time that the deceased had to cease work. There were probably also benefits for the deceased by reason of the fact that he had someone in his home who was able to attend to his daily wants, particularly during the times when he would be incapacitated because of his illness.

It is noteworthy that it was the intention of the parties to sell Street and eventually go to live at Mathesons Bay. That move may have resulted in a large portion of the proceeds of sale of Street going into the Mathesons Bay property which ultimately, by survival, would have gone to

Mrs Lucas, but that still would not have extinguished a claim which might have been brought by the Plaintiff had that in fact occurred.

I have to balance the competing claims bearing in mind that by reason of the association Mrs Lucas has already benefitted to the extent of $8,000. But she has benefitted to a further degree. For the last three years she has remained in the estate property and has paid no rent although she may have paid some outgoings to the Housing Corporation on the mortgage. From the accounts which have been produced it is evident that many of the outgoings in respect of the property have been paid by the estate so that Mrs Lucas has had the benefit of free rent for three years and that must be worth quite a considerable sum of money. If one fixed the rent at $40 per week, which would be less than 7½% on the capital value as shown by the Government valuation, then there is a sum in excess of $6,000 involved and a proper rental would probably have been in excess of that sum.

On the other hand one must have regard to some degree to the deceased's wishes, but one must also have regard to the fact that here is a son who had such a moral claim on the bounty of the deceased that for the deceased to overlook it, and indeed neglect the duty which he owed, leaves his intentions very suspect indeed.

In all the circumstances I have come to the conclusion that having regard to the benefits which Mrs Lucas has already obtained, and having regard to the somewhat uncertain value of the residue in this estate, substantial justice

would be done if the whole of the estate was vested in the Plaintiff subject to the payment thereafter to Mrs Lucas in the sum of $7,500 and she is to be forgiven any liability for rental from the date of the deceased's death up until 31st March 1984, but subject to her not receiving any reimbursement for any amount she may have paid out in respect of that property from the date of death down to the present time. I do not think very much will be involved in that, but there is no reason why she should be reimbursed it and I have fixed 31st March 1984 as an appropriate date so that she can make arrangements to move out and so that the property can then be dealt with in accordance to the wishes of the Plaintiff.

The Defendant as trustee is entitled to her costs out of the estate in any event, but in her capacity as beneficiary she is allowed the sum of $1,000 and disbursements also to be paid out of the proceeds of the estate.

P. Davis J.

SOLICITORS:

Towle & Cooper, Auckland for Plaintiff
Bowen Roche & Hill, Auckland for Defendant as beneficiary
Haigh Lyon & Co for Trustee