

IN THE HIGH COURT OF NEW ZEALAND  
WHANGAREI REGISTRY

A.1/82

1307

IN THE MATTER of the Family Protection Act  
 1955

A N D

IN THE MATTER of the Estate of  
R MURDOCH (Deceased)

BETWEEN: M LEGARTH  
 of Dargaville, Farmer

Plaintiff

A N D: K ALLEN  
 of Dargaville, Accountant, and  
R BAANDERS of Dargaville,  
 Solicitor, as Executors and  
 Trustees of the Estate of  
R MURDOCH (Deceased)

Defendants

Hearing: 15 October 1984

Judgment: 24 October 1984

Counsel:

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JUDGMENT OF HENRY, J.

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The testator died on 1981, then aged years. He was predeceased by his wife, and survived by one of his two children, both of whom were daughters. The surviving daughter, Mrs Condon, is now aged years and is married with an adult family. The second daughter died in and is survived by her only child, the plaintiff, who brings this application

as a grandchild of the testator. By his last will dated 19 December 1977, the testator bequeathed to the Plaintiff's two children a mortgage for \$10,000.00 in respect of which the Plaintiff and his wife were mortgagors, and left the residue of his estate to his surviving daughter, Mrs Condon. The net estate, after administration expenses, comprised some \$48,634.00. Included in the assets were the mortgage of \$10,000.00 already referred to, and a further debt of \$12,000.00 owing by the Plaintiff and which was evidenced by a Deed of Acknowledgment. Partial distribution to Mrs Condon has been effected, this comprising some \$17,275.00 in cash, and also a caravan, a motor-car, personal belongings, and chattels to an approximate further value of \$10,000.00. The trustees are now holding a further cash balance of \$2850.00 and have obtained judgment against the Plaintiff for the debt, in respect of which there is now due approximately \$14,200.00, including interest and costs. The Plaintiff in his claim seeks provision from the Estate only to an extent which would result in his release from the debt. No further claim is made, and no attack is made on the mortgage, in respect of which his children are now the beneficiaries.

The basis of the Plaintiff's claim is in respect of services rendered the testator during the latter years of his life, and which it is submitted establish a moral duty on his part to make provision for the Plaintiff. Plaintiff is now      years of age, married with two children now of or approaching teen age. In 1975 the testator

commenced to live with the Plaintiff and his family, originally in a house provided by the testator. In 1976 they moved to a farm property purchased by the Plaintiff and his wife, with \$10,000.00 being advanced by the testator and secured by mortgage at an interest rate of 6%. In 1978 the farm was sold and a second farm property purchased at a total of some \$200,000.00. The testator contributed a further \$12,000.00 towards this property, this sum representing the debt evidenced by the Deed of Acknowledgment. The earlier mortgage of \$10,000.00 also remained, secured against the new property. Because of the Plaintiff's commitments, interest payments on the \$12,000.00 debt were forgiven. In March 1984 the second property was sold for \$310,000.00 and after payment of liabilities left the Plaintiff with an equity of \$98,000.00. He and his wife then purchased a third property which is to be used for horticultural purposes. The principal assets of the Plaintiff and his wife would appear to be as follows :

Farm property ..		\$169,000.00
Mortgage back from purchaser ..		\$20,000.00
		<u>\$189,000.00</u>
LESS 1st Mortgage..	\$60,000.00	
Mortgage to		
testator..	10,000.00	
Debt to		
testator..	14,200.00	84,200.00
		<u>84,200.00</u>
	BALANCE..	<u>\$104,800.00</u>

His present income position is not clear. The Plaintiff's father is still alive, having remarried. He is said to enjoy good health and to have substantial assets, of the order of \$500,000.00.

The daughter, Mrs Condon, is now years of age. Her health is poor, she suffers from diabetes, and has had cancer and has eye problems. She has also suffered two coronary attacks. She has net assets of approximately \$70,000.00, taking into account the distribution already received from the testator's estate. She works as a nurse for the Red Cross and also does tutoring. Her husband is employed as a taxi driver.

The primary question for determination is whether in failing to make any testamentary provision for the Plaintiff, the testator was in breach of his moral duty. I accept that the Plaintiff did provide material assistance to the testator over the last six years of his life, and that this would have entailed some measure of sacrifice having regard to his own age and that of his family, as well as the age of the testator. He did, however, receive not insubstantial benefits from the testator, namely advances of some \$22,000.00 at minimal interest rates, which undoubtedly would have assisted in achieving his present capital position. There was also the provision of a house for the first period of 18 months, and a small contribution to living expenses by way of payments of board.

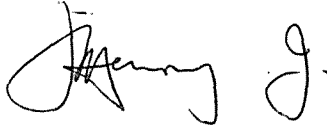
In determining whether there has been a breach of moral duty, consideration must be given to the extent of the testator's estate, the claims of others on his bounty, and the financial position of the Plaintiff. The estate is comparatively small, comprising only \$48,634.00.

The testator's only surviving child has modest assets and income, and does not enjoy good health. Her needs are likely to increase in the near future, and she has no substantial capital to rely upon. There is nothing in the evidence to warrant her being treated other than as a daughter of modest means with a now adult family. On the other hand the Plaintiff and his wife now have net assets exceeding \$100,000.00 - twice those of the estate, and substantially exceeding those of Mrs Condon. He received some benefits from the testator during his lifetime. At the date of testator's death, the Plaintiff was      years of age, with a young family to bring up. His capital position, although not strong, was and is reasonable. He has a probable expectation from his own father's estate in due course of time. Whether any financial assistance can be expected from that source beforehand is not covered by the evidence.

Taking all factors into consideration, I have concluded that the testator was in breach of his moral duty to his grandson, and that a modest award to him would be appropriate to remedy that breach and help alleviate the burden of the present debt. That amount, which must represent the figure which would discharge that duty in all the circumstances of the case, I fix at \$4000.00.

Accordingly, there will be an order that from the estate of the testator a sum of \$4000.00 be paid to the Plaintiff absolutely. In all other respects the terms of the last will are confirmed.

The Plaintiff is entitled to an award of costs which I fix at \$500.00, together with disbursements as fixed by the Registrar. Mr Kain's costs, as counsel for the infant children, are fixed at \$300.00 and are also payable from the Estate. The other parties will not require any such order.



Solicitors:

Holmden Horrocks & Co., Auckland, for plaintiff

Webb Ross & Co., Whangarei, for I F Legarth and R M Legarth

Swarbrick Dixon & Co., Hamilton, for Mrs R L Condon

Connell Lamb Gerard & Co., Whangarei, for Trustees