IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

2/4

NO. A.325/82

258

IN THE MATTER of the Family Protection Act, 1955

A N D

IN THE ESTATE of M NECKLEN, Deceased

BETWEEN A STEWART

Plaintiff

A N D G ROUNTREE and L. NORTH, Trustees and Executors in the Estate of the abovenamed M NECKLEN, Deceased

Defendants

Hearing: 20 February 1984

Counsel:

(ORAL) JUDGMENT OF COOK J.

The testatrix died on the survived by her daughter, the plaintiff, and two infant children of the daughter. A son, unhappily, had died at a young age. The husband of the deceased had been married previously and of his first marriage there are two children, both daughters, now in their 50's. As to the infant grandchildren of the deceased, the plaintiff was ordered to represent them and it has been submitted that, in the circumstances, no order should be made in their favour, a submission which I accept, but it is to be remembered that there are these two children when deciding what

further provision would be proper for the plaintiff.

The will had been made a few weeks prior to the death of the testatrix. Some years earlier she had inherited her husband's estate and this seems to have produced the bulk of the estate which she herself left. The net amount at this time is approximately $58,000 and, under the will, the trustees were directed to hold the residue of the estate upon trust, as to one half for the parish priest, for the time-being, of the Church of St. Teresa of Lisieux, Christchurch, and, as to the other half, to pay the sum of $4,000 to the Riccarton Methodist Church; to M Cole the sum of $2,000, to the Mother Superior for the time-being of the Sisters of Mercy the sum of $2,000, the residue then remaining to be divided equally between the plaintiff and the two step-daughters of the testatrix.

Counsel for the churches, the Sisters of Mercy and Mr Cole each stated that his client wished to abide by the decision of the Court and in each case counsel was given leave to withdraw.

As I understand the position, if the will were to operate, the St. Teresa church would become entitled to approximately $29,000 and, after the other amounts mentioned had been paid, the residue remaining for the daughter and the step-daughters for division between them would produce approximately $7,000 each. The testatrix had made an earlier will with a substantially different scheme providing legacies for the charities, a great deal more for the daughter and, in place of the share of residue, legacies for the step-daughters. The latter both support the daughter's claim, at the same time seeking to preserve their own share of the residue. In the circumstances they are not able to claim anything further for themselves.

While it is unnecessary to dwell upon the details, it does seem that the deceased changed in her relationship to others after her son died at the age of 9. She seemed to have developed a strange attitude, if not an actual antipathy, towards her own daughter and also her step-daughters. The doctor who attended the testatrix says in an affidavit that she had suffered from symptoms of depressive illness for at least

15 years, but that this had become much worse following the death of her husband approximately 7 years ago. In 1980, she had had to undergo surgery and, in January 1982, she became so severely depressed that he arranged for her admission to hospital She was still depressed in , shortly before her death. As to the attention paid to her mother by the daughter, it has been pointed out by counsel that over the years she had been close and attentive. It appears from her affidavits that she had kept in regular contact with her mother and provided assistance when she could, both when her own father was in hospital and when her mother herself was hospitalised as has been mentioned. After her father's death, she endeavoured to provide companionship and meals and tried to encourage her mother to take part in various community activities.

As against this, the mother appears to have felt the daughter did not fully support her. In notes made at the time her last will was made, her solicitor recorded that she had said that she had not seen her daughter regularly over the last few years; that her daughter rang occasionally, once a week perhaps, but that the daughter never did anything for her. Despite that, I accept that the daughter appears to have been a dutiful daughter who has not disentitled herself to the recognition that she might reasonably expect from her mother.

As to her circumstances, at the time of making her affidavit she and her husband had a net weekly income of some $364.00 but I have been informed that, while she is still in employment, that is likely to terminate shortly. They have a home which has recently been valued at $48,000, some life insurance as collateral security for mortgages, chattels, a motorcar and modest savings. Their debts by way of mortgages on the home are quite substantial. In this situation counsel for the plaintiff submits that her present needs include the provision of a more substantial and satisfactory residence, a provision of a capital fund to guard against extingencies and to provide supplementary income, particularly in the event of her losing her income (as may well be the case) or of either or both of her sons wishing to undertake advanced education or in the event of ill-health; such possible needs as that can readily be accepted. I consider that, having regard to the circumstances of the daughter, the fact that she appears not to

have disentitled herself to the benefit that a daughter in her position might reasonably expect and which may well be regarded as the assistance her mother was under a moral obligation to provide, she is entitled to substantially more from the estate than the will provides for her. The questions to decide are how much this should be and how the incidence of further provisio should fall.

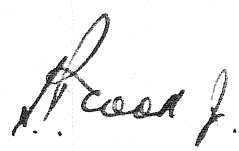
I turn first to the step-daughters - I am satisfied it should not be borne by them. They are in reasonably modest circumstances and, while they can, no doubt, do with some extra capital, I regard as important the fact that, as mentioned, their father left the whole of his estate to the testatrix and this really created the estate which she herself left. Probably the testatrix had this in mind when she included them. It is inevitable, therefore, that the legatees must bear the burden.

While, very properly, they have not striven to maintain the gifts to them, but stated in each case that they will abide the decision of the Court, it is not to be forgotten that the will is the expression of the testatrix's wishes and these should not be disturbed to any greater extent than is necessary. In the case of the parish priest of St. Teresa, there is mention in the note made by Mr Rountree that he visited the testatrix every week without fail and that she was very appreciative of his support. The parish priest has made an affidavit, as I understand it not to advance his case in any way, but to ensure an accurate record being on the file. From this it is apparent that he must have been of considerable assistance and comfort to the testatrix in her later years. However, it is difficult to see that this charity can fail to have to bear the main burden of the extra provision for the daughter. As to the Riccarton Methodist Church, there is a record by Mr Rountree that the testatrix was appreciative of the support she obtained there, but I think it must bear a small portion of the burden. There is no particular reference to the Sisters of Mercy, but it may well be understood that she wished to benefit them. As for Mr Cole, while he has not sought either to protect his legacy, he has sworn an affidavit and it appears from that that he and his wife had known the testatrix since 1970; that he had given her valuable assistance from time to time without reward and one can see that it is understandable

that the testatrix should have wanted to recognise that.

With these considerations in mind I am of the view that the plaintiff should receive an additional sum in the vicinity of $25,000 from the estate over and above her present share of residue. In order to achieve that result, I make the following orders in lieu of the existing provisions of the will in respect of residue:

That in the case of the parish priest of St. Teresa, in lieu of the gift of half the residue, there be substituted a legacy of $5,000. In the case of the Riccarton Methodist Church, in lieu of a legacy of $4,000, that there be a legacy of $3,000. The legacy to the Sisters of Mercy and to Mr Cole remain unchanged. That there be a legacy in favour of the daughter of an amount which will leave, after payment of the legacies already mentioned and her legacy and the costs which will be ordered or remain to be charged against the estate, a residue in the estate of approximately $21,000, such residue to be divided between the plaintiff and the two step-daughters in equal shares. I ask counsel to submit a draft order which will provide for this result. I do not have the information as to the exact amount available. The figures need not be precise, but I anticipate the legacy for the daughter will be of the order of $25,000. As to costs, the plaintiff must bear her own, the trustees need no order. Out of the estate there will be paid in favour of the parish priest of St. Teresa the sum of $300, the Sisters of Mercy $150, the Riccarton Methodist Church $150, and Mr Cole $100. The question of costs for the step-daughters is reserved and, if it cannot be agreed, then a memorandum may be submitted.



Solicitors:

Anthony, Polson & Co., Christchurch, for Plaintiff
The Solicitor, Public Trust Office, ChCh, for Public Trustee
White, Fox & Jones, ChCh, for F.M. Gordon & N.I. Campbell
Flesher, Son & Sandford, ChCh, for Riccarton Methodist Church
De Goldi & Cadenhead, Christchurch, for Sisters of Mercy
B.J. Drake & McGillivray, Christchurch, for Lisieux Catholic Church
Simes, Jacobsen & Steel, Christchurch, for Melvin George Cole.