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IN THE HIGH COURT OF NEW ZEALAND

A. 672/81

AUCKLAND REGISTRY

1342

IN THE MATTER of the Family
Protection Act,
1955 and its
amendments

- a n d -

IN THE MATTER of the estate of
F POOK
late of Auckland,
Married Woman

BETWEEN W POOK
PLAINTIFF

A N D A WOOD
and G
RUCK

DEFENDANTS

Judgment: 10 October 1984

Hearing: 10 October 1984

Counsel:

ORAL JUDGMENT OF CASEY J.

This is an application for further provision under the Family Protection Act from the Will of the late Mrs Pook, who died on 1980 at the age of . Her Will was made on 27th May 1971. In it she left legacies of \$2,000 each to Mr Pook and his sister, Mrs McKenzie (who live in Auckland), and one of \$200 to Mrs McKenzie's daughter. The residue of her estate was given to her daughter in England, Mrs E.M. Woon, who resides at Brighton with her

husband. According to the affidavits from the Trustee, the net value of the estate at the moment would be about \$52,200 and consists mainly of a dwellinghouse at , which was built by Mrs Pook on a section she purchased there in 1956. She was then a widow, having come out to New Zealand with Mr Pook some three or four years previously, and the latter has lived with her ever since.

He seeks further provision on the grounds of a breach of moral obligation his mother owed to him in respect of the care and devotion he has given to her over all the years he lived with her, particularly as she moved into old age in the 70's. There is mention in the affidavits of her suffering an accident in 1979, and I have no doubt that this would have increased the burden on him. He makes no attack on the legacies to Mrs McKenzie or her daughter, and the contest is really one between himself and Mrs Woon. He suggests that in all the circumstances the residue of the estate should be divided equally between them. It is pointed out that he actually built a garage on the property, which was valued at \$1,713 in the total valuation of \$50,000 made last August, and produced in the Trustee's latest affidavit. This was acknowledged to be his property by the late Mrs Pook when she was giving instructions for her Will, and apparently there is no dispute that he is entitled to some allowance for this.

There is annexed to the Trustee's first affidavit a letter from Mr Ray who prepared the Will. His recollection of the visit is understandably vague, but he has the impression that Mrs Woon was benefitted in this way because Mrs Pook wished to bring her economic circumstances up to parity with those of her other children. I am informed that Mrs McKenzie is relatively well off and makes no claim, whereas Mrs Woon, has by all accounts, led a fairly hard life. Her husband was unemployed to the end of the 30's. They raised five children and have quite clearly made a very good job of it, although now, with most of them off

their hands, they can probably look forward to an easier lifestyle. I do not think anybody could doubt that in human and economic terms, her life has been relatively hard. She deposes she and her husband are in the process of purchasing a Council house. Both are on a moderate income. She has part-time work as a cleaner and her husband is in steady employment, but suffers from various disabilities which may affect his future. She is obviously concerned herself about what might happen to her if there should be any unexpected problems, and emphasised in her affidavit her inability to keep up insurance contributions, on which the amount of any pension would depend.

By contrast, Mr Pook has never married. He suggests that his mother's desire he should stay with her influenced his decision. I am unable to form any conclusion about that. He is now a mature man, settled in life with steady employment as a fitter, apparently suffering from no disability and, of course, as Mrs Woon's Counsel has pointed out, he has been for many years living with his mother who provided him with a home and who, I have no doubt for most of that period, satisfactorily looked after his domestic needs. His Counsel suggests that on a comparison with Mrs Woon, there is not very much between them in relative economic terms. He has savings of about \$13,000 and a car valued at \$11,000, which was used to take his mother around when she needed it because she had no vehicle of her own, and did not drive. He submits that this should be taken into account in looking at Mrs Pook's reasons for making the Will in the way that she did. Whatever the position might have been in 1971, it now turns out that not quite the same considerations would have influenced her if she was looking at the matter at the date of her death which, of course, is the time at which the Court must make an assessment of whether or not there has been a breach of the moral duty owed by the testator.

Mr Wilson also suggested that Mrs Pook might

have been prompted by plans on Mrs Woon's part to come to New Zealand with her family; and was making, by means of her Will, an appropriate provision to encourage this. Naturally enough, she would have liked to have seen them come out here. Those plans existed at that time, but were abandoned shortly afterwards as the children started leaving home, marrying and settling down. For quite understandable reasons the Woons preferred to remain close to them and used the money they had been saving for fares, to put down on their Council house, which they are still in the process of buying. There was a suggestion in her affidavit that Mr Pook may have benefitted from a block of flats which were built in conjunction with his mother and Mrs McKenzie around the late 1960's. There is certainly no reference to this in the reasons recorded by Mr Ray when he received the instructions for the Will in 1971, and Mr Pook has gone to some pains to answer this suggestion in a later affidavit. He deposed to the fact that only a very small profit resulted, due to a down-turn in the market and the difficulty of disposing of them. I therefore put this matter aside in considering the issues before me today.

The basis of his claim is the relationship he had with his late mother as a dutiful son, and the help and assistance which he rendered her over a long time. It is acknowledged by Mr Galbraith that there was a breach of moral duty in this case. I must commend all Counsel for the very fair and balanced way they have made their submissions. These cases are difficult enough when members of a family find themselves at odds over a Will. I can record with pleasure that nothing taking place today between Counsel in the way they have put their respective clients' views before me, would have exacerbated any problems. I am quite sure they did their best to try and bring about a settlement out of Court. Mr Galbraith mentioned the difficulty of conducting such negotiations with a party overseas, and I can well understand this. I only hope that the decision I have to make will not deepen any rift which has formed between the

family in New Zealand, and the Woons in England.

The Court's duty is clear in these cases. It is to remedy any breach of moral obligation that the testator owed to the Plaintiff, but only to the extent that is necessary to do so. It cannot remake a Will on the basis of what might have been fairer all round, or if the parties think a Will in different terms would have been more suitable. The moral obligation, of course, is to make adequate provision for the needs of the Plaintiff, and the Courts have emphasised that this is not to be determined on purely economic considerations, but that moral and ethical aspects also play their part. It is on this basis that I have no doubt Mrs Woon accepts (through her Counsel), that in leaving a legacy of \$2,000 to Mr Pook, her late mother did not pay sufficient regard to the care and consideration which he had afforded her over the years. Balanced against this, of course, is the fact that for many years he has had the comfort and company of a home with his mother and, until increasing years and infirmities prevented it, the domestic care and consideration which she could provide. Over all those years, therefore, he has no doubt been able to enjoy a lifestyle which would have been considerably easier than that undertaken by Mrs Woon. I have no doubt from the material before me and the submissions of Counsel, that this was the kind of situation the late Mrs Pook recognised and tried to provide some compensation for by the terms of her Will. So that it is not simply, as Mr Wilson suggests, a case of looking at and balancing up the relative financial positions of the parties today, and deciding that Mrs Pook might have done things differently if she had been making a Will at the date of her death.

It is essentially a balancing operation. Mr Pook, I think, is like anybody else of his age and financial situation - he could do with the extra money out of the estate. But he is in no real financial need; he is in steady employment and if economic aspects were all that I had

to pay regard to, he would have some difficulty in persuading me that any substantial award from the estate was warranted. However, I accept the largely uncontradicted evidence - especially towards the latter years of Mrs Pook's life - that he did render considerable assistance to his mother and was a devoted son. While this could to some extent be regarded as repaying the obligation he may have owed to her for the benefits he obtained in the past, nevertheless, I think it warrants recognition going well beyond the small legacy (in today's terms) which he was left.

Mr Galbraith suggests that the area at which the Court should be looking to remedy the breach of moral obligation, would lie somewhere between one-third to one-half of the net residue of the estate. I am not prepared in all the circumstances to go so far as a half. I think I would be doing justice to the parties in the sense the Act contemplates if I directed that the legacy of \$2,000 to Mr Pook should remain, in recognition of his interest in the garage. The other legacies, of course, remain intact. Subject to this, the residue of the estate is to be divided one-third to him and two-thirds to Mrs Woon. Miss Goddard submitted a very helpful memorandum in her capacity as Counsel representing the grandchildren. I am satisfied that they have no independent claim, and all of them are making their way in life satisfactorily. Mr Cutting also indicated that neither Mrs McKenzie nor her daughter wish to advance any claim. There will be orders accordingly in these terms. I direct Counsel to submit a draft order in which they can make their recommendations for costs.

Solicitors:

Thom Sexton & Macdonald, Auckland, for Plaintiff.
 Wood Ruck Gibbs & Co., Otahuhu, for Defendants.
 King Gerrard & Co., Pukekohe, for E.M. Woon.
 D.D. Cutting & Co., Auckland, for I.B. McKenzie.
 L.P. Goddard, Auckland, for the grandchildren

M. C. C. J.