IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 993/82

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Will of D REID late of Auckland, Widow, Deceased

BETWEEN F HILL of Tauranga, Married Woman

Plaintiff

AND J WILSON of Auckland Retired and P MITCHELL and B DAVIDSON, both of Auckland Solicitors, Executors and Trustees in the Estate of D REID, deceased

Defendants

Hearing: 7th February, 1984

Counsel:

ORAL JUDGMENT OF SINCLAIR, J.

This is a claim under the provisions of the Family Protection Act 1955 brought by a daughter of the deceased, she being the only child of the deceased and her husband. The late D Reid died on 1981; her last will is dated 17th May, 1978. The form of that will was to leave some pecuniary legacies to a Mr and Mrs Wenham, Mr and Mrs Nicholas, Miss C. White and Mr K. Atkinson. In addition, to J and N Wilson she left her Howick home and the contents of it. For the purposes of the record the value of the furniture, effects and house property is

in the region of $113,000. The balance of the estate was left to the Auckland branch of the St John Ambulance Association. No provision was made for her daughter and in paragraph (5) of her will she recorded that she had made no such provision because in her lifetime and in the lifetime of her late husband and under her late husband's will adequate provision had been made for the Plaintiff and her children.

The estate at the present time is valued at approximately $311,000 so that by any standards it can be regarded as a large estate and if the will remains unaltered the St John Ambulance Association, which for the first time was introduced as a charity to benefit under the deceased's will, would benefit to a considerable extent - on my calculations somewhere approaching $180,000.

The Plaintiff was adopted by the deceased and her late husband and it seems to be accepted by all that this is a case where there has been a breach of moral duty on the part of the late Mrs Reid. It is evident that Mrs Hill did not come up to expectations so far as Mrs Reid was concerned, not only in relation to her degree of education, but in relation to the work which she undertook and in relation to the husband she married. It is evident from the evidence of Mrs Mitchell that the late Mrs Reid was so disappointed that she distanced herself from her daughter by shifting from Wellington to Auckland and thus put distance between the two families so as to really sever all connection which she had with her daughter.

I record now that there is nothing in the evidence

at all, and nothing has been put forward to suggest that in any way Mrs Hill has so conducted herself as to disqualify herself from consideration by her late mother. Indeed, it is my view from the evidence before me that Mrs Reid so distanced herself from her daughter and her family that she was not aware at all as to what the circumstances of that family were so that she was in no position to assess her moral duty or even to give it any proper consideration whatever.

In her will she refers to the fact that the Plaintiff had received benefits during the lifetime of both Mr and Mrs Hill and under the late Mr Hill's will. That is far from the truth. Indeed, there is evidence that there was some small amount of assistance given during the subsistence of Mrs Hill's marriage when Mr Hill ran into financial difficulties and some five hundred pounds was made available to pay his debts. Other than for occasional small gifts and a gift at the time of the marriage there were no other gifts of any substantial nature given to Mrs Hill or her family and there is no evidence of anything else having been done for them. There was, under the late Mr Reid's will, two thousand five hundred pounds left to the Plaintiff, but that was the extent of any benefit she received under his will until she took family protection proceedings and an order was made by consent which in essence made money available to the extent of $25,000 to enable a house to be purchased in which she was able to live with her family.

There are four children of Mrs Hill's marriage ranging in age from years. It is unfortunate that three

of those children have disabilities in relation to their health and also as to their mental capacity, a factor of which Mrs Reid obviously was never aware. Had she been aware of those factors she may well have done something for those three children during her lifetime to enable them to be better fitted to meet the exigencies of life with which they were going to be faced in the long run.

It is an unfortunate quirk of life that the Plaintiff's marriage has broken up and she is living apart from her husband at the moment. From all the reports there seems to be little hope of Mr Hill offering anything to his children in the material way and he seems to have had a history of running foul of the law and being involved in drugs. The second daughter at the present time is living with him and all that it seems that he can offer her is a roof over her head and some love and affection.

The older daughter is now married after having made an unfortunate start in life and just what her prospects for the future are is anyone's guess. So far as the two boys are concerned one at the present time is out of work but with some assistance may be able to do something gainful and while he has certain handicaps he is not, from the evidence as I read it, in the unemployable category. The young boy appears to be quite normal and is progressing well at school.

Having regard to all of those factors, and without going into everything that is in the affidavits, it is plain that not only was there a breach of moral duty, but there is a need so far as the Plaintiff is concerned in the

widest sense of that word and not the narrowest sense. She has at the moment no permanent housing but that can be remedied because the home which was purchased for her in Tauranga has been sold and there is a sum of money available to her for that purpose. But the father's estate taken as a whole with the proceeds of the sale of that house would have some $70,000 in it and eventually it will go to the children in any event. I am of the view that the whole of that estate ought to be available for the children to the exclusion of Mrs Hill and the provision which I intend to make for her out of this estate will be conditional upon her renouncing all her interest in her late father's estate so that the whole amount will then come to the hands of the Trustee for the benefit of her four children. Leave has been reserved under the Family Protection Act proceedings in that estate for a further application to be made to the Court. Having regard to the state of the four children of Mrs Hill I am of the view that it would be appropriate for an application to be made pursuant to that leave which has been reserved to have the $70,000 which will become available, if Mrs Hill avails herself of the opportunity, converted into a class fund.

Turning now to her present application, and bearing in mind that this is a substantial estate and that she is the one person who really has a substantial claim against the estate, I am of the view that the one third figure mentioned by Mr Sanders is not out of the way, but I think it better to quantify it. Therefore, so far as Mrs Hill is concerned there will be an award to her of $100,000 out of the residue

of the estate and that amount is to be made available to her absolutely. Out of that it is my view that she ought to be able to obtain a house and that she ought to be able to provide herself with some means of transport and any additional furniture which is required, and also provide her with a contingency fund which will be available for her when the need arises. However, I am firmly of the view that she ought to be advised carefully by legal advisers as to how she should expend that money so as to ensure that it is not wasted. If she has the interests of herself, and eventually her children, at heart I can only recommend to her that the contingency fund be handed to somebody or administered by somebody who can ensure that the best use is made of the fund and of the moneys which are there available.

So far as the children are concerned they will at least have $70,000 available to them. Whether or not that amount becomes a class fund depends upon the appropriate application coming before the Court and the Court deciding to make the appropriate order. In relation to the grandchildren I am likewise of the view that they are in a special category in that they have never really known their grandmother and their grandmother has really never known them. Had the grandmother known them she would, I am sure, have recognised that they did have certain needs, that she had the wherewithall to help them and that she ought to, in all those circumstances, have helped them both with financial assistance and with moral support. That she failed to do and to that extent she is in breach of her duty to them within the meaning of the decided cases. Therefore out of

the residue of the estate I direct that there be set aside the sum of $30,000 as a class fund , that sum to be paid to the Public Trustee to be administered by him as a class fund for the benefit of the Plaintiff's four children. That will mean that there will be in all $100,000 set aside for these four children out of the two estates and by setting aside such a fund there will at least be something to aid and assist them towards their establishment in life.

By making those orders out of residue it will be seen that the bequest to the Wilsons has not been touched. To my mind that does no disservice to the residuary beneficiary in the long run. There will still be, on my calculations, somewhere in the region of $50,000 to go to the St John Ambulance Association which is a windfall by any standards and is still a substantial bequest.

So far as Mr and Mrs Wilson are concerned, they had been friends of the deceased for some 20 years. They had taken this lady virtually under their wing particularly after the death of Mr Reid, and in the latter years their care and attention to Mrs Reid has been nothing short of quite marvellous. I think it appropriate that so far as they are concerned, the deceased having decided that she had a moral obligation to recognise their services, the benefit to them ought not to be touched in any shape or form. Accordingly there will be the orders which I have mentioned to be out of residue.

To summarise: there will be an award to the Plaintiff of $100,000 out of residue contingent upon her renouncing all of her interests in her father's estate.

Secondly: there will be the sum of $30,000 to be set up as a class fund for the four children of the Plaintiff to be paid to the Public Trustee and to be administered by him pursuant to the provisions of the Family Protection Act 1955.

In all other respects the will of the deceased is confirmed, but out of the residue there will be paid to the Plaintiff the sum of $2,000 as costs plus any necessary disbursements.

To Mr Gittos, who was appointed to represent the children, there will be paid the sum of $2,000 as costs plus any necessary disbursements. To Mr Allen, as representing Mr and Mrs Wilson in their personal capacity, there will be paid the sum of $1,500 and disbursements. There is no necessity to fix Mr Hawk's costs as his will come out of residue in any event.

SOLICITORS:

Dignan Armstrong & Jordan, Auckland for Plaintiff
Rudd Garland Horrocks Stewart Johnston, Auckland for Defendants and John and Nancy Wilson as beneficiaries
Jackson Russell Tunks & West, Auckland for St John Ambulance Association
Sharp Tudehope & Co., Tauranga for Infant Children of Plaintiff