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NZLR

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.No.241/82

IN THE MATTER of the Family Protection Act 1955

AND

1413

IN THE MATTER of the Estate of I ROSEVEAR late of Christchurch, Widow, now deceased,

BETWEEN E DUTHIE of Rotorua, Widow,

Plaintiff

AND J ROSEVEAR of Christchurch, in his capacity as Executor and Trustee of the Estate of the abovenamed Isabella Rosevear

Defendant

Hearing: 13 September 1984

Counsel:

Judgment: 30 OCT 1984

JUDGMENT OF HARDIE BOYS J.

The plaintiff Mrs Duthie and her sister Mrs Dick, two of the four children of the late Mrs Rosevear, have applied under the Family Protection Act 1955 for provision from her estate, from which Mrs Dick has been entirely excluded, and in which

Mrs Duthie is to receive only a legacy of $500.

Mrs Rosevear died in Christchurch on 1982 aged years. By her last will, made on 31 October 1980, she left her whole estate to her other two children, Mrs Birss and Mr J.B. Rosevear, apart from the legacy to Mrs Duthie and a legacy of $500 to each of her son's three children.

The estate principally comprised cash and three residential properties, and had a net value at the date of death of $141,943.21. The properties have been retained, and let, and as a result of the income received the net value of the estate after payment of administration expenses to date is, in round figures, $148,000. I agree with counsel that it is unlikely that Mrs Rosevear would have realised that she was worth as much as this.

Mrs Birss and Mr Rosevear have very properly acknowledged that their sisters ought to share in their mother's estate. There can be no doubt that there was a breach of moral duty towards them. Mr Penlington, appointed by the Court as counsel for the nine grandchildren of the deceased, who are all of full age, has reported that none of them wishes to claim. Indeed none appears to have any basis for claim. The issue therefore becomes substantially one of determining the proper awards to make to remedy the breach. In that exercise, the size of the estate is not a constraining factor, for counsel were agreed that the case falls within the second class described by Salmond J in In re Allen (deceased), Allen v Manchester [1922] NZLR 218, 222, namely:

> " ...that in which, owing to the largeness of the estate or the nature of the testamentary dispositions, the applicant for relief is

> complaining not of the unjust distribution of an inadequate fund among dependants all of whom had a moral claim upon the testator, but of the failure of the testator to make out of the abundance of his resources a provision sufficient for the proper maintenance of the claimant. In such a case, of which the present is an example, the function of this Court is not, as in the first class of case, that of distributing an insufficient fund, as far as it will go, among the various dependants in accordance with their relative needs and deserts. It has the more difficult function of determining the absolute scope and limit of the moral duty...."

The Court's function is to be discharged in accordance with well-known principles, recently concisely summarised by Cooke J delivering the judgment of the Court of Appeal in Little v Angus [1981] 1 NZLR 126, 127:

> " The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

The facts in this case are rather unusual, and I deal with them by first outlining the family history, and then discussing the more detailed aspects of the case put forward by each of the parties. For convenience I shall refer to them all by the names by which they refer to each other: B H B and V

B (Mrs Duthie) and H (Mrs Dick) were born in Edinburgh, Scotland in 1915 and 1921 respectively, the children of a union between their mother and a man whose status is

unclear, but who was not lawfully married to her. That relationship came to an end, and in 1922 or 1923 the mother emigrated to New Zealand, leaving her two daughters in Edinburgh in the care of her own widowed mother, Mrs Wares, and her brother J Wares. In 1925 she married Mr Rosevear. B and V (Mrs Birss) are the children of that marriage. They were born in 1926 and 1929 respectively. In 1927 B came to New Zealand to live with her mother and the new family here. H remained in Edinburgh. After three years in Hawkes Bay, the family moved to Christchurch. B lived at home until she married in 1935. There were two children of that marriage, but it was unhappy and in 1951 there was a divorce. The marriage to Mr Duthie took place in 1952, and as a result there was a move from Christchurch to Rotorua, where they lived until Mr Duthie died in 1971, and where B still lives.

Meanwhile, in 1936 James Wares died. It seems that he owned the home in which he, his mother and H lived, and a tobacconist-newsagent's business, and that his mother inherited the home, and his sister Mrs Rosevear most of the rest of his estate including his business. Mr and Mrs Rosevear thereupon moved to Edinburgh with their two children. They went to live with Mrs Wares in her home, which Mrs Rosevear then purchased from her. Mrs Rosevear with the help of her family ran the business. In 1946 Mrs Wares died, and Mrs Rosevear then returned to Christchurch with V leaving B and his father behind in order that the son could complete his apprenticeship. They came back to this country in 1948.

In that same year, H who had remained in Scotland,

married her present husband and in 1950 they too emigrated to New Zealand and have since lived in Christchurch. They also have had two children.

On her return in 1946, Mrs Rosevear purchased a dairy in Ferry Road, which she sold in 1948, to buy another in Waltham Road. She bought and sold several residential properties, some as rental investments. Her husband died in 1975 leaving a small estate, of a value of about $6,200, which all passed to her. She lived in her own home until 1979 when as a result of failing eyesight she was admitted to the Home where she remained until her death.

V lived at home until her marriage in 1950. She and her husband have always lived in Christchurch. They have two surviving children. She has been in part-time work for many years. She and her husband own their home, with an equity of about $50,000, and they have miscellaneous assets of no great consequence. Their once substantial savings are committed to resolution of a difficulty in which Mr Birss has been involved.

B too lived with his parents until his marriage, which was in 1955. He and his wife live in Christchurch and have three children. He is presently employed as an electrician whilst his wife has recently acquired an interest in a tearoom business. They have their own home worth about $40,000 net of mortgages, and other assets including the business worth about $8,500 net.

It was not suggested that V and B did not merit full recognition in their mother's will for the contribution each had made to the life and welfare of the family. It is

not of course for them to justify the preference accorded them, nor is it necessary, or desirable, to draw comparisons between them and their half-sisters. For the Court may not remake the will, and it must respect the deceased's preferences, except so far as it is necessary to modify them to make good the failure to recognise the proper claims of the plaintiffs. But the plaintiffs claim that they should be treated equally with their half-brother and half-sister and that claim can be assessed only against the backdrop of the whole family story. One point must however be emphasised immediately, and that is that although equality of treatment may seem fair - as the plaintiffs say it is - it is not the Court's function to achieve fairness, but only the more limited objective of discharge of moral duty that I have described.

There is no question but that B and V were closer to their mother than her other two children. That was largely, perhaps entirely, a matter of time and circumstance. H was hardly part of what may be called the Rosevear family at all. She lived with them for little more than two years in total. B was with them for about 8 years. The Rosevear children lived in their parents' home until they were married. The early years in New Zealand were during the depression. Both the Rosevear children were very young when the family moved to Scotland, and life there was not easy either, for the war came within three years. Nonetheless the family circumstances were much improved as a result of Mrs Rosevear's inheritance. Everyone was of course still expected to pull their weight, and the two children helped in the home and the business. After the return to Christchurch however,

B although still living at home, pursued his own career. Velma helped in the shop at evenings and weekends.

After his marriage, B was of considerable help to his mother in the practical aspects of her role as landlady. He did almost all the maintenance, and helped with the selection of tenants and the collection of rents. There was regular, very frequent personal contact, and after Mrs Rosevear went to B for some time managed her affairs. He was, it was acknowledged, all that a mother could wish a son to be.

In about 1978 V fell out with the family but that breach was healed within a year, and apart from that period she too maintained close contact with her mother, not only visiting and having her to visit, but also taking her shopping and attending to her needs at No criticism was or could be made of the way in which she discharged her responsibilities to her mother, particularly in her last years.

In comparison with the relatively normal and certainly unified family circle in which V and B grew up, B and H and H in particular, were considerably deprived. Their claims however, were put forward on rather different grounds. H was largely based on that deprivation. But B made no complaint about it, founding her claim principally on the proposition that she had been a dutiful daughter and deserved recognition on that account.

The circumstances of grandmother and uncle in Edinburgh were apparently reasonably comfortable, but B remained there only until she was 12. She came to New Zealand at the start of the depression, when B was aged one, and V

still to be born. At the age of 14 B went out to work, variously as a maid or a housekeeper, paying her wages - as did B later - into a common family fund. She married at the year before the Rosevears went to Scotland. I was not told of her relationship with her mother in the years immediately after the latter's return in 1946, but once she had gone to live in Rotorua in 1952, and whilst her husband was alive, opportunities for direct contact were obviously limited. But Mrs Rosevear, and sometimes Mr Rosevear, went to stay with her once a year for several weeks on end, and each year too she came to Christchurch to be with her mother for a fortnight. Mr Duthie's death in 1971 left her in financial difficulties. She rented her house in Rotorua for sufficient to pay the mortgage instalments and went to live with her daughter in Nelson, where she took a job. Then when Mr Rosevear died, at her mother's request she moved to Christchurch and lived with her for several years, going back to Rotorua for holidays. This arrangement ended shortly before Mrs Rosevear entered and Mrs Duthie then went back to her own home in Rotorua. She continued to write to her mother of course, and came to Christchurch to visit her as often as she could afford. Due to a coronary condition, she has been unable to work since 1981. I assume her income is now limited to her pension. Her home is worth about $35,000 and she has furniture, a car and savings totalling about $5,500.

H 's tale is a sad one. She says that she grew up in the belief that her illegitimacy was an embarrassment to her mother, and that throughout her life she has felt rejected by her: her exclusion from the will being the final evidence.

She had virtually nothing to do with her mother until she was

Although her uncle in particular accepted responsibility for her in Edinburgh she spent almost half of her first nine years living with a succession of foster parents. She lived permanently in her grandmother's home from the age of remaining until a year after the Rosevear family had moved in. She says that last year was unhappy. She worked long hours in the shop and was expected to do housework on top of that. After she left the home, she fended for herself and had a hard time of it. When the war came, she joined the Army. Following her discharge in 1945 she went back to the family home for the year until her mother's departure for New Zealand, it being arranged that she would do domestic work in exchange for free board, an arrangement which she says her mother did not adhere to. After Mrs Rosevear left for New Zealand, H moved into lodgings and obtained paid employment. She worked for most of the time until she and her husband emigrated, then for the first year after their arrival in New Zealand and then again from the time her youngest child went to school until 1981, by which time she was over 60. Her husband accepted early retirement in the same year and the couple now live in an unencumbered property, acquired jointly in 1982 for $52,000. They have a car and a caravan, savings of about $8,000 and furniture and effects.

H says that over the almost 30 year period between her arrival in Christchurch and her mother's admission to they saw each other about once a week. She also helped B whilst B was living with their mother. And at times she would have her mother to stay. But after Mrs

Rosevear went to she saw her much less frequently, for the deterioration in the mother's health made conversation difficult. There was some dispute as to the accuracy of this account, indicative of some feeling between H and V in particular but there is nothing to be achieved by attempting any resolution. There is no doubt that H remains affected, in a way not apparent in B , by the circumstance of her birth and early upbringing. In her own words: "throughout my life she [her mother] had actively or more subtlely (sic) rejected or shunned me. I have always been on the outer. She never regarded me as her own in the same way as she regarded her children J and V This came out in countless ways." She went on to give examples of preferential treatment accorded to V and B and their families. B and V do not accept these criticisms of their mother and one cannot but wonder to what extent they are based on H s own perceptions and resposes rather than on the reality of her mother's attitudes. Be that as it may, I am sure H 's feelings and beliefs are genuine enough, and they cannot be ignored.

Mrs Rosevear gave her own reasons for her preferment of the Rosevear children in her will. Both B and V deposed that their mother, discussing her will, from time to time said that B and H had "had their share". This was a reference to the fact that when their grandmother Mrs Wares died in 1946, B and H were beneficiaries - probably the only beneficiaries - under her will. V and B certainly received nothing. Neither did Mrs Rosevear. B and H both say they each received 1,000

pounds sterling, and B says that she gave 300 pounds to her mother, of which 100 pounds was to be put aside for each of V and B There was some dispute about this, but I do not regard the differences as of great consequence. The amount B and H each received was a relatively substantial sum in those days. Mr Abbot sought to demonstrate it significance in present day terms by introducing an affidavit by a lecturer in economics, who expressed the view that in order to compensate a person in June 1982 for being deprived of 1,000 pounds in 1947, a sum of no less than $41,265 would be required; that if 1,000 pounds had been invested in 1947, and the interest thereon reinvested, in Government securities, the amount accumulated by June 1982 would have been $16,329; and that the equivalent sum in purchasing power in June 1982 to 1,000 pounds in 1947 is $21,050. Mr Woolley tendered the evidence of another and more senior lecturer in economics, who thought that the first figure should be $35,000, but accepted the other two.

This kind of exercise is of very limited value, for the Court is not concerned with financial compensation but with moral duty, and that is to be judged in the light of circumstances at the date of death. This is not a case where a claimant is alleged to have squandered an inheritance. I do not know what B did with what she kept of hers. V was used in part for the fares of her husband and herself to New Zealand and in part in the purchase of their first home here. And whilst it might be useful to compare what the claimants received from their mother's family with what the mother herself received from that source and has chosen to pass

on to her other two children, that is not possible because the sum with which the comparison is to be made is not known. It does appear however that it was quite considerably more.

In leaving her estate to her two eldest grandchildren, Mrs Wares can fairly be taken to have recognised the family circumstances up to that time, particularly those in which B and H had grown up, as well as the fact that Mrs Rosevear had benefited from J estate, a benefit more likely to favour the two younger children that the two elder. This was proper recognition for Mrs Wares to accord, and the fact that she had done so was also a factor Mrs Rosevear was entitled to regard as relevant to the provisions to be made in her own will. It did not justify the will that she made however, for at the most Mrs Wares' will made up for what had occurred up until that time. Mrs Rosevear had at the least to recognize her eldest daughters' claims by virtue of the time and the events subsequent to Mrs Wares' death.

Another factor relevant to the kind of provision Mrs Rosevear ought to have made in her will is the contribution Mr Rosevear had made to her estate, for she could rightfully regard that as something which ought in the main to be passed on to the two children she had had by him. Here again there was some dispute, which it is impossible to resolve. It is however clear that Mrs Rosevear was quite an astute businesswoman, that she managed the family finances, and that the matrimonial assets were almost all in her name. Mr Rosevear's small estate consisted entirely of quite small bank accounts. He worked at a variety of largely unskilled jobs, and he kept working until he was in his seventies. At times

he helped in his wife's shop. In view of the size of his estate he must have put most of his earnings at her disposal. Thus his contribution to the estate she was finally able to amass cannot have been insignificant.

Even were I permitted to do what I regarded as fair I would not regard fairness as requiring equality in this case. The provision B and H had received under Mrs Wares' will, and the contribution Mr Rosevear had made to his wife's estate, alone would warrant inequality of treatment between them on the one hand and V and B on the other.

In any event, as I have explained I must approach the matter rather differently. I must add to these two factors the fact that neither claimant is in really necessitous circumstances, although admittedly both are now dependent on superannuation, and I must have regard to the deceased's own wishes. Taking account of all the circumstances, I consider that proper provision for B and H would be an award of one-third of the residue between them, leaving V and B with one-third each.

V and B have expressed the view that B should receive more than H B and H however have not suggested that there should be any differentiation between them. It is true that B relationship with her mother was the closer. But as against that H has laboured under a sense of rejection which, whether entirely justified or not, certainly emanated from the circumstances of her upbringing, and for which I think her mother still owed her some duty to compensate, despite what the grandmother had done. Moreover, despite the differences that have emerged, this family is, I

was assured, still a united one - no small tribute I suggest to the character of the deceased herself - and I am not disposed to make an order which could only lead to that very dissension which all parties expressly disavowed. I therefore consider that B and H should share equally in the one-third interest that is awarded to them: but by declaring that to be an interest in residue, I preserve the legacy of $500 to [illegible], so as to accord her that slight preference which was the deceased's own wish.

My order therefore is that Mrs Duthie and Mrs Dick each receive a one-sixth share in the residue of the estate remaining after the satisfaction of legacies and the payment of outstanding administration expenses, including the proper costs of these proceedings. This is not in my view a case for costs to be fixed on a full solicitor and client basis, but nonetheless I invite counsel to indicate what would be payable on that basis in order that I may fix an appropriate allowance.

Solicitors: