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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A 103/82

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of FLORA JESSIE GREENFIELD Deceased

BETWEEN MALCOLM DONALD GILLIES of Christchurch, Company Manager

Plaintiff

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED (TRUST DEPARTMENT) a duly incorporated company carrying on business in New Zealand as a Trust Company, Administrator of the Estate of FLORA JESSIE GREENFIELD Deceased

Defendant

A 24/81

IN THE MATTER of the Law Reform (Testamentary Promises) Act 1949

BETWEEN MALCOLM DONALD GILLIES of Christchurch, Company Manager

Plaintiff

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED (TRUST DEPARTMENT) a duly incorporated company carrying on business as a Trust Company, Administrator of the Estate of FLORA JESSIE GREENFIELD of New South Wales, Australia, Deceased

Defendant

Hearing: 27, 29 February 1984

Counsel: G M Brodie for the plaintiff
P J Rutledge for the defendant
D J Boyle for C G Greenfield

Judgment: 19 APR 1984 19 APR 1984

RESERVED JUDGMENT OF GREIG J

This is a claim by an only son against his mother's estate. A claim is made under the Family Protection Act as well as under the Law Reform (Testamentary Promises) Act.

The deceased died in Australia on 17 March 1979 intestate. She was survived by a husband whom she married in September 1978. Letters of administration in New Zealand were granted to the defendant on 13 February 1980.

The plaintiff commenced his Testamentary Promises action on 11 February 1981. On 1 April 1982 the widower moved to strike out the action for want of prosectuion. That application was adjourned sine die on 10 May 1982 but on 7 May 1982 the plaintiff moved for an extension of time to commence a Family Protection action and filed an originating summons. I heard all the matters together.

The plaintiff was born in 1938 and was the only child of the deceased. He lived with his parents till their marriage ended in divorce about 1946. From that time he was in the custody or care of his father and there was little if any contact with the deceased mother till about 1963. In the meantime she had married for a second time but that marriage ended with the death of her second husband. From 1963 until her death there was a close and continuing association between the plaintiff and his mother.

The mother was involved in domestic troubles both marital and extra-marital after 1963. In particular a stormy extra-marital relation ended in 1968 with the burning of a house which had been occupied by the mother and her friend. The result of that was that the mother was convicted of arson. The plaintiff stood by his mother at that time and gave her particular support

including the purchase of the fire-damaged house and its rebuilding. In 1972 the mother married for a short time and that ended in divorce in 1977. She met her fourth husband, the widower, in June 1978 and travelled to Australia at his invitation. She married him, lived with him, but became ill and after a relatively short time in hospital in Australia died there.

Her estate amounts to approximately $44,000 which is held by the defendant in an investment fund. At the date of death the estate comprised a savings account, two investments on mortgage and some minor sums held in accounts on her behalf.

The first question that arose in this matter was a question of jurisdiction which in turn depends upon domicile. If the deceased is domiciled in Australia then the estate comprising movables is governed as to succession by the law of the domicile. At least as far as the Family Protection action is concerned while the Court may have power to entertain an action under the Act it is not able to make any order in respect of the estate - see Re Butchart (Deceased) (1932) NZLR 125, and Re Terry (Deceased) (1951) NZLR 30. As far as the mortgages are concerned, which have now been collected and are represented by the investment funds of the defendant, there might at one time have been an argument as to whether those were to be treated as movables or immovables. I have no doubt that the question has been settled in New Zealand and that the interest of the deceased in the mortgages must be treated as movables - see Re O'Neill (Deceased) (1922) NZLR 468 and Haque v Haque (No 2) 114 CLR 98, and in particular the judgment of Kitto J at p 128.

The crucial question then is what is the domicile of the deceased but there is a further and subsidiary question as to whether the principles applicable to Testamentary Promises actions and the category into which that action falls is different from the Family Protection action so as to give jurisdiction to a New Zealand Court in spite of the domicile of the

deceased.

The primary rule for deciding a wife's domicile is that she has the domicile of her husband. That rule has been altered to a limited extent by s 62 of the Administration Act 1969 and since the death of the deceased by the Domicile Act 1976. It was suggested in submissions to me that s 62 of the Administration Act applies in this case and the question of the deceased's domicile has to be decided as if she were an independent person. That section, as it applies in this case, alters the rules for the determination of domicile when the succession and distribution of the property of the deceased intestate has to be determined. Re Bulchart is authority for the proposition that the provisions of the Family Protection Act relate not to administration but rather to the succession to or distribution of the testator's estate - see Kennedy J at p 131. There may be a question as to whether that relationship or analogy is sufficient to be included in the provisions of s 62 of the Administration Act. It may be that that section is limited strictly to the intestate succession and distribution as provided for in Part III of the Act but is not extendable to Family Protection claims which are not in terms matters of distribution or succession to an intestate estate but are merely related to or analogous to that situation. If the Act does not apply then the deceased must be treated as a legally dependent person and have the domicile of her husband. I assume, however, for the purposes of this case that the Act does apply and I then turn to the question of the deceased's domicile treated as an independent person. There appears to be only one case in New Zealand which has dealt with this matter and that is Re Dix (1951) NZLR 642. The principles stated in that case are the same as the principles now stated in 8 Halsbury's Laws of England (4th ed) paras 427, 428, 429 and 432, and in Dicey and Morris, The Conflict of Laws (10th ed) p 110 et seq. The essence of the matter as stated in

Halsbury is that an existing domicile may be changed and a domicile of choice acquired by the fact of residence in another country coupled with the intention of continuing to reside there indefinitely. The burden of proving a change of domicile rests upon the person alleging it, in this case the widower.

I assume that the deceased had a domicile of origin in New Zealand. Her previous marriages were apparently to husbands with New Zealand domicile and although she had made a number of previous visits to Australia these were clearly relatively short and not with any intention to reside indefinitely there. I set aside the question whether her marriages converted her New Zealand domicile of origin to a New Zealand domicile of choice and I assume, therefore, that she remained with a New Zealand domicile of origin.

Her residence in Australia was of short duration ending in illness and death. She married in Australia to a domiciled Australian. She resided in a house owned by her husband and at her suggestion, so I find, they moved home within Australia from one town to another. The evidence satisfies me that to all intents and purposes the deceased and her husband were setting up a permanent home in Australia.

The deceased went to Australia on a return air ticket but shortly afterwards cashed in the return part. She took a considerable amount of clothing but left her other assets, including furniture and a recently purchased television set, in New Zealand. I think it may be said that her intention when she first left New Zealand to fly to Australia was not clear and indeed I think at that stage she had not determined to marry her last husband. It is clear, however, that she did decide to marry him and thereafter had a small quantity of further chattels sent over to Australia. She arranged to have her pension transferred to Australia so that it could be paid there. She did not have any of her money assets sent over. It

seems that this was partly because there was a delay in the settlement of a house sale which meant that the funds were not immediately available and, of course, the mortgages were not susceptible of transfer until they were repaid. The deceased left a power of attorney with her New Zealand solicitor but I think that that is quite equivocal and indeed might be explained more as a prudent step to avoid the expense and delay of sending documents to Australia from time to time for execution.

Before the deceased became ill there had been talk of a return to New Zealand in March 1979 to attend a race meeting in Christchurch. That discussion included a reference to use that opportunity to arrange for the transfer of her remaining assets to Australia. It is clear that the deceased had discussed with her son, the plaintiff, her impending marriage. I am satisfied that she had discussed her previous marital affairs from time to time with her son and indeed informed him, if not consulted him, on all her more important transactions. There was a suggestion that some little time after her marriage and in discussion with her son she had indicated that her marriage was not happy and might not be permanent.

Although the widower was not aware of that conversation between his wife and the son he denied any such imputation and asserted vigorously that the marriage was a happy one.

I have come to the conclusion that in all the circumstances the deceased did change her domicile by residing in Australia with the intention to reside there indefinitely. The important factors in my mind are the marriage, the setting up of a home and the clear indication that the only intention as far as New Zealand was concerned was to return for a short visit and then settle up her affairs here. The contrary indications are, in my view, far outweighed by those in support of a change of domicile and I conclude that the burden of proof is met.

There is a clear distinction between matters of succession and matters of administration. Questions of succession and distrubtion are governed by the law of the country in which the grant is made. Family protection is classified as a matter of succession or distribution but the question is whether the Testamentary Promises action is different. That there are differences in the character of the two types of action has been made clear in a number of cases in New Zealand and I refer to Re Moore (1965) NZLR 895, 901; Breuer v Wright (1982) 2 NZLR 77, at p 85; and Lilley v Public Trustee (1978) 2 NZLR 605, 611. When one considers the provisions of the Act itself I am drawn to the conclusion that the proper classification is in the category of administration rather than succession. Section 3 (1) refers specifically to a claim being made in the administration of the estate and requires the Court to consider other claims on the estate including claims of other creditors. Subsection (2) of s 3 shows, in my view, the specific nature of the claim as it allows the vesting of specific property if that has been promised. Subsection (6) of s 3 refers to the reordering and priority of debts and other expenses and seems to treat the claim as if it was a debt and certainly something to be dealt with before the matters of succession and distribution are considered. Under s 4 (1) the estate is to be held subject to the order but I note that subs (2) of s 4 deems the order as a bequest or devise so treating it as if it were a matter of succession. The use of the word "deemed" in that subsection implies that it is not so in fact or in law but by statute has to be so treated.

It seems to me that it would be just in any event to treat a claim under the Testamentary Promises Act as a matter of administration. It is a singular remedial measure in New Zealand and it would be unjust to defeat a claim against a New Zealand estate merely because of a matter of domicile. A promise made in the deceased's lifetime is, I am sure, intended to enure in spite of changes of domicile.

My conclusion is that the Court is entitled to entertain and to make an order in the Testamentary Promises action notwithstanding the Australian domicile of the deceased.

I turn then to the merits of the Testamentary Promises claim. I am satisfied that the plaintiff gave extraordinary and unusual services and support to his mother. That included support in relation to the criminal proceedings brought against her and in matrimonial and domestic problems: but in addition he provided beyond his filial duty support and assistance to his mother from 1963 onwards. There was no evidence of any specific promise and there was no corroborative viva voce evidence of any promise as that word is defined in the Act. I accept and believe the son, however, when he says that there was reference to and clear implication for a number of years that the whole of the estate would go to him. There are a number of wills which make the son the major beneficiary although it appears that these are substantially when the deceased was unmarried or at the end of marriage or an extramarital association. There is, I am satisfied, something to be inferred in favour of a promise out of what appears to have been an independence of the son in the face of offers of assistance from time to time by his mother. He seems to have preferred to rely upon his own endeavours rather than of monetary assistance from his mother and I think that inevitably implies, or at least supports, the representation and promise that he would benefit in the end.

The next important question is whether there is the appropriate link between the promise and the service or services. That is more difficult when the services are or might be attributed to ordinary filial duty or affection. That is not a bar to a claim nor is it conclusive and I refer here to Jones v Public Trustee (1962) NZLR 363. In this case there was, as I have found, special assistance and support to the mother and her gratitude for those drew from her the

promise. The services were performed and were continued to be performed at least in part because of that promise.

It is difficult to say in this case that the services have enhanced the value of the estate and it cannot be said that the services performed were comparable to those performed where a testator has been nursed or looked after for a long period. Rather they were casual services, not in the sense of being valueless but in the sense that they were provided from time to time. The estate is comparatively small and there is, of course, a claim by a widower which is not perhaps in itself of the strongest but has to be borne in mind. Taking all things into account it cannot be said that the plaintiff is entitled to the whole of the estate but I think he is entitled to a reward for the services in light of the promise made to him. I conclude that the proper amount in this case is the sum of $10,000.

I should say, although it appears not to be necessary, that I have given consideration to the merits of a claim under the Family Protection Act. In this category the claim is by an able-bodied son who is in comfortable circumstances and there can be no need in the strict sense. The widower, of course, has a claim but he too is in a relatively comfortable situation and I think it is proper to take into account the fact that this was a relatively short marriage. I think that there was a breach of moral duty in the circumstances and that the deceased ought to have made some provision for her son as a wise testatrix. It must be a modest amount but if I were able to make an order I would award him under this claim the sum of $5,000.

I grant leave to the plaintiff to make the claim out of time. There has been no prejudice to any party by the delay and it is, in my view, just and it would have been just to allow his claim.

There will be an order that the plaintiff is entitled to the sum of $10,000 under the Testamentary Promises claim. There will be an order that the

defendant will have its costs out of the estate and the plaintiff too is entitled to his costs out of the estate, which I fix in the sum of $1,500 plus disbursements. There is no need for an order for costs in respect of the widower who will in the end retain the bulk of the estate.

Solicitors for the plaintiff: Anthony, Polson & Co (Christchurch)

Solicitors for the defendant: Spiller, Rutledge & Langham (Christchurch)

Solicitors for C G Greenfield: Cavell, Leitch, Pringle & Boyle (Christchurch)