IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.537/82

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of LAURA EVELYN BUTLER late of Auckland, Married Woman (deceased)

BETWEEN CHARLES EDWARD BUTLER of Auckland, Retired Freezing Worker

Plaintiff

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED a duly incorporated company having its registered office at Auckland and the Reverend GEORGE ALFRED JEFFREYS of Auckland, Minister of Religion as executors and trustees of the Estate of LAURA EVELYN BUTLER of Auckland, Married Woman (deceased)

Defendants

Hearing: 3 April, 1984.

Counsel: C.H. Daroux for Plaintiff.
M.J. Fitzsimons for Defendants.
C.J. Allan for Charities.

Judgment:

JUDGMENT OF VAUTIER, J.

This is an application under the Family Protection Act 1955 in which the plaintiff seeks further provision in his favour from the estate of Laura Evelyn Butler who died

on 17 September, 1981 leaving a will dated 7 August, 1976 of which the defendants are the executors. The plaintiff is the widower of the testatrix. He is now aged 83 and is blind but said to be in a stable but fair condition having regard to his age. He and the testatrix were married on 15 October, 1969 when she was aged 78. She was accordingly aged about 90 at the time of her death. There were, of course, no children of this marriage and the testatrix herself had not been previously married. The plaintiff had been and he has a daughter of his first marriage, Mrs Kelway, who was named by the testatrix as one of her executors but she decided to renounce.

The will of the testatrix provided for small legacies to two friends and a further legacy of $1,000 to the Board of Managers of the St. James Presbyterian Church "to be applied for the purposes of social services conducted by the Church". She bequeathed her jewellery and personal chattels to her two sisters and all furniture and household items to the plaintiff She further directed that $10,000 was to be held in trust to pay the interest from the date of her death to the plaintiff for the remainder of his life, the capital to fall into her residuary estate on his death. The residue, she directed, was to be held in trust to pay the nett income to her two sisters during their lives and thereafter the whole nett residue was to be applied as to five-sixths thereof to be paid to the Presbyterian Social Service Association (Auckland Inc.,) for its general purposes) and the remaining one-sixth to the Board of Managers of the Church previously mentioned

to be applied in the same way as the legacy to it.

One of the sisters of the testatrix pre-deceased her and accordingly the share of residue to be held in trust on her behalf is available, subject to any order made by this Court in these proceedings, for distribution between the two residuary beneficiaries.

The other sister, Mrs Shakespear, is married and living in Auckland with her husband; her age was not stated. Although served with the summons she has taken no step in the proceedings. The plaintiff in his affidavit says that she and the testatrix shared the other sister's estate and that Mrs Shakespear has substantial assets in her own right.

The plaintiff and the testatrix lived together for a few years in a house in Auckland which the testatrix had purchased and settled on herself and the plaintiff as a Joint Family Home. Mrs Kelway says that she was a frequent visitor to the home when the plaintiff and the testatrix were living in this home and that they were happily married. She further says that she assisted them in various ways with household tasks and provision of meals. Because of the plaintiff's blindness the testatrix at this time looked after all the plaintiff's financial affairs, banking his superannuation moneys and providing for all his needs but in February, 1980 the home was sold and they both went to reside at the Meadowbank Home. Their house was sold to Mrs Shakespear at its then government valuation; the furniture

and fittings were sold at the same time except for a few small items, so that the plaintiff really received nothing under the bequest of chattels in the will. The testatrix had been obliged for a period of some three months in 1977 to go into a rest home. At this time Mrs Kelway commenced to look after the plaintiff's financial affairs and Mrs Shakespear those of the testatrix. While the plaintiff and the testatrix were together in the Meadowbank Home Mrs Kelway paid the plaintiff's fees out of moneys she had of his and Mrs Shakespear looked after the payment of fees for the testatrix.

The nett value of the estate as at the date of death was $107,388. The affidavit made on behalf of the trustees shows that as at 17 September, 1983 the total assets of the estate were $123,475.

The plaintiff's only assets as at 7 February, 1984 were:

(a) Inflation adjusted savings bonds, $10,000.

(b) Loan to grandson, $2,500.

(c) A small balance remaining in his Auckland Savings Bank account held by Mrs Kelway for payment of tax about to fall due and the plaintiff's weekly expenses at the Meadowbank Home. These were stated at that time to be $126 per week and, in addition, there were periodic accounts for doctor's fees, medicines and sundry other expenses and taxes as they fell due.

His annual income was shown as:

(a) Interest on inflation adjusted savings at 2% per annum	$200.00
(b) National Superannuation -	5,047.12
(c) Income from trust fund created by testatrix	1,200.00
	$6,447.12

To the above, of course, has to be added the premiums accruing to the plaintiff in respect of the inflation bonds as to which there was no information at all available at the time of the hearing. In accordance with my direction a further affidavit was filed on 14 May last showing that as at that time, on the basis of redemption then, there would be a yield of $14,913 from the bonds. It should be mentioned that the plaintiff acquired these bonds by using the half share which he received of the nett proceeds from the sale of the house.

Mrs Kelway's affidavit sworn on 7 February, 1984 stated that the plaintiff did not then require hospitalisation but if he did the cost at the Meadowbank Home would be $231 per week.

An affidavit filed on behalf of the Presbyterian Social Service Auckland (Inc.,)) referred to the various social and community services which the Association undertakes and to the fact that these were operating in the year ending 30 June, 1983 at an estimated deficit of $364,000.

A further affidavit filed by the Session Clerk of the St. James Presbyterian Church shows that that Church has no separate Board of Managers but that it does itself undertake various social work. It is also stated that the

testatrix was a member of the Church for about 70 years and that she was always active in and interested in the social programme undertaken by the Church.

Mrs Shakespear having furnished no information as to her financial circumstances, it must of course be assumed that she was in no need of any assistance from the testatrix. It is to be noted, also, that there is evidence that she received a gift from the testatrix of $11,673 not long before her death. It was also suggested that Mrs Shakespear probably acquired the house at an under-value because the government valuation to which I have referred was one made in 1978.

Mrs Kelway's second affidavit showed that the expenses of the plaintiff were not able to be met out of his income and that it was for this reason that his total assets, (leaving aside the accretions to the inflation bonds) were some $2,200 less in March, 1984 than they were in May, 1982.

Mr Daroux for the plaintiff submitted that on those facts there was a clear breach of the moral duty of the testatrix in respect of the plaintiff. He referred to her having, when the parties were living together at home, taken care of him and provided for his needs so far as he was unable to do so for himself, to the absence of competing claimants and the ability of the testatrix from her substantial assets to make adequate and proper provision for the plaintiff. He submitted that the scheme and intent-

ion revealed by the will was that the plaintiff would have the unencumbered house and contents on her death plus the income from the $10,000 to provide for his maintenance. The testatrix failed, however, he submitted, to take account of the changed circumstances of the house and contents being sold and the proceeds divided and of the five year progressive inflation between the time of the execution of the will and her death with the result that the income was now insufficient. He submitted that provision by way of a capital sum was necessary to protect the plaintiff against extraordinary needs which might arise. Mr Daroux referred to the following authorities:

Hooker v. Guardian Trust and Executors Co. of NZ [1927] GLR 53

In Re Assaff [1962] NZLJ 292.

In Re Harrison (deceased) Thomson v. Harrison [1962] NZLR 6.

Re Young (Deceased) Young and Another v. Young and Others [1965] NZLR 294 (CA).

Re Wilson (deceased) [1973] 2 NZLR 359.

Re Mercer (deceased) [1977] 1 NZLR 469, [1978] 2 NZLR 514 (CA Approving)

Re Swanson (deceased) [1978] 2 NZLR 469.

Re Z (deceased) [1979] 2 NZLR 495.

In Re McCaul, Chalmers v. South British Guardian Trust Co. Ltd [1979] Recent Law 179.

Little v. Angus [1981] 1 NZLR 126.

He submitted that taking an overall view an award of half the estate of the testatrix to the plaintiff would be justified.

Mr Allan for the residuary beneficiaries did not seek to argue strenuously that there was no breach of moral duty revealed but he submitted that no need for a capital provision was demonstrated. He referred to the relatively short period and lateness of the marriage, the considerable danger that any capital sum would be likely to amount simply to a benefit for persons other than the plaintiff and to the fact that there was no indication that the plaintiff contributed anything to the building up of the estate as factors all requiring to be taken into account.

Most of the authorities to which Mr Daroux referred are very well known but I have re-read them in relation to the submissions here advanced. It is unnecessary, however, to discuss them in detail. One of the most helpful is Re Z (deceased) (supra) because of it having several factors of similarity with the present case. My conclusion is that there has been shown to be a breach of moral duty in that the provision made for the plaintiff was inadequate in all the circumstances. The plaintiff here clearly did in my view have a paramount claim upon the bounty of the testatrix despite the fact that the marriage was a late one and lasted only some 12 years. His age and his physical disability placed him in a position where he was in just as great a need as a widow in a similar position would have been and I see no justification for regarding the two situations differently. The testatrix by marrying the plaintiff had in fact assumed a responsibility in respect of his future welfare. His being left with insufficient income to meet his out-

goings so that he has to resort to his capital which could in this way ultimately, if the plaintiff lives long enough, be entirely exhausted, clearly demonstrates, I think, having regard to the size of the estate and the absence of others with competing claims, that there has been such a breach.

In Re Z (supra) shows it is proper for the Court to take into account the reduced value of money between the making of the will and the date of death for the purpose of considering the question of breach of duty. It should also of course be taken into account, when the Court is considering what order to make, that there has been further inflation between the date of death and the date of the hearing. The absence of any provision in the will in this case for resort to capital in case of the proper needs to be met not being covered by income available at a particular time is also a matter to be taken into account as regards breach of duty.

Re Z (supra) of course also shows, however, that it is proper for the Court to take account of the amount being received by the plaintiff by way of National Superannuation. I cannot agree, however, even though a breach of duty is shown, that a substantial share of the estate capital should for this reason be awarded to him as Mr Daroux suggested. The breach was largely in my view in the failure to provide an income which would ensure that the plaintiff himself is freed from risk in the future. The provision to be made is not, I appreciate, to be measured solely on the basis of need for maintenance. Moral and ethical considerations must be taken into account also. (In Re Harrison, Re Young (supra)).

Those considerations, however, have not in the past been regarded as calling for substantial capital provision to be made for widows unless there are special circumstances which make this necessary or expedient such as is often the case with small estates. Thus in Re Wilson (supra) McCarthy, P. at p.362 said:

> "I now say something about the attitude of the Courts to the award of capital sums to widows. There can be little doubt that the Courts have, as a rule, been against such awards. There must be special circumstances before they can be made: Re Williamson [1954] NZLR 288. Nevertheless, there are many instances in the reports of them, especially where the estate is small. The reasons usually given for this overall careful approach are first that children can be deprived of their patrimony by such grants, second that the husband's capital should not be utilised to support the widow in the event of remarriage and, much less, to support her husband, and third that a widow should not be provided with a fund which she can leave to others on her death. These considerations, of course, continue to be highly important, but it can be overlooked that there is nothing in the Act which expressly prohibits capital awards to widows."

He concluded:

> "For myself, I think that the occasions when capital grants can rightly be considered necessary 'in order to enable a widow to live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime' are probably more frequent today than in the past."

In that case regard was had also to the need "to provide (the widow) with the ability to meet from time to time those special difficulties which her physical condition would be likely to lead. (The plaintiff in this case was a spastic) I see no reason to differentiate as regards a widower in the position of the present plaintiff.

There is no indication in any of the cases cited that the Courts will today disregard the factor that provision should not be made which will be likely to serve only to provide a spouse with a fund which he or she can leave to others on death. Neither is there any suggestion that the Courts today will pay less regard to the well recognised principle that the terms of the testators will should be interfered with to any greater extent than is necessary to enable the breach to be repaired. (See Little v. Angus (supra)).

It has to be remembered, also that as regards emergencies the plaintiff has available to him on one month's notice all or part of the $14,900 now due in respect of his inflation bonds - a capital sum which was of course originally provided by the testatrix because she provided the house. In addition, there is still $2,500 to be repaid to him in respect of the loan to his grandson (which repayment, it seems, is now well overdue because the original loan of $4,000 was referred to by Mrs Kelway in her affidavit of May, 1982 as being a loan for a "three month term").

If the bonds were redeemed and invested at 10% per annum there would be at least $1,300 in additional income available, i.e. more than sufficient to meet the present shortfall. There would still, however, be the risk of the substantially greater fees for hospitalization having to be paid and resort to capital for this purpose or other emergency payments would, of course, reduce the future income.

Having regard to all these considerations the conclusion I have reached is that the breach in this case can be remedied by increasing the capital sum to be set aside to provide an annuity for the plaintiff from $10,000 to $20,000 and the addition of an order that the defendants or the trustees for the time being may in their sole discretion, if they at any time consider that the income from the said sum is insufficient for the proper maintenance of the plaintiff and without any obligation to refer to any other beneficiary under the will of the testatrix, have recourse to the capital so as to make the income up to such sum as shall in the opinion of the defendants or trustees be sufficient for the purpose with no obligation to recoup such capital out of any future income payments due to the plaintiff. This, I think, is one of the kind of exceptional cases to which McCarthy, P. referred in Re Wilson (supra) where there is really only this one area in which the needs of the plaintiff require to be met. The possible disadvantages referred to in that judgment will not in the circumstances and having regard to the terms of the order, arise in this case.

The plaintiff and the beneficiaries represented at the hearing are entitled to an order as to their costs to be paid out of the estate. If counsel will submit a memorandum I will fix these.

SOLICITORS:

Rennie Cox Garlick & Sparling, Auckland, for Plaintiff.
Alexander Bennett & Co. Auckland, for Defendants.
Rudd Garland Horrocks Stewart Johnston, Auckland, for Charitie