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No Special Consideration

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

A NO 87/82

1438

IN THE MATTER of The Family Protection Act, 1955

AND

IN THE MATTER of the Estate of the late A[illegible] BENTLEY of Paraparaumu Beach, Shoe Shop Proprietor, Deceased

BETWEEN: F[illegible] BENTLEY of Melbourne in the State of Victoria in the Commonwealth of Australia, Hospital Employee

Plaintiff

AND: M[illegible] BENTLEY of Paraparaumu Beach, Widow, J[illegible] BENTLEY of Auckland, Shop Assistant, and F[illegible] BENTLEY of Melbourne in the State of Victoria in the Commonwealth of Australia, Hospital Employee, as Executors and Trustees of the late A[illegible] BENTLEY of Paraparaumu Beach, Shoe Shop Proprietor, Deceased

Defendants

Hearing: 25 October 1984

Counsel:

Judgment: 19 November 1984

JUDGMENT OF JEFFRIES J.

This is a claim pursuant to the Family Protection Act 1955, and at least one unusual aspect is that all the protagonists were born and have lived up to this point the greater part of their lives in foreign countries, but it is New Zealand where the testator died and where his widow now lives, and intends to remain, apparently, for the rest of her life. It is here one of his two sons also lives. The plaintiff will be described in greater detail hereafter but he once lived in New Zealand for about two years, leaving in to live in Melbourne, Australia.

I commence by listing the dramatis personae giving here the barest details for each. After that the main characters will be given fuller treatment. The deceased, A Bentley, was born in to wealthy parents of British stock. His father, F Bentley, died intesate in . His mother, R , died in The deceased married first, F , and the only issue of that marriage was the plaintiff, F Bentley born in He married D and there are no children. A divorced F in 1930 and took a second wife, Nadine, in 1939. From that marriage there was one issue, J Bentley, who was born in and now lives in Whangarei. It is convenient to mention that he and his brother, F , are co-executors of the will with A widow, and appear in the proceedings formally as defendants. J married, first, B , a New Zealand girl, whom he met in England when he was living there in . Of that marriage there were children but it ended in divorce and J was remarried in to L and they have one child born in . A divorced N on a date uncertain, but what is established is that in he married his third wife, Y , which marriage lasted a mere matter of weeks and he was divorced the following year. In that year whilst separated from Y he met

M Bentley, who is his widow, and a co-executor of the will. At the time of meeting between A : and M he was then aged approximately , and she approximately . She also was married at the time but separated from her husband. There was one child of that marriage, namely J Coen, but he takes no part in these proceedings. Of significance, and to be returned to later, is that F and M are of comparable age, she having been born in . A and M commenced living together in and ultimately married in when in England. A had only two children, namely F and J , by different wives but had no further children by his third and fourth marriages.

A : died at Paraparaumu on the 1980, then aged years. He had executed a will on the 5th of December 1979, that is some nine months before death, in which he named his two sons and his wife as co-executors. His assets consisted of a house at Paraparaumu, then unencumbered, and at death having a government valuation of $32,500. He had other assets, mainly shares in public and private companies, and securities valued at approximately $62,000 with cash of about $500. His net estate returned for duty purposes amounted to $93,117.18. The will provided that the capital be kept in tact and that his widow be permitted to occupy the former matrimonial home for the remainder of her life, or until remarriage. Certain powers were given to the trustees in regard to the sale of that property should that be the widow's wish. She remains in occupation to this day caring for her aged mother and deposes to the fact she has no present intention of moving. It also seems that she has no intention of remarrying which, because of the terms of the will, is a significant matter to dispense with. On her death the will provides that the capital of the estate is to be divided equally between A two sons.

It is now necessary to set out the salient features of the lives of the protagonists, and I begin with A . He was born in and apparently lived with his parents in until when he was first married. It is perhaps now of historical significance only that it is alleged in the affidavits his first wife, F , brought with her to the marriage a dowry of 6,000 sovereigns; a not inconsiderable sum in those days. F was born in in 1928. A and F divorced in and A formally became the custodial parent of F but in fact F went to live with his grandparents, then aged about a year and a half. He was brought up by them and his schooling was entirely at their expense, and his actual contact with A , his father, seemed to consist of weekly visits. A remarried in 1939 and J was born the next year. Little detail is contained in the affidavits of A life from adulthood, reached some time in the early 1920's, until he met M in . What one gathers from the affidavits is that he lived in the style of the son of wealthy parents. The affidavits do not disclose that he had any formal vocational qualifications, or in fact that he ever undertook permanent employment until much later in his life. His father, F died in intestate. He, apparently, with at least one brother, and possibly two, took over administration of their father's estate. One of A brothers, A who now lives in has filed an affidavit lending some support to the allegations F makes about assets supposedly stemming from A father and earmarked for F Further details of those assets are given hereafter.

From the time of M meeting with A in , and their decision to establish their lives together, naturally more information is available concerning A and his lifestyle. In his mother died and from her he received jewellery, which is a sharply disputed asset of

his estate. In 1956 the notorious Suez crisis occurred which resulted in the expulsion from Egypt of foreign nationals. They were officially unable to leave with assets but managed, with the help of a Turkish diplomat of easy principles, to take from Egypt jewellery, about which M gave oral evidence from the witness box.

At this point I continue the narrative in reference to A and M for they remained together until his death. I begin here earlier in the life of M for the sake of completeness rather than because of its relevance to the exact issue to be decided.

M was called for cross-examination by Mr McGechan who wished to pursue the issue of jewellery which I postpone to deal with hereafter. Counsel took the opportunity to fill in some of the details of M life prior to meeting A . Her nationality is French and she was born in , also of wealthy parents. With the invasion of her country by the Germans she and her mother left where they had been visiting from ahead of the invading army and travelled by various means to . From she and her mother reached in about the year She would then have been aged about years. During the war M and her parents lived in . Apparently after the war ended in 1945, she returned to Europe and some time in her early 20's she married in and had one son. She separated from her husband and in about the year 1955 she began associating with A . The year was eventful. Al 's mother, R , died and it was from her that Albert received much jewellery, including a valuable ring that many years later in 1979 was sold in New Zealand to repay the mortgage advances to the Housing Corporation so the house at Paraparaumu could be unencumbered. The ring then fetched $9,000. A and M after making suitable

arrangements with the Turkish diplomat, went to England where they remained until 1960, or thereabouts. The jewellery was recovered from the Turk in Naples in 1958. A and M purchased a flat in England where they lived until the early 1960's when they moved to in Northern Italy, and remained there until As will become clear below, the family's association with New Zealand began by J marrying a New Zealander in 1964, and coming to live in Paraparaumu, New Zealand, in 1969. For whatever reasons, A : and M emigrated to Paraparaumu in 1971. They there purchased a section at and, with the assistance of a State Advances (now Housing Corporation) loan, erected a dwelling where they lived together until A s death. A and M formed a business partnership in a shoe shop at Paraparaumu which they operated successfully together until A death. With the consent of all beneficiaries the business was sold in 1981, and A ; share of $9,000 became part of his estate.

Here I take up the story of F In his early life he was brought up by his grandparents who took entire responsibility for him, including his education. Between 1947-49 he spent at a university in but it did not prove successful. After this he travelled widely including living in Florida in the United States where he was engaged in the hotel business. In he married D and lived in for the next two years. Before his marriage in the later 1960's there is exhibited to affidavits, correspondence with his father who generally conveyed to him his disappointment, and not without some bitterness, at the itinerant lifestyle F was leading. This paternal advice was precipitated by a request for financial assistance from F :o his father, which was given, but in a much lesser sum than that requested. By

1974 J and his father and stepmother were living at Paraparaumu, New Zealand, and F emigrated to the country, living first at Paraparaumu and then at Masterton, in which town he was engaged in hotel work. He remained in New Zealand until , and then with his wife went to live in Melbourne where they now reside. F is currently employed in the catering business, now aged years and has very few assets. He lives in rented accommodation and he and his wife both work and receive a total net weekly income between them of approximately $450. They have no children. They have furniture and small savings. F is also contributing to the support of his mother, F , who lives with them in Australia. It is pertinent to comment at this stage that relationships between F and his wife on the one hand, and M and his father on the other, were always cordial and A and M visited Melbourne and stayed with them in 1978. By some of the letters exhibited to the affidavits, the cordiality remained even after A death in 1980, and at one stage it looked as though the prospects of settlement of this intractable situation were bright. However, I need not say no more for the matter is now for this court to decide.

Overall, J plays a less significant role in the events. His position is different from that of F and M by the fact that he is more than years their junior and, therefore, can probably expect greater benefit from his father's will as drawn than could F J married a New Zealand girl in England in and came to New Zealand in 1969. He separated from his wife and in 1976 went to live in Auckland. He divorced his first wife, by whom there were four children, and remarried in and he has one young girl by that marriage. In Whangarei he owns a men's outfitters shop and owns his own house.

He appears to be in reasonably comfortable circumstances, but has maintenance obligations to his first family. He is not a claimant and his counsel appeared and withdrew before argument. However, it is to be remembered J(is the father of the only grandchildren of the deceased. The will provides a gift over to his children in the event of him dying before distribution.

Now to mention an issue of sharp controversy between F and M , being the jewellery. It is alleged by F that his father was the recipient of much valuable jewellery from his mother when she died in 1956. It is further F allegation that M has not disclosed to the court the full extent of the jewellery she would have pssessed from this source at the date of A death. Probably the references to the courier activities of the Turkish diplomat inferred that the jewellery was indeed very valuable. M as cross-examined about this but insists that most of what jewellery she does possess came to her not through A but from her own family. From the early lifestyle she informed the court about, that seems a likely occurrence. However, no lists were produced to the court of the jewellery which was handed to the Turk and one was prepared but may have been lost. There certainly is no allegation that the Turk himself did not, two years later, honestly pass back the jewellery which he had taken out of In his affidavit F made much of an alleged display of jewellery at Paraparaumu by A in 1974 before F his wife and two others, namely Mr and Mrs P . There seemed some suggestion that the P might have been interested in purchasing some of that jewellery, but in any event nothing came of that. M in the witness box said the jewellery was then placed in a bank deposit box at Paraparaumu. She also said the display contained jewellery that belonged to her. The argument of counsel for the plaintiff was that the court

should infer the estate rightfully owned jewellery separate and distinct from any jewellery the widow, M , might have received from sources other than A It should be mentioned that the day after A 's funeral M distributed some jewellery of A ; to F and J . The allegation now is that she has failed to disclose particulars of any jewellery and the value thereof, and that she wrongfully retains estate jewellery in her possession. The argument on the evidence is impossible to resolve, and the onus must rest upon the plaintiff who makes the allegations of wrongful retention and possession of estate jewellery, and it has not been discharged. Having said that, I think there is some justification in Mr McGechan's submission that the court might infer that the failure by M to give material details of her own jewellery, does suggest the plaintiff's allegations are not entirely unfounded, but the court can go no further.

There is another allegation made by F which is against his father, the deceased, and must carry even less weight. As stated earlier, F with at least one other brother, was the administrator of his father's estate following his intestacy in when he died. F alleges that there were bonds, insurance annuities, and a diamond ring which should rightfully have been passed to him, but were not. He also alleges a very valuable stamp collection of his grandfather's was destined for him, but it was sold by his own father for a sum that cannot now be ascertained. The relevance of these facts seems to be that it increases the plaintiff's claim against his father's estate for maintenance and support, because at a much earlier stage of their lives his father had wrongfully converted, or deprived him of, assets which should have come to him.

There is some mild support for these allegations from the deceased's brother who has filed an affidavit on the plaintiff's behalf, but otherwise great weight is not able to be attached to them.

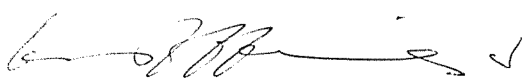
In a family protection application the court, guided by the statute and the decided cases, seeks to make orders, if they are necessary, which will cause the minimum disruption to the lives of those involved. To achieve that this case presents serious difficulties caused principally by an estate of relatively modest size, coupled with a will drawn as it is without addressing the complication of M and F being of the same age. The probabilities are that F will not obtain any worthwhile benefit from his father's estate. Some relief stems from J not advancing himself as a claimant but resting on the provision made for himself by the will. At the date of hearing the estate is valued at approximately $120,650 divided between house at $65,500 and net investments of $55,150.

The first step in the decision process begins with the principle that the claim of the widow is paramount. M spent years with A : and was married to him for years. Apart from the allegation of conversion of assets over 30 years ago, said to be destined for F only she can claim to have contributed to the assets of the estate. The main asset is the house in which she presently intends to remain. M has some assets of her own but those are not extensive. She cares for an aged mother who apparently has no assets of her own. She is in good health and has a part-time occupation which brings to her a small weekly income. Overall her position is by no standard strong. She could even be a claimant herself, but has chosen not to.

It must be acknowledged F , approaching years, is quite vulnerable. He and his wife still work receiving barely an adequate total income on which to live, with little chance of providing capital for themselves. Notwithstanding the primary claim of his wife, a wise and just testator should not have made a will which probably results in his older son receiving nothing from his estate. There is almost no evidence that A assisted F to any material degree throughout his whole life. Neither is there any suggestion that F engaged in any disentitling conduct towards his father. I think F has established a breach of moral duty, but in the exigencies of this case the order to remedy that breach cannot be large. I order that the plaintiff receive from the estate a lump sum of $15,000, but otherwise the will is to remain as executed.

For completeness I mention that Jc four children by his first marriage were represented by counsel who indicated he abided the decision of the court and withdrew.

The parties are entitled to costs from the estate. Counsel may confer and submit a memorandum.



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