IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.793/82

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of CHRISTIE of Auckland, Married Woman, Deceased

BETWEEN G COOTES of Mangateparu, Married Woman

Plaintiff

AND THE NEW ZEALAND INSURANCE COMPANY LIMITED a duly incorporated company having its registered office at Auckland as executor and trustee of the will of the said CHRISTIE

Defendant

Hearing: 8th February, 1984

Counsel: Allan for Plaintiff
Woodhouse for Defendant
Bright for Nola Irene Price and her two children
Hawk for granddaughter Cootes
Boyle for niece Nunes

Judgment: 29 February 1984.

JUDGMENT OF SINCLAIR, J.

This claim brought under the provisions of the Family Protection Act 1955 is brought by a daughter in respect of the estate of her mother who died on 5th September, 1972. Probate was granted on 11th October, 1972 but the present proceedings were not filed until 6th August, 1982 so that they are, in effect, approximately 8 years and 9 months out of time and it is necessary to consider whether leave should

be given to extend the time within which proceedings might be brought.

A consideration of that issue will necessarily involve a consideration of the merits of the claim and I therefore approach this matter in accordance with the principles which were referred to in Magson v. N.Z. Insurance Company Limited, C.A. 206/82, judgment 28th June, 1983. In that case the Court was concerned with a request to extend the time to bring proceedings under the same statute and the principles were collected from a number of cases which are referred to in the judgment of the Court. The matters which are to be taken into account were summarised as follows: the length of the delay; the extent to which it is excusable because of ignorance of rights or otherwise; the strength of the claim that there was a breach of moral duty by the deceased; and the extent of any prejudicial effect on beneficiaries in reliance of the will or intestacy. That latter aspect has no relevance in the present case at all, but as was pointed out in the Magson decision, the motives of the applicant are also relevant, but one has to be cautious before giving any major weight to them as they can be difficult to assess, especially where all the evidence is on affidavit and the Court does not have the opportunity to make its own judgment of the reliability of the various witnesses.

Bearing the above factors in mind I now turn to consider the Plaintiff's case.

The will was dated 28th June, 1972 and after giving a car to her sister-in-law, Kathleen Thomas, the testatrix

created a life interest for her husband in a house property which she owned in Mt Eden together with the furniture therein and on the husband's death a provision was made for two trust funds to be set up. The first trust fund was as to the sum of $12,000 or two thirds of the net proceeds of the sale of the house and furniture, whichever was to be the greater, and the income from that trust fund was to be paid to the Plaintiff and upon her death the fund was to be divided amongst the Plaintiff's children. From the remaining third $1,500 was to be paid to a granddaughter, Barbara Bovington, and the balance was to be retained as a second trust fund and the income therefrom was to be paid to a niece, Lois Hazel Nunes for her life with a gift over to her children, with a further provision that if Lois Hazel Nunes should have no children then the second trust fund was to be divided between Barbara Ann Bovington and the children of the Plaintiff in equal shares. I record now that the likelihood of Mrs Nunes having children is extremely remote and for all practical purposes at the present time it is probable that Barbara Bovington and the children of the Plaintiff will succeed in due course to this second trust fund.

The residue of the estate was directed to be dealt with in a manner similar to the above two trust funds.

The will also refers to the fact that no provision had been made by the testatrix for another daughter, Nola Irene Price, by reason of the fact that the testatrix during her lifetime had transferred a property in Auckland to that daughter which had been subsequently sold and the testatrix considered that ample provision had been therefore made

for that daughter during her lifetime.

The Plaintiff is now married and she has four children, two of whom are of full age while two are still infants and are living with her. The present application was opposed by Mrs Price and by one of the Plaintiff's daughters, Patricia Dawn Cootes, but there was no representation on behalf of the remaining daughter who was of full age, namely Mrs Jennifer Irene Fawcett. Mrs Fawcett had been appointed to represent not only herself, but her two youngest sisters and I was somewhat concerned at the hearing that no action had been taken to have these infants represented. However, counsel urged me to proceed with the hearing as the claim was being brought by their mother and that there were no circumstances existing which were peculiar to the two infants and which would entitle them to claim in their own right. As matters have developed I accept that that is a correct assumption of the position.

At the hearing counsel for Mrs Nunes took virtually no part in the proceedings because counsel for the Plaintiff restricted his client's claim to the first of the two trust funds mentioned above and did not seek to attack the provision which had been made for Mrs Nunes, notwithstanding that the Plaintiff, in her first affidavit, contended that she did not feel that Mrs Nunes should receive all the income from the second trust fund and contended that her children should also receive some of that income. Apparently she did not feel that Barbara Bovington should eventually have some share in that fund. However, as already indicated when the matter came on for hearing, a decision was taken to abandon

any claim to that second trust fund. At the present time the first trust fund has a capital of approximately $47,000.

The Plaintiff is an adopted daughter of the deceased, having been adopted apparently not long after her birth , while Mrs Price is a natural daughter, having been born some five years after the Plaintiff. The Plaintiff in her first affidavit concedes that she was a wayward child, resorting to stealing and lying and her conduct eventually resulted in her being committed for a period to the Burwood Girls Home in Christchurch at the age of 13 years, where she remained for some 3½ years. Mrs Price also comments about her sister's behaviour and much of what she has said has been challenged by the Plaintiff, but the inescapable conclusion is that the Plaintiff's conduct caused considerable upset and dissension in the family with the result that there was not the relationship between the deceased and the Plaintiff which one would have been able to attribute to a normal relationship between a loving mother and a loving daughter.

It is also apparent that there is a certain degree of antagonism existing between the Plaintiff and Mrs Price, but by reason of all the evidence being on affidavit it is difficult to endeavour to resolve many of the conflicts which exist in the affidavit evidence. However, by reason of the Plaintiff's own admissions I am able to assess and determine that it was the Plaintiff's conduct to a marked degree which has brought about the state of dissension with her sister and some considerable degree of concern on the part of her mother.

In 1956 when the Plaintiff returned to Auckland she was

placed with a family on the North Shore but she had little or no contact with her family at all although her mother attended her wedding in Palmerston North in January of the following year. She then moved with her husband to Wellington and in mid 1958 returned to Auckland where she lived in a house in Sandringham Road which was rented from her mother. However, that arrangement lasted for but six months when Mrs Cootes returned to Wellington, she claiming that her mother had an objection to her husband riding a motor-bike to and from work; she quite frankly attributes the return to Wellington to the friction between her mother and herself. On reflection she conceded that the real reason for the conflict was her mother's disapproval of her husband because he was a Maori. That aspect is challenged by Mrs Price who states that the real reason for the friction was that the Plaintiff was constantly leaving her child unattended to a point where Mrs Christie had threatened to report the matter to the authorities. Mrs Price alsc says that matters really came to a head when her mother ascertained that the Plaintiff had been selling off property of Mrs Christie which she had stored underneath the house which the Plaintiff was renting from her.

On a consideration of all the evidence I am inclined to think that what Mrs Price has said is probably right. I am distinctly of the view that Mrs Christie was perturbed at her daughter's behaviour and probably felt that there had been no real improvement from her conduct when she was a child.

When in Wellington both Mrs Cootes and her husband worked at varying periods and in 1965 the family moved to Te Kuiti. Unfortunately Mr Cootes was involved in a serious motor accident which resulted in his being off work for lengthy periods. That accident brought about a return to Wellington and in 1967 when the Plaintiff was expecting her third child she was for a period ill in hospital and suffered a nervous breakdown. Indeed, following the birth of her last child the Plaintiff in 1969 was in Porirua Hospital for a short time. After having lived in State rental accommodation whilst in Wellington, in December 1971 Mrs Cootes and her husband purchased a house at Silverstream with the assistance of a loan from the Maori Affairs Department. The cost of that house was some $11,500. At that time Mr and Mrs Cootes had but $300 in cash to contribute while the family benefit was capitalised raising $2,000 and the Maori Affairs Department took a first mortgage for $7,000 with the vendor taking a mortgage back for the balance. In 1974 that property was sold and the family moved to Matamata where Mr Cootes hoped to be able to become a share-milker. The Wellington house was sold for $22,000 which left a surplus, after repayment of all the mortgages, of some $9,000. However, misfortune struck again in early 1975 when Mr Cootes sustained a further accident which resulted in him having to give up the farm work and meant that the family had to shift into different accommodation. The $9,000 which had been received from the sale of the Wellington house, the Plaintiff says, was spent for general living expenses.

For a short period the Plaintiff and her husband

separated and then for some four years they lived in a rented house on a property owned by Mr Bruce Fawcett at Walton. Later Mr Cootes worked for Mr Fawcett for about two years.

In 1981 they shifted to Puriri, near Thames, where they remained until 1982 when Mr Cootes was again unfortunate enough to be involved in a tractor accident in which he sustained injuries which still prevent him from working. At the present time Mrs Cootes is living with her husband and her two younger children, plus her daughter Patricia's elder child, in a house near Morrinsville which cost $26,500, they paying a deposit of $5,340 and borrowing $18,500 from the Maori Affairs Department. In order to raise the deposit they borrowed $1,000 on security of their car and boat.

It is evident from the affidavits that for a number of years there was little or no contact at all between Mrs Cootes and her mother although whilst living in Wellington Mrs Christie did visit the family at Easter 1972 and in August of that year Mrs Christie paid for Mr and Mrs Cootes and their three youngest children to come to Auckland and stay in a motel for five days. Other than for that contact which was not long before the testatrix died, it seems that there was a period of some years from the time the Plaintiff left Auckland in 1958 when there was absolutely no contact at all. Between Easter 1972 and August 1972 Mrs Christie suffered a coronorary attack and it is noteworthy that she made her will in June of that year and probably at a time when she realised she may not have long to live.

In her first affidavit Mrs Price stated that before

her mother made her will she considered what she ought to do and later informed Mrs Price that she had thought long and hard about the provisions of her will in relation to Mrs Cootes. Mrs Christie, according to Mrs Price, told her that she had made provision for the Plaintiff to have income as she got older as she did not want to give her a lump sum or money that could be wasted and that she wanted to ensure that the Plaintiff's children would get something eventually. Indeed, that is precisely similar to what the Plaintiff says she was told by her mother during the course of her visit to Auckland in August 1972. On the occasion of that visit the Plaintiff deposes to the fact that her mother told her that she had made a will to give her some income as she was getting older and, of course, that is precisely what the will does provide for the Plaintiff, namely income and not capital.

In explanation as to why she had not made a claim until these proceedings were filed in 1982, the Plaintiff says that on the day of her mother's funeral the will was read to her by an officer of the N.Z. Insurance Company Limited, which is the named executor, and that she was then given a copy of the will but, she says, without its meaning being explained to her. She says that she did not receive any advice from that particular person, nor did he suggest that she should take any legal advice. The Plaintiff claims to have later re-read the will and understood it to mean that she would receive a two thirds share of the value of the house in Mt Eden after her father's death, and that her children and Mrs Nunes would share equally in the remaining third once they attained the age of 25 years.

She makes no reference at all to what she believed Barbara Bovington was to get. She later claimed that she gave a copy of the will to a solicitor in Hamilton who was acting for her. He, she says, read the will but did not explain the provisions to her. She goes on to say that she did not question that solicitor, who was unnamed, about the contents of the will because she thought she understood them and was satisfied with the provisions which she thought had been made for her. She further states that it was not until she saw a solicitor in Thames in January, 1982 that she realised that she had misinterpreted the will.

On the other hand, Mrs Price claimed that her sister, she is sure, would have understood the provisions of the will and she does not accept her claim that she did not understand the terms of it. She comments that the will is not obscure and that it is quite plain.

I have no evidence as to what education the Plaintiff received, but there is nothing to suggest that she received other than the normal education which one would expect of a person who was being educated in this country in the 1940's and 1950's. Certainly there is no claim made by the Plaintiff that she received little or no education or that she has been disadvantaged in any way by a lack of education. It is true that her situation has been compounded by the fact that her husband has been involved in three serious accidents, but she deposes to the fact that her own health and that of her two younger children is good while the grandchild who is living with her appears to be in a similar state. At the moment no money is being paid for that grandson's maintenance, but this

was apparently brought about by the fact that the mother of that child did consent to an adoption, but the consent was not filed within the requisite time so that the proceedings would have to be commenced again. Because of some difference in opinion which now exists between Mrs Cootes and her daughter Patricia, there are some difficulties now in the way of a further adoption application proceeding. It is evident from Patricia's affidavit that there is a certain amount of ill-feeling between her and her mother, some of which has been generated by there having been legal proceedings between the two when the daughter sued her mother for $1,700 and obtained judgment, the daughter claiming that the amount involved was a loan whereas the mother contended it was a gift. For the record Patricia has a second child, is unmarried, and her state of health is such that she is on a Social Welfare Benefit.

After the father's death, and incidentally he appears to have left no estate, arrangements were made to sell the Mt Eden home and the furniture. By reason of inflation and the general increase in values of properties in Auckland, the house was sold for $72,000 and it is that amount and the proceeds of the furniture which form the whole of the assets of the estate and there is, in fact, no residue.

Initially, before these proceedings were commenced, the Plaintiff received some income, but once the proceedings were commenced the trustee has declined to make any further payments of income to either the Plaintiff or Mrs Nunes. That fact has brought about an alteration in the Plaintiff's position in that in her last affidavit she claims that the family now has liabilities approaching $10,000 which relate

to arrears on both the first and second mortgages on the property and to certain loans which have been raised to enable the family to meet its general living expenses. Included in the debts is the $1,700 being the judgment which the daughter Patricia has obtained. She claims also that she and her husband have had to sell their 1972 Ford Falcon car to assist in meeting the living expenses.

In an affidavit sworn by her on 29th August, 1983 the Plaintiff deposes to the fact that at the time of purchasing the Morrinsville property she felt that the necessary mortgage could be serviced by using the funds which she was receiving pursuant to her life interest in her mother's estate. At the moment it appears that the accumulated income in respect of the trust for the Plaintiff is $8,811.

On behalf of the Plaintiff Mr Allan sought $22,500, being approximately half of the first trust fund by way of a capital payment which would enable the Plaintiff to meet the various debts which she has, to purchase a modest car and to have a capital sum as a contingency fund. He pointed out that the income which the Plaintiff receives has an effect upon the Social Welfare Benefit which her husband is receiving. While that may be so it does not reduce dollar for dollar, but precisely what effect the expected income from the trust fund would have upon the benefit is not clear. However, I do accept it would have some detriment.

In relation to the application for extension of time it is contended that the delay is excusable and that it

is just to grant leave or, in the alternative, that if the delay is inexcusable then a manifest injustice would result if the extension were not granted as the Plaintiff had a strong claim on the merits and there was a lack of prejudice to other parties. In relation to the claim itself it was submitted that the deceased misconceived the need of the Plaintiff and her family in giving only income when there ought to have been as well a gift of capital.

It was submitted also that the evidence tended to suggest that there had been a resumption of the relationship between the parties which was developing back into a normal mother and daughter relationship. Some reliance was had on a letter written by the deceased to the Plaintiff on 14th May, 1972. I accept it is a normal type of letter for a mother to write to her daughter, but it also has the hint in it that Mrs Christie was thankful that at last there seemed to be some signs of stabilisation of the Cootes family position because she refers to the fact of them being settled in their own home at last. The mother also said in the letter to let her know to whom the second mortgage was due as she, that is Mrs Christie, might be able to help them a little later on. Indeed, Mrs Price has stated that she was informed by an uncle that Mrs Christie had given him some money to hand to the Plaintiff and the Plaintiff, in a subsequent affidavit, acknowledged that she did receive the sum of $600 from that uncle.

I bear in mind the principles which were referred to in Little v. Angus (1981) 1 N.Z.L.R. 126, but I have come to

the conclusion that having regard to all the circumstance surrounding the Plaintiff and her family, and in her relationship with her mother, there has been no breach of moral duty at all. In 1972 when she made the will the testatrix considered her first duty was to her husband, which of course it was, and then in a very carefully considered way she dealt with her estate as she knew it then to be upon her husband's death. In providing income for the Plaintiff, having regard to the Plaintiff's past performance, I am of the view that the testatrix was acting in a just and wise way in ensuring that the Cootes family had income to enable them to manage, particularly with what then would have been a young family and, indeed, with two children still at school.

It is now extremely easy, having regard to the family's misfortunes, to say that there should have been a gift of capital, but to my mind the testatrix was entitled to look at the family as a whole and to consider where best her bounty could be applied for the benefit of all of them. In addition, it is not unnatural that the testatrix should have had some feeling of concern for Mrs Nunes who she knew to be deaf and dumb. In any event, I am unimpressed by the Plaintiff's protestation that she did not know that she was but to receive income under her mother's will. That is precisely what her mother told her in August 1972 about a month before her death and that is precisely what is in the will. It is not a will which is difficult to understand and while it was said that it might be difficult for an uneducated person to understand, I have no evidence at all that Mrs Cootes falls within that category of persons.

I am of the view that the Plaintiff knew precisely from the time the will was read what her entitlement was; that she was content at that time to accept her entitlement and that this application has been dictated for reasons which have not been set forth in the Plaintiff's affidavits. Consequently I am of the view that the claim has no merit, that the delay is inexcusable and that no injustice will result from declining to extend the period within which the proceedings may be brought. There will be an order refusing the extension of time sought for the commencement of these proceedings and accordingly the application fails.

In all the circumstances, and as the Plaintiff is legally aided, I will allow costs of all parties out of the estate but to be charged against the capital of the first trust fund. There is no necessity for any order for the Defendant's costs, but the costs of the remaining parties are fixed as follows:

(a) To the Plaintiff the sum of $1,000 plus disbursements.

(b) To Mrs Price the sum of $750 plus disbursements.

(c) To Miss Patricia Cootes the sum of $600 plus disbursements.

(d) To Mrs Nunes $250 plus disbursements.

P.D. Ineson J.

SOLICITORS:

Miller & Poulgrain, Thames for Plaintiff
Glaister Ennor & Kiff, Auckland for Defendant
Johnston Prichard Fee & Partners, Auckland for Mrs Price
Goddard, Moran, Finlayson & Co., Wellington for Miss Cootes
Saunders & Co., Christchurch for Mrs Nunes