IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

(3)

No. A.137/84

IN THE MATTER of The Family Protection Act 1955

A N D

IN THE MATTER of the Estate of AITKEN late of Christchurch, Widow, deceased

1331

BETWEEN D[illegible] of West Melton, Christchurch, Apprentice, and J[illegible] of West Melton, Christchurch, School Pupil, by their Guardian ad Litem L[illegible]

Plaintiff

A N D DICKSON of Christchurch, Widow as Executrix and Trustee of the Estate of AITKEN deceased

Defendant

Hearing: 11 December 1985

Counsel: D.J.R. Holderness for Plaintiff
Carolyn Risk for Defendant

Judgment: 13 DEC 1985

JUDGMENT OF HOLLAND, J.

This claim under the Family Protection Act 1955 is brought on behalf of the two infant grandchildren of the testatrix who died a widow leaving her surviving only one child, the father of the plaintiffs who himself died some eight months after the death of

the testatrix. The testatrix was 68 years of age at her death and left a modest estate of a net value of approximately $25,000 comprising cash in bank accounts $2,450, motor vehicle $7,300, personal chattels not valued, debenture stock $16,500. Under the terms of her will made on 2 May 1983, some two months before her death, the testatrix provided that the whole of her estate was to go to the defendant, Dickson, if she should survive her. Mrs Dickson did survive the testatrix and accordingly is the sole beneficiary. The will provided that in the event of the earlier death of Mrs Dickson there should be a legacy of $2,000 to be divided between her two grandchildren, the plaintiffs, and that the residue of her estate was to go to her foster daughter,

H.

The testatrix changed her will frequently. Evidence of nine wills made between 1956 and her death in 1983 were produced, including particulars of their contents. I have not in the circumstances found the contents of the wills of assistance. It was only in her last two wills that the testatrix disinherited her son, but no evidence is produced to give any reason for the change of testamentary disposition at that time. In the absence of such a link, evidence of earlier wills is not generally of assistance to the Court. The question which must be decided is whether at the date of death the testator was in breach of duty to those to whom she owed a duty under the Act. Whether or not in previous testamentary dispositions subsequently revoked she was in breach of such duty or recognised such a duty will only rarely be of assistance.

The defendant, Mrs Dickson, who is described as a widow, first met the deceased over 30 years ago and was matron of honour at the wedding of the deceased to her second husband from which marriage there were no children. Her second husband died in or about 1957. Mrs Dickson was housekeeper for the deceased for almost 30 years until the date of death. It is apparent however that the relationship was much closer than one of housekeeper and at the very least was one of housekeeper/companion.

On 28 May 1965 the testatrix and Mrs Dickson by deed jointly undertook the guardianship of H a female child born on 5 March 1965. The deed was signed by the child's mother. They jointly cared for the said child as their foster daughter. She is now 20 years of age. She is not a direct beneficiary under the will, nor is she a person entitled to claim under the Family Protection Act 1955.

The testatrix and Mrs Dickson pooled their resources, living in the same house or flat which changed from time to time. There were instances when their residential property was owned by the testatrix, but at the time of death they were in a rented property in respect of which they pooled their income and jointly paid outgoings. The testatrix and Mrs Dickson came to an informal arrangement concerning the making of their wills and what they described as their shared responsibility towards H Joint instructions were given to solicitors in July 1982 to prepare the wills recognising that each had a first responsibility to each other and that on the death of the survivor some small provision should be made for the grandchildren, the plaintiffs, but the balance of the estate would be bequeathed to H Wills

were prepared accordingly and later wills have confirmed this informal arrangement. Mrs Dickson made a will on 2 May 1983 in similar terms to the will made by the testatrix but substituting one for the other and with exactly the same provisions in the event of the death of the primary beneficiary.

The plaintiffs' father was the only son of the testatrix by her first marriage. He died at the age of 44, some eight months after his mother from heart problems. He was known to be seriously ill with heart problems at the date of death of the testatrix and it is acknowledged by Mrs Dickson that that fact was known by the testatrix. The plaintiffs' father married their mother on 20 April 1963. They are both boys now aged 18 and 15. On the marriage of the plaintiffs' parents they were permitted to reside rent free in a house property in Christchurch owned by the testatrix. They paid all the outgoings on the property and effected some improvements. They resided in the property for seven years until it was sold in 1970 for some $9,000 yielding apparently an equity of $5,182.61 of which the testatrix received $1,000 and the son of the testatrix $4,182.61. Although no formal gift statement was made, this was a gift by the testatrix to her son.

Immediately after the sale of this property the plaintiffs' father and mother purchased another property in Christchurch for $10,900 which they sold six months later for $14,000. They then purchased a hotel near Hokitika. That hotel was purchased with assistance of mortgage finance but the cash provision required was obtained from the sale of the residential property. The cost of the hotel was $14,000 together with $10,630 for goodwill, $70 for the licence, $2,500 for furniture and plant, and

stock of $800. That hotel was sold in 1982 after some twelve years of management by the plaintiffs' parents for $140,000. After the sale of the hotel, the plaintiffs' parents purchased a property out of Christchurch for $163,000 which was registered as a joint family home and which has passed to the mother of the plaintiffs by survivorship. Its current government valuation is said to be $140,000.

There is some dispute on the affidavits as to the relationship between the testatrix and her son. For 12 of the last 13 years of the life of the testatrix the son was resident away from Christchurch. That of itself explains some distancing in relationships. There is no evidence of any disentitling conduct on behalf of the son, nor on the other hand is there any evidence of any particular services rendered by the son to his mother which place him in a category different from the simple relationship of mother and son.

The elder of the plaintiffs left school two years ago and is employed as an apprentice with a furniture manufacturing firm. He has a motor car, the purchase of which was provided for him by a loan from his father but which has now been totally repaid to his mother. The younger plaintiff is in the fourth form at Lincoln High School and is in good health. The elder plaintiff is earning $148 per week net. The estate of the plaintiffs' father had a net value of $208,000 if the property acquired by the plaintiffs' mother on survivorship is included. The estate, apart from the house property, included a mortgage from the purchaser of the hotel near Hokitika which has only this week been repaid for approximately $50,000, life insurance of $8,000, two horses valued at $2,500, a

motor vehicle valued at $2,400, bank accounts of $750 and a tavern premises licence valued at $10,000 but which is for sale and has not been sold. The list of assets and liabilities as at the date of his death included a mortgage to the National Bank of $10,000 presumably secured over the joint family home. The evidence does not disclose whether that mortgage has been repaid. The plaintiffs' father under his will left his total estate to his widow, their mother.

The claim is out of time and it is necessary for leave to be granted as the originating summons was not issued until just over one month after the expiration of twelve months from the grant of probate. The plaintiffs are both infants and may have an easier task in obtaining leave on that score alone, but the circumstances here make it clear that leave should be granted and no real opposition was made to the application for an extension of time. The proceedings are only just over one month out of time and no-one has been prejudiced by the delay. The reason for the claim no doubt arose substantially from the unfortunate death of the plaintiffs' father some eight months after the death of his mother. It is clear that it is a case where leave should be granted and it is granted accordingly.

The circumstances in this case are unusual. At the time of hearing there are no persons other than the two plaintiffs within the class of persons to whom the testatrix might have owed a duty under the Family Protection Act 1955. It was submitted by counsel for the plaintiffs that the defendant is a "stranger" and that if any obligation to Miss Haines is to be taken into account she also is a "stranger". If by "stranger" counsel meant that those two persons were not blood relations and were not persons entitled

to claim under the Family Protection Act 1955 then the submission is undoubtedly correct. In some of the cases residuary beneficiaries have been described as strangers. I am not aware of the term ever having been used in respect of a residuary beneficiary to whom the Court considers the testatrix had a moral duty to make provision in her will. This issue has been made clear in In re Sutton (1980) 2 N.Z.L.R. 50. After setting out a passage from Allen v Manchester (1922) N.Z.L.R. 218 at p221, the judgment says at p53:-

> "Neither in Allen v Manchester nor in any of the other leading cases cited to us in argument was the Court concerned with whether the moral claims to be weighed, in deciding whether there has been a breach of duty, are confined to those of persons eligible to claim under the Act. In principle we see no sound reason why that should be so. The key provision, s4(1) in the 1955 Act, states that if adequate provision is not available from the estate for the proper maintenance and support thereafter of the persons by or on whose behalf application may be made, 'the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons'. There is nothing in this to exclude from the factors open to consideration in exercising the discretion the competing moral claims of de facto dependants. The deceased's reasons for making or not making provisions may be taken into account, as ss11 and 11A recognise, and the wise and just testator would surely not be one to ignore moral claims on purely legal grounds."

As was said in Allen v Manchester where the estate is insufficient to meet in full the entirety of all moral claims "... in such a case all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims". I am left in no doubt that at the date of death of the testatrix the defendant and Miss H had

moral claims upon the bounty of the testatrix. The question that arises is whether in the light of those moral claims the failure of the testatrix to make any provision for her grandchildren was a breach of her duty under the Act. I have not overlooked that the testatrix made no testamentary provision for Miss H The Court is unable to make any provision for Miss H but there is no reason to doubt that the defendant will to the best of her ability carry out her part of the bargain with the testastrix and leave the residue of her estate to Miss H. The defendant is 76 years of age.

The plaintiffs are grandchildren. The principles to be applied in claims by grandchildren are expressed in In re Horton (deceased) (1976) 1 N.Z.L.R. 251 where the history of the varying provisions for claims by grandchildren are set out and discussed. Mrs Dickson has no assets of any substance other than the furniture in her flat and her interest in the estate. Her sole income apart from the estate is National Superannuation of $131 per week and she receives $15 per week board from Miss Ha The trustees in the estate have in fact advanced her $30 per week from the estate and she appears also to have had modest capital advances of just over $1500. It accordingly follows that the expectations of Miss H from her surviving foster parent are not likely to be high apart from what is left in the hands of Mrs Dickson from the estate of the testatrix.

I am not satisfied that the testatrix was bound at her death to make testamentary provision for her son. She was aware of the successful sale of the hotel property and was entitled to consider that her son was reasonably well to do and that she had

contributed substantially to his assets by her original gift of the equity in the house property in Christchurch. I mention this because I do not consider that the plaintiffs can advance their claim relying on any failure by the testatrix to make provision for their father.

Section 3(2) of the Act provides:-

> "In considering any application by a grandchild of any deceased person for provision out of the estate of that person, the Court, in considering the moral duty of the deceased at the date of his death, shall have regard to all the circumstances of the case, and shall have regard to any provision made by the deceased, or by the Court in pursuance of this Act, in favour of either or both of the grandchild's parents."

A relevant circumstance in this case and a dominant one is undoubtedly the poor health of the plaintiffs' father at the time of death of the testatrix and the very real risk which so shortly was converted into reality of his death at an early age. It follows that the testatrix should have foreseen that there was a real possibility of the plaintiffs being left without a father at a stage while they were still entirely or partially dependent on him. Another relevant circumstance, and almost of equal force, is the fact that the plaintiffs' father had assets of more than sufficient quantity to ensure that the plaintiffs were adequately maintained as children and provided with the necessary education to set out in life on their own. Similarly they could have expected an inheritance of no insignificant amount but not until the death of their mother who is now 42 years of age. I was also informed that the maternal grandparents of the plaintiffs are still alive but there is no evidence as to whether or not the plaintiffs might

receive any benefit on their death. I do not consider that the testatrix in contemplating the early death of her son should have contemplated that he was likely to make immediate capital provision available for his children on his death.

On the other hand, a relevant circumstance was the very real moral claim that the defendant had on the testatrix. This claim has been brought by the plaintiffs under the Family Protection Act and it may well be that not all evidence is before the Court in what might be described as irrelevant matters but the evidence nevertheless satisfies me that the defendant would undoubtedly have had a claim under the Law Reform (Testamentary Promises) Act 1949 if the testatrix had failed to carry out her part of the bargain with the deceased and not made testamentary provision for the defendant. I am equally satisfied that the testatrix owed a moral duty to her foster daughter which she fulfilled according to her lights by the arrangement she made with the defendant. Miss H is now 20 years of age and self supporting. She has had the benefit of the care, affection, maintenance and support both financially and otherwise of the testatrix and the defendant. She is not, however, a daughter. Her true mother is known to her and by arrangement the testatrix and Mrs Dickson became her guardians. It would have been helpful to have had more evidence as to Miss Haines' position and in particular as to what relations, if any, she has with her true mother. She apparently does have some relationship with her maternal grandparents. In any event I am satisfied it would be wrong to treat her moral claims to the estate of the testatrix in the same way as if she were a daughter or a legally adopted daughter. Her claim is less than that. Nevertheless, it is

apparent that Miss H has given the testatrix the pleasure of a close relationship akin to that of a daughter and the testatrix clearly recognised that she had an obligation to her. In this respect the testatrix was clearly right but the question that arises is whether the moral claims of the defendant and Miss H were of such an extent as to entitle her to disinherit her infant grandchildren whose father was very ill and likely to die at a young age. In this respect I consider that the testatrix was in error.

Although there may have been ample money to provide for the daily upkeep, maintenance and education of the grandchildren, she should have contemplated her obligation to her own grandchildren to provide them with a small fund of capital to give them some independence in this respect. Her assete were small. Of the $25,000 now available, $7,000 represents a motor car, and $2,227.50 represents furniture. I have no reason to doubt that the defendant will bequeath her estate to Miss H . The furniture and motor car may well to some considerable extent be wasting assets. Having regard to all the circumstances, I consider that provision should have been made for legacies for the grandchildren to be paid to them on the death of the testatrix. There will accordingly be an order varying the terms of the will by providing for a legacy of $3,750 to each of the plaintiffs to be paid to them upon their attaining their majority at the age of 20 but with a provision in the unusual circumstances of this case that in the event of either of them dying before attaining his majority the legacy is to fall into the residue of the estate and not to form part of his estate.

The plaintiffs are entitled to costs. There will be an order that the plaintiffs have costs in the sum of $1,000 which includes interlocutory applications, together with disbursements and other necessary payments to be fixed by the Registrar to be paid from the residue of the estate. There is no need to make an order for costs in respect of the defendant who is the residuary beneficiary and who is absolutely entitled to the residue.

A D. Holland J.

Solicitors:

Weston Ward & Lascelles, Christchurch, for Plaintiffs
Papprill, Hadfield & Aldous, Christchurch, for Defendant