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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A13/82

115

BETWEEN: THELMA HARTLEY of
Mangamutu, House-
Keeper

Plaintiff

v

A N D: VINCENT BERNARD
O'BRIEN of Pahiatua,
Farmer

RUSSELL RUTHERFORD
COOPER of Pahiatua,
Post Office Tech-
nician

Defendants

Date of Hearing: 19 February 1986

Counsel: J C A Thomson for Plaintiff
J H Williams for Defendant V B O'Brien
H C Hoogendyk for Defendant R R Cooper
B D Andrews for Grandchild S Steminger
P. Whitehead for A.M. O'Brien

Judgment: 5 March 1986

JUDGMENT OF JEFFRIES J

Plaintiff was the sister-in-law of Joseph Ignatius O'Brien, who died on 13 August 1981 and probate of his last will and testament dated 16 March 1978 was granted to the abovenamed defendants on 22 October 1981.

The deceased married relatively late in his life to the sister of the plaintiff. There were two children born to the marriage, namely O'Brien, (Tony) born on 1963 and Graeme Joseph Harold O'Brien, born on 12 May

1959. The latter son was killed in a motor accident in May 1980. Before his death he had formed a relationship with and by her he had a child Shaun born posthumously at Palmerston North or 1980. There is now no dispute that he is the father of that child and is therefore a grandchild of the deceased. Counsel has been appointed for him for the Family Protection proceedings which will be mentioned shortly. The deceased's wife died in 1964 when the two children were quite young.

Before giving details of the plaintiff's claim against the estate of deceased, it is convenient here to give details of his property and his dispositions. Deceased was a farmer on land in the Mangamutu district near Paiatua. By a trust deed dated 2 August 1974, deceased had settled for him a family trust to make provision for his sons Graeme and Anthony who were named as the beneficiaries. The trustees were directed to stand possessed of the trust funds for such of the beneficiaries as shall be living on 1 July 1984 as tenants in common in equal shares. The deed provided that if any of the beneficiaries shall have died before 1 July 1984, leaving a child who shall attain the age of 21 years, then such issue shall take the share of the parent. That eventuality occurred for it has already been stated Graeme died in 1980 leaving a son who now becomes a beneficiary in the trust. The deceased in his lifetime transferred to the family trust one half share of the farm land at Mangamutu.

The last will of the deceased dated 16 March 1978 appointed the named defendants as trustees and made certain specific bequests. One bequest was to give plaintiff an equal share in a beach cottage at Foxton together with Russell Rutherford Cooper and his wife, Judith A Cooper, the latter being plaintiff's daughter by her marriage in circumstances which will be described hereafter. There was a further bequest of furniture and personal effects equally to his two sons. The remainder of the property was to be held on certain trusts whereby the annual income would be paid equally to the two sons during their lives

and the other share of capital of each was to go to their children respectively. The will included a gift-over in similar terms to that contained in the trust, and that also now operates and Shaun becomes a beneficiary in the estate taking his father's share. The will provided that plaintiff was to be paid for looking after the deceased's children. Some payments were made for a short time but have long since ceased. I was informed that there has been no distribution of any income as at the date of hearing of this action.

It is appropriate here to mention related proceedings under the Family Protection Act in which the surviving son

is plaintiff seeking further provision from his father's estate. It was agreed by all counsel that for the purposes of this action I was to have full access to the papers filed under the Family Protection proceedings. Those proceedings were called in Court at the time of the action and it was agreed by all counsel that the evidence on the action should be heard and after a decision, which it was rightly anticipated would have an effect upon the estate property, the Family Protection Proceedings could then be heard and decided upon.

I return now to the facts of this case. The deceased almost immediately following the death of his wife in 1964 approached the plaintiff with a proposition that she come to live on the farm and take care of his two children and for that she would have a home for the rest of her life and he would look after her and her two children. In a question addressed by the Court plaintiff confirmed that she was told by the deceased that she would have a house for the rest of her life, even before she moved to the farm property. At the point this proposition was put to the plaintiff she was separated from her husband and had two young children. One of those children later married Russell Rutherford Cooper, one of the executors and the share in the Foxton property is with him and her daughter.

After this proposition was put to her she said that almost straight away she left her own house and went out to the farm. At the time she was on a welfare benefit. From the time she took up residence on the farm, she stated in her evidence she kept house for Mr O'Brien and the two families combined and in the words of plaintiff "we all lived as one happy family". She said that deceased's children regarded her as their mother and called her mum. This was confirmed in evidence which will be reached shortly. In the rest of the evidence, short though it was, of the plaintiff she stated she took full participation in farm management and worked as an active, interested wife of a farmer would do. That lasted throughout the time she was on the farm with the deceased until his death in 1981. After his death she continued to occupy the farm with deceased's son Tony until they were given notice by the executors and as a result she left the farm and went to live in a house in Pahiatua which was purchased by deceased's son Tony from proceeds he had received from the estate of an uncle. Mrs Hartley still lives in that property although Tony is living back on the farm.

I should here mention that each of the executors was separately represented by counsel in these proceedings, it being made clear to the court that there is an unhappy situation between them. Mr Williams stated on behalf of the executor Mr V B O'Brien, who is a younger brother of the deceased, that he had been advised not to take any part in the proceedings because of his ill-health but in so far as the court should be made aware of his attitude, Mr Williams said he wished it to be known that the will should be upheld without alteration. However, Mr Williams effectively took no further part in the proceedings, offered no cross-examination of any witness called on behalf of the plaintiff, and made no submissions as to the law. Ms Hoogendyk for the other executor, Mr R R Cooper, plaintiff's son-in-law, and Mr B D Andrews for the grandchild Shaun Steminger, informed the court they abided the decision; they

offered no cross-examination and made no submissions. Only the plaintiff called witnesses.

Plaintiff called _____ surviving son of the deceased to support her claim notwithstanding he is the plaintiff in the Family Protection proceedings. He gave unqualified evidence in support of plaintiff's evidence and he informed the court that it was not until he was about 10 or 12 years of age that he discovered plaintiff was not his real mother but in fact his aunt. Notwithstanding the attitude conveyed to the court of the executor Mr V B O'Brien, his own wife was called to give evidence. she being present in the courtroom under subpoena. She also gave positive confirmatory evidence of the fullness of the life led by plaintiff in the family of the deceased from the time she went to live on the property until his death. Apparently she and her husband, together with deceased and plaintiff, socialised together regularly over the years up until about three weeks before his death. Another witness, being a neighbouring farmer, also confirmed Mrs Hartley's evidence as to the extent of her involvement in the family and farm.

On the evidence as presented to the court and particularly by the attitude and manner of the way the case was handled by the formal defendants to the claim, and the grandchild through his counsel, the court has no hesitation in accepting that Mrs Hartley has made out her claim under the Law Reform (Testamentary Promises) Act 1949. Her claim is for the sum of \$75,000.00 being the value of the testamentary promise. No specific evidence was placed before the court about values of properties but a submission was made by Mr Thomson that that is about the value for a reasonable home in the district. The court feels entitled to take notice of that submission and accept it, especially as there was no challenge. When the promise was made by deceased Mrs Hartley would then have been in her mid-30s and the deceased a man many years her senior. She is now in her mid-50s and requires a dwelling for the rest of her life.

The value of the estate property available for distribution pursuant to the will is somewhere over \$250,000.00 and an order in the terms requested can be met. There will therefore be judgment for the plaintiff in the sum of \$75,000.00 together with costs and disbursements and witnesses expenses as fixed by the Registrar.



Solicitors for Plaintiff: Cooper Rapley & Co, Palmerston North

Counsel for V B O'Brien: J H Williams, Esquire

Counsel for R R Cooper: Ms H C Hoogendyk

Counsel for Shaun

Graeme Steminger: B D Andrews, Esquire