10/11 NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY A.30/81

NOT RECOMMENDED

LOW PRIORITY

1677

IN THE MATTER of the Family Protection Act 1955

BETWEEN THELMA MARGARET HYDE of Cambridge, Married Woman

Plaintiff

AND WALTER HOLLAND MILICICH of Tauwhare, Farmer and THELMA MARGARET HYDE of Cambridge, Married Woman as executors of the will and trustees of the estate of the said WALTER MILICICH, deceased

Defendants

Hearing and Judgment: 29 October 1986

Counsel: J. Milne for the Plaintiff
A.L. Hassall for the First Defendant in personal capacity and G.W.Milicich and W.C. Milicich and D. Spencer
W.J. Scotter for P.R. Hyde
J.P. Doogue for Trustee
G.E. Gay for J. Mander

ORAL JUDGMENT OF DOOGUE J

These are proceedings under the Family Protection Act in which relief is sought from the estate of Walter Mililcich, late of Cambridge, retired, deceased, afterwards referred to as the Deceased.

The proceedings were commenced by his daughter, Mrs Thelma Hyde. In addition there is a claim by her daughter, Mrs Jennifer Mander, a grand-daughter of the Deceased, to which I will refer later. I intend to refer throughout to the members of the family of the Deceased by their first given names.

The proceedings have been marked by some of the matters which too often arise in claims of this sort, a failure to file an address for service, apparent omissions in service by all parties, lengthy affidavits attesting to facts of little relevance to the claims, and the like. These matters may well have exacerbated the dispute. I do not refer to any of that here. They are not helpful in resolving the real issues.

I do, however, refer to proceedings by the Plaintiff against the estate of the Deceased under the Law Reform (Testamentary Promises) Act 1949. These first came to my notice during the course of the argument for those opposing relief. Mr Milne, for the Plaintiff, undertook those proceedings would be discontinued and this judgment proceeds on the basis that that will be done, as plainly this Court has no ability to properly determine the present claims unless the corpus of the estate of the Deceased is known.

The Deceased died on 18 August 1980, aged 84, leaving a last Will dated 31 August 1979. The Deceased had married in 1922 but his wife had died in 1963. There were two children of the marriage, Thelma, the Plaintiff, born on 21 April 1923 presently aged 63 years, and Walter, born on 9 November 1924, presently aged 61 years. Both married. Thelma's husband is still alive. They have two children, Phillip aged 33 and Jennifer aged 32. Walter's wife is dead. He has three children - two sons, Wayne and Graham both aged 32, and one daughter, Diane, aged 28.

There are four Testamentary Dispositions by the Deceased before the Court.

The first is a Will made in 1963. After certain specific gifts to Thelma and Walter they shared the residue equally between them. There was a 1969 codicil to that Will which altered the specific gifts but Thelma and Walter remained the only beneficiaries, again sharing the residue equally.

In 1973 there was a second Will which left the Deceased's estate shared between Thelma and Walter. Again there was specific gifts with the residue shared equally. Neither the first nor second Will shared the whole of the estate in equal shares between Thelma and Walter but it would appear that in a rough and ready way the second Will at least came close to that.

In 1978 there was a third Will which radically altered the previous pattern. Neither Thelma nor Walter were mentioned at all. The whole of the estate of the Deceased was left to four of the five grandchildren, leaving aside a specific bequest relating to a grandfather clock. Wayne, Graham and Diane each received 20% of the estate and Phillip 40%. The 1979 Will altered that again, principally in favour of Wayne and Graham. It provided for Wayne and Graham to share equally the Deceased's remaining interests in the family company, Ardnalea Holdings Limited, and a debt to the Deceased by their father, Walter. The residue was then shared as before

with Wayne, Graham and Diane each receiving 20% shares and Phillip a 40% share. Jennifer has not been mentioned in any of those Wills.

I turn now to the question of inter vivos gifting. Because of the reliance put on this topic by Mr Hassall for those opposing relief, it is as well if I mentioned this subject now. I would first make it clear that I do not intend to refer in any detail to each and every gift made by the Deceased to either Thelma or Walter or their children during the course of his lifetime. It is apparent that the Deceased was generous to his family and, as will be seen when I come to the nature of his estate, that he effectively disposed of much of it prior to his death. There were, however, arguments between counsel and the parties they represent as to the extent of the gifting. It is apparent from Thelma's own affidavits that she was the recipient of various properties, shares, and gifts, from her father. So, however, was Walter. To some extent it is apparent that the father endeavoured to treat the son and daughter equally, for example he gave each a half share in various sections at Leamington. Most of the gifts to Thelma were made between 1964 and 1973. They included a section at 58 Wordsworth Street, although at the same time or earlier a similar section had been given to Walter; four sections and two bachs at Kaipara, the exact value of these properties at the time of gifting is not known; $2,000 of New Zealand Steel shares, whether that was the face value of the shares or their market value at the time of gifting is not known although the

affidavit of Mr Shirley, on behalf of the trustees, indicates that at the time of gifting there may have been 1200 shares valued at $1536; a half share in sections at Leamington in 1969 when similar gifts were made to Walter; a house and land at Williams Street, Cambridge; certain cash gifts, it is not clear whether the cash gifts relate to the forgiveness of indebtedness in respect of property transactions or are entirely separate. There is also some uncertainty as to a runabout and an outboard motor. Mr Shirley's affidavit discloses gifts in favour of the Plaintiff totalling $17,686, although it may be, as Mr Hassall properly submitted, that that affidavit does not disclose the full position in respect of some of the properties already referred to above. There is, however, no doubt, as I have already said, that the Deceased was generous towards his children. The relevant factor which Mr Milne pointed to in respect of those gifts to Thelma was that only one had been made subsequently to the second Will in 1973, namely a gift of $4,600 on 15 October 1976. I should perhaps record, however, that the gift last in time before that gift was one on 11 October 1973 of $3800 which was virtually contemporaneous with the date of the second Will of 15 October 1973.

There was a similar gifting programme in respect of Walter. It was not identical. Mr Shirley's affidavit also deposes as to those gifts of which a firm of which he is a partner has records. Suffice to say, that it showed total gifting to Walter between 1955 and 1975 of $19,986 of which two

gifts of $6,000 each had been made after the date of the second Will. The relevance of the second Will is of course that that is the last of the Deceased's testamentary dispositions which provided for his children with the subsequent Wills being for the benefit of his grandchildren.

In addition to the gifts deposed to by Mr Shirley, there were three further gifts to Walter which were comprised in the Deceased's notional estate totalling $17,433, giving a total gifting from father to son of $37,419 on the materials before the Court. In addition there was other gifting by the Deceased to the grandchildren in various ways which I do not intend to refer to here.

I now turn to the nature of the Deceased's estate at death and its nature at the present time. It is simplest if I describe the estate in relation to the manner in which it has been distributed under the Will.

First there are the Deceased's interests in Ardnalea Holdings Limited consisting of a loan by him to that company of $20,107 and his shares which at death were valued at $3500. In addition there was his unsecured loan to Walter of $34,750. This part of his estate which, under his last Will goes to Wayne and Graham in equal shares, totalled at death $58,357. The residue of the estate totalled about $44,290 with a total estate of about $102,646. Those are the values at death.

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The position now is that the loan to Ardnalea Holdings Limited is $35,012, the value of the shares in that company is $4600, the unsecured loan to Walter remains the same at $34,750. The total of these assets which, under the Will, pass to Wayne and Graham in equal shares, now totals, if my arithmetic is correct, $74,362 or thereabouts. The residue of the estate is substantially increased and is now approximately $106,550 with the total estate now being of the order of $179,017.

I should make clear that some of these figures are the result of some of my own arithmetic and are not necessarily totally accurate but they give a clear guide to the general order of things.

The effect of the Will at death would have seen Wayne and Graham each receiving the specific bequests of $29,000 and a little more, with Wayne, Graham and Diane each receiving 20% of approximately $44,290 and Phillip 40% of that amount. The effect of the Will, at the present time, is that Wayne and Graham would share the specific bequests and each receive a little more than $37,000, whilst the residue to be shared in the same proportions is, as I have mentioned, of the order of $106,550.

The position of the claimant at death of the Deceased, so far as her financial position is concerned, was deposed to by her in paragraph 48 of her first affidavit of

8 June 1981. I will not refer to the whole of that and the following paragraph in detail. Paragraph 48 disclosed that Thelma and her husband had net assets of approximately $93,600 and paragraph 49 disclosed that in the previous 12 month period for which figures were available, her husband had earned, through his company, the sum of $5418 approximately. Her financial position at the present time is deposed to in paragraph 33 of her affidavit of 29 January 1986. In that paragraph Thelma said that neither she nor her husband were working and neither of them were able to work for health reasons. She then set out the joint assets of the couple which include their unencumbered house at 58 Wordsworth Street, Cambridge, which had a 1985 Government valuation of $61,000; a 1983 Toyota Cressida motor car which they had purchased at some time for $19,000; money invested by them totalling $90,000; a bach at Whitianga which they had purchased on 1 April 1984 for $44,000; a sum of $3,000 set aside for a special sewage rate in respect of the Whitianga property; Building Society shares worth approximately $5,000; the usual personal belongings; and an older car upon which they place no value. Their income, at that time, was National Superannuation, combined with interest on their loans. The interest rates in respect of the money invested by them were 13.5% on an investment which matures in January 1987 and 10% on $50,000 lent to their son Phillip.

I now turn to the position of the beneficiaries under the Will and of Walter, their father. I do not intend to

traverse the details of the positions of each of the grandchildren. They are all, including Jennifer, who is not mentioned in the Will, in roughly similar positions of being people in their late twenties or early thirties who are going through the vicissitudes of life at that age. All of the boys are people with professional academic qualifications. All of them are in roughly comparable economic positions. None of them put forward any particular reason why they should be the recipient of the bounty of the Deceased. There is nothing in the affidavits made by them which indicate that any one of them has any particular call on that bounty. Walter, who makes no claim against the estate, deposed in a general way to his assets and income in his affidavit of 17 May 1983. There has been no updating information since that date. The information given by him at that time showed that he had very substantial assets and a comfortable income for that time.

I mentioned at the commencement that Jennifer has also made a claim against the estate of the Deceased. This claim was not referred to in either of her affidavits lodged in these proceedings. It was first raised from the Bar. It appears to be conditional upon the nature and extent of the relief that I may or may not grant to the Plaintiff. I can only say, at this stage, that upon the information set out in her affidavits, which I do not intend to traverse in detail, she is in no better position than any of the other grandchildren to mount a claim against the estate of her grandfather and should it be relevant I would find against her

claim. I will not refer in detail to the principles applicable to claims by grandchildren against the estate of a Deceased as I do not regard it of particular relevance in the circumstances of this case where her circumstances are comparable to those of the other grandchildren and she could not make out any better claim for relief than any one of them. If any of them had been bringing claims against the estate then, in my opinion, they would have been doomed to failure. Nor do I intend to refer in any detail to the considerable family background and personal circumstances of the various members of the family put before the Court. It would be unhelpful to the proper determination of this case to do so. I have already indicated that it is a case where there is considerable affidavit evidence disputing various minor matters of little relevance to these proceedings. To deal with it in detail would only further inflame the existing acrimony between the two branches of the family.

The overall picture one gains is of a family which for many years had close co-operation and good relationships between its branches. The Deceased, as I have already indicated, was generous in his ways, and Thelma and Walter were in turn generous and dutiful in their responses to him. He was plainly well looked after by his children during his lifetime. I am not quite clear from the papers before me at what time the rift occurred either between the Deceased and Jennifer and perhaps Thelma or between the two branches of the family, Thelma's and Walter's. It is clear, however, from the papers

that those two branches of the family have different perspectives of the Deceased and of various matters in contention between them.

I intend to refer to some of those matters in contention in a general way only in the hope that it may enable them to reconcile the rift between them. It is clear from the affidavits lodged by Thelma and members of her family that they had a different appreciation of the Deceased from Walter and his family and by other deponents of affidavits filed on behalf of Walter and his family in opposition to the claim by Thelma. It would appear to be entirely understandable that that should be so. Thelma and her family were living next to the Deceased. She was at his beck and call in quite a different way to Walter and his family to the extent that there was in fact an emergency bell system installed in her home for the Deceased to use if necessary. With herself and her family in such close proximity to the Decased it is, as I have said, entirely understandable that the attitude of her family in respect of the nature of the Deceased should be rather different from those further removed. One has a picture of an elderly man making demands upon the daughter nextdoor which would not necessarily have been made upon Walter or his family. It is also apparent from the affidavits of the Plaintiff which, despite some submissions to the contrary, I have no reason to disbelieve that the Deceased did make substantial demands of his daughter at various times and particularly after the death of his wife. It is, however, to

the credit of Thelma and Walter that neither of them have endeavoured to discredit the assistance that the other gave to their father in during his lifetime. It is understandable that with the acrimony engendered by the content of the last Will and these proceedings they both now seek to emphasise theirown part in assisting their father in their different ways but neither of them have denied the efforts made by the other of them. It is appropriate that I mention that Thelma comments in her affidavits where she appears to have been critical of Walter, particularly, for example, in respect of his efforts in building up the family business which contributed largely to the estate of the Deceased, were based on what her father had told her and not on her own observation or beliefs. Her father, understandably, had a different perspective to the efforts made by him and his son to that held by Walter. Most of the other matters of apparent dispute between the two branches of the family can be explained in such ways, not all perhaps, but most. Plainly something occurred at the time of Jennifer's wedding and later when Thelma was in hospital to disturb the Deceased's attitude towards them both. It would seem likely that the reasons given by Thelma of her father resenting her absence during those periods is the correct one. At the time of Jennifer's wedding in England in 1977, Thelma was away for some five or six weeks. In 1978 she suffered a heart attack and was again absent from her home for several weeks. But none of these matters are really relevant to whether or not Thelma should be receiving relief from the

estate of her father. I mention then in the hope that the family may put them to rest.

The principles to be applied in cases of this sort have recently been affirmed in the decision of the Court of Appeal in Re Leonard, [1985] 2 NZLR 88, which dealt with approval with what has been said in the earlier decision of the same Court in Little v Angus, [1981] 1 NZLR 126. I do not need to refer to those decisions or earlier decisions in any detail. I have to consider whether the Deceased has been guilty of a breach of the moral duty which a loving father owes towards his daughter. This is to be determined at the date of death. Did the Deceased act as a wise and just Testator properly considering the differing needs of those to whom he owed a moral duty? This was an estate which, at time time of death, could be said to be in the first category referred to in Allen v Manchester, [1922] NZLR 213, namely it was a relatively small estate where the Deceased had to appropriately consider the competing claims of those to whom he primarily owed his moral duty rather than a large estate where, having considered those to whom he owed a duty, he was entitled within the bounds established by the cases to do as he pleased with his estate. A significant circumstance in the present case is that it appears that the Deceased in his last Will has totally ignored his moral duty to those with the first call on his bounty, namely his children. It is understandable that he should have done so in the case of Walter as it would appear from the affidavits before the Court, first that Walter was in a

substantial position and, secondly, that it may well have been that Walter preferred to see his children being the recipients of the share of the estate which he might otherwise have expected to have received. Be that as it may, it is apparent that the Deceased has not addressed himself to the position of his daughter. Mr Hassall sought to justify the form of the Will by reference to the apparent belief of the Deceased that he had discharged his moral duty to both Thelma and Walter by his very considerable gifts of money and property during his lifetime. He submitted that such a reason was entitled to great respect by the Court and further submitted that viewed objectively in relation to the facts such a reason was a good reason.

I do not intend to refer to the detailed submissions made by counsel in respect of this aspect of the matter. This is not because of any disrespect to the careful submissions made to me but I do not feel that it is a case which would be assisted by lengthy extracts from either the affidavits or the submissions. As is already indicated by my reference to the position of Thelma at death, she and her husband were, at that time, in modest circumstances with what appears to have been a low income or relatively low income for people at their time of life. It is true that she had been the recipient of various gifts from the Deceased during his lifetime, and I have referred to those of consequence which were clearly drawn to the attention of the Court. Nonetheless, as I have indicated, the position at the time of death of the Deceased could hardly

be regarded as one of substance and certainly could not be regarded as one where the Deceased could appropriately ignore his moral duty to consider her position. It is true that neither she nor her husband were destitute by any means but, having regard to the risks of life ahead of them, nor could it be said that their level of comfort was such that the Deceased could properly ignore her in his testamentary dispositions.

I am satisfied therefore that there was a breach by the Deceased of his moral duty to the Plaintiff and that her right to look to his estate for relief is properly made out.

With all respect to the submissions by Mr Hassall, in this case, as I see it, the real questions are what is the proper level of relief and what is the proper incidence of such relief. Paterson, Family Protection and Testamentary Promises in New Zealand, Butterworths 1985, paragraph 12.6 page 184 refers to what the author sees as the current position in respect of claims by adult children. He ends the paragraph with the following statement:-

> "The proper approach is still that adopted by the Court of Appeal in Mudford v Mudford, [1947] NZLR 837 to consider the claim of each child on an individual basis, albeit on perhaps a more generous scale than might have been applicable at the time that Mudford v Mudford was decided."

Mudford v Mudford, as is apparent from the quotation just given, involved a claim where there were competing claims by adult children and is dissimilar from the present case where

the beneficiaries of the Deceased are his grandchildren with a lesser claim upon his bounty as is evidenced by the views of the Courts in such cases as Re McGregor, [1960] NZLR 220 approved on appeal, [1961] NZLR 1077 and confirmed by the Court of Appeal in Re Horton [1976] 1 NZLR 251. It cannot be said that the Plaintiff's present position is one of discomfort or destitution. I have already set out the position of herself and her husband and it indicates a couple with modest capital reserves in the event of there being a rainy day or in the event of their income reducing for reasons beyond their control. Neither are capable of working because of factors relating to health.

For the Plaintiff Mr Milne submitted that as a minimum the Plaintiff should receive the net residue of approximately $106,550. He was supported in this submission by counsel for both of Thelma's children, Phillip and Jennifer. Mr Hassall, for his part, resisted such a claim, not only because he resisted any relief from the estate but also because it would result in a re-making of the Will and would incidentally extinguish the shares of both Diane and Phillip and substantially reduce the shares of Wayne and Graham.

In every case of this sort the amount which the Court might award at the end of the day is, to some extent, a figure plucked out of the air in an endeavour to do justice in circumstances where there can be no mathematical right answer.

I am certainly not persuaded to the view put to me by Mr Milne and Messrs Gay and Scotter in support of his submissions. I do not think it appropriate that I give such relief to the Plaintiff that it requires a re-writing of the Will in the way in which that would occur if Thelma were given half the estate. No particular emphasis was put on it by counsel but I have taken into account, as I believe I am entitled to take into account, the change in asset position of the different parts of the estate between the date of death and the present time.

Doing the best I can with the material before me, in an endeavour to do real justice not only to the Plaintiff, Thelma, but also incidentally and entirely as an incidence of the order I intend to make, I would hope, between the families, I intend to award Thelma $75,000. That should put her in a sufficiently comfortable position to be protected for the balance of her life. So far as the incidence of such an order is concerned, I intend to order that the first $15,000 should come from the assets in respect of which the specific bequest has been made to Wayne and Graham, namely the Deceased's interests in the family company, Ardnalea Holdings Limited, and the unsecured loan owing to the estate by Walter. I intend to order that the balance of the sum of $75,000, namely $60,000 should come from the residue. By those means the pattern of the Will of the Deceased at the date of his death will not be effected at all but justice will, in my view, have been done to

Thelma's claim, leaving the pattern of distribution of the Deceased's estate as it was at death.

That is the order I intend to make in respect of the merits of the matter. I order that those parties that Mr Hassall represents should receive $3,000 costs together with disbursements to be fixed by the Registrar, that the Plaintiff should receive $3,000 costs together with disbursements to be fixed by the Registrar, and each of Jennifer Mander and Phillip Hyde should each receive $500 costs together with disbursements to be fixed by the Registrar. I order that all of such costs and disbursements should come out of the residue of the estate.

Solicitors for the Plaintiff: Tompkins Wake & Co
Hamilton

Solicitors for the First Defendant in personal capacity and G.W. Milicich and W.C. Milicich and D. Spencer:
O'Neill Allen & Co
Hamilton

Solicitors for Claimant P.R. Hyde:
Harkness Henry & Co
Hamilton

Solicitors for Trustee: McCaw Lewis Chapman
Hamilton

Solicitors for J. Mander:
Edge Beech and Norton
Auckland