

NOT
RECOMMENDED

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.276/82

IN THE MATTER of the Family Protection
Act 1955

1190

AND

IN THE MATTER of a claim for further
provision in respect of the
estate of ROSEMARIE ELEANOR
MULLER

BETWEEN

FRANZ JURGEN MULLER

Plaintiff

AND

TIMOTHY RUSSELL RITCHIE
and DAVID JOHN STOCK as
Executors of the Will of
ROSEMARIE ELEANOR MULLER

Defendants

Hearing: 7 August 1986

Counsel: Mr Fox for Plaintiff
Mr Weston for Defendants
Mr Davidson for Infant Children

Judgment: 7 August 1986

ORAL JUDGMENT OF WYLIE, J.

This is a claim by the husband of the deceased under the Family Protection Act for further provision out of the estate.

The deceased died in 1982 leaving a will dated 18 March 1980 under which, after making some minor bequests, she left all her furniture and personal effects to the plaintiff absolutely, released to the plaintiff any debts which he might have owed, gave the principal dwellinghouse owned by the deceased which was the matrimonial home to her trustees to permit the plaintiff to have the use, occupation and enjoyment thereof during his life so long as the children

or any of them lived with him, but with the proviso that if all of the children ceased to be living with the plaintiff and if the husband should have remarried or be living as husband and wife with another person then his right of occupation would cease and the property would fall into the residuary estate. The residue of the estate was given to the children of the marriage equally.

The testatrix also devised to the trustees her two-third interest in a property in Trafalgar Street, but in fact that interest in the property had been transferred by the testatrix to the plaintiff after the date of her will, but prior to her death, the transfer being effectively by way of gift.

The plaintiff and the deceased were married in the United Kingdom in July 1969 and had lived in New Zealand since shortly after that date. There were two children of the marriage, now aged 14 and nine respectively. Both children are at private schools and their school fees are currently being paid by the parents of the deceased. The school fees have to an extent been prepaid for the anticipated school period, but it is likely there will be a deficit which will have to be met either by the grandparents or by the estate as time goes on.

The estate is quite substantial. Apart from the matrimonial home in Mersey Street, the assets have a balance sheet value of some \$218,000. The Mersey Street home is estimated to be worth in the region of \$70,000 to \$80,000.

The testatrix became ill in 1979 and at that time the plaintiff gave up employment to care for her and the children. He was by occupation a chef. He had previously engaged in a business venture in a restaurant, but this had not proved successful. He has effectively given up his occupation and the best earning years of his life in order to look after the testatrix initially and since her death, to give his full-time care to the children which he continues to do.

The plaintiff seeks an order vesting the Mersey Street property in him absolutely. He also seeks an order, if such be necessary, that he be not required to elect between the transfer of the interest in the Trafalgar Street property and the other benefits given to him by the will.

I am satisfied in all the circumstances that the plaintiff is entitled to the orders he seeks. They are not really opposed either by the trustees or by counsel appointed to represent the infant children. In my opinion the testatrix failed to make adequate provision for the plaintiff. The marriage was of quite long standing. It is true that the plaintiff may have contributed little to the assets of the testatrix and indeed he has little in the way of assets of his own, but such as he has, namely the balance remaining from the sale of the Trafalgar Street property, about \$18,000 he has lent interest free to the estate so that the estate is even now receiving the benefit of such assets as he has.

Having regard to the devotion which he has demonstrated both to the testatrix and to the children by giving up his

employment and devoting himself full-time to their care, I am satisfied that the testatrix should have made a more secure provision for him for the future and I accept the submission that it would be unreasonable for the plaintiff to be at risk of being ousted from the matrimonial home on the children leaving home and in the event of the plaintiff seeking to remarry.

Accordingly I make an order that in lieu of the provisions in Clause 5 of the will of the deceased, there be substituted a devise of the Mersey Street property absolutely to the plaintiff and I further order in case the doctrine of election applies, about which I am not entirely convinced, that the plaintiff is entitled to retain the proceeds of the sale of the Trafalgar Street property as well as all other benefits given to him under the will without being put to election.

Counsel are agreed on appropriate orders as to costs and I adopt the figures agreed by them. There will be an order for costs payable out of the estate for the plaintiff in the sum of \$750, plus disbursements to be fixed, if necessary by the Registrar, and for Mr Davidson as counsel representing the infant children, in the sum of \$500, plus disbursements to be fixed, if necessary. The Trustees do not seek an order.

Solicitors: White Fox & Jones, Christchurch for Plaintiff
 Weston Ward & Lascelles, Christchurch for
 Defendants
 Young Hunter & Co., Christchurch for Infant
 Children