

14/3

3

NOT RECOMMENDED

X

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

A348/81

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the estate of ANTHONY CIAM  
late of Wellington, Mechanic,  
deceased

122

BETWEEN HELEN TSAMBOROPOLOS of  
Wellington, Machinist

Plaintiff

A N D

JOHN BENTLEY MORRISON of  
Wellington, Solicitor, as trustee  
and executor of the Will of the  
said ANTHONY CIAM deceased

Defendant

Hearing: 3 February 1986

Counsel: C.M. Stevens for Plaintiff  
R.C. Laurenson for Defendant  
M.F. Quigg for N. Ciamaropol

Judgment: 27/2/86

---

JUDGMENT OF HERON J.

---

This is an action brought by the daughter of the deceased against the executor of the estate, for further provision out of the estate of the deceased. The deceased died on 25 May 1981. The deceased left an estate which comprised a three flat property in Newtown, cash savings of \$1400 approximately, a superannuation fund entitlement of approximately \$32500

including salary and holiday pay, and miscellaneous chattels worth \$4000.

The affidavit by the executor as at the date of hearing reveals that the estate excluding the superannuation fund which has been distributed, has a value of approximately \$150000.

The deceased was a member of the Denhard Bakeries Ltd Superannuation Fund, and nominated pursuant to that fund, his daughter and his brother in equal shares to receive any amount that he would be entitled to in that fund. In the event the sum of \$34,000 was payable to the deceased who died during the course of his employment, and both the Plaintiff and the deceased's brother have received that sum in equal shares. The deceased's will made in 1972 left his estate equally to the Plaintiff and his brother.

The deceased's brother is aged 54 and lives in Rumania. He is a driver for a state owned organisation, is married and has no dependents. It seems that he succeeded to the estate of his mother after the death of his father, who had a life interest. The deceased, whilst nominally a beneficiary of his mother's estate apparently took no interest pursuant to it. The deceased's brother filed an affidavit in the proceedings and has attempted to deal with some of the matters at issue between the parties in New Zealand. At best it can be said it is difficult to come to grips completely with his circumstances, and the Court is simply without any appreciation of the

brother's likely standard of living in that country, or to what extent it would be enhanced by a bequest to him.

The deceased's wife had arrived in New Zealand in 1957, and they were married on 25 June 1957, and their only child, the Plaintiff was born on 7 November 1958. The parties separated in 1965. The Plaintiff continued to live with her mother. The deceased, a Rumanian, had arrived in New Zealand in 1953. He was apparently a skilled engineer and worked at Denhard Bakeries Ltd for a number of years prior to his death. He was killed when a dough mixer was accidentally operated whilst he was carrying out cleaning work on it. The deceased's former wife gave evidence and described a somewhat tumultuous marriage with some violence, which ended with a separation when the Plaintiff was only seven years old. The Plaintiff has lived with her mother ever since, but in the same locality as the deceased. The Plaintiff says that the association with her father was always difficult. He worked at night, and notwithstanding her attempts to build a relationship with him he was difficult to approach, often being moody and offhand, and that the conditions of his employment were such that it was not easy for a little girl to see him during daylight hours. The Plaintiff has indeed had difficult times since she was quite a small girl.

In December 1981 when the proceedings were first commenced in this case, she deposed to the fact that she had been born with some handicaps in that she had claw feet, a shortened right leg

and had a degree of cerebral disfunction which continued to cause her difficulties. She produced an orthopaedic report which recommended the need to have a tendon transfer procedure and the need to wear some form of padded shoe in the future. In 1969 there were indications on an EEG consistent with grand mal epilepsy. She was treated at the Home of Compassion, where she stayed for about two and a half years. She had difficulties emotionally and Professor Weston described it as follows:

"This was a tragic situation in many ways. A child who did not relate well to her mother, and spending a significant period away from her family at a critical stage of development. She did not have enough outside interests and associations to stimulate a more normal psychological development. It appeared that both mother and child may have become even more dependent on each other with a rather unusual attachment in spite of their antagonism. This abnormal relationship stifled Helen's normal development."

He concluded:

"That her inter-personal relationships will be affected for life, her range of employment was limited."

There were some further reports provided by the Psychological Service of the Department of Education which in summary showed difficult but not impossible circumstances as to future employment. Her mother had acquired a small flat in Riddiford St, Newtown at the time of the separation largely from contributions from her parents in Greece. She spoke then about contributions from her father and apart from regular maintenance payments up to the age of 16, nothing additional was paid notwithstanding that she continued her education beyond that date. It was plain also that the Plaintiff was regarded as something of a misfit amongst her school companions

and she was having difficulty in managing at school and indeed described it as being an unhappy time. On leaving school as late as age 19 she obtained some employment. In her earlier affidavit she spoke of genuinely trying to form a relationship with the deceased, but that had proved impossible. She says that her interest in music, which had been encouraged and for which she received lessons, was not paid for by her father despite requests that he should do so. It is difficult to know what to make of this evidence but on any view of it it seems plain that an adequate father and daughter relationship was not established.

By her recently filed affidavit she has brought the situation up to date. From December 1981 until June 1983 she maintained employment at Databank as a disc operator, but there were limitations on the amount of income she could earn. On 1 June 1983 she suffered a very serious motor accident which brought employment to an end. Following the accident she has been assessed as having a 60% permanent disability for the purposes of the Accident Compensation Act. She had a number of broken limbs and other injuries, but the most serious one was brain damage. Notwithstanding the accident and the pre-existing disadvantages, to her credit the Plaintiff has endeavoured even now to obtain work and has endeavoured to undertake further training. She has been able, as a result of the lump sum compensation to go overseas and obtain further medical advice. Some criticism of this visit was made but it was combined with a visit to her grandparents. No doubt the cost of the trip has

materially affected her financial position and made some inroads into the compensation money she has received. She is now awaiting an operation on her eardrum and also to one of her eyes. She has not had the further treatment recommended in respect of her pre-accident disability.

In her recent affidavit she expresses more directly the attempts she made to construct a satisfactory relationship with her father. She says that she endeavoured to go to his house almost every day after school and was met with hostility on occasions, and lack of enthusiasm on others. Her evidence is to be contrasted with the evidence of Mrs Laird, who described the deceased as being anxious to further the relationship and with an abundance of affection for his daughter. It may well have been that the personality of the mother made it difficult for the father to develop a proper relationship with his daughter. That there was no proper relationship in my view is beyond any doubt, and is confirmed to some extent by the evidence of Mrs Fitzgerald. I think it is clear that the daughter would have had a much different attitude to her father and his home than that observed by Mrs Fitzgerald if the relationship had been as Mrs Laird portrayed it. I think the Plaintiff was, for whatever reason, substantially deprived, not only because of the physical disabilities that she had during her childhood, but arising from the results of the relationship between her father and mother. She deserved better from her father, who in every aspect of his conduct which has been examined in these two cases has emerged as a somewhat selfish individual.

Late in 1979 it would appear as if there were some attempts to put the relationship on a better footing, and there was an exchange of gifts and some socialising between father and daughter. There was nothing in her conduct that could be criticised, she had little influence over events, being under the influence either of her mother or being subjected to the negative reactions of her father. It is plain she was entitled to her father's estate to a much greater extent than the deceased's brother could ever have contended. That was so having regard to the events as they stood in 1981 and of course the situation has been made worse by the serious motor accident in 1983. In my view there was a serious breach of moral duty by the testator in allowing his estate to be divided equally and in considering that the interests of his daughter were equal to the interests of his brother.

One must look at the breach of moral duty, if there is one at the date of death, but I have found that without difficulty.

In endeavouring to determine what may be done to remedy that breach, I am entitled to have regard to the circumstances as they now apply, and that without doubt requires that the bulk of this estate should be left to the Plaintiff. I have already assessed the entitlement of the Plaintiff in the Testamentary Promises action at \$12,500, but as I make clear in that decision I have done so only after reaching a conclusion as to the respective merits and claims of the beneficiaries in the

estate, as I am required to do under Section 3. In this case not only have I had regard to those entitlements but I have had to adjust them for the clear breach of moral duty that exists here. I am also entitled to have regard to the benefits already received by the deceased's brother and the Plaintiff pursuant to the superannuation provision. In my view that enables me to extend any relief the Plaintiff is entitled to as against the deceased's brother to a greater extent than might otherwise have been the case.

Mr Stevens suggested a token payment together with costs is all that the deceased's brother is entitled to, that the situation of the Plaintiff is such that it demands all that the estate can provide. There is some merit in that submission but I think I should preserve the brother's entitlement to an extent. Not to do so might otherwise appear to be a wholesale re-writing of the will. The estate is not large, having regard to the demands on it, but it is sufficiently large in my view to sustain the deceased's brother's provision to a small extent.

I have not ignored either the information contained in the affidavit of Haralambou Papadopolos to the effect that monies were advanced by the Plaintiff's mother's family to the deceased to enable him to get started in business and to purchase his first property. Not only that but that family have helped in a material way with the support of the Plaintiff.



Mr Quigg submitted to me that having regard to the state of affairs at the deceased's death, a bequest of half the estate to her completely discharged the moral duty which the deceased undoubtedly owed. I cannot accept that submission. It might have been capable of being accepted if the Plaintiff had been a normal young woman with the prospect of a career and employment and who had not suffered at all during the period of her childhood. This cannot be said here. The Plaintiff was severely disadvantaged in my view. That is attributable in part to the actions of the deceased. He was required, so far as money could, to have made up to her the difficulties that the separation had presented, the absence of any fatherly companionship during the time that she was in the Home of Compassion and an acknowledgment from him that she stood in his estimation somewhat higher than his brother overseas. As I have said his brother did extend hospitality to the deceased, and he was entitled to have regard to that, but one might have thought that making the deceased's mother's estate available to his brother was sufficient in that regard.

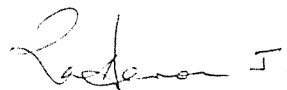
The size of the estate will allow the Plaintiff to house herself adequately without undue commitments, but it will do little more than that. There will be, I imagine, some small fund available to her, but it is unlikely that the estate can provide a source of income sufficient to render the intervention of the state unnecessary.

The dicta in Little v. Angus 1981 NZLR 126 calls for a flexible

approach to these matters and notions of adequacy must be looked at in the light of current standards and modern expectations.

The deceased's brother is entitled to retain the sum of \$10,000 together with a contribution towards costs of \$1,000 and approved disbursements to be paid out of the estate. The balance of the estate after the payment of the amount awarded under the Testamentary Promises action is to stand charged with the payment to the deceased's brother of the sum of \$10,000 and costs as fixed. Thereafter the balance of the estate is to go to the Plaintiff.

There will be leave to any party to apply for further direction if required to implement these orders.



Solicitors

Phillips, Shayle-George for Plaintiff

Scott, Morrison, Dunphy & Co. for Defendant

Perry Wylie for N. Ciamaropol