

IN THE HIGH COURT OF NEW ZEALAND  
ROTORUA REGISTRY

A 103/85

1072

IN THE MATTER of the Family  
Protection Act 1955

AND

IN THE MATTER of the Estate of  
T.C. CLIFFORD

BETWEEN J.M. CLIFFORD

Plaintiff

AND

D.G. TURNER

DEFENDANT

Hearing: 31 July 1986

Counsel: Mr Gittos for plaintiff  
Mr Blair for defendant

Judgment: 31 July 1986

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(ORAL) JUDGMENT OF HILLYER J

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This is a claim by a widow against the estate of her husband under the Family Protection Act 1955.

The plaintiff and the deceased were married on 20 June 1969. Prior to that time they had been living in a de facto relationship for approximately 4 years. They had both previously been married. The deceased's former wife died on 4 November 1961. The plaintiff was divorced from her previous husband on 4 June 1969.

The parties were separated in approximately June 1976, but it appears that the marriage had for all practical purposes, broken up in November 1974. A matrimonial property settlement was entered into between the parties on 12 April 1979, after proceedings had been issued in the then Supreme Court under the Matrimonial Property Act, 1976. Under that settlement, broadly speaking, the wife received the sum of \$20,000, and

the husband received the matrimonial home and business.

It appears that deceased suffered some mental difficulties, and it was suggested to me by Mr Gittos for plaintiff, that the matrimonial property settlement was not as much as the wife was really entitled to, and that she agreed because she wanted to bring the matter to a close.

Mr Blair for the residuary beneficiaries submitted however, that the settlement was a fair one. I do not propose to embark upon any detailed consideration of that matrimonial property settlement. The matter was dealt with and the factors I must consider under the Family Protection Act are the extent of the husband's estate, the extent of the wife's assets and the claims upon his bounty. If it was clear that the matrimonial property settlement was seriously unfair to the wife, it might be a matter that could be taken into consideration in Family Protection proceedings, but I think that would be only a peripheral matter.

What was being dealt with then was what part of the matrimonial assets belonged to the wife. What is being dealt with now is what part of the husband's assets should have been left to his wife.

The deceased left his estate to friends. The estate was directed to be divided into 8 shares, two of such shares were left to each of Mr & Mrs Brydon, one of such shares to Mr & Mrs O'Sullivan and one of such shares to each of Mr & Mrs Wilson. It is fair to say, I think, that none of the beneficiaries is in a situation of financial difficulty. Mr Brydon is a veterinary surgeon, his wife is or was a nurse. His net income was approximately \$30,000, and he owned a residential property, a clinic property and a motor car as well as other chattels. He and his wife appear to be comfortably off.

Mr O'Sullivan's salary is \$31,257 per annum. The O'Sullivans own their own property and a motor car. Mr & Mrs Wilson

are both retired. Mr Wilson has an income of \$7800 pa. They own their own home and have a car and presumably furniture, etc. No suggestion was made that any of these people were in need of financial support, other than the ordinary fact of life that anybody will appreciate being left something extra in the will of a friend. These beneficiaries clearly have endeared themselves over the last few years of his life, to the deceased.

It was about eight years between the date the deceased separated from his wife and his date of death. The beneficiaries under his will were made so, obviously because of the kindnesses they had shown and the comfort they had given to the deceased. There was however, no moral duty to make provision for them other than such moral duty as arises when people are kind to an aging, separated, sometimes unwell man.

The estate of the deceased comprised a dwelling valued at \$40,000 as at 24 July 1986 and short term investments and cash of the order of \$48,000. The liabilities were small and the net value of the estate, I am advised is \$80,795.88.

The plaintiff at the time of the deceased's death was working as a proof reader for the Bay of Plenty Times, but deposes that she retired from that employment on 23 April 1986 because at the age of 62 she was no longer able to cope with the long working hours and pressure of work required of her in a newspaper office. Her sole income is from the National Superannuation at the rate of \$245.80 per fortnight. She owns her own property which has been valued at 13 May 1986 at \$67,000. There was a mortgage of \$4000 on the property owing to a bank. That was repaid by the applicant's two youngest sons, and that

amount of \$4000 the plaintiff says is now owing to those two sons. She wishes to repay them, but there is no date fixed by which she must do so. Nor is she being charged interest on the debt.

As is made clear in re Churchill Deceased (1978) NZLR 744, the fact of a matrimonial property settlement will not prevent a claim under the Family Protection Act by the widow of a deceased. As I have earlier indicated in this judgment, the effect of a matrimonial property settlement is to give the plaintiff widow assets which will be taken into consideration in determining whether there was a breach of moral duty by the deceased husband in the provision he made in his will. To the same effect was a decision of Hardie Boys J, in re Barna unreported Invercargill 52/83 Judgment 1.5.85, and a decision of mine to which Mr Gittos tactfully referred me in the Dunedin Registry, Templeton v The Public Trustee judgment 19.2.85.

In my view there was a breach of moral duty by the husband. Although he was separated from his wife she was still his wife, and the matrimonial property settlement did not relieve him of any obligation to make provision for her in his will. In the matrimonial property settlement the obligation to provide maintenance was expressly reserved. The settlement said :

"It is expressly acknowledged that this agreement has been entered into independently of any arrangements as to maintenance or support, and any such arrangements as to maintenance or support form no part of the consideration of any of the obligations under this agreement."

The breach of moral duty of course, occurred at the date of death of the deceased, but in determining the amount that should be allowed to the wife in any award I make, I am entitled to take into consideration her present circumstances. It would, in my view, have been within the contemplation of a wise and just husband that when the

plaintiff reached the age of 62 as she now has, she would be unable to go on working and would need some further support. I must contrast the moral duty owed to the wife with the duty imposed by friendship, owed to the beneficiaries under the will, and the financial circumstances of the wife with those of the beneficiaries. It seems to me that she is in a worse financial position than any of the beneficiaries, and I am of the view therefore, that an award should be made to the extent of 50% of the estate.

There will therefore be an order under the Family Protection Act that the plaintiff receive one-half of the net estate of the deceased after administration costs have been paid. The remaining half of the estate will be divided amongst the beneficiaries in the same proportions as the deceased in his will divided his estate; he obviously having taken into account the different strengths of those beneficiaries' claims against him.

Counsel was appointed by the Court to represent the parents, brothers and sisters of the deceased. That counsel in a memorandum has advised that none of the parties whom he has been appointed to represent were entitled to claim under the Act, and that he would not therefore take any further steps in the proceedings. Costs of \$250 will be awarded to the counsel so appointed, Mr J.L. Saunders..

The costs of the defendant trustee will be paid out of the estate in the ordinary course of administration. Costs of the solicitors for the plaintiff and for the beneficiaries can be met out of the shares in the estate which pursuant to this order, will be given to those parties.

*P.G. Hillyer J*  
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P.G. Hillyer J

Solicitors  
 Sharp Tudhope & Co, Tauranga for plaintiff  
 Turner Scott & Blair of Tauranga for defendants  
 Dennett Olphert Sandford & Douthwaite representing relatives  
 of deceased.