

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 607/84

IN THE MATTER of the Family Protection
 Act 1955

A N D

IN THE MATTER of the Estate of
JESSIE CUSHION late of
 Auckland, Widow
 now deceased

BETWEEN

BRUCE ROY HOYLAND of
 Poroti, Farmer

Plaintiff

A N D

RUSSELL LENARD HAMILTON
GREEN and RODERICK MILTON
DOUGLAS STURM both of
 Auckland, Solicitors as
 Executors and Trustees of
 the Estate of the said
JESSIE CUSHION

Defendants

Hearing 22nd July 1986

Counsel J. W. Watson for plaintiff
 C. F. Foote for defendants
 M. E. Casey for certain beneficiaries

Judgment 13th August 1986

JUDGMENT OF TOMPKINS J

The plaintiff claims, pursuant to the Family Protection Act 1955, further provision from the estate of his mother, the testatrix, who died on 16th June 1983.

The will

The testatrix, by her will dated 3rd May 1983, bequeathed her home unit at Pakuranga to her brother, James Darby Delaney and his wife Catherine, in equal shares. She then bequeathed the residue of her estate to her two brothers, Leslie Glasier and Laurie Glasier, her neice Faith Delaney and her three grandchildren, the children of the plaintiff, Anne Vivienne Hill now aged almost 30, Judith Gayle Baldwin now aged 27 and Graham Bruce Hoyland now aged 24.

Mr Casey appeared for Mr and Mrs Delaney, for Messrs Leslie and Laurie Glasier and for Faith Delaney. The three grandchildren were not represented.

The plaintiff, the testatrix's only child, is not a beneficiary under her will. Mr Green, the solicitor who prepared the will, has, in accordance with the duty placed on the administrator by s 11A of the Act, deposed to the deceased's reasons for making the dispositions she did in her will and for not making any provision for the plaintiff. The testatrix told Mr Green that the plaintiff had three children and lived in Whangarei, that she had not heard from him since 1965 although her grandchildren had kept in touch with her. She gave Mr Green instructions that accord with the will as finally prepared. Mr Green pointed out to her that the plaintiff would be entitled to make a claim under the Act and advised that she should

consider the terms of the will before completing it. This she did. He discussed it with her on two or three subsequent occasions when she indicated her determination to proceed with her original instructions. The result was the completion of the will on 3rd May 1983, some three months after she had first consulted Mr Green.

The estate

The testatrix's estate consisted of the home unit she then owned at Pakuranga, some mortgage investments and cash in various savings accounts. The net value of the estate as at the date of death was \$75,147.56.

At the date of hearing the assets of the estate were

	\$
Mortgage due 20th September 1986	27,000.00
Short-term deposit	3,256.17
Pakuranga home unit valued at 11th April 1986	<u>73,000.00</u>
TOTAL	\$103,256.17

The family background

The plaintiff's parents were married on 19th June 1926. The plaintiff was born on 19th December 1926 - he is now aged 59. His parents were divorced on 27th August 1934. His father died on 16th October 1975.

On 22nd July 1955 the testatrix married William Albert Cushion. He died on 2nd September 1964. He had no children.

Following the divorce of his parents in 1934 the plaintiff, who was then aged 8, lived with his mother's parents on a farm at Tomarata near Wellsford, until he was 15. This farm was owned by the plaintiff's uncle, the testatrix's brother, Leslie Glasier, one of the residuary beneficiaries. When the plaintiff was 15 he moved to Auckland where he lived with the testatrix until 1955. That year he married. He and his wife then commenced sharemilking on Leslie Glasier's Tomarata farm as 50 per cent sharemilkers. The testatrix's husband, Mr Cushion, lent the plaintiff and his wife 2,500 pounds to assist in their commencing the sharemilking venture. This loan was paid back over five years.

While the plaintiff and his wife were sharemilking on the Tomarata farm they maintained a relatively close contact with the testatrix and Mr Cushion who were in the habit of visiting the plaintiff at the farm and staying there over a weekend several times a year.

The plaintiff and his wife ceased sharemilking for his uncle during 1966, having been on the Tomarata farm for 11 years. There is a difference in the evidence concerning the circumstances surrounding the termination of the sharemilking contract. According to the plaintiff, his uncle wanted them to

remain for a further five years but was not prepared to sell the farm to them. According to Mr Glasier, he offered to sell the farm to them at what Mr Glasier claims was a modest price, but that offer was declined. The plaintiff also says that his decision to leave his uncle's farm caused the testatrix to become upset with him as she wanted him to remain there as she regarded it as the family farm property.

During 1966, the plaintiff and his wife purchased a 133 acre dairy farm near Wangarei. In 1970 he bought a further 85 acres from a neighbour.

The testatrix had lived with Mr Cushion for some 12 years before their marriage in 1955. During the 1940's - the date does not emerge from the affidavits - the testatrix and Mr Cushion had built a house at Whitehaven Road, Glendowie. This was while the plaintiff was living with the testatrix before he started sharemilking. The plaintiff says that he helped with the building of the house by providing labour, carting bricks, digging out soil and laying brickwork. The testatrix lived in this house until some time towards the end of 1970 - again the date does not emerge from the affidavits - when she sold that house and purchased the home unit at Pakuranga where she continued to live until she died.

The plaintiff also claims that he provided some weekend assistance, providing labour to assist Mr Cushion building a bach

on a section he owned at Beachlands, a claim that is disputed by some of the beneficiaries.

The plaintiff's circumstances

The plaintiff and his wife continue to reside on their dairy farm of 218 acres at Poroti near Whangarei. It is farmed as a dairy unit. The plaintiff and his wife are both in good health. With them live one of their daughters now divorced, and her child.

The affidavits do not establish the value of the plaintiff's farm. He says that the latest government valuation is \$170,000 but does not state the date of that valuation. He refers by way of comparison, to a neighbouring farm sold for \$2,000 per acre several years ago which, if applied to the plaintiff's farm, would produce a value of \$350,000. The farm is subject to a Rural Bank mortgage shown in the latest accounts for the year ended 31st March 1986 at \$10,828. The plaintiff also deposes to owning a dairy herd valued at \$40,000 and farm implements and the like that he values at \$30,000.

The plaintiff's affidavits say little about his lifestyle but it is apparent from the above that he owns substantial assets, his liabilities are minor, he has a good income, so he could fairly be described as being financially well off. The

affidavits do not disclose the financial position or circumstances of his three children.

The beneficiaries under the will

Mr and Mrs Delaney, to whom the testatrix bequeathed her home unit, are the brother in law and sister of the testatrix. Mr Delaney is aged 71, Mrs Delaney is aged 72. It is apparent that there has been a very close relationship between Mrs Delaney and the testatrix throughout the testatrix's life and also between Mr Delaney and the testatrix since he married Mrs Delaney in 1937. The testatrix lived with Mr and Mrs Delaney for some two years after their marriage. They then assisted her into a flat where she lived until she started living with Mr Cushion in or about 1943. Mr Delaney says that he too helped with the building of the Whitehaven Road house, he having been a builder all his life. After Mr Cushion died in 1964 Mr Delaney states - and the plaintiff is not in a position to challenge this - that Mrs Cushion came to rely heavily on his wife and him for company. In about 1972 Mr and Mrs Delaney moved to Waihi but contact between them and the testatrix continued regularly. Mr Delaney helped the testatrix sell the Whitehaven Road property and purchase the Pakuranga home unit.

In mid 1982, some nine months before her death, the testatrix was diagnosed as having cancer. Mr and Mrs Delaney were then living in the testatrix's house. They visited her while she was in hospital, daily, then when she returned home they

nursed and cared for her until she died. Their assets now consist of some \$50,000 invested, household furniture and a car. Their income, apart from interest on the investment, is national superannuation.

Mr Leslie Glasier has lived in Australia since the plaintiff first started sharemilking on his Tomarata farm in 1955. He maintained some contact with his sister on visits to New Zealand and by correspondence. His affidavit does not disclose his financial position.

Mr Laurie Glasier is a meat worker who has resided in Taranaki since 1947. He too has kept in touch with the testatrix, visiting her between once and three times a year and also by correspondence. His affidavit also does not reveal his financial position. Nor is there any information in the affidavits concerning the financial position or personal circumstances of Faith Delaney, also one of the residuary beneficiaries.

The plaintiff's two daughters moved to Australia when they married. However they kept in touch by correspondence with the testatrix. When they both returned to New Zealand a few months before she died they visited her on at least two occasions. The affidavits do not reveal whether the third grandchild, Graham, maintained any contact with the testatrix.

Was the testatrix in breach of her moral duty?

The principles are well settled. They have been re stated in the Court of Appeal in two recent cases. In Little v Angus [1981] 1 NZLR 126 Cooke J said

"The enquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix and if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties."

In Re Leonard [1985] 2 NZLR 88 Richardson J said at 92

"The question of whether the testator was in breach of his moral duty to his daughters as claimants on his bounty must be determined in the light of all the circumstances and against the social attitudes of the day. Mere unfairness is not sufficient and it must be shown that in a broad sense the applicant has need of maintenance and support, but an applicant need not be in necessitous circumstances: the size of the estate and the existence of any other moral claims on the testator's bounty are highly relevant and due regard must be had to ethical and moral considerations and to contemporary social attitudes as to what should be expected of a wise and just testator in the particular circumstances."

It was submitted by Mr Watson for the plaintiff that the testatrix was in breach of the moral obligation that she owed the plaintiff and that the appropriate order to remedy that breach was for the plaintiff to receive one half of the estate or at least the whole of the residue. It was submitted by Mr Casey that, in all the circumstances, there was no breach of moral obligation by the testatrix and that the plaintiff's claim should fail.

A significant aspect of this claim is the estrangement between the plaintiff and the testatrix that lasted from the termination of the sharemilking contract with Mr Glasier in 1965 until the deceased's death 18 years later. The plaintiff gives two explanations for this rift. He says that she was angry with him for not staying on the Tomarata farm. This is disputed by certain of the beneficiaries who say that that was a matter of no concern to the testatrix.

The second reason for the discord was the plaintiff making contact with his father in about 1962. The plaintiff says although his mother's initial reaction was that it was all right, she became increasingly bitter at the knowledge of his having contact with his father. However obviously this factor would have ceased to have any effect on the testatrix when the plaintiff's father died in 1975.

The plaintiff did see the testatrix before she died. He visited her on 13th June 1983, three days before her death. He did so as the result of a request that he received from his cousin, Miss Shirley Glasier, the daughter of Mr Laurie Glasier, but it is apparent from his evidence that he was aware by what he had been told by his daughters, that his mother had undergone surgery for cancer some months before. That was not sufficient to persuade the plaintiff to endeavour to make contact with her.

Until this rift developed in 1966 there appears to have been a relatively close and harmonious relationship between the plaintiff and the testatrix. This is borne out by the testatrix's previous wills. The one she made in 1956 left her estate to Mr Cushion, but the one she made in 1959 left her estate to Mr Cushion if he should survive her, but if he did not, left her estate to the plaintiff. So it seems clear that whatever was the cause of the rift, it was the estrangement that followed - and continued until her death 17 years later - that caused the testatrix to make no provision for the plaintiff. Whatever may have been the cause of the rift it is clear that the plaintiff made no attempt to repair it or to re establish any sort of relationship with the testatrix, so this long estrangement, resulting in the loosening of the bonds between the plaintiff and the testatrix, is a matter properly to be taken into account in assessing the moral duty of the testatrix: Re Young (Deceased) [1965] NZLR 294, Hutchison J at 301.

In considering the extent of other moral claims on the testatrix's bounty the Court is not confined to considering the claims of those of persons eligible to claim under the Act: Re Sutton [1980] 2 NZLR 50. The testatrix was, in my view, clearly entitled to recognise the moral claims of Mr and Mrs Delaney. Of all her relatives it was they who provided her with companionship and support and it was they who nursed her through her final illness. Their resources are limited, so it is understandable that the testatrix would want to show her

appreciation by leaving them her Pakuranga unit. Once this claim upon her bounty is recognised then the balance of her estate - some \$30,000 - can only be regarded as modest.

In determining whether the testatrix was in breach of her moral duty to the plaintiff, it can be said in the plaintiff's favour that as a child he was deprived of a normal parental upbringing once his parents separated when he was aged eight. He maintained a close and apparently harmonious relationship with his mother until the estrangement in 1966 when he was aged 40. For that period he seems to have been a dutiful son, giving his mother such assistance as he could and welcoming her and Mr Cushion on their visits to the Tomarata farm. Also of some relevance is the nature of the claims on the testatrix's bounty by the residuary beneficiaries. Although her two brothers and at least the plaintiff's two daughters maintained some contact with the testatrix, it was not close, largely no doubt because of the geographical separation between them and her. So their claims on her bounty are relatively slight.

Against the finding of a duty is the 18 year estrangement and the absence of any evidence that the plaintiff endeavoured to re establish relationships with his mother until only days before she died. Then there is the further factor that the plaintiff is financially secure and in good health.

Having considered all these factors I have reached the conclusion, but with some hesitation, that the testatrix was in breach of her moral duty to make provision for the plaintiff.

An appropriate award

The factors that I considered in determining whether the testatrix was in breach of her moral duty are also relevant to the appropriate amount to award to remedy that breach. I do not regard the circumstances as justifying a substantial award, primarily having regard to the plaintiff's financial position and to the period of estrangement. I am satisfied that the bequest of the unit to Mr and Mrs Delaney should remain undisturbed. Having regard to the other persons whom the testatrix wished to benefit and the amount of the residuary estate, it is my conclusion that an appropriate award is for the plaintiff to receive one quarter of the residuary estate. Based on the figures supplied, allowing for costs, this should result in the plaintiff receiving about \$6,500.

There will therefore be an order that the plaintiff have further provision out of the estate of the testatrix by his being awarded one quarter of the residuary estate. The remaining three quarters of the residuary estate will be divided equally between the residuary beneficiaries named in clause 4 of the will. In all other respects the provisions of the will are confirmed.

The plaintiff and the beneficiaries are entitled to their costs out of the estate. Counsel may submit memoranda setting out the amounts they consider appropriate.

Chambers

Solicitors

Messrs Johnson Hooper, Whangarei, for plaintiff
Messrs Kendall Sturm & Strong, Auckland for defendants
Messrs Kensington Swan, Auckland for certain beneficiaries