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NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.24/85

LOW PRIORITY

1678

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of VIVIA MONA DEMPSEY late of Hamilton, Femme Sole, now Deceased

BETWEEN EUGENE FRANCIS HARVEY of Sydney, Australia, Sickness Beneficiary

Plaintiff

AND THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED a duly incorporated trustee company having its registered office at Auckland as Administrator of the Estate of the said VIVIA MONA DEMPSEY

Defendant

Hearing and Judgment: 30 October 1986

Counsel: Miss A. Fisher and Miss Calder for the Plaintiff
Miss B.M. Walsh for the Claimant K.E. Yuile
Miss C.M. Grice for A. Togiotama and Miss J.M. Burgess
C.M. Earl for the Trustee Defendant

ORAL JUDGMENT OF DOOGUE J

These are proceedings under the Family Protection Act 1955 in respect of the estate of Vivia Mona Dempsey, late of Hamilton, Femme Sole, now deceased. I will subsequently refer to her as the Deceased.

There are claims against the estate of the Deceased by the Plaintiff, as a son, who I will subsequently refer to as

the son, and by Mrs Kharen Regina Yuile, a grand-daughter, who I will subsequently refer to as the grand-daughter.

The Deceased died on 14 August 1984 leaving a last Will dated 22 May 1980. At death she was 76 years of age. The Deceased first married in the 1920's. She divorced that husband in 1952. He subsequently died in 1957. There were two children of that marriage, the Plaintiff, born on 4 November 1927, who will be 59 years of age in a few days time and a sister who died in 1946. Prior to that marriage, the Deceased had had a relationship with another man and gave birth to a son in 1925, Reginald James Colley, who later in life adopted the surname, Harvey. He is a minor beneficiary in the last Will. He brings no claim against the estate. Subsequent to the Deceased's divorce in 1952, she re-married a man called Tennessee Dempsey, previously known as Tennessee Togiotama, but this marriage did not last and the parties were divorced after a short period. There were no children of that marriage.

It was, however, during the term of that marriage that a brother of Tennessee Dempsey (Togiotama), the principal beneficiary under the Deceased's last Will, started boarding with the Deceased and remained boarding with her for some 30 years until her death.

The only grandchildren of the Deceased are the children of Reginald James Harvey, namely Brian Alrick Harvey

born on 1 June 1950, who makes no claim against the estate, and Kharen Regina Yuile, born on 19 January 1952, who is a claimant.

There are four testimentary dispositions of the Deceased before the court. The first was dated 3 December 1965. It principally provided for the maintenance of the Deceased's cats, dogs, and other pets, and for a friend, Gladis Jeffries, but if she died then Anda Togiotama, who I will subsequently refer to as the boarder, was to receive the residue of the estate after provision had been made for the cats, dogs and other pets of the Deceased and her other debts and duties.

The second Will before the Court was dated 1 December 1966. That Will left the whole of her estate in equal shares to the son and the boarder.

There is before the Court a file note relating to the second Will indicating that Mrs Jeffries had been excluded as for some time she had not been in contact with the Deceased.

The third Will before the Court is dated 20 September 1968 left the whole of the estate of the Deceased to the boarder. There is again before the Court a file note by the solicitor taking instructions in respect of that Will indicating that the son had been excluded because he had rendered her no assistance whatsoever and took very little interest in her. He had, however, been to see her a short time

ago, was thoroughly rude to her and her boarder, to the extent where the Police had to be called. She therefore did not feel disposed to make any provision in favour of the son in her Will. The file note continued:-

> "To be fair, however, I must comment that approximately one month ago she rang me during the weekend to ask me how she could get rid of Anda [her boarder] as he was misbehaving. I put this to her when she gave me instructions about the Will but her only comment to me was that, "He was alright"."

Nothing turns on the allegations made by the Deceased at that time in respect of her son or the boarder.

The fourth and final Will before the Court is that of 22 May 1980. That Will appointed the Defendant to be the executor and trustee of the Will and gave legacies free of duty to the son of $500, to the natural son, Reginald James Dempsey $100, and to "her friend and aide", Josephine Mary Burgess, the sum of $200. The whole of the rest of her estate, after the payment of debts, funeral and testamentary expenses and duties, went to her boarder.

There is evidence before the Court as to the nature and extent of the estate at death and at the present time. There is so little difference in the positions that it is enough to say that the principal asset in the estate is a house property in a rundown condition at 111 Rimu Street, Hamilton, which was valued at death and now at $33,000 and that, in addition, there was a cash sum which has varied very little between death and now and at present stands at $7,000. The

Court has been advised by counsel for the Defendant Trustee, and it is not disputed by other counsel, that the net cash asset, after expenses have been met, will be $6,000. That is before any legacies may be paid. The effect of the Will at death and now is therefore so close to identical it does not matter. There are the small pecuniary legacies. The boarder would take the balance consisting of the house property and cash of approximately $5,200.

The son has deposed to his position in his principal affidavit of 22 January 1985. I have been advised from the Bar that there has been no real change in his position since then. He has never married, he has no children, he lives in Australia in Sydney where he is a sickness beneficiary. All of his income is used in maintaining his board, lodging and living expenses. He has virtually no savings. He has no property of his own. He has no car. He is unable to work. He has arthritis which is kept in check with medication.

The position of the grand-daughter is disclosed in her affidavit of 17 February 1986. At that time she was in receipt of a Domestic Purposes Benefit of $439.96 per fortnight. I was advised from the Bar that it is now approximately $330 net per fortnight, less a sum of $39.85, whether that be weekly or fortnightly I am unaware, which is paid to the Housing Corporation for rent of a Housing Corporation unit. She [illegible] discloses that she has no assets other than [illegible] and that she acquired no

assets during either of her two marriages. It indicates that she has largely been self-supporting since she was 15 years old. She was married twice, first in 1971, with two children of that marriage born in 1972 and 1974. That marriage was dissolved in 1980. She re-married in the same year but separated from the second husband in May 1985. There were no children of the second marriage. She states that her eldest daughter suffers from allergies and also needs major dental treatment but that otherwise her children are in good health.

Her parents are divorced. Her father has not re-married. His financial position is not before the Court. The grand-daughter says that she approached him for some financial help. She received a video from him for her and a small monetary gift to one of the children. He has no immediate relatives other than her and her brother. He has retired and lives in Morrinsville.

Her mother has made an affidavit dated 17 January 1986. It refers to her knowledge of the Deceased and the Deceased's relationship with the boarder. However, that did not go beyond 1967. The mother, Mrs Hickman states that she is not in a position to provide the grand-daughter with any financial assistance. She says, that she re-married in 1970 but her second husband died in October 1984. She says further that she has, as a result of her second marriage, a house and a car which, under her Will, are left equally to the grand-daughter and her grand-daughter's brother.

The grand-daughter, in her affidavit, also states that she has suffered from poor health for the last ten or eleven years. She referred, in that affidavit, to the likelihood of surgery but there is no further information before the Court as to that.

The position of the boarder is set out in his affidavit of 30 May 1985, with the current position again being updated with information from the Bar. He was born on 29 April 1934. He works at Hutton's Bacon Factory. There has been a slight change of income between the date of death and the present, but not enough to be relevant for the circumstances of these proceedings. His present income is $210 per week approximately. He is in reasonable health. He has no savings or assets other than the items he bought for the Rimu Street property of the Deceased's over the years, including a fridge, deep freeze and other furniture. He has, however, contributed to an employees' superannuation fund and I am advised, from the Bar, that the present value of his interest is of the order of approximately $9,000. His parents are dead. He has not married. He has no children or other close relatives.

It is against that background that the present claims fall to be considered. All counsel referred me to the principles applicable in cases of this sort, with reference in particular to Little v Angus, [1981] 1 NZLR 126, which is referred to in the last reported decision of the Court of

Appeal on this topic Re Leonard [1985] 2 NZLR 88. It is unnecessary for me to refer in any detail to the principles applicable to claims by adult children such as the son.

It is perhaps worthy of mention that whilst counsel referred to various cases relating to the position of a grandchild claimant, no particular mention was made of the commonly referred to passage in the decision of McCarthy J, as he then was, in Re McGregor, [1960] NZLR 220, confirmed by the Court of Appeal [1961] NZLR 1077, which was again referred to, with approval by the Court of Appeal in In Re Horton, [1976] 1 NZLR 251. Perhaps the most helpful of the other references put before the Court was that of Re Sutton, [1980] 2 NZLR 50 where the judgment of the Court by Cooke J, as he then was, considered the position of moral claims by persons other than those eligible to claim under the Family Protection Act 1955. In that particular case it was a question of the position of a de facto spouse or dependants. In that judgment it was said:-

> "Neither in Allen v Manchester, [1922] NZLR 218 nor in any of the other leading cases cited to us in argument was the Court concerned with whether the moral claims to be weighed, in deciding whether there has been a breach of duty, are confined to those persons eligible to claim under the Act. In principle we see no sound reason why that should be so. The key provision Section 4(1) in the 1955 Act, states that if adequate provision is not available from the estate for the proper maintenance and support thereafter of the persons by or on whose behalf application may be made, "the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of the said persons". There is nothing in this to exclude from the factors open to consideration in exercising the discretion the competing moral

> claims of de facto dependants. The deceased's reasons for making or not making provisions may be taken into account as Sections 11 and 11A recognise, and the wise and just testator would surely not be one to ignore moral claims on purely legal grounds.
>
> The concept of moral duty has been used by the Courts in administering the Act and has been adopted by Parliament in the addition of Section 3(2), concerning the claims of grandchildren, in 1967. "The point is obvious that the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time". Re Wilson [1973] 2 NZLR 359, 362, per McCarthy P. If it ever was conceivable that a man did not owe a clear moral duty to a twenty year old girl with whom and with whose help he had set up a home, and who was bearing his child, that could not seriously be contended today."

Further on in the judgment this statement appears after references to such cases as Worthington v Ongley, [1929] NZLR 1167, Re Joslin [1941] Ch 200, Dillon v Public Trustee [1941] AC 294 and Bosch v Perpetual Trustee Co Ltd [1938] AC 463:-

> "When that approach is applied to the present case, it is evident that the testator was faced with a problem of distributive justice. There was not enough to go round. His modest estate had to be apportioned as fairly as possible between his legal wife and their four children and his de facto wife and their child to be born."

I have referred to that last passage because it bears distinct similarity to the present case. There is simply not enough to go around. The Deceased, as the Testatrix, had to determine who had the greatest moral claims on her bounty at the time of her death. In her Will made in 1980 she evaluated

those claims by making provision for her son to the extent of $500, to her natural son, who appears to have taken no interest in her whatever, of $100, to "her friend and aide" Mrs Burgess, who clearly had taken an interest in her, to the extent of $200, and to her companion and boarder for the last 30 years of her existence, or thereabouts, the balance of the estate. It is this disposition that the claims now call upon me to interfere with.

It is plain that within the limits of his abilities, the son kept in touch on and off over the years with the Deceased. As he was living in Australia and, as it appears that he has at no time been a person of means, it is fair to say that he probably did the best he could to keep in communication with his mother. It is plain that when he was aware of his mother being ill he came to New Zealand to visit her. It cannot be said that he has not been a dutiful son to her according to his lights and to the best of his ability. It is equally clear, however, that at no time has he been in a position to offer his mother the support and assistance which the boarder did living with her.

The position of the grand-daughter is one of a different nature. She has had no association whatever with the Deceased since she was a child and visited her with her mother, now Mrs Hickman. The first occasion that she appears to have evinced an interest in her grandmother since she last visited

her as a child, appears to be with this claim against her grandmother's estate.

The position of the boarder is the position of the person who has lived closest to the Deceased since 1954 or thereabouts. It is apparent from the information before the Court that the Deceased, at various times, had differing relationships with her son and the boarder, but that is common enough. What is clear, however, is that it was the boarder who provided her with companionship and support over the last thirty years of her life, and from 1979, when she was disabled and required constant assistance, the person who provided it for her. It is true that the Plaintiff, on his occasional visits, gave some assistance, but it was of a limited nature. The evidence indicates that the boarder, in one way or another, contributed his total wages towards the household. At the time of death he was paying some $40.00 board per week but it would appear that he and the Deceased ran the house as a joint enterprise with his means being applied as necessary.

The claimants have seen fit to criticise the boarder on the basis that he did not provide the Deceased with appropriate assistance for various reasons. They have first referred to the fact that the Death Certificate of the Deceased showed the Deceased's causes of death in intervals between onset and death were shown as pneumonia (12 hours), malnutrition (6-12 months), alcoholism (years). They have therefore suggested that the boarder could not have properly

provided for the Deceased if she was to die of malnutrition. There is no information before the Court of a medical nature as to the nature of the malnutrition, whether it was related to the alcoholism or otherwise. In any event, for those who have taken little or no care or interest in the Deceased, it falls badly from their lips to criticise the boarder who has plainly done the best that he could to care for the Deceased during her declining years. The boarder has indicated, in his affidavit, to which I have already referred, that since 1979 he carried out tasks of the following nature for the Deceased:- obtaining the food for the household, preparing and serving the Deceased's breakfast in bed, going home from work at lunchtime to prepare and serve her lunch in bed, after working doing such cleaning, washing and drying dishes as was needed, washing the Deceased, helping her change, changing the linen on her bed, helping her to the commode toilet in her room and putting her back to bed, emptying the commode, doing such nursing as she required. It may be that the standard of care which he gave her was not that of a professional person, but it is also apparent that for a number of years he gave her all the care and assistance of which he was capable. He was on the spot assisting her. The son was in Australia communicating only by an occasional written or telephone communication, with rare visits to New Zealand. The grand-daughter had no contact whatever.

The further branch of complaint by the complainants is the standard of the property of the Deceased. It is said that

if the boarder had properly provided for the care of the Deceased, the property would have been in a better condition. It may be that the Deceased and her boarder lived in a degree of squalor which may not have been to the liking of everyone. It is apparent, however, that there was no real difference in that between the years when the Deceased was capable of looking after herself and later times. For the boarder to be criticised for doing his best is inappropriate when the claimants have done nothing of the same sort except when the son was in New Zealand when it appears he did do something towards clearing the property. Although such criticisms were made of the boarder and reference was made to photographs annexed to the affidavit of the son of 22 January 1985, the photograph of the grounds of the house shows them to be in reasonable order and it may indeed be that the allegations made on behalf of the claimants are stronger than in fact could be supported by other evidence.

Other criticisms made of the boarder are that there were inadequate cooking facilities. However, the fact remains that the boarder has put his means into the household, regularly paid the Deceased board, and whilst those criticisms have been made by the Claimants, neither of them did anything to provide such assistance to the Deceased.

Thus when the circumstances are looked at in their totality, it could be said that the wise and just Testatrix on 20 May 1980 would [illegible] the boarder as the person with

the first call on her bounty, the person with whom her closest emotional relationship had been for some thirty years, the person who had paid her board throughout that period, who had given her such help as she had received from no-one outside the public health services over recent years apart from the spasmodic and small assistance of the son, and the only person who had had any form of caring relationship with her for years.

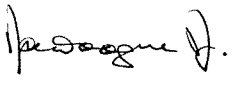
In those circumstances one would have expected the boarder to be the principal recipient of her bounty. That is not to say that she would have been able to ignore the proper call upon her by her son. It is apparent that in evaluating that in 1980, she put it somewhat lower than the boarder's value in providing only for a legacy of $500. Having regard to the respective positions of the boarder and the son, I doubt whether it can be said that she has fulfilled her moral duty to him. I will return to the position of the son in a moment.

So far as the grand-daughter is concerned, I would not have expected the Testatrix, given her limited estate and the calls on her bounty by both the boarder and her son, to have had any regard whatever for the position of the grand-daughter. It is questionable that the wise and just Testatrix would have even been aware of the existence of a grand-daughter who had not taken any trouble whatever to call upon her or have communiction with her. Be that as it may, in the absence of other information, the just and wise Testatrix was fully entitled to regard the grand-daughter as reasonably

provided for as a result of her having two living parents and as a result of her having had marital relationships and presumably a right to some form of matrimonial property I have no hesitation whatever in declining the claim of the grandchild.

So far as the son is concerned, the question is how one can make reasonble provision for him without disturbing the provisions of the Will and properly providing for the boarder. Exercising my discretion in the best way I can, I think the appropriate position which the Court should adopt is that the boarder should be entitled to retain the house property lived in by him for so many years but that the son should be the recipient of the cash residue in the estate after the payment of all legacies and debts and the distribution of the realty. I therefore intend to order that further provision be made for the son in the way that I have just indicated, namely, that after the payment of all legacies and debts of the estate and the distribution of the realty, that he should receive the cash residue of the estate.

I intend to make no order as to costs having regard to the size of the estate. If I were to order costs in favour of any party, I would need to order costs in favour of at least two of the parties. I feel that justice is better done to the son and the daughter for me to make no order as to costs.



Solicitors for the Plaintiff: Brandon Brookfield Towle & Beyer
Auckland

Solicitors for the Claimant K.E. Yuile:
Glaister Ennor & Kiff
Auckland

Solicitors for A. Togiotama and Miss J.M. Burgess:
Harkness Henry & Co
Hamilton

Solicitors for Trustee Defendant: McCaw Lewis Chapman
Hamilton