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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.182/84

NOT RECOMMENDED NZLR

956

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of ROSEMARY ELEANOR DU FAUR late of Ngunguru, now deceased

BETWEEN GUY JOSEPH DU FAUR of Ngunguru, Northland

Plaintiff

AND DAVID DU FAUR of Onewhero, and LENARD PLUMMER GRAHAM JOHNSON of Whangarei

Defendants

Hearing: 4 June 1986

Counsel: Mr Ruffin for Plaintiff
Mr Watson for Trustees
Mr Earwaker for Mrs Morgan
Mr Cato for Grandchildren
Ms Bates for Mrs Kuggeleijn

Judgment: 12 June 1986

JUDGMENT OF WYLIE, J.

This is an application under the Family Protection Act 1955 for further provision from the estate of the deceased made by her son the plaintiff.

The deceased, who was a widow, died on 28 December 1982. By her will dated 5 November 1980 she left the whole of her net estate, apart from minor bequests of some rings, to the plaintiff, to her daughter Katherine Louisa Morgan and to "her friend" Lesley Ann Kuggeleijn in equal shares. The plaintiff and Mrs Morgan were the deceased's only children.

The net estate at the date of death was worth some $115,000 and consisted mainly of the deceased's house property worth $65,000, a motor-car then worth $7,000, furniture and chattels worth some $6,400 and various investments, shares, debentures and a mortgage and savings totalling some $41,000 before payment of debts and funeral expenses. However, a memorandum filed at the hearing by counsel for the trustees and accepted by other counsel shows the present value of the estate to be $238,000. The main changes arise from an up to date market valuation of the house property at $150,000 and an increase in the cash and investments resulting, it seems, from prudent management by the trustees and a favourable share market. Apart from changes in the investments, the assets of the estate today are much as they were at the date of death. The plaintiff for reasons which will be mentioned shortly has occupied the house and has had the use of the furniture and car down to the present time. This was by arrangement and with the consent of the other beneficiaries and the trustees make no claim in respect of the plaintiff's occupation of the house or the use of the car and furniture nor in respect of any of the outgoings on the house which until now have been borne by the estate as a whole.

The plaintiff who is said to be about 40 years of age is in a poor state of health. He suffered a severe stroke in 1977 while in Australia with the result that he is now partly paralysed. Shortly after the stroke he began to suffer epileptic fits as a consequence of the paralysis and although at the time of the swearing of an affidavit by Mr Eyre, a neurologist, in August 1984 the plaintiff's epilepsy was in a state of remission, the risk of further seizures was still significant. In the opinion of Mr Eyre even a further three or four years without further seizures would not eliminate the risk of recurrence on the withdrawal of anti-epilepsy treatment and the risk of such recurrence would be significant - as he put it, possibly of the order of 33 to 50 per cent. There is also a chance of further strokes. In Mr Eyre's opinion the plaintiff's disability resulted in approximately 60 per cent impairment of his normal capacity and this is not likely to improve. Not surprisingly the plaintiff says he is unable to find employment and he is dependent on a sickness benefit. He does, however, have some degree of mobility and with difficulty is able to drive a motor-car. I am satisfied from the detailed evidence in Mr Eyre's affidavit that the plaintiff has no real prospect of obtaining regular employment. He has been in receipt of a sickness benefit.

The plaintiff has never married and has no dependents. His financial position, apart from the one-third interest in the deceased's estate is far from comfortable for one suffering his disabilities. He was entitled, as was Mrs Morgan, to a total of four-ninths of his father's estate, the father having died in 1978. One-ninth, amounting to some

$5,800, was distributable on the father's death, but the remainder was subject to a life interest to the plaintiff's mother. The one-ninth share not passing to the plaintiff and Mrs Morgan went to the deceased absolutely. As at the date of hearing the father's estate had been fully distributed, the plaintiff having received in total about $27,000. But as at the date of the plaintiff's second affidavit in March 1984 he had only $8,500 left in a bank account from a total received at that stage of almost $18,000. I was not given an up to date figure of his cash position and I can only assume that he now has in the region of $17,500. Apart from personal effects he has no other assets.

Mrs Morgan is married, aged now about 37. At the date of death of the deceased she had three children then aged seven, six and one respectively. A further child was born in in 1984. Mrs Morgan says that she and her husband are reasonably well off financially and are able to cope with some medical problems they have in their family. Commendably, Mrs Morgan through her counsel supported the plaintiff's claim even if this should mean some diminution in her own entitlement.

Counsel appointed to represent the grandchildren indicated there were no circumstances requiring any special provision for them, and he was granted leave to withdraw.

Mrs Kuggeleijn is married and is now aged 39. She has one child who was aged two at the date of death. Her husband is a school teacher, some 19 years older than her and thus

approaching retirement. Their circumstances are modest. Her husband's income as a teacher is about $28,000 p.a. They own a dwellinghouse in Hamilton worth, it is said, about $45,000 subject to a mortgage of $9,600. This house is let at $90 per week, but the family rent a house in Huntly where the husband presently teaches. Mrs Kuggeleijn herself does a little relieving work at her husband's school, but she is not a qualified teacher and her earnings in this respect are minimal. Because of her young child she does not have other employment. They own a motor-car worth $15,500 on which they owe $9,000.

It is desirable to explain the relationship between the deceased and Mrs Kuggeleijn which resulted in the latter becoming an equal beneficiary with the deceased's children. Mrs Kuggeleijn had been a close friend of Mrs Morgan for many years. They had flatted together and Mrs Kuggeleijn was a bridesmaid at Mrs Morgan's wedding. It seems that the deceased befriended Mrs Kuggeleijn who had come to New Zealand from Australia and came to treat her very much as a daughter. There clearly developed a close friendship between the two.

Unlike many such cases it is pleasing that in this there is little dispute as to the facts and none of the recriminations so often encountered. There was some reference in the affidavits to statements said to have been made by the deceased critical of her son, and also of her intention to cut Mrs Kuggeleijn out of her will. There was also some suggestion of difficulties between the deceased and the plaintiff over the trusteeship of the father's estate

which was vested in the widow, the plaintiff and Mrs Morgan. However, there seems to be little substance in these matters and I disregard them. It is clear from the plaintiff's affidavit which is not disputed, that he had a normal close relationship with his parents. He worked on the family farm without wages for a time. When he spent some years in Australia he frequently visited them in New Zealand had them to stay with him in Australia for some two and a half years, during which time he contributed to their travel and living expenses. There is nothing shown in the conduct of the plaintiff to suggest that he was other than a dutiful son or that in any way he had disentitled himself to the consideration which was his due.

On the evidence I am satisfied that having regard to the serious disabilities he suffers which existed at and prior to the execution of the deceased's will and which were well known to the deceased as the plaintiff was then living with her, the deceased failed to make adequate provision for his proper maintenance and support. I think the deceased failed to give adequate recognition to his disabilities, his lack of a home and his lack of assets other than those received and to be received from his father's estate.

I am conscious, however, that whatever sympathies the plaintiff may merit, the Family Protection Act does not authorise interference with the testator's wishes to any greater extent than is necessary to redress the breach of duty

by the testatrix. Had the house property represented a lesser proportion of the value of the estate I would have contemplated making an order which would have enabled the plaintiff to remain living in the family home, he having lived there now for a number of years. However, the value of the property in relation to the estate as a whole is such that to do so would, I think, err on the side of generosity and undue interference with the wishes of the testatrix. Moreover, the property is of a rather greater value than the plaintiff's circumstances justify. I must also recognise that the plaintiff has had the free occupation of the house, for now some three and a half years, and it should be mentioned that the value of that occupation was assessed at $21,460 by a registered valuer in a valuation included in the memorandum of up to date values produced by counsel for the trustees, (and to which other counsel took no objection). I think, however, that the plaintiff should be entitled to retain absolutely the chattels and motor-car of which he has had the use since the date of death. Eliminating these from the present value of the estate and making some allowance for costs of these proceedings and of administration and realisation there will remain assets of some $210,000 to $215,000 (based on the valuation of the property). I think the proper order to make is one which will enable the plaintiff to provide himself either by purchase or rental, with a somewhat more modest home, and leave a reasonable sum to provide him with some income.

I order that in lieu of the provision made for him by the deceased's will he be awarded absolutely the chattels (other than the rings, the specific bequest of which will remain unaltered) and the motor-car, absolutely and that he receive in lieu of one-third of the residue of the estate, one-half of the residue.

In my view the main burden of the additional provision for the plaintiff should fall on Mrs Kuggeleijn as a stranger to the deceased rather than on Mrs Morgan as a daughter, notwithstanding the apparently better financial position of the latter. Mrs Morgan's entitlement will remain at one-third of the residue although that will have been reduced to a minor extent by the exclusion of chattels and the motor-car, now to go to the plaintiff. Mrs Kuggeleijn's interest in the residue will be reduced to one-sixth.

As to costs all counsel were agreed that the costs of counsel for the grandchildren should be fixed at $750, and I so order, he having no other fund to look to. Counsel asked that I should fix costs for the other parties, except of course those of the trustees who need no order. Counsel for the plaintiff mentioned special difficulties in obtaining instructions because of the plaintiff's disabilities. Although the hearing was of short duration, the proceedings have been protracted and a number of interlocutory steps have been necessary.

I fix the costs of the plaintiff at $1,500, and of Mrs Morgan and Mrs Kuggeleijn at $1,000 each, such costs to be payable out of the residue of the estate. In addition the parties will have disbursements to be fixed, if necessary, by the Registrar.

Solicitors: Meredith Connell & Ptnrs, Auckland for Plaintiff
Johnson, Hooper & Co., Whangarei, for Trustees
Meredith Connell & Ptnrs, Auckland for Mrs Morgan
Mr Cato, Auckland for Grandchildren
McDermott & McIntosh, Huntly for Mrs Kuggeleijn