IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.878/84

664

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of VALERIE GEORGINA FIELDSEND of Auckland, Housewife, now deceased

BETWEEN LLOYD CLARENCE FIELDSEND of Auckland, Retired

Plaintiff

AND THE PUBLIC TRUSTEES, New Zealand, as Executor and Trustee of the said Estate of the said VALERIE GEORGINA FIELDSEND

Defendant

Hearing: 3 June 1986

Counsel: Miss J. Doogue for Plaintiff
R.D. Hindle for S.A. Fieldsend
B.J. O'Meagher for Defendant
A.H. Waalkens for Charities (given leave to withdraw

Judgment: 3 June 1986

(ORAL) JUDGMENT OF BARKER J

This is an application under the Family Protection Act 1955 in the estate of Valerie Georgina Fieldsend, late of Auckland, housewife, deceased ("the deceased"). She died at Auckland on 1 June 1984 at the age of 61. The claim is brought by her widower, the plaintiff; her only child,

Shirley Alison Fieldsend, now aged 20, also seeks further provision.

The deceased's last will was dated 12 March 1984; it left legacies of $40,000 to the Cancer Society, $40,000 to the Arthritis and Rheumatism Foundation; the residue of the estate was left to the plaintiff and to the daughter to be shared equally. The net value of the deceased's estate is now about $120,000. This means that the plaintiff and the daughter each receive about $20,000. The assets in the deceased's estate are now in liquid form; these assets came to her principally from the estate of the deceased's mother.

In a previous will dated 6 August 1982, the deceased provided that her estate was to be shared equally between her husband and her daughter. The plaintiff is now retired. He has assets worth about $230,000, including the matrimonial home which has always been in his name. His annual income is about $17,000 which includes dividends and interest from investments, plus superannuation.

The deceased's last will was executed some 3 months before her death from cancer from which she had suffered for the last six years of her life. The plaintiff is now aged 64. The plaintiff and the deceased were married for 24 years. Throughout that period, the plaintiff supported the deceased; there is no suggestion that theirs was not a happy marriage. There is no evidence of any loosening of the normal ties between husband and wife. The plaintiff looked after his wife for some 2 1/2 years before her eventual death when she was suffering from cancer; one can appreciate the strain that this must have caused for both the plaintiff and his daughter.

The officer of the Public Trustee who took the instructions for the deceased's last will, explained the

provisions of the Family Protection Act to her. He noted her reply that "her daughter would be reasonably well provided for from the estate of her husband on his eventual death". The plaintiff and the daughter concede that the deceased received, at very late stages of her life, assistance from the Cancer Society; they consider that there is some right to recognition of that charity. However, there is no evidence that the deceased had any connection with the other charity, the Arthritis and Rheumatism Foundation. There are no other competing claims other than those of the plaintiff and the daughter.

Clearly, in my view, the daughter has a claim for further provision. In giving her only child 1/8 of her estate, when that child had no assets of her own, was a clear breach of moral duty. I shall consider the quantum of the award to be made to her later.

Of greater difficulty, however, is determining whether the plaintiff qualifies for an award in the circumstances. In my view, there was a breach of moral duty; he was married to the deceased for 24 years. He supported his wife all that time. He looked after her, particularly in the last years of her life; these factors have found recognition in cases such as Re Wilson (Deceased), (1973) 2 NZLR 359 and In Re Harrison, (1962) NZLR 1077.

The difficulty is in assessing whether he has shown a need in view of his assets. However, in all the circumstances, particularly the absence of a competing claim other than that of the daughter, which claim he supports, I think that the plaintiff is entitled to some further provision; the quantum of that provision cannot be nearly as large as that which the daughter is clearly entitled to receive.

This was not a large estate where the deceased could really have afforded the luxury of leaving large sums to charity at the expense of those who had a clear moral

claim on her bounty. The observations made by Reed J in Pullins v. Public Trustee, (1922) NZLR 1022, 1029, are just as apposite today as they were then; he said:

> "A bequest to charity is fitting in the case of the testator who has ample means and can make such bequest without inflicting hardship on his own family, but when hardship is inflicted by an undue proportion of the testator's estate being disposed of in this manner, the Court I think will not feel at all hampered in making such provision as is considered fitting for the maintenance and support of those normally entitled to the testator's bounty."

The daughter is age 20. She had originally embarked on veterinary studies but is now at ATI training to be a nurse. She receives the standard tertiary bursary and accommodation allowance. She has another year of nursing training to complete; she has some $900 invested. There was no suggestion but that she is a sensible young lady.

In my view, she should receive a reasonable award from this estate which will help her as she starts her working life and which, when invested, will provide her with additional income. One would imagine that, if she were to marry or buy a home of her own, the award from the estate will assist her markedly.

Counsel addressed me as to whether there should be a discrimination between the charities because the deceased clearly had some connection with the Cancer Society, whereas she had none with the Arthritis and Rheumatism Foundation. I think there is a justifiable distinction there; I think that I should award more to the Cancer Society than to the other charity.

I therefore consider that the best way in which to make further provision for both the plaintiff and the daughter is in the following way:

(a) To reduce the legacy to the Cancer Society from $40,000 to $15,000;

(b) To reduce the legacy to the Arthritis and Rheumatism Foundation from $40,000 to $5,000;

This will mean that the amount for the charities is about $20,000. I consider that the residue of the estate should then be divided between the plaintiff and the daughter in the proportions of 30% to the plaintiff and 70% to the daughter. This will in effect mean that, in stead of $20,000 from the residue, the plaintiff should receive $30,000 and the daughter, instead of $20,000, will receive $70,000. In those circumstances, the plaintiff and the daughter do not need any order as to costs.

I award costs in favour of the two charities in the sum of $250 each with liberty to apply in case I have been unreasonably low in that award.

Counsel may care to produce a draft order which incorporates what I have said.

R. D. Barker J.

SOLICITORS:
Cairns, Slane, Fitzgerald & Phillips, Auckland, for Plaintiff.
Simpson Grierson Butler White, Auckland, for S.A. Fieldsend.
Bell Gully Buddle Weir, Auckland, for Charities.
The Solicitor, Public Trust Office, Auckland, for Public Trustee.