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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.571/84

LOW PRIORITY

109

IN THE MATTER of the Family Protection Act 1955

A N D

IN THE MATTER of the Estate of HILDA MARY CLAUDI FINLAYSON of Auckland, Widow, deceased

BETWEEN BEVERLEY ANN CAMPI of Auckland, Married Woman

Plaintiff

A N D MAURICE EMMANUEL BOWEN and MARTIN DAVID ROCHE both of Auckland, solicitors as executors in the estate of the said HILDA MARY CLAUDI FINLAYSON

Defendants

Hearing: 3 February 1986

Counsel: Stuart for Plaintiff
Hill for Defendants
Revell for Desmond John Hoare
Keene for Grandchildren

Judgment: 10 February 1986

JUDGMENT OF SINCLAIR, J.

In this application under the Family Protection Act 1955, the Plaintiff - a daughter of the deceased - sought further provision from her mother's estate. Mr Keene originally had been appointed to represent the grandchildren but as the Plaintiff was the mother of four of the grandchildren and Mr Hoare - the major beneficiary - was the father of the remaining two grandchildren, it became apparent that

the grandchildren would have no claim and Mr Keene was given leave to withdraw following his having filed a helpful memorandum. Mr Hill was also given leave, during the course of the hearing, to retire as the trustees had placed before the Court all the information which they had and it became obvious that the dispute was, in reality, purely one between the Plaintiff and Mr Hoare as the main beneficiary.

The deceased, Mrs Finlayson, died on 22 November 1983 probate being granted to the Defendants on 4 January 1984. Under the deceased's will, certain items of jewellery were left to the Plaintiff, Mrs Hoare and Mrs Hoare's daughter Kim, and it was not desired to interfere with those particular gifts, and accordingly no argument was directed towards those items of jewellery. The Will then went on to forgive Mr Hoare the payment of any sum owing by him to his mother at the date of Mrs Finlayson's death in respect of a house property at 35 Denbigh Avenue, Mt. Roskill, which had been transferred to Mr Hoare during Mrs Finlayson's lifetime. The balance of the estate, after payment of all debts, was directed to be divided between the Plaintiff and her brother Mr Hoare in equal shares.

As at the date of the hearing, on an affidavit filed by the trustees, the estate consisted of an amount owing by Mr Hoare to his mother by way of mortgage on the Denbigh Avenue property of $31,500, cash of just over $1300, savings in the Country Wide Building Society slightly in excess of $1100 and personal

chattles which had been valued at $3,445.50. After payment of the administration expenses and the costs of and incidental to the present proceedings, it appeared as though the cash and the savings in the Country Wide Building Society would disappear leaving but the chattels and the amount due on the mortgage as the only assets in the estate. The amount owing on the mortgage of $31,500 was the amount directed to be forgiven in so far as it affected Mr Hoare.

The deceased had been married twice and was some 74 years of age at the time of her death. In July 1946, her first husband, Mr Hoare, died intestate and the deceased and her son and daughter inherited one-third each of the estate. Thus, at that time, each of those persons owned a one-third interest in the Denbigh Avenue property. In April 1958, Mrs Finlayson married her second husband and in the following year, the Plaintiff married. As at the date of the hearing, the Plaintiff's husband was still alive and she had four sons who ranged in ages between 23 and 17 years and all were unmarried. Mr Hoare had two children, a daughter who was married and a son, Mark, some 25 years of age and unmarried. In 1961, at the suggestion of the deceased, both Mr Hoare and Mrs Campi agreed to transfer to their mother their one-third interest in Denbigh Avenue and received a mortgage back from her for the then value of their one-third share. The house remained in Mrs Finlayson's sole name until March 1983 when, on instructions which had been given in 1982, a transfer of the house to Mr Hoare was effected the considera-

tion being the then Government valuaticn, which was $46,500. At that time, Mrs Finlayson forgave her son $15,000 of the consideration and that $15,000 was nctionally included in her estate. The balance of $31,500 was secured by the mortgage earlier referred to. Mr Finlayson died in March 1983 and Mrs Finlayson, as I have already stated, died in November of that year.

It is evident from the affidavits filed by both the Plaintiff and Mr Hoare that the family relationships by and large were as one would expect in a normal family with both children doing their duty towards their mother, although it is evident that there was, from time to time, some degree of strained relationships but those relationships were not to the point where there was an open break between any of the parties at any time, nor was there any conduct which would entitle the Ccurt to find that any one party had so conducted himself or herself as to disqualify him or her from consideration under the deceased's Will. It is evident that when Mr Hoare married, there was some ill-feeling by the deceased toward Mrs Hoare but whatever rift then existed was healed when the Hoare grandchildren were born and from that time on, there appears to have been a reasonably close relationship between the Hoare family and the deceased.

So far as the Plaintiff is concerned, by reason of the fact that for almost the whole time she lived either with her mother or close to her, her associaticn with the deceased was much closer than that of her brother who, for a period

in the early stages of his marriage, was living out of Auckland. Accordingly the Plaintiff and her family were able to, and did, give the deceased more assistance in and around her property and in the general management of her affairs but one could hardly say that that really entitled the Plaintiff to any greater consideration than her brother at the time when the deceased was considering her Will.

It is noteworthy that in 1966 Mrs Finlayson made a Will then leaving the house property to Mr Hoare but in 1976 she changed that Will leaving everything equally between the Plaintiff and her brother. The present Will was made on 17 Dcember 1982 - and that date may or may not have some significance in relation to the deceased's then attitude toward the Plaintiff as I will endeavour to illustrate.

Not long before the deceased's death, the Plaintiff and her husband paid for the deceased to travel with the Plaintiff to Australia on holiday, and that may have produced some friction in that it is made to appear that the deceased believed that Mrs Campi had broadcast the fact that she had paid for her mother to go to Australia and that that wrankled with the deceased. Mrs Campi, for her part, says that she did not in fact broadcast that fact although she had mentioned it to a close friend who may have passed the information on to other people. But Mrs Campi felt that she could not be held responsible for that occurrence.

However, there is another happening which may explain why the deceased acted as she did when she came to make her Will. The deceased's brother, one Edward Augustin Commons, on 12 February 1982, made a Will under which the Plaintiff, her husband and her four children were the major beneficiaries. Mrs Campi received from her Uncle's estate some $14,587.24 while her husband received something just over $12,500 and each of her four sons received just over $10,500 each. An assessment of the distribution from the late Mr Commons' estate to the Campi family shows that in total, something over $69,000 was distributed to them.

It was generally known - and it is now accepted - that Mrs Finlayson was somewhat annoyed that her brother had acted in the way he did and it may well be that that annoyance was translated by the deceased into the provisions of the Will which she made in December 1982, Mr Commons having died not long before that date. However, one cannot be certain just exactly what prompted Mrs Finlayson to make the Will in the way she did, and it is apparent that Mr Roche, one of the trustees who acted for Mrs Finlayson for some time, on two separate occasions really, raised in a pointed way with the deceased the fact that she had in effect cut her daughter out of her Will. Mr Roche deposes to the fact that Mrs Finlayson acknowledged that she was aware that that was the situation but she declined to discuss her reasons for having acted as she did. If in fact Mrs Finlayson did act in a way in which she felt she was 'evening-up' the situation

so far as her son was concerned in comparing that with what the Campi family received from her brother's estate, then one might have reasonably expected her to have communicated that fact to Mr Roche. However, she did not do so which may be grounds for saying that there may be some doubt, even now, in accepting that proposition as an explanation for the contents of the Will. Mrs Finlayson may well have had other reasons in her mind for acting as she did and if she did, it is a pity that she did not communicate them to Mr Roche at the appropriate time.

The estate of the deceased is, by today's standards, an extremely modest one. The Plaintiff and her family are in comfortable but not affluent circumstances, they owning their own home with some relatively small mortgages registered against them. They have a business of their own which is not substantial but which appears to be a well ordered business providing a reasonable income for the Campi family. Mrs Campi deposes to the fact that the family has modest savings and, while there is some suggestion that the family might be more better off than has been disclosed by reason of some overseas trips which have been taken, Mrs Campi has countered by deposing to the fact that at least one if not possibly more of the trips has been business related particularly the one trip to Fiji. There is really no reason to doubt that assertion.

Mr Hoare is not as well off as is Mrs Campi and her husband but he now has title to the Mt. Roskill property and he is

in regular employment; his wife also working. He had the misfortune to enter into a contract in 1979 which fell by the way and which, from his affidavit, I gather affected his financial position somewhat adversely. However, the total picture which appears from the affidavits is that neither family can be regarded as being in the affluent category and all that can really be said is that the Campi family are in a more comfortable situation than are the Hoare family but neither can be said to be in necessitous circumstances.

A valuation of the Denbigh Avenue property, which was produced by consent, shows that as at March 1983 when the property was transferred to Mr Hoare, its value was $54,500 whereas the value as at November 1983 when Mrs Finlayson died was $56,000. As at today's date, its value is assessed at $75,000. Thus Mr Hoare now has an asset which in less than three years from its transfer to him has increased in value by almost $30,000.

On behalf of the Plaintiff, it was submitted that at a minimum, the Plaintiff should receive one-third of the value of the house at the time when it was transferred to Mr Hoare which would mean an award to her of some $15,500. But counsel went on to submit that when one took into account other contributions made by the Plaintiff during Mrs Finlayson's lifetime and the benefits conferred upon Mr Hoare during the same period, it would be appropriate to increase the award to Mrs Campi above the figure of $15,500.

On the other hand, counsel for Mr Hoare submitted that the contents of the Will could not be entirely overlooked and that one had to bear in mind the size of the estate as at the date of death and to assess whether, in all the circumstances, the deceased had failed to carry out her moral duty to both her children. It was submitted that the deceased was entitled to look at the benefits which the Campi family received from the Commons' estate and that in those circumstances, it could well be that the Court would be justified in holding that the contents of the Will should stand as they now are.

I recognise that this is a small estate but it seems to me that so far as their own conduct is concerned, there is little to distinguish Mrs Campi's situation from that of Mr Hoare. Both of them saw fit to transfer their one-third interest in the Denbigh property to their mother thereby securing her position in relation to that property and both contributed to her estate by effecting a transfer of their respective shares. Both children have carried out their duties toward their mother in such a way that one cannot criticise their conduct at all and, as I have earlier acknowledged, while the Campi family may have done slightly more for Mrs Finlayson than did the Hoare family, that does not require in my view, any approach which would justify a greater award to one party than to the other on that ground alone.

Various authorities were cited to me but I think there is necessity to refer but to three cases. The first I refer

to is the decision in Little v. Angus (1981) 1 N.Z.L.R. 126 in which the Court of Appeal really summarised the modern approach of the Courts to claims of this nature. Indeed it may well be that there really is no necessity now to go further than the decision in this particular case in dealing with a claim under this Act and in relation to an estate of the nature of which I am now required to deal with. It is, I think, sufficient to restate the principles which are set out in the Headnote, and I quote as follows:-

> "The following principles are now well settled in Family Protection cases. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator; 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. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

I also refer to the decision of this Court in Re Mercer (deceased) (1977) 1 N.Z.L.R. 469. In that particular case, White, J. reviewed a number of cases in relation to claims under this Statute and in particular, referred to the decision in Re Green (1951) N.Z.L.R. 135 which drew attention to the principle that the Court must decide what is proper and adequate provision for the maintenance and support of the claimants having regard to their deserts and to the relatively small estate involved. He went on to refer to the decisions in Re Harrison (1962) N.Z.L.R. 6 and Re Young (1965) N.Z.L.R.

294. From those cases White, J. extracted the principle that if claimants are not in necessitous circumstances, that does not disqualify them in the consideration of a provision for proper maintenance and support having regard, however, to the size of the estate in giving effect to moral and ethical considerations.

In the context of the present case, it will do no harm to repeat a portion of the judgment from Re Young (supra) which appears at p.299 of the Report and which reads as follows:-

> "In Bosch v. Perpetual Trustee Co. (1938) A.C. 463; (1938) 2 All.E.R. 14 their Lordships said: "... the powers given to the Court only arise when any of the persons mentioned is left without adequate provision for his or her proper maintenance"; Again in Dillon v. Public Trustee (1941) N.Z.L.R. 557; (1941) G.L.R. 227, their Lordships were at pains to emphasise that a testator's will-making power remains unrestricted but the statute in such a case authorises the Court to interpose in order to carve out of his estate what amounts to adequate provision for those relations if they are not sufficiently provided for". The italics are supplied. We agree, with respect, with the observations of Fullagar J. and Menzies J. in their joint judgment (though in result a dissenting one) in Blore v. Lang (1960) 104 C.L.R. 124: "Good conduct and honest worth are not to be rewarded by a generous but secondhand legacy at the hands of the Court"; likewise with the statement of Windeyer J. in his separate judgment: "The jurisdiction under the Testator's Family Maintenance Act is to provide for deserving persons according to their requirements, not to reward past services. This is sometimes overlooked...". In short, it must be shown in a broad sense that the applicant has need of maintenance and support. That is the language of the statute, and its provisions must not be confused with the provisions of the Law Reform (Testamentary Promises) Act 1949.

> In view of the weight which counsel placed on the decision of this Court in In re Harrison (deceased), Thomson v. Harrison (1962) N.Z.L.R. 6, it is we think possible that the learned Chief Justice may have thought himself free to act in the way he did from a reading of a passage in the judgment of Gresson, P. which has been included in the headnote to the case. It reads: "There can be a moral obligation to make provision for a child even if that child is comfortably situated financially....".
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> With respect we think that the phrase "comfortably situated financially" needs defining before this dictum can become useful as a statement of principle. If, as we think was the case, the learned Judge meant no more than that the moral obligation which rests on a father to make adequate provision for the "proper" maintenance and support of his son is not to be judged solely on a narrow basis of economnic needs; that moral and ethical considerations require to be taken into account as well, we agree, so long as the words "comfortably situated financially" are not to be understood too literally. Thus, in Bosch's case their Lordships said: "The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy but the Court has to consider what is proper maintenance and therefore the property left by the testator has to be taken into consideration."

I think that there are moral and ethical considerations, amongst other things, which require this Court to consider Mrs Campi's claim in a favourable light. She was a dutiful daughter and, as indicated earlier in this judgment, she contributed to her mother's estate by transferring to her mother the one-third interest which Mrs Campi had vested in her following the death of her father.

Having regard to the conduct of the parties, it would not have been surprising had, in the circumstances, Mrs Finlayson left the whole of her estate, after the specific bequest, equally between the Plaintiff and her brother. Had that

happened, Mrs Campi would have returned to her the one-third interest which she had transferred in the house property to her mother and would have received half of the one-third interest which had originally been vested in Mrs Finlayson.

In the absence of a cogent explanation, it is hard to understand why the testatrix acted as she did but in any event, I observe that Mr Hoare is now in possession of an asset which has, as I have earlier indicated, according to the valuation, increased in value to $75,000. I think it therefore appropriate to treat the gift of $15,000 and made to Mr Hoare at the time of the transfer of the property to him, as an 'evening-up' of the situation which resulted in Mrs Campi obtaining almost an equivalent amount from her Uncle's estate. I do not think it is right to take into account the whole of the benefit which the Campi family obtained from the late Mr Commons' as the benefit was shared between six members of the family and it has not been shown, either directly or indirectly, that Mrs Campi received any benefit from the monies which went from the Commons' estate to the other members of her family.

Having come to that conclusion, it would in my view, then be appropriate to treat the balance at present owing under the mortgage of $31,500 as falling into residue and permitting the residue to be dealt with in accordance with the testatrix's direction, namely, that it be divided equally between the Plaintiff and Mr Hoare. By acting in that way I consider

that the moral and ethical considerations which ought to have received attention will have received that attention and that the award thereby obtained by Mrs Campi will recognise her need for maintenance, in the wider sense of that phrase, as is now accepted by the Courts.

Accordingly, it is directed that further provision be made for the Plaintiff out of the deceased's estate by directing that the provisions of Clause 5 of the deceased's Will be deleted from the Will and that the amount owing as at the date of the deceased's death by Mr Hoare in respect of the house property at 35 Denbigh Avenue, Mt. Roskill, shall fall into and form part of the residue of the deceased's estate to be dealt with in accordance with paragraph 6(c) of the testatrix's Will.

So far as costs are concerned, the Defendants are entitled to the costs of and incidental to this action out of the deceased's estate and Mr Keene is entitled to his costs to be paid out of the deceased's estate in the sum of $300. In relation to the costs payable by the Plaintiff and Mr Hoare in respect of this action, I think it appropriate that the Plaintiff and Mr Hoare should respectively be responsible for his or her own costs and disbursements. In all other respects, the deceased's Will is confirmed.

Solicitors:

Webster Malcolm & Kilpatrick, Auckland, for Plaintiff;
Bowen Roche & Hill, Auckland, for Defendants;
Corban Revell & Co, Henderson, for Desmond John Hoare;
Morpeth Gould & White, Auckland, for grandchildren.