IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.237/83

IN THE MATTER of the Family Protection Act 1955

1198

A N D

IN THE MATTER of the Estate of ROBERT BRUCE HAMILTON of Tauranga in New Zealand Retired Sharebroker

BETWEEN ROBERT JOHN CHARLES HAMILTON of Christchurch Barman

Plaintiff



A N D THE PUBLIC TRUSTEE OF NEW ZEALAND

Defendant

Hearing: 14 August 1986

Counsel: W.H. McMenamin for Plaintiff
T.G. Sullivan for Defendant
A.J. Forbes for Children of Plaintiff

Judgment: 14 August 1986

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ORAL JUDGMENT OF HOLLAND, J.

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The plaintiff in this action is the 48 year old son of the testator who died some four years ago. The plaintiff is a divorced man with four adult children. The testator was a retired sharebroker who had married a second time after the death of his first wife who was the mother of the plaintiff and another son who, with the plaintiff, were the only two children of the testator. The testator's widow died approximately a year after his death.

The testamentary provision made for the widow was almost entirely by way of life interest and in the events that have occurred the residue of the testator's estate after providing for certain specific bequests is to be divided equally as to half to one son, the younger brother of the plaintiff, and the other half to be divided equally amongst the plaintiff's four children. The plaintiff is excluded entirely from the will of his father.

The testator made a number of wills prior to his death. His will in 1977, after the death of his first wife and before his remarriage, provided for the residue of his estate to be divided equally among his sons. A further will in 1978 following his remarriage provided for the residue to be divided equally among his two sons. In November 1978 the testator made a material change in his will in that he excluded the plaintiff from any testamentary provision. The terms of that will were essentially repeated in his last will made on 14 July 1981 with the exception that a more beneficial specific bequest was made to the plaintiff's brother.

When the testator excluded the plaintiff from his will he expressed to an officer of the Public Trustee who prepared the will that he wished to alter his will:-

> "to omit his son, the said Robert John Charles Hamilton, and the reasons given by the testator were that the son had left his wife and children and was living in a relationship with another woman and that it was the testator's feeling that the omitted son had received direct assistance over and above that given to his brother in previous times. It was also the testator's view that his son, Robert John Charles Hamilton, was in good financial circumstances, therefore requiring no assistance from the testator".

A short while before the testator died he resumed communication with his former solicitor and gave instructions for a new will to be prepared. Although he made no reference to the exclusion of the plaintiff in his existing will, he instructed his solicitor to prepare a new will along the lines of what had been prepared in 1977 with equal distribution of residue to the two brothers. The testator signed a draft will submitted to him and it appears from the correspondence submitted that he believed he had changed his will. He did not do so because he did not obtain witnesses to his signature and he died some three days after executing this document which he thought was a will.

Only limited relevance can be given to this informal expression of testamentary intention. Care must be taken to ensure that the Family Protection Act 1955 is not used as a means of avoiding the provisions of the Wills Act. On the other hand, the invalid document is helpful, particularly in so far as it would seem to indicate that the testator had changed his mind and if he had considered that the plaintiff was guilty of disentitling conduct he had resiled from that view. Nevertheless the principles to be applied by the Court to claims under the Family Protection Act are clear and were repeated in modern times in Little v Angus (1981) N.Z.L.R. 126, and in particular the Court must remind itself of what was said there at p127:-

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry 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 plaintiff has chosen not to attack any of the specific bequests or the provision in the will bequeathing half the residue of the estate to the plaintiff's brother. That is a sensible and wise approach for the plaintiff to have taken. In a recent affidavit filed by the Public Trustee as executor it is shown that the residue of the estate after an estimate of administration costs and payment of all legacies is approximately $160,000. The claim is essentially between the plaintiff and his four children, all of whom are now adult. Counsel for the four grandchildren of the testator submitted that by electing only to attack that half of the residue the claim should be considered as if it were a claim in an estate of $80,000. With respect to counsel, I am of the view that that oversimplifies the matter. The task before the Court is to consider the total assets available to the testator, the duty that he owed to the plaintiff, and then to assess what was the extent of that duty in money terms or proportionately in relation to the total estate considering the claims of other beneficiaries and others on his bounty. If the Court reached a view that the plaintiff was entitled to more than the precise testamentary provisions which he attacked then the plaintiff would lose, but I do not consider that the plaintiff's claim should be assessed in the rather artificial manner suggested by counsel for the grandchildren.

In the conclusion which I have reached nothing turns on this point because I do accept the submissions of counsel for the grandchildren that there is ample available to meet the obligations which the testator had to his son in the provisions which were attacked and there was no suggestion advanced on behalf of the grandchildren, and nor should there have been, that any award to the plaintiff should be at the expense of the plaintiff's brother.

The plaintiff has not made a great success of his life. He has attempted a number of ventures that have not been financially successful. It also appears that he has had difficulty in retaining remunerative positions. He is at present employed in a hotel bottle store where he receives what he describes as a take home pay of $220 a week. He does, however, own a residential property in Hamilton which cost him approximately $79,000 and which he states is its present market value. It is subject to two mortgages totalling $38,000. The equity in the home came from the winding up of an investment company in which he obtained shares from his father. That yielded him after his father's death a nett figure of approximately $20,000. The remaining $20,000 came from the sale of his Christchurch residential property after his father's death which according to valuation figures at the time of his father's death had very little equity in it at all. Nevertheless it seems to me important to take into account that this man has from the investment company received $20,000 which was at least in part provided for him by his father.

This is a sad case in that it is always said to see a family fighting among themselves and it is even sadder when it is a claim by a father against his four children. Regrettably this occurs with broken marriages from time to time, but I wish to commend the parties for not having embarked in any great length on the breakup of the marriage of the plaintiff with his wife. Those matters really bear little relevance to the issue that is before the Court. In this case the testator had only two children, both of whom were adult, plus of course a widow. He provided by way of income for the widow so the issue which really arises is what was his obligation to his children after he had provided for his widow.

Counsel for the plaintiff submits that his obligation was to divide his estate equally between his two sons after having given some recognition to the other son by way of specific bequests which in fact appear to be worth something over $30,000, no doubt to compensate for assistance that was given to the plaintiff in his lifetime. The four grandchildren have not challenged that the testator owed a duty to their father to make provision for him in his will. That was a proper attitude to take. Clearly with assets of this size, and effectively the only close competing claim that of the plaintiff's brother, the testator was undoubtedly under a duty to make provision for the plaintiff and there is no evidence of disentitling conduct. No doubt the testator was disappointed that the plaintiff's marriage broke up and he may well rightly have blamed his son in that regard, but that was not a sufficient ground for a father to disinherit a son where there is no evidence whatsoever of the son having done anything in relation to the father or of his conduct with his father so as to disentitle him. Further, the reason given to the Public Trustee as to the financial position of the plaintiff in my view reflected a mistake in the testator's view as to the plaintiff's financial circumstances. He was not by any means well off or, as the testator described, in good financial circumstances requiring no assistance.

There is a paucity of evidence as to the financial assistance given by the testator to the plaintiff. The reasons given to the Public Trustee for the disinheritance were disclosed in an affidavit filed on behalf of the Public Trustee on 11 September 1984. The plaintiff chose to file an affidavit in reply to allegations made in his children's affidavit and he specifically

referred to the affidavits of those four children in an affidavit sworn by him on 22 April 1986. He made no specific reference to the affidavit of the Public Trustee. In paragraph 4 of his affidavit he says:-

> "THAT I concede that I had financial assistance from my father in both the purchase of my farm and the house at Circuit Street but that each loan was interest bearing and secured by a mortgage and was repaid in full on the sale of both properties. My mother-in-law's only assistance to me was to guarantee a loan from Dalgety & Co. to purchase stock and I repaid this loan in full."

That paragraph is clearly in answer to allegations raised by his children that assistance had been given to him not only by his father but also by his mother-in-law. I should have been more helped if the plaintiff had set out precisely in answer to the Public Trustee's statement particulars of all financial provision that was given to him by his father, or alternatively a clear statement that no other financial provision was made for him by his father. I do not, however, in the circumstances of this case regard that aspect as particularly material.

The claim here is by an adult son who, although by no means affluent, has few financial obligations and no dependants. The residue of the estate is now considerable. The law has not yet reached the stage where an estate is to be divided into portions so that children can expect as of right to be treated equally. The law is, however, clear that a testator must fulfil his duty to his children by way of testamentary provision, but it has not been demonstrated to me that the testator was bound to fulfil that duty by leaving half the residue of his estate to the plaintiff.

The four grandchildren are within the class of people entitled to claim under the Act but I do not regard them as being in the position of having a claim under the Act if they had not had provision made for them under the will. They are, however, close relatives of the testator. Reminding myself again, however, that the will must be disturbed only to the extent that there has been a breach of duty, it does not appear to me in the circumstances of this case to be material who were the other beneficiaries. I am not regarding the four grandchildren as being people who could have claimed if they had not been included in the will but the fact is that they were included in the will and they were the objects of the testator's bounty. There is no disentitling conduct on their behalf, but nor has it been demonstrated that they were particularly close as grandchildren, apart from the relationship itself.

The residue of the estate has increased substantially in value mainly because of the shareholdings in the estate. It is appropriate, however, that I should look at the matter of assessing the duty to the plaintiff on the present value of the residue. Having given consideration to all the matters raised before me I am of the opinion that the obligation to the plaintiff can be best met by providing for a legacy to each of the four grandchildren to come from the half share which was originally provided for them under the will leaving that half share to the plaintiff after providing for those legacies. The will will accordingly be varied by providing that the half share left to the four grandchildren of the plaintiff be left to the plaintiff but subject to paying therefrom a legacy to each of the four grandchildren of $6,000. That legacy is not to attract interest until after today's date. In all other respects the terms of the will are confirmed.

It is appropriate that the four grandchildren should have costs because it is not their fault that these proceedings have had to be brought. It is not appropriate that the half share of residue going to the plaintiff's brother should be affected by the costs of this dispute. I direct that the costs of the four grandchildren be fixed at $1,000 and disbursements to be paid from the half share of residue going to the plaintiff. There is no need to make an order in respect of the plaintiff's costs because he receives the balance anyway. I also direct that the Public Trustee's costs in relation to these proceedings should be borne by the half share of residue going to the plaintiff.

A D Holland J