N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

M. No. 93/86

UNDER the Family Protection Act 1955

IN THE MATTER of the Estate of JAMES ALEXANDER PECK late of Palmerston North, Painter, Deceased

BETWEEN JAMES TOM PECK of Palmerston North, Spraypainter

Plaintiff

A N D JOHN HOWARD PECK of Palmerston North, Driver and DAVID BRUCE PECK of Palmerston North, Driver as the trustees of the Estate of JAMES ALEXANDER PECK, Deceased

Defendants

Hearing: 13 August 1987

Counsel: C.P. Somerville for Plaintiff
C.J. Walshaw for Trustees
L.H. Atkins for the widow and for J.H. Peck and D.B. Peck

Judgment: 9 September 1987

JUDGMENT OF QUILLIAM J

The testator died on 16 February 1985 aged 75 years. He had been married twice. He married first in 1931 and that marriage ended in divorce in 1946. There was one child, namely, the plaintiff who is now 52 years of age. He

remarried in 1948. Of that marriage there were two children - John now aged 34 and David now 30. The testator was survived also by his second wife who is now 62.

His last will was made on 23 April 1975. By that he left legacies of $3,000 each to the sons of the second marriage. He left to his wife a life interest in a property at Fergusson Street, Palmerston North with a direction that on his wife's death the property should be sold and the nett proceeds divided equally among his three sons. That property was sold to the plaintiff prior to the testator's death and so this provision failed.

The residue of the estate was left to his wife if she survived the testator for one month, which is what happened.

The estate comprised a house property which had a Government valuation of $45,000, a car valued at $12,000, and a half-share in a mortgage. The value of that half-share was $19,000. The only liability was the funeral account of $1,600. In the result, therefore, no provision was made for the plaintiff. The only provision for the other two sons was the legacy of $3,000. They are not claimants in the present proceeding.

The plaintiff's case is based on the claim that he worked for some years for the testator for inadequate reward and assisted in work done on business premises belonging to the testator. He also says that for other reasons the testator failed in his moral duty towards him.

The testator had a business as a spraypainter. The plaintiff assisted him in that business for some 11 years. He says he was paid throughout on the basis of a 40 hour week, although he frequently worked overtime. The testator purchased a property in Fergusson Street and after about a year the business moved into those premises. During

that time work was required on the property and the plaintiff says that for most weekends during that period he assisted in the work.

In 1966 the testator took the plaintiff into partnership in the business on the basis of virtually equal shares. The plaintiff was not required to make any payment for his share of the assets or goodwill of the partnership. The plaintiff's wife assisted with the books from before the time of their marriage but without payment. In 1980 the testator retired from the business and the plaintiff purchased his share but without being required to make any payment for goodwill. There was some difficulty in arriving at a price but this was eventually agreed upon.

In 1984 the testator was made an offer by a commercial firm for the purchase of his property in Fergusson Street but he considered the offer too low. The plaintiff wished to purchase the property as that was where he carried on his business. Eventually a sale was arranged at a price of $93,000. There has been differing evidence as to how this was achieved, but this seems to me to be of little relevance. There is no suggestion that the property was sold to the plaintiff at an under-value. Indeed, it was apparently sold at a price in excess of a current market valuation which had been obtained. The plaintiff paid $55,000 in cash and gave a mortgage back to the testator and his wife for the balance of $38,000. This accounts for the asset in the estate of $19,000. That mortgage was for a term of three years at a rate of interest rather less than the current market rate. The cash payment of $55,000 went into a joint account of the testator and his wife so that she received the full amount by survivorship upon the testator's death.

The plaintiff is now the owner of the spraypainting business. He has not detailed his financial position as at the date of death, but an indication of it

can be obtained from his position in December 1986. At that time he had a house property valued at about $130,000 subject to a mortgage of $1,000. His wife owned some flats valued at about $53,000 which were unencumbered. The value of the business premises is estimated at $136,200 subject to the mortgage of $38,000. He also owned the adjoining property valued at $139,500 subject to mortgages of $49,430. They owned two cars valued at $23,000 and $2,000 respectively. The plaintiff has life insurance of $25,000 which has been in existence for 12 years and had savings of $18,000. For the 1985 tax year his income was $26,129.

The nett worth of the plaintiff and his wife at that time was accordingly about $413,270. It would have been somewhat less at the date of death because the properties would have had lower values. It should be added that the values have increased from December 1986 to the present time.

The principal competing claim on the testator's bounty was that of his wife. She was in separate employment during a substantial part of the marriage. She had savings of about $52,000 and has received, by survivorship, the sum of $55,000 already referred to. She owns also the other half-interest in the mortgage, namely, $19,000. Her total assets are therefore worth $126,000. In terms of the will she would receive the house property, the car and the other half of the mortgage.

Although neither of the sons of the second marriage is a claimant some indication should be given of their financial positions.

The older son, John, is a contract driver for a freight firm. He receives wages of $150 per week. The balance of his earnings go to repay the amount owing on his truck and to pay running costs. He owns a house valued at $100,000 subject to a mortgage of $25,000, a truck valued at

$130,000 subject to a liability of $90,000, and also a trailer unit valued at $18,000 on which there is about $14,000 owing. He has other equipment worth $10,000, some tools and furniture, and a car valued at $1,200. His nett worth at the present time is accordingly about $130,200. He is married but separated and has no children.

The younger son, David, is married with one child. He is employed as a driver by the same freight firm. He receives a wage which varies from $220 to $370 per week depending on available overtime. He and his wife own a home valued at $75,000 subject to a mortgage of $18,000. They have two cars worth $26,000 and $500 respectively, subject to a liability of $4,000. They have savings of about $3,000 and some machinery and a rifle collection. Their nett worth is accordingly about $82,500.

The plaintiff's claim was based on several factors. As I have mentioned earlier, he claimed to have worked for about 11 years for the testator at inadequate remuneration and in that way to have helped the testator build up his estate. He also claimed to have helped with work on the business premises before they were occupied. These aspects of his claim are, to a degree at least, offset by the fact that it was the testator who enabled him to acquire the business and to get himself into the favourable financial situation which he now enjoys. Perhaps the claim most strongly advanced was that which was based on the terms of the will. It was argued that the testator's intention was clear, namely, to provide an income for his wife out of the Fergusson Street property and then to leave the capital of that property equally among the three sons. It was accordingly said that the testator himself recognised that he had an obligation to make some provision for the plaintiff even if on a deferred basis and that the fact that, in the result, no provision at all was made for him suggested a breach of moral duty. The submission was that a similar consideration could not be applied to the other two

sons who only received $3,000 each as they could expect to benefit from their mother's estate in due course.

There seems little doubt that this argument would represent what would have been a fair course for the testator to take but that is not the test which must be applied. It must nevertheless be given consideration.

I was referred to a number of the well known cases and, indeed, as far back as Allardice v Allardice (1910) 29 NZLR 959 and Bosch v Perpetual Trustee Co. Ltd [1938] 2 All ER 14. It was urged that a claim under the Family Protection Act should not be judged on the basis of economic considerations alone and I accept that to be so. The principles to be applied were summarised by the Court of Appeal in Little v Angus [1981] 1 NZLR 126 at p 127 in this way:

> " 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 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. "

The testator's estate, in terms of s 2 (5) of the Family Protection Act, is to be deemed to include all property which is the subject of any donatio mortis causa. On that basis his estate, as at the date of death, must be regarded as comprising -

House property	45,000
Mortgage	38,000

As at the date of death the widow was entitled to National Superannuation. There is no evidence of the rate at that time but I believe it to have been of the order of $5,500 per annum. There was then no limit on the amount of other income a superannuitant could receive and there was nothing to suggest to the testator that he ought to have anticipated the imposition of such a limit which actually occurred. In addition to that income the widow was, in terms of the will, able to receive income on a total of about $150,000 (after allowing for payment of the legacies). Again on an uninformed basis as to the rates of interest at that time, I calculate that there should have been available an income of about $25,000 per annum, or perhaps more. This, together with the superannuation, indicates a total income of not less than $30,000 which is somewhat more than that of the plaintiff as at the date of death. I recognise that these calculations pay no regard to the possibility that some of the widow's capital may have been required for expenditure on the house.

I accept the submission for the plaintiff that some regard should be paid to the intention of the testator that the plaintiff should receive something from the estate. Notwithstanding the change in the testator's assets by reason of the sale of the business premises, it was still possible for him to have made a similar type of provision for the plaintiff, and having regard to the total amount available to him that could have been achieved without any breach of his prior obligation to the widow. I accordingly conclude that the plaintiff has shown that there was a breach of the testator's moral duty towards him.

It is necessary then to consider how that breach should be remedied and this must be done on the basis of the position as it existed at the date of hearing.

The situation of the widow had not materially changed except for the fact that her right to National

Savings	55,000
Car	12,000
	$150,000

At that time the widow's situation was that she had savings of $52,000. The testator's paramount duty was to her and although she was a second wife it needs to be remembered that the second marriage had lasted more than twice as long as the first marriage. The duty was therefore a strong one.

The first obligation was to ensure that the widow had a home. This was discharged by the fact that the matrimonial home was part of the estate left to her. The house was a modest one and so it cannot be said that the testator discharged any more than his bare obligation in this regard. He provided further for his wife by ensuring that she would receive one-half of the mortgage on the Fergusson Street premises, namely, $19,000, and also the cash payment of $55,000 from the same transaction. This meant that she had the house and $126,000. In terms of the will she was to receive, in addition, a car which was later sold for $12,000 and the other half of the mortgage, namely, $19,000. On that basis her total assets, apart from the house, would amount to $157,000. She was 60 years of age and entitled to National Superannuation. She had a heart by-pass operation in 1984 but it appears her health at the date of death was satisfactory. The question for determination now is whether it was necessary, in order for the testator to discharge his principal obligation to the widow, to have left her the whole of his estate.

He discharged his obligation to his two younger sons by leaving them $3,000 each and they do not allege that any failure of moral obligation arises out of that. In view of their right to expect that they will ultimately benefit

from their mother's estate this is no doubt a reasonable attitude. The only remaining claim on the testator's bounty was that of the plaintiff. As it happens the plaintiff's financial position at the date of death was stronger than that of the widow and the testator combined. On the basis of the values supplied by the plaintiff about a year after the date of death, the principal assets of himself and his wife were -

House property	130,000
Flats	53,000
Business premises (at purchase price)	93,000
Cars	25,000
Savings	18,000
	319,000
Less - Mortgages	39,000
	$280,000

I have omitted the other Fergusson Street property as that appears to have been purchased after the date of death. The plaintiff's income for the 1985 tax year was $26,129.

A simple comparison of the plaintiff's nett worth with that of the testator and the widow combined, namely, $202,000, is not, of course, in itself determinative of this claim, but it suggests that any moral obligation on the testator to the plaintiff can never have been strong. What it means, I think, is that the testator was obliged to ensure that the widow was adequately and, indeed, comfortably provided for before he had any residual duty to provide for the plaintiff.

Superannuation may have been affected by the other income to which she would be entitled. As best I can assess this, however, I doubt whether there will be any significant diminution in her superannuation. The value of the house is now $78,000.

The plaintiff's position has changed rather more. He has acquired the other Fergusson Street premises and the position of himself and his wife appears to be -

House property	135,000
Business premises	148,000
Other property in Fergusson Street	158,000
Flats	53,000
Cars	25,000
Savings	18,000
	537,000
Less - Mortgages	88,430
	$448,570

The plaintiff has not given any up-to-date figure as to his income.

It is apparent that the plaintiff is in no immediate need of assistance and I think his claim will be adequately met if he is awarded a modest capital sum subject to the widow's life interest. This is similar to the form of provision contemplated by the testator.

There will accordingly be an order that the trustees hold out of the residue of the estate the sum of $10,000, to pay the income from that sum to the widow during her widowhood, and upon her death or remarriage to pay the

capital to the plaintiff. In other respects the will is to remain undisturbed.

The plaintiff having succeeded in his claim is entitled to costs out of the residue of the estate which I fix at $3,000 with disbursements as fixed by the Registrar.

Solicitors: Fitzherbert Abraham, PALMERSTON NORTH, for Plaintiff

Loughnan Stewart & Co., PALMERSTON NORTH, for Trustees

Behrens & Atkins, PALMERSTON NORTH, for the Widow and for J.H. Peck and D.B. Peck