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A: 45/85

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

IN THE MATTER of the Family Protection
Act 1955

AND

IN THE MATTER of the Will of THELMA
BEATRICE LILLIAN
DAVENPORT of Hastings,
Widow, Deceased

LR 465.

BETWEEN: ROBERT ALBERT JOHN
BRITTAIN of Whakatane,
Contract Supervisor

Plaintiff

A N D: RAYMOND WILLIAM ROLFE of
Rotorua, Retired as
Executor and Trustee of
the Estate of THELMA
BEATRICE LILLIAN
DAVENPORT, Deceased

Defendant

Hearing: 18 September 1987

Counsel: L:H: Chisholm for Plaintiff
H:R: Grayson for Defendant
R:P: Wolff for Residuary Beneficiary

Judgment: 5.10.87

JUDGMENT OF JEFFRIES J:

The deceased, Thelma Beatrice Lillian Davenport, died at Napier on 24 November 1984 then aged about 65 years. Two days before her death she had executed her last will and testament in which she named her brother, Raymond William Rolfe, as executor and trustee. She left surviving her two

children, namely the plaintiff and the second respondent, further details being recorded hereafter: By her will she left jewellery to her two granddaughters, Rachel Byford and Vicki Byford: To her grandson, Grant Brittain, and another granddaughter, Joanne Brittain, providing they attain 21 years, she left \$2,000 each: The rest of her property she left to the second respondent, her son Leslie Walter Byford, and made no provision whatsoever for her other son who is the plaintiff: Because of deliberate acts of the executor it has been necessary for plaintiff to apply pursuant to s:49 of the Administration Act 1969 for a tracing order in addition to the application for further provision: The foregoing will be covered in greater detail by the outline of facts:

Before detailing those facts there are one or two general observations that I think ought to be made about applications under the Family Protection Act: An application is made pursuant to the Act because there is an allegation that for one reason or another a person dies without making adequate provision from the estate for the proper maintenance and support of persons who are authorised pursuant to s:3 of the Act to apply: Adequate provision for proper maintenance and support, that the person who has died, owed to a lawfully authorised applicant is the issue: In the course of investigating the factual background disentitling conduct by the applicant towards the deceased person may be a factor that the court has to consider, but before any party chooses to embark upon such allegations he or she must be satisfied that the conduct is truly substantial and disentitling: In a recent case that went on appeal I had occasion to observe that there is a palpable difference between errors of judgment and disentitling conduct: As the aphorism suggests the conduct must be of such a category that it has the effect of disentitling the applicant (the most common use of it) altogether, or markedly reducing an ordinary entitlement: I have observed a tendency whereby overall conduct, usually

raised by opponents of an applicant, is achieving a prominence that is neither necessary nor desirable, and can have the disadvantage of distorting the more important issues upon which a court must concentrate: This court in this judgment will not attempt to lay down any rules whatsoever for in the final analysis it is always a matter of degree and judgment within the confines of a particular case, which is always unique in its own fact pattern: What the court does say, although it might have only negative value, is that disagreements, fallings out, quarrels, even rows lasting perhaps over some period should not be canvassed unless they can be effectively tied into truly discrediting conduct which might reasonably have an influence on the court's discretion: Naturally the greater the hardship and the more difficult the lives have been for participants, of which this case is an example, the greater therefore are the opportunities, or possibilities, of fundamental and strongly held opposing viewpoints: In the course of argument I had occasion to observe to counsel that the papers before the court revealed personality clashes in this family entirely unconnected with the plaintiff: For the foregoing reasons many of the issues covered at some length in the affidavits about past quarrels will be largely, but not entirely, bypassed for the sound reason that they are simply not relevant to the issue before the court:

I now concentrate on the facts of the case before the court: The deceased was first married in the late 1930's to the father of the plaintiff: The date of the marriage is not known but the couple separated in about 1942: The plaintiff was then aged about three years: For whatever reasons, and there was a dispute about them, plaintiff was placed when aged about seven years into the care of his maternal grandparents who effectively raised him from thereon: His contact with his mother continued throughout his life, although there were quarrels resulting in withdrawal from ordinary friendly

relationships: Unfortunately it was during one of these periods the testatrix made her will and died suddenly: Because the lives of plaintiff and his mother diverged at a very early stage, I stay first with the facts of the deceased:

After separation from her first husband she obtained a divorce and remarried the second respondent's father in 1949: That marriage lasted only a short time and ended in divorce: In about 1952 deceased went to live in the home of Sydney Davenport as his housekeeper on his farm property near Pahiatua: She took with her her son Leslie Walter Byford who was then aged about three years: Mr Davenport married the deceased in 1956 and by all accounts in the papers it was a happy marriage until it ended with his death in 1973: In about 1960 he sold his farm and bought a residential property in Foxton where he lived until his death: He had never been married before and had no children of his own: At his death his wife inherited his property: Until adulthood Mr Byford had been brought up in the household of Mr Davenport and throughout their joint lives the relationship was a close one: In the year before her death the deceased decided to shift to Napier to be near her son Mr Byford and she purchased a small flat property which comprised the main asset in her estate: In summary deceased had married three times and her second and third husband's precedeased her: Her first husband, the plaintiff's father, is still alive and filed an affidavit in support of his son to the extent it gave some further details of how he came to be left with his grandparents: She had no children by her third marriage:

Attention now returns to the plaintiff: At the time of his parents' separation he was placed in a home run by the Presbyterian Church: At the age of about seven years he went

to live with his maternal grandparents with whom he lived until aged 15 years. He then had a period with other aunts and uncles for about four years and returned to his grandparents' home where he lived for another seven years until he married in 1965. Plaintiff recalled only seeing his mother once when he was in the home, but thereafter his lines of communication with his mother were constant even if at times there were sharp disagreements. In short his psychological parents from age about seven years were his grandparents for after about the age of three years his mother undertook no direct responsibility for his life. Those are not ordinary circumstances and the difficulties that mother and son had from time to time during their joint lives must always be assessed against those background facts. Overall sympathetic allowances must be made to each of them and allocation of blame withheld. This case has some similarities with a recent one I had to decide where a mother (she had adopted her own grandchild when aged about seven years) very markedly preferred in her will her daughter, whom she had raised, to her adopted son. It is about the nature and importance of the first few years of life and the bonding process between parent and child which I think is significant in assessing the total relationship throughout the joint lives. I reproduce this short extract, as having relevance here, from Lawson v Divers (Auckland Registry A:800/85, Unreported, 24 August 1987):

"The most formative years of plaintiff's life until he was about seven years were most unsettled for then he was deprived of a parent, or person to whom he could bond in the manner of child to parent. Those are the years when the bonding relationship on each side runs strongest and deepest, and provide the character of inseparability to the quality of the union. If that did not have an opportunity to develop strongly because of circumstances it is not simply noted, but why it is of that character is to be taken into account."

Something must be said of two critical incidents of disagreement between plaintiff and his mother because they are relevant to the will and the decision of the court: In keeping with earlier observations contained in this judgment I do not go into detail and most carefully avoid a judicial finding on culpability: They both concern treatment of plaintiff's grandmother by her daughter (deceased) and to an extent the executor in his capacity as a son: Plaintiff had married in 1965 and lived in Wellington with his wife and children: In 1972 plaintiff's grandmother took ill and a very sharp dispute occurred between plaintiff and his mother as to her after care: That dispute resulted in disruption of the relationship for about 4-6 years (affidavit ambiguous on the point): When deceased herself became ill and was hospitalised in 1978 (or 1976) plaintiff said at his initiative communication was re-established with her and remained fully cordial until 1981: In that year his grandmother became terminally ill and plaintiff said he approached both his mother and his uncle, the executor of the will, to share on a three way basis the financial cost of a nursing home: In fact she died shortly after re-admission to hospital: Mr Rolfe in his affidavit strongly disputes plaintiff's version and denies he or his sister refused assistance as plaintiff alleges: Plaintiff said this row continued, although efforts at reconciliation by him were rejected, until his mother again became ill in 1984 and he decided to visit her in Napier on a mission of peace, but she died suddenly on the very morning of the day of the visit: Plaintiff's assertion that the two occasions on which he had serious disagreements with his mother resulting in long periods of withdrawal of ordinary relationships were over the subject of his grandmother's care is not disputed: There was a claim, disputed only on detail, that plaintiff had performed construction work on his mother's home at Foxton: He claimed he was a dutiful son:

Plaintiff's circumstances are materially good! He works in the building trade and in 1982 shifted to Whakatane where he constructed for himself a house which is unencumbered and presently valued at \$121,000! He is aged 48 years and employed as a contract supervisor! His two teenage children live with him and he supports them! His wife has employment in a retail store giving them a good combined income!

Some details have already been recounted of the life of the residuary beneficiary, Leslie Walter Byford! He directly confirms that his mother's early life was not easy having contracted two unsatisfactory marriages! Apparently, until adulthood he lived and was cared for by his mother throughout, but there is a vagueness in the affidavits which is probably not material! At a very early age he lived at the property of Mr Sydney Davenport near Pahiatua until he was 11 years when they all shifted to Foxton! As stated earlier, he had an excellent relationship with his stepfather who accepted him as a son! He said his own father remarried and died in 1975, but he received nothing from his estate, but no details were given! He gave Mr Davenport's death at July 1973!

Mr Byford did not detail exactly when he left his mother's home or when he married, but he has four dependent children! After marriage he returned to live in Foxton in 1972! Contact with her was regular, of course, and he denied it was so for plaintiff! In 1977 Mr Byford left Foxton, living thereafter in several North Island towns and finally settling in Hastings in 1984! His mother joined him there and purchased a flat! Shortly after purchase her terminal illness was diagnosed and she died in November 1984! Throughout Mr Byford retained a close relationship with his mother and it was not subjected to the strain and disruption which occurred with his half brother! Moreover, Mr Byford was a dutiful son and did much to assist his mother throughout her life! His total asset

position is definitely inferior to that of the plaintiff! He owns his home but he has a mortgage debt of about two thirds its value, of approximately \$70,000! The combined income of the Byfords would be about equal to that of the Brittains! He is, or course, 10 years younger than his half brother!

The estate is a small one and was valued net at date of death at about \$53,000, of which the main asset was the flat valued then on government valuation at \$39,000! In circumstances to be described it was transferred to Mr Byford who sold it for the sum of \$49,677 net! There was cash or equivalent in the estate of about \$15,000! The jewellery was not included in the valuation, and no attack is made on the legacies to some grandchildren! There are no claims by grandchildren!

I turn now to the administration of the estate after death and say immediately there was a spirited attempt to defeat the plaintiff's claim by capitalisation on a mistake of law by plaintiff's solicitors coupled with a distribution as if the circumstances were exigent! Together with the application under the Family Protection Act it was necessary for plaintiff to file an application under s:49 of the Administration Act 1969 to trace assets!

Perhaps the shortest way of demonstrating the acts of the executor is to construct a calendar:

22 November 1984	-	Date of will!
24 November 1984	-	Date of death!
17 December 1984	-	Grant of probate!
Early 1985	-	Plaintiff's solicitors make enquiries about estate!

- 28 March 1985 - Plaintiff's solicitors advise estate solicitors of claim: Also sought probate details:
- 7 May 1985 - No reply and further letter:
- 6 June 1985 - Telephone call to estate solicitors who advise instructed to withhold information:
- 19 June 1985 - Search by plaintiff's solicitors received:
- 2 July 1985 - Family Protection proceedings filed in court:
- 8 July 1985 - Money transferred to beneficiary:
- 9 July 1985 - Flat transferred in specie to beneficiary:
- September 1985 - Family Protection proceedings served:

The mistake made by plaintiff's solicitors was that after formal notice on 28 March 1985 of the claim proceedings were not then issued within the three months' period as required by s:48(1) of the Administration Act and, therefore, the estate could lawfully be distributed in July 1985: The explanation for delay between filing and service was the time in court obtaining directions as to service: Once it was discovered that the estate had been distributed plaintiff's solicitors then filed the motion to trace assets:

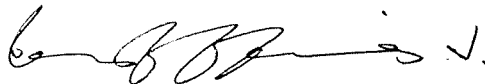
On distribution Mr Byford received \$8,863 in cash and has sold the flat for \$49,677 making a total of \$58,540: Sufficient has been retained in the estate to meet the \$4,000 in legacies, and that sum is invested on interest:

Not surprisingly, Mr Chisholm levelled criticism over the behaviour of both the executor and residuary beneficiary in support of his motion to trace assets: The common line of defence of both was first, that what was done was pursuant to a commitment to the deceased who had expressed a firm wish to the executor that her son, Robert Brittain, should receive nothing; and, secondly, that what was done was lawful: The latter is technically correct but overall the least said about the common line the better: Mr Wolff on behalf of Mr Byford sought to distance his client from the activities of the executor and said his client had acted on legal advice: Mr Grayson for the executor when questioned by the court about some of the plainly obstructive acts he had employed, which were defended in his affidavits, claimed he acted against legal advice: Overall the court disapproves of the conduct of both residuary beneficiary and executor, but finds that of the executor more culpable: With the observation that executors and beneficiaries cannot, and should not, take such active and deliberate steps to defeat a rightful claimant under the statute law I leave this aspect of the case:

At the present time the estate has undistributed \$6,200 approximately and the residuary beneficiary has on deposit and available the sum of \$18,897: I am satisfied that Mr Byford took actions to consume the benefits he received from the estate so as to prevent, or obstruct, a tracing order: He filed an affidavit immediately prior to hearing claiming his material position will be adversely affected by a tracing order, and even goes so far as to claim his very home would be threatened: His counsel argued against a tracing order and sought a strict interpretation of s:51(a) and (b) of the Act: I do not hold the beneficiary had a reasonable belief the distribution was properly made and would not be set aside: Neither do I hold it is inequitable to grant relief:

The plaintiff in arguing his claim under the Family Protection Act limits both the relief for an order following the assets and his claim under the Act to a sum of approximately \$19,000 plus accumulated interest or money held in the estate: That is opposed by the beneficiary and he argued, through counsel, that plaintiff was not entitled to a support order in any event:

In my view the plaintiff has established a claim under the Family Protection Act: He is a son against a parent's estate which places him in the front rank of claimants under the Act: I do not think he ever engaged in conduct which would disentitle him to an award: His early life was less fortunate than that of his half brother, but notwithstanding I think he did his best to retain a good relationship with his mother: However, the issue is adequate maintenance and support: Plaintiff is in a superior material situation to Mr Byford and that is relevant: The court must as best it is able remedy the failure and do no more: In this court's view that will be done by making a tracing order that Mr Byford, the residuary beneficiary, is to pay to the plaintiff the sum of \$15,000 to meet the claim: There will be a further order that the residuary beneficiary pay the sum of \$2,000 costs to the plaintiff, plus his disbursements, as fixed by the Registrar:



<u>Solicitors for Plaintiff:</u>	Willis Toomey Robinson, Napier
<u>Solicitors for Defendant:</u>	Kelly McNeil & Co., Hastings
<u>Solicitors for Residuary Beneficiary:</u>	McDonald Brummer & Co., Hastings