IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

No. M.20/86

UNDER THE FAMILY PROTECTION ACT 1955

IN THE MATTER of the Estate of GLADYS IRENE DEPHOFF of Timaru, Married Woman, Deceased

BETWEEN COLLEEN IRENE FIELD of Timaru, Married Woman

Plaintiff

A N D WYNNE ARCHDALL RAYMOND, Solicitor of Timaru and ARTHUR HOOKE, Fisherman of Timaru, as the Executors of the Will of GLADYS IRENE DEPHOFF of Timaru, Married Woman, Deceased

Defendants

Hearing: 15 September 1987

Counsel: T.M. Gresson for Plaintiff
J.R. McGlashan for Defendants
G.J. Proudfoot for National Heart Foundation of New Zealand, Royal New Zealand Foundation for the Blind, & Canterbury/Westland Division Cancer Society of New Zealand Incorporated

Judgment: 15 September 1987

ORAL JUDGMENT OF HOLLAND, J.

This is a claim brought under the Family Protection Act by the plaintiff who was the only child of her mother, the deceased. The plaintiff was adopted by the deceased and her husband at an early stage. For the purposes of the Family Protection Act, the fact of adoption can make no difference to her claim and there is certainly no other circumstance here relating to the adoption which would relieve the testatrix from the obligation which she owed to a natural daughter.

The husband of the testatrix predeceased her, leaving his estate to her. The plaintiff is married with two

children, both of whom are now independent of her. It is not clear on the papers before me precisely what the assets of the testatrix were at her date of death, but the estate has been administered and there is now a sum of $61,000 invested on short term deposit, a mortgage of $6,000 and jewellery of $3,379.50 The testatrix in her will provided specific legacies and her Singer sewing machine to one friend and the balance of her furniture and other articles of household use or ornament to another friend. She bequeathed to the plaintiff her diamond shaped diamond ring and provided that $1,000 was to be divided between such of her grandchildren as shall attain the age of 25 years. The plaintiff does not attack any of those specific legacies. The testatrix then provided that her estate was to be held as to one half for the Otago Region of the National Heart Foundation, and the other half to be divided equally between the Canterbury/Westland Division Cancer Society of New Zealand Incorporated and the Timaru Advisory Committee of the New Zealand Foundation for the Blind. Mr Proudfoot for the three charities has indicated that the charities abide the decision of the Court. He has accordingly made no submissions.

The plaintiff's case is a tragic one. It is apparent from the affidavit that she has filed that her adoptive parents did not fulfil their duties as one might have expected. It seems that they adopted her as the child of the sister of the testatrix under a sense of duty and one can only glean from the affidavit of the plaintiff that they did no more than was regarded as their sense of duty. The plaintiff was adequately provided for in her childhood by way of material means and was educated at a private school. She, however, received little, if any, love or affection from her mother and from the time of her first marriage has been completely estranged. Counsel

for the plaintiff has submitted to me that the estrangement was entirely of the parents' making. I must examine such a submission with care bearing in mind that the submission is made in a claim against a deceased estate where the deceased is not able to give any reply. It is important, however, to note that there is no evidence of any conduct on behalf of the plaintiff justifying the attitude of her parents.

The plaintiff accordingly has during her lifetime received from her parents nothing but the bare essentials by way of maintenance and education. I have no doubt that the testatrix owed a duty to provide for her under her will and that she failed to carry out that duty. Not only are the three charities who were the residuary beneficiaries not entitled to expect anything from the estate of the testatrix by way of being a competing claimant, but there is no evidence that there was any particularly close association between the testatrix and the charities. The only persons with legitimate claims on her estate were her daughter, the plaintiff, and the daughter's two children. In the circumstances of this estate, I do not consider that the testatrix was under any duty to provide for her grandchildren, but she has of course done so in a token way by the legacy of $1,000 which is to remain.

The principles on a claim under the Family Protection Act are clear. The Court, having found that there was a duty, must consider what were the needs by way of maintenance of the plaintiff. Those needs are to be interpreted liberally and that is particularly so when there is no competing claimant. The plaintiff is happily married for the second time. and is aged approximately 56. She has been married to her present husband for 26 years. He is employed as a tractor driver on

a country station and has been in that employment for 25 years. He is provided with a house by his employer at a nominal rental of $16 per month. His gross earnings per month are only $955.72. They have $800 savings in a joint account and own a 1969 Vauxhall Viva car and the furniture in their house. They are both approaching the period when retirement must be in contemplation and they do not have anything like sufficient money to acquire a home of their own or any suitable accommodation. It is the obligation of the Court not necessarily to redraw the will of the testatrix by providing what the Court would have done if the Court were the testatrix or necessarily to have done what was fair. The Court is permitted to vary the terms of the will only to the extent that it is necessary to provide for the duty that the testatrix owed to make provision for the maintenance and support of her daughter. In those circumstances, the testatrix did not have the right to leave the residue of her estate to the three charities. On the other hand, some regard must be had to her wishes and I do consider that she did have the right to leave a modest legacy to those charities.

The terms of the will are confirmed in respect of paragraphs 1 to 6 hereof relating to the specific legacies earlier referred to. The will is varied by providing for legacies of $4,000 to the Otago Region of the National Heart Foundation and $2,000 each to the Canterbury/Westland Division of the Cancer Society of New Zealand Incorporated and the Timaru Advisory Committee for the New Zealand Foundation for the blind. The residue of the estate, subject to the payment of those legacies is to be held for the plaintiff absolutely.

It is appropriate that the charities should have their costs out of the estate. They have instructed one counsel

but are separately represented by solicitors. In all the circumstances I fix the costs of each charity in the sum of $250 and disbursements to be fixed by the Registrar and to be paid from the residue of the estate. There will be no need to make an order for costs in respect of the plaintiff or the defendant trustees.

J D Holland J