



The two above-mentioned sons were the testator's only children of his first marriage. His first wife died in 1956 and he married again late in life in 1973. There were no children of the second marriage. Ian has been married only once and has four children. Bryon has been married three times, the first two marriages ending in divorce. There are four children of his first marriage, all boys. and one child of his second marriage, a girl. There are no children of his present marriage.

Mr B.C. Nordgren was appointed by the Court to represent all the grandchildren all of whom, are sui juris. All Ian's children, Bryon's eldest son, Neville, and his daughter Angela, indicated their intention of claiming provision from the estate. The claims of Ian's children were withdrawn when settlement of Ian's claim was reached leaving only the claims of Neville and Angela before the Court.

The testator's second marriage to Olive Ruth Fisk took place when he was 73 years of age and she 52. They lived together until his death and their relationship appears to have been a satisfactory and happy one. By his will, made on 27 April 1979, he left his whole estate to his wife absolutely should she survive him.

The testator's estate consisted in the main of three residential house properties, the total value of which at the present time is \$189,000. The total net value of the estate including the amount of advances made to the widow by the defendant trustee is approximately \$235,000. Administration costs and the costs of these proceedings will in all probability reduce that amount to something in the vicinity of \$220,000.

It is convenient to examine Neville's claim first. He was the eldest of Bryon's children and is now aged 35 years. His three brothers range in age from 2 to 11 years younger. Bryon deserted his first wife and family in 1964 when Neville was 11 years of age and the youngest boy was only 3 months old. They were then living in a house located on land owned by the testator and known as 83 Pine Avenue, Hamilton. The house had been bought by Bryon and relocated on the testator's land where he also lived only about 50 yards away from them. After Bryon left, the testator allowed his family to live in the house rent free. A maintenance order for \$12.00 per week was subsequently made against Bryon but the payments made thereunder were irregular and the family subsisted on a Deserted Wife's Benefit payable to their mother supplemented by her earnings. The marriage was dissolved in 1972.

The children did not do well at school, none of them succeeding in passing the School Certificate examination, and

their mother deposes to her belief that their poor school results and behavioural problems were largely due to the lack of a father in the home and the need for her to take employment.

After leaving school at the age of 16, Neville served an apprenticeship as a motor mechanic and then went to live in Australia where he remained until his return to New Zealand early last year. Because of injuries suffered in a motor accident he is now unable to work as a motor mechanic but prior to leaving Australia worked for an automotive wholesaler receiving take-home pay of \$266.00 weekly. He owned his own house the value of which he puts at \$70,000.00 subject to mortgages totalling \$30,000.00. He had no other substantial assets except for an inexpensive motor car and some furniture. His reason for returning to New Zealand was to seek alternative treatment for a condition of chronic depression and anxiety. He was admitted to hospital at the end of April last year and discharged after 3 months. He has found a job similar to the one he had in Australia and has been so employed for about 5 months now. He and his wife and two daughters, aged 15 years and 3 years are living with his mother in Hamilton. He still owns his house in Melbourne which is let while he is in New Zealand but is unsure whether he will return to Melbourne.

The relationship between Neville and the testator appears to have been an affectionate one. In adolescence he lived close by his grandfather and performed services for him such as

mowing lawns and cleaning the car. A letter written by the testator just before Neville came to New Zealand with his family for a holiday in 1981 is couched in very friendly terms and the eulogy inserted by Neville in the newspaper after his grandfather's death gives every indication of his having had a very warm regard for him. I do not think the suggestion that the testator was critical of Neville's pre-marital association with the girl who subsequently became his second wife is of any significance.

The basis of Neville's claim is that he was disadvantaged as a result of his father's desertion of his family, that he had a good relationship with the testator throughout his life and accepted responsibilities beyond his years in assisting his mother in bringing up the younger boys after his father's virtual abandonment of them. Bitterness still exists between Neville and his father to an extent that makes it unlikely that Bryon would make any testamentary provision for him even if his means permitted him to do so which at present would seem to be doubtful. It is Bryon's view that the testator owed no duty to provide for him or his sons and that attitude is shared by the three other grandsons whose financial circumstances do not appear to be superior to those of Neville. Each of them has made his own way in the world and is now reasonably well established in life. That they have expressed opposition to Neville's claim is, however, of very little relevance to the issues to be determined by the Court.

I accept that Neville's early life was adversely affected by his own father's conduct and that to some extent the testator became a father figure to Bryon's four boys. It is clear that when Bryon's children were young he recognised an obligation to assist in providing for them and did so, at least to the extent of making available to the family a rent free home. I accept that a warm relationship existed between Neville and the testator up until the time of his death. I am unable to say whether Neville's claim to have assisted his brothers is correct. His mother supports it but the brothers do not. I am unable to reconcile this divergence on the evidence before me but consider the issue to be of only peripheral relevance anyway.

At the time of the testator's death Neville was in receipt of a reasonably substantial income from his own efforts; he had acquired a quite substantial asset in the equity in his home and did not appear to have been in need of financial assistance. His health was not then suspect and although it may later have deteriorated to some extent through anxiety it now appears to have stabilised so as to permit him to resume full-time employment. Generally speaking, at the time of the testator's death Neville had largely overcome the disadvantages of his early life and established a quite comfortable position for himself and his family. I do not think his financial position was such as to impose an obligation upon the testator to assist him by making provision

for him in his will and, although their relationship was a warm one, that of itself did not put the testator under an obligation to benefit him by his will. I conclude that the testator did not fail in the moral duty of a wise and just testator by not providing for Neville and find accordingly that his claim under the Family Protection Act 1955 cannot succeed.

Turning to Angela's claim it is to be noted that she is now 20 years of age and is employed as a computer operator receiving a wage of \$200.00 per week after tax. Her share of the rent of a flat and the expenses of food and power amounts to \$90.00 per week. She has an interest in a motor vehicle amounting to about \$4,000.00.

Angela was 8 years of age when Bryon deserted her mother. That was in 1976 and she and her mother lived alone until her mother's remarriage in 1984. As with the first family Bryon failed to maintain them and a maintenance order was made which he did not keep up. They subsisted on a Social Welfare benefit supplemented by the mother's earnings in a part-time job. The mother deposes that they were constrained to live very frugally and I can readily accept that. There is some evidence that Angela's father is fond of her and will provide for her. She says however that she has had little contact with him and I think that that is probably true. It would not surprise me if she has no great faith in his promise to provide for her. Her step-father has three children of a

former marriage and her mother has 2 daughters of her first marriage. Her chances of any substantial inheritance from those sources are not shown to be realistic. Her grandfather was fond of her and always visited her on her birthdays and usually at Christmas time as well. Her father's promise to provide for her is a factor of which the testator would not be aware but even had it been known to him might have been viewed with some degree of uncertainty. Certainly Angela now has a job and has acquired some savings which are invested in the motor car but 5 years ago when the testator died her position was less secure.. Even now, although she has present employment, in the event of anything untoward happening which affected her continuing employment she has little to fall back on. In my view there was an obligation on the testator to make some provision to assist her in obtaining a start in life and to guard against adverse contingencies.

The estate is large enough after reduction by the sum agreed to be paid to Ian to make a modest payment to Angela and still provide the security for the widow which the testator so obviously desired. I fix the sum at \$5,000.00 and order that amount to be paid as a legacy to Angela. Otherwise the will is unaffected except for an amount to be paid to Mr Nordgren as counsel appointed to represent the grandchildren. I fix the amount of his fee at \$3,000.00 and order it to be paid out of the estate.

*J. A. H. J.*

Solicitors -

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Stace Hammond Grace & Partners (Hamilton) for defendant