IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.338/85

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the Estate of CAROLINE VIOLET HOARE late of Christchurch, Widow

BETWEEN DESMOND HUGH HOARE of Christchurch, Process Worker

Plaintiff

A N D MARGARET FLORENCE CRAWFORD of Christchurch, Married Woman, as trustee and executrix of the will of the late CAROLINE VIOLET HOARE

Defendant

NOT RECOMMENDED

Hearing: 18th February 1988

Counsel: E.J. Tait for Plaintiff
C. Ruane for Defendant
Isabel M. Mitchell for grandchildren

ORAL JUDGMENT OF WILLIAMSON J.

Caroline Violet Hoare died on the 19th May 1985. She was then aged 70. She was survived by her son, Desmond Hugh Hoare, who is the Plaintiff in these proceedings. In December 1981 the Testatrix made a will in which she deliberately omitted any reference to her son. The will provided for certain specific legacies to friends, her grandchildren and her niece, and for the residue to go equally to the St John Ambulance Association, the Salvation Army and the Christchurch City Mission. The son, Desmond Hoare, now claims for provision from his mother's estate under the Family Protection Act 1955.

BACKGROUND FACTS

The background facts to this claim are within a comparatively short compass. The Plaintiff was the only child of the Testatrix. His father died in 1981. He has three children, Desmond, Sean and Damon. They are, of course, the only grandchildren of the Testatrix. It appears from the affidavits that the Plaintiff and his wife separated in 1980 or early 1981. Perhaps significantly, the will of the Testatrix was made after this separation in December 1981. I say significantly because it appears on the evidence that prior to the separation the relationship between the Plaintiff and his mother was a reasonably normal one. Among the Testatrix's belongings was found a handwritten note which appears to indicate the reasons why she decided to omit the Plaintiff from provision in her will. She stated in that note that she wished to make it clear that her son should not inherit her estate because he did not help her or her husband in any way after leaving school. She then proceeds to set out some views concerning his conduct following her husband's death and about moneys which she says she had given to him in order to pay accounts but which he had used to pay off a second mortgage. Unfortunately it appears that during the latter years of her life there was less and less contact between the Testatrix and the Plaintiff and between the Testatrix and her grandchildren. Fortunately for her, that is the Testatrix, her niece Margaret Crawford was available to assist her, not only in many day to day activities, but also in important decisions which had to be made in relation to her care in hospital and her eventual care in a nursing home.

TESTAMENTARY PROVISION

There does not appear to be any evidence of testamentary dispositions made prior to 1981. The last will made in December 1981 provides for bequests to a Mrs Ethel Mary Kelly of $1,000; to George and Thora Brundell of $1,000 each; to the three grandchildren Jason, Sean and Damon of $5,000 each; and to Margaret Crawford of $20,000, together with the Testatrix's wedding and engagement rings. As I have previously indicated, the residue of the estate is to be divided into

three equal portions, being one for each of St John Ambulance, the Salvation Army and the Christchurch City Mission.

THE ESTATE

At the date of death the estate consisted primarily of the house property, furniture, a car and a substantial amount in a Post Office Savings Bank Account. It now consists of an amount of approximately $106,900, including some $12,100 in income and without making any deductions for fees, costs and tax. The affidavit by an accountant employed by the estate's solicitors indicates a nett amount, after deductions of the legacies provided for in the will and of the fees, costs and tax, of $47,578.39.

CLAIM AND ISSUES

The claim that the Court is required to consider is a claim by the Plaintiff as an able-bodied only son of the Testatrix, together with a claim by the three grandchildren for increased provision. The issues to be decided are first whether there was a failure or breach of moral duty by the Testatrix towards these claimants, and secondly whether the conduct of the Plaintiff was such that it disentitled him to any interest in his mother's estate. It may be appropriate to deal with the second issue first.

DISENTITLING CONDUCT

Under s.5 of the Family Protection Act the Court may refuse to make an order in favour of any person whose character or conduct is or has been such as in the opinion of the Court should disentitle him to the benefit of such an order. None of the parties to these proceedings have argued that the Court should refuse to make an order on this basis. The onus of proof in relation to the claim under the Family Protection Act lies with the Plaintiff, but the onus of proof in relation to any application of disentitling behaviour lies with the person alleging the misconduct. The test of such disentitling conduct is set out in a decision of our Court of Appeal in a case of In Re Worms Deceased [1953] NZLR 924. Even if such disentitling behaviour is established in a case where there has been a

breach of a Testatrix's moral duty, the tendency of the Court has been to treat that behaviour as a circumstance in determining the quantum of any provision. See for example Re Ward [1964] NZLR 929.

In this case the Testatrix set out in her handwritten note the reasons why she had decided not to leave any provision for the Plaintiff. In that she expresses the view that he was not entitled to any provision because of his conduct towards her and her husband. I am satisfied on the evidence of the Plaintiff and of his separated wife, Geraldine Nora Hoare, that the evidence contained within the Testatrix's handwritten note is not sufficient to disentitle the Plaintiff. It appears that other specific facts contained within the same handwritten note in relation to money, which was handed over after the death of the Testatrix's husband, are incorrect. Mrs Hoare details what happened to that money which had been hidden in jars in the garden and how it was used to pay various accounts. Further she sets out an incident which occurred between herself and the Testatrix concerning the balance of the money left after payment of various accounts.

On the evidence I am of the view that it is reasonable to conclude that the Testatrix was upset, not only by the loss of her husband but also by the trauma associated with her son's separation, and the difference which that made in her relationships with him and the grandchildren. Her decision to disentitle him was made no doubt as a reaction to these matters, rather than as a decision made in proportion to any conduct of the Plaintiff's.

MORAL DUTY

Since the Plaintiff was the Testatrix's only son, that he had been brought up in reasonably modest circumstances, that he had carried out a number of normal filial duties and that his own personal circumstances were very modest, I am of the view that the Plaintiff has established a breach of moral duty in this case which would warrant provision being made for him. In arriving at that conclusion I am applying the

principles which are conveniently set out in the Court of Appeal decision of Little v Angus [1981] 1 NZLR 126 which has recently been reaffirmed by the Court of Appeal in a case of Shirley v Shirley, C.A. 155/85, 6th July 1987.

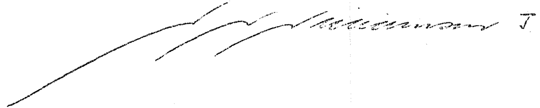
The case of Little v Angus makes it clear that whether there has been a breach of moral duty is determined at the date of the Testatrix's death, but a decision as to how that breach should be remedied is made with due regard to later events.

So far as the claim by the grandchildren is concerned, it must be shown that the Testatrix was in breach of her moral duty towards them. She provided for them to have a sum of $5,000 each. While it is always a matter of degree as to what is adequate provision, I am unable to conclude that the provision which the Testatrix did make for her grandchildren was in breach of her moral duty towards them, even taking into account and giving what weight I can to the fact that in this case the ability of their parents to provide for them was, to say the least, doubtful. I am conscious, in arriving at that decision, of the matters which have been persuasively argued by Miss Mitchell, and in particular her reference to the case of Re Horton Deceased [1976] 1 NZLR 251.

The Plaintiff is a process worker. He does not have any home and his assets appear to consist of some personal belongings, furniture and a motor vehicle. The estate is of a reasonable size and the evidence indicates that to some extent the Plaintiff himself has made a contribution towards properties previously owned by his parents which eventuated in the property owned by the Testatrix at her death. Giving what weight I am able to those matters, and to the fact that the Plaintiff is an only child and that there is an absence of urgent competing claims, in my view provision should be made for him and I do so in the sum of $32,000. The legacies provided for in the will are to stand, including the legacy of $20,000 together with the rings to Mrs Crawford. I am unable to see any basis upon which I should interfere with these

legacies, particularly the latter one. Clearly they were based on a genuinely perceived merit. They will, of course, bear interest on the basis provided for in s.39 of the Administration Act 1952.

Costs are reserved and will be fixed upon the receipt of a Memorandum.



Solicitors:
Malley Mahon & Co., Christchurch, for Plaintiff
Weston Ward & Lascelles, Christchurch, for Defendant