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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. No.58/87

UNDER The Family Protection Act 1955

IN THE MATTER of the estate of WINIFRED EDITH WHITTLE late of Christchurch, Widow Deceased

BETWEEN NORA WINIFRED PONT of Nelson, Retired

Plaintiff

A N D JAMES HASWELL FALKLAND MacFARLANE as Executor and Trustee of the Will of Winifred Edith Whittle, late of Christchurch, Married Woman, Deceased

Defendant

Hearing: 3 November 1988

Counsel: A.D. Barnett for the Plaintiff
Miss B.A. Coup for Defendant
C.R. Johnstone for Intellctually Handicapped Childrens Society

Judgment: 3 November 1988

ORAL JUDGMENT OF TIPPING, J.

This is a daughter's claim against the estate of her late mother pursuant to the provisions of the Family Protection Act 1955. The deceased Winifred Edith Whittle died on 1 October 1985. Her last will is dated 22 August 1983. Probate was granted to the Defendant

Mr MacFarlane on 12 March 1986. The late Mrs Whittle was survived by two adult children, being the Plaintiff and her brother Ronald. There were 16 grandchildren, but in the light of the size of the estate their circumstances do not require further consideration.

The will gives legacies of $500.00 each to the three children of the deceased who were living at the date of the will and to a daughter-in-law whose husband had earlier died. Since the will one of the children has died before the deceased. Following the giving of the four legacies the testatrix provided that her residue was to go the New Zealand Society for the Intellectually Handicapped (Canterbury Branch) with a direction that the capital and income be applied for her great grandson Michael Sinclair to meet his needs during his life and thereafter to the Society absolutely. Michael Sinclair is, as this provision might suggest, intellectually handicapped.

When the case was called on it was pointed out that there was no direct evidence before the Court as to Michael's circumstances. In view of the size of the estate I was very reluctant to adjourn the proceedings and with the approval of counsel it was arranged that Mr MacFarlane, the Defendant, who had made certain enquiries, should give oral evidence as to the result of those enquiries. In brief Michael's circumstances are these. He is at present aged 11. He is a Downs syndrome child. His parents are in modest circumstances financially. His mother receives a wage from her job at the training college where she works as a

cleaner part time. She has a special benefit for Michael of $25.00 per week plus the family benefit of $6.00 per week. Michael attends a special class at school. He has very little speaking ability, no road sense and is very short sighted. He wears glasses but is constantly losing them to the considerable expense of his parents. He requires constant supervision. His capacity to learn is very limited. He is physically quite active but to give some indication of his mental handicap Mr MacFarlane told me that his enquiries revealed that at the age of 11 Michael is still reading pre-school books. He suffers in addition periods of deafness. He has no ability to construct sentences and speaks simply one word at a time.

The proceedings were ordered to be served on Michael's mother who, for reasons that one can understand, felt she could not afford to take legal advice. Unfortunately the person whom she consulted initially does not seem to have explained other possible avenues to her. Be that as it may, I am satisfied that Michael's circumstances and his needs are now properly and fully put before me. It seems clear from Mr MacFarlane's evidence and his enquiries that Michael will require continuing care in the future into his adult life. Mr MacFarlane was not able to say what effect outside income might have on Michael's special benefit. Mr MacFarlane, he being the deceased's solicitor during her lifetime, was not aware of any particular relationship between Mrs Whittle and her great grandson Michael. There must obviously have been some relationship or appreciation

of his particular needs. There is no evidence before me suggesting that Michael's lifespan might be shorter than average and, as I have said, he is likely to require care into the foreseeable future.

The Plaintiff Mrs Nora Pont does not challenge the legacies to her brother and sister-in-law and this is of course quite understandable in the light of their very modest size. Something should now be said about the size of the estate itself. At date of death it had a nett value of about $21,500.00. As of now its value capital and income is of the order of $33,000.00. The Plaintiff is now aged 66 years and married. Her husband is aged 70. They are retired and living in Nelson. They have five children who are independent. They have the normal sort of assets one might expect - a house mortgage free, a modest car, some savings and household effects. Their income is confined to national superannuation which I was told amounts to $260.00 per week for the two of them, plus the interest that they are able to earn on their relatively small capital savings. There is no particular change in their position since the date of death. It may be said in summary that the Plaintiff Mrs Pont and her husband are in modest financial cicumstances and indeed that has been the position during the whole of their marriage.

The evidence satisfies me that the Plaintiff has at all times been a loyal and dutiful daughter and indeed has gone well beyond what one often finds in these cases as the norm, in the care and attention that she has devoted to her mother. Mrs Pont's brothers

received secondary education at boarding school and two of them were supported into apprenticeships by their parents. The Plaintiff however left school in form two and had no formal secondary education. She wanted to train as a nurse but family finances did not allow this. She took a job but paid board to her parents. She then worked with her mother for a period of about two years at a tea kiosk. She did this, I accept, without any remuneration. On her marriage she left home but continued to live near her parents until she moved to Christchurch with her husband.

The parents moved to Christchurch in the early 1950's when the Plaintiff's father retired and there was continuing contact between the Plaintiff and her husband and the parents after the move to Christchurch. In 1973 when Mrs Pont's father's health was failing both her father and her mother came to live with her and her husband. Mrs Pont gave up her employment so that she could spend more time with her parents and tend to their needs. A granny flat was added to the Pont home to accommodate the parents. $9,000.00 was paid by the parents towards this venture and Mrs Pont and her husband put in about $3,000.00. As will emerge in a minute this circumstance is one of some moment.

The parents lived with the Ponts for about eight years until Mr whittle died and Mrs Whittle continued to live with them for some time thereafter. The financial arrangements were mentioned. The parents certainly made a contribution but I think it is a reasonable inference from the evidence that the Ponts

supported the parents significantly, both in a financial way and in many other ways. To give an example, the parents sold their car and were reliant on Mr and Mrs Pont thereafter for transport. The father died in about 1982 and in 1983 Mr Pont retired. They sold their home for $49,000.00 and moved to Nelson. Mrs Whittle then went into an old peoples home.

There is evidence to suggest that the addition of the granny flat did not materially inflate the price of the house when the Ponts sold it. This evidence, as Mr Barnett for the Plaintiff submitted, has some significance because it appears that Mrs Whittle came to the view that she had already effectively given her daughter something like $9,000.00 by means of the contribution to the granny flat. There is a record of a telephone conversation between the deceased and a solicitor in the office of Mr MacFarlane which suggests that Mrs Whittle was of the view that she had already given her daughter $10,000.00 to build the granny flat and thought using the words of the note "she has had more than her share". This note was made in November 1983, the will having been signed in August of that year. It therefore appears to have been the deceased's view that she had already made some financial provision for her daughter by the means which I have described. However in that respect the evidence satisfies me that no significant financial provision was so provided.

I am satisfied that in a family protection case it is perfectly proper and indeed the Court

is directed to consider the reasons for the provisions of the will and there is authority for saying that it is a material circumstance if the reasons are shown to be wrong, irrational or unreasonable. Mr Barnett referred me in this context to the case of Summerfield v. Public Trustee [1985] B.C.L. 466. There is also some suggestion in the evidence of difficulties between the deceased and her daughter and particularly between the deceased and Mr Pont. I accept the submission that the difficulties were more apparent than real and I consider this to be a case where there is absolutely no foundation for any suggestion that there has been disqualifying conduct on the part of the Plaintiff. Indeed it is fair to say that no such suggestion was raised in opposition to her claim. Difficulties between the deceased and Mr Pont related to the fact that he, Mr Pont, had not fought in the Second World War as had the deceased's sons.

Against that broad background, and I have not traversed all the material referred to in the affidavits but I have of course closely studied them, the question is whether or not the deceased was in breach of her duty as a wise and just mother to make, if necessary, adequate provision for her daughter. The law is clear. The question of whether there is a breach of that duty is to be judged at the date of death. If a breach is found the quantum necessary to repair it is assessed at the date of hearing: Little v. Angus [1981] 1 N.Z.L.R. 126. I was also helpfully reminded by Mr Barnett that need for adequate maintenance and support is not confined solely to

financial matters but broadly speaking moral and ethical considerations can be brought to account as well. There are a number of cases on that including the case mentioned by Mr Barnett: Young [1965] N.Z.L.R. 294. In my view both financial needs and moral and ethical considerations arise in this case.

The estate is, in comparative terms, very small. It is clear that the deceased felt an obligation to make provision for her great grandson Michael and then for the Society that was likely to be looking after Michael. That is perfectly natural and reasonable in view of Michael's circumstances as they were obviously known to the deceased. However, I am completely satisfied by the evidence and by Mr Barnett's submissions that the deceased failed in her moral duty to her daughter. Michael's claim, if one may call it that, is not a competing claim in the strict sense. The Plaintiff's financial position is far from strong. She is, as was pointed out, retired and she has no capacity to generate greater income or capital. The submission was made that in her early years she forsook secondary education and a career and that I think is a material circumstance. She was certainly in my view on the evidence a loyal and dutiful daughter.

One only needs to make reference in that context to the handsome tribute which her brother Ronald pays to her activities to be able to reach that view without any difficulty at all. Ronald makes no claim for

further provision himself. He says this at the end of his affidavit:-

> "From my point of view there is no doubt that Nora was and is much more worthy of receiving provision from my parents' than I or my brothers. I say this taking into account the commitment that she made to both of my parents over many years and the very substantial sacrifices that she made, all of which she did willingly and graciously."

I accept that evidence and it is obviously a sincere and justified tribute to the Plaintiff's efforts over the years. Mr Barnett reminded me of some of the more important aspects. The fact that the parents had lived with the Ponts for eight or nine years. This is often, and I am satisfied in this case was, a demanding responsibility. There was the father's health problems. In her later years the deceased perhaps became a little difficult, as is not uncommon, and the Plaintiff appears to have coped with this sensitively. She, the Plaintiff, received no provision from her father's estate. There is the point already mentioned about the fact that the deceased appears to have misled herself as to the granny flat value on the sale of the Pont house.

All of this brings me to the clear view that the deceased should have made provision beyond a legacy of $500.00 for her daughter, not only because of her daughter's modest financial circumstances, but also in recognition of the considerable care and attention which Mrs Pont had given to her mother over a large number of years. The question now becomes what provision should be made. Counsel for the Plaintiff referred me to a number of cases in this context. I do not propose to traverse them

although I have borne the circumstances disclosed by them in mind.

It is perhaps sufficient for present purposes to say that if there is sufficient money to go around a charitable bequest is a laudable and proper step for a testator or testatrix to take but it is clear that a charitable bequest must yield to a failure to satisfy the moral claims of the people who have a right to look to the deceased for some provision. The cases mentioned were Morrison [1985] B.C.L. 783 and Summerfield, the case already cited in another context. Mr Barnett also mentioned the case of Pulleng v. Public Trustee [1922] N.Z.L.R. 1022. What I have to do, I apprehend, is to decide what should a wise and just mother, against this factual background, have done to reconcile the obvious claim and needs of the Plaintiff, her daughter, against her desire to make some provision in her will for her handicapped great grandson.

In his initial submissions Mr Barnettt suggested that perhaps the Court might feel able to go so far as awarding the whole estate to the Plaintiff but rightly, in my view, that stance was modified during the course of argument to the proposition that there was justification for acknowledging to a certain extent the deceased's wish to benefit the Society and Michael but that the primary focus of her attention should have been towards the Plaintiff. Mr Johnstone for the residuary beneficiary the Intellectually Handicapped Society drew my attention, in accordance with his duty, to Michael's circumstances.

He emphasised that Michael was likely to be dependent for the rest of his life and that if anything the costs that would be attendant on Michael's care would increase rather than diminish into the future. The Society itself properly abides the decision of the Court but asks me to bear very much in mind Michael's needs and the deceased's wish to make provision for him.

It is perfectly apparent from the enquiries made by Mr MacFarlane that Michael's parents are by no means well off. Mr Johnstone submitted that the cases mentioned by Mr Barnett seemed to involve gifts to charities per se whereas here, as he put it, there was a family element in the bequest as well. The gift here was not only charitable in the general sense but also had a family connotation. I accept that proposition and there is therefore some greater force in it in these circumstances than if it had been just a charitable bequest without any family connection.

In my view the following orders will in all the circumstances of this case adequately reflect appropriate quantum to repair the breach of moral duty which I have found to exist while at the same time recognising and respecting the wish of the testatrix to benefit first Michael and then the Society that was likely to be responsible for his welfare during his life. I therefore make the following orders:-

(1) The residuary bequest in favour of the Society for the Intellectually Handicapped (Canterbury Branch) is cancelled.

(2) In lieu thereof the Society is to receive a legacy of $7,500.,00 on the same terms as provided for in the residuary provisions of the will.

(3) The residue of the estate is to go to the Plaintiff.

No order for costs is made in favour of either the Plaintiff who will receive the residue or in favour of the Defendant as Trustee, he not needing any order. As to the costs of Mr Johnstone's client it is my intention that the reasonable and proper solicitor and client costs of the Society be a charge on and be paid out of the legacy of $7,500.00. As to quantum that is not my concern and I do not think I need say any more about it.

ACT J