

NOT
RECOMMENDED

26/7

MZCR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP.42/87

UNDER the Family Protection Act 1955

738
IN THE MATTER of the Estate of
KENNETH WILLIAM HOWARD
HOLLAMBY late of Mosgiel
Retired, Deceased

BETWEEN RONALD CHARLES HOLLAMBY of
72 Main South Road, East
Taieri, Lift Operator,
RAYMOND GEORGE HOLLAMBY of
4A Inglis Street, Mosgiel,
Linen Service Manager
KENNETH JOHN HOLLAMBY of
471 Thames Highway, Oamaru
Shop Proprietor and MICHAEL
JOSEPH HOLLAMBY of 111
Factory Road, Mosgiel,
Unemployed

Plaintiffs

A N D RAYMOND GEORGE HOLLAMBY of
4A Inlis Street, Mosgiel
Linen Service Manager as
Executor of the Will of
KENNETH WILLIAM HOWARD
HOLLAMBY late of Mosgiel
Retired, Deceased

Defendant

Hearing: 5 July 1989

Counsel: P S Rollo for Plaintiff
D J More for Donna Nguyen
A V J Hamel for Trustee

Judgment:

JUDGMENT OF FRASER, J.

Mr Kenneth William Howard Hollamby died on 11 March 1986
leaving a will dated 26 July 1985 probate of which was granted to
the defendant on 4 June 1986.

He was survived by his wife but they had been separated for many years and although she was served with these proceedings has taken no step in them. He was also survived by his four children (the plaintiffs in the present action) 10 grandchildren and one great grandchild. The deceased's grandson Murray Hollamby was appointed to represent all grandchildren and any great grandchildren who may be beneficiaries under the will and was duly served but has taken no step in the proceedings.

For many years Mrs Nolleen Ferguson kept house for the deceased. Her daughter Donna, (now Mrs Nguyen), lived with her at the deceased's home from the time she was 20 months old and according to her own affidavit was brought up by him as his own daughter.

By his will the deceased gave certain legacies and bequests and devised his house at 109 Factory Road, Mosgiel, the major asset in the estate, to Donna Nguyen. The residue of the estate was left to such of his great grandchildren as should survive him and attain the age of 20 years and if more than one in equal shares.

Ronald Charles Hollamby and Raymond George Hollamby were each left a legacy of \$250. Except for some specific items which were bequeathed to other persons, the deceased's personal chattels were left to the four sons. No other provision was made for them.

Clause 5 of the will reads as follows:

"I HEREBY DECLARE that I have specifically instructed the preparation of my will as set out herein leaving only a minor interest in my estate to members of my family because they have shown very little or no interest in my well being for more than the last ten years and I believe they are not concerned about me at all."

The final balance of the estate according to the statement of assets and liabilities in the administrator's statement was \$15,284.13.

Since the date of death the debts and administration expenses have been paid and there is a small deficit (\$86.54). The personal chattels (which were not valued) have been removed from the house, and the house has been and still is let to a tenant. The rent received has been sufficient to pay off the small mortgage owing, meet other expenses and accumulate a credit balance of about \$1,000. The house has recently been revalued at \$36,000. There are no assets other than the house so there is no residue and the question arises as to how the legacies and the cost of these proceedings is to be met.

Mr More informed the Court that subject to any order made in these proceedings Mrs Nguyen would meet the legacies (totalling \$1,300) and costs to enable the administration to be completed and the house transferred to her.

The four sons claim further provision from their father's estate and the contest is essentially between them and Mrs Nguyen as any award made to them must in effect come from the house. Affidavits were filed by Michael Joseph Hollamby, Raymond George Hollamby and Mrs Nguyen. By arrangement between counsel viva voce evidence was heard from the four claimants as to their individual financial circumstances and as to the reasons for the deceased falling out with his sons and inserting clause 5 in his will.

All the witnesses in various terms described the deceased as

a rather difficult man of stormy temperament who was quick to take offence and harboured grudges over real or imagined slights. Quite apart from the sons Mrs Ferguson left his home on three occasions as a result of his temper. I think the deceased's own conduct and attitude is at least part of the reason for the limited contact between the sons and their father, although it does appear that at least in the period of his illness prior to his death all the sons visited him in hospital and that gave him some satisfaction and peace of mind. Mrs Nguyen in her affidavit while by and large minimising the contacts between the deceased and his sons said that Ray "was the only son who had anything like a normal father/son relationship with the deceased". It is also pertinent that despite the sentiments expressed in clause 5 he appointed his son Raymond to be his sole executor and trustee. Both of these factors are inconsistent with the views contained in clause 5 which apply generally to all members of his family. My conclusion is that while relations between him and his sons were far from close mainly because of his own temperament, nevertheless objectively considered there was no conduct on the part of any of them which justified the stand taken in clause 5 of the will, or which amounted to conduct disentitling them to relief in their present application.

Mr Ronald Charles Hollamby is aged 58 years, married and has a 21 year old son. The latter suffers from a psychiatric or psychological condition which has required his treatment at Cherry Farm Hospital although he is presently at home on medication but needing supervision. Mr Hollamby owns his own

home worth \$35,000 free of mortgage, has savings of \$2,500 and is employed as a lift attendant at an annual salary of \$14,000.

Mr Raymond George Hollamby is aged 57 years, married, and has three adult children. He does not own his own home, has assets consisting of a motor car valued at \$6,000, a section \$5,000, and savings of \$1,200. He is employed by the Otago Area Health Board at an annual salary of \$40,000.

Mr Kenneth John Hollamby is 55 years of age, married, with two adult children. He has a home which he says is worth \$65,000 free of mortgage, owns two cars and shop premises in Timaru with no value being given to those, and has savings of \$20,000. He says that he and his wife are semi-retired and each has an annual salary of \$12,000.

Mr Michael Joseph Hollamby is aged 47 years and has four children, the youngest of whom is aged 14 years. He owns his own home said to be worth approximately \$30,000, has two motor cars to a total value of \$10,000 and is unemployed. His wife works part time and earns a small income.

In all material respects the circumstances of each of the claimants at the time of the deceased's death and at the present time are the same.

Mrs Nguyen is aged 28 years and is married with one child three years of age and is expecting another child to be born in February 1990. She had met her husband in November 1981, lived with him in 1982 and was married to him on 11 January 1988. At the date of deceased's death she was unmarried, living with Mr Nguyen and pregnant with his child. Mrs Nguyen's present

circumstances are that she lives with her husband in a property at Green Island owned by her husband worth about \$100,000 and subject to a mortgage for \$17,000. Her husband was made redundant at about the end of 1988 and received a redundancy payment which he used to build a flat above the garage at their home for members of his family who have come to New Zealand from Viet Nam and now reside in that flat. Her husband's present income is an unemployment benefit. Her only personal asset is a Cortina motor vehicle which she says is worth about \$500.

The viva voce evidence given by the claimants pursuant to counsels' arrangement was limited to the two factors which I have referred to. There is a degree of conflict between what they say and what Mrs Nguyen says about the extent and nature of the contact between the deceased and his sons, and while it is not possible to entirely reconcile those, I think that the position was broadly as I have already described.

The information before the Court as to the claimants' personal circumstances, despite the fact that they were called to give oral evidence, is rather sparse. This is particularly so in the case of Mr Kenneth James Hollamby who lists assets tersely described as two cars and shop premises at Timaru without any explanation or value being ascribed to them; he says that he is semi-retired without any explanation as to where he and his wife derive the income described as annual salary. There is no suggestion that he is in ill health or has any particular needs which merit consideration in relation to his present claim.

The principles applicable are conveniently set out in Little

v Angus [1981] 1 NZLR 126 at p.127:

" The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach or moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

It is desirable also to refer to Re Allen Allen v Manchester [1922] NZLR 218 and the following well known passage from the judgment of Salmond J at p.221:

" Applications under the Family Protection Act for further provision of maintenance are divisible into two classes. The first and by far the most numerous class consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary dispositions, the applicant is competing with other persons who have also a moral claim upon the testator. Any provision made by the Court in favour of the applicant must in this class of case be made at the expense of some other person or persons to whom the testator owed a moral duty of support. The estate is insufficient to meet in full the entirety of the moral claims upon it, in the sense that if the testator had possessed more he would have been bound to do more for the welfare of his dependants. In such a case all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims. No question arises in such a case as to the general scope and limits of the duty of the testator to make provision for the maintenance of his widow and children, for his duty in the circumstances is merely to do the best that he can and to distribute his available resources with

justice between his dependants in proportion to their deserts and necessities."

I also bear in mind that although Mrs Nguyen would not be eligible to claim under the Family Protection Act her competing moral claims are a relevant factor: Re Sutton [1980] 2 NZLR 50.

Having regard to Mr Kenneth Hollamby's position, I do not think that a wise and just testator in the position of the deceased having regard to his limited estate and the moral claims which I will refer to later, would have been under any moral duty to make any provision for Mr Kenneth Hollamby. His position relative to the others, even on the figures given, is much better and in addition there are the unvalued assets which I have referred to; in the absence of any information from him I can only assume that they are of significant extent.

The other three brothers are, however, in rather different circumstances. Mr Michael Hollamby was at the date of the testator's death, and still is, unemployed. He has a dependant child and although he owns a modest home and motor vehicles, his prospects of employment at his age and in the current economic situation are not good. I think that the wise and just testator would have made some provision by way of a capital sum for this son. Similar considerations apply to the other two. Mr Raymond Hollamby is aged 57 years and although he is earning a reasonable salary from his job with the Otago Area Health Board that must be limited in duration because of his age. He has no home of his own and only limited assets. Mr Ronald Hollamby is earning a small salary and has his own modest home free of mortgage

andsavings of \$2,500 but he too at his age must be facing retirement and he has the added responsibility of his handicapped son.

Mrs Nguyen's circumstances would also have required careful consideration by the testator. She was a de facto daughter, lived in his home until she was adult, maintained contact with him thereafter and provided assistance from time to time both directly and indirectly through her husband. At the date of his death she was living with the man she later married and was pregnant. She had no assets and no independent income. Her situation has improved significantly since that time because of her marriage and her husband's financial position, but with a young child and another expected and her husband unemployed, cannot be said to be well placed financially even though they do live in what appears to be a much more expensive house than any of the others involved in this case. Although she would have no legally enforceable claim under the Family Protection Act, her moral claim to benefit from the testator's estate was one of some weight.

Mr Rollo suggested that if an award were to be made in favour of the sons there should be a five way division of the house with one-fifth to each of the four sons and the remaining one-fifth to Mrs Nguyen.

Mr More contended that each of the plaintiffs was in a different position, their claims should be considered individually and while he argued against making further provision for them, he submitted that if there were to be an award his

client would prefer that it be on the basis of a cash payment rather than a share in the house, so that if it were possible for her to finance it, she would be able to pay out the other persons entitled (including the legatees) and keep the house or dispose of it as her own.

It will be apparent from what I have said that I think there should be an award to the sons, except Mr Kenneth Hollamby, and I think that the approach suggested by Mr More is preferable to vesting the house in Mrs Nguyen and the successful claimants.

I take into account in expressing this view, and act on the basis of, her stated intention to see that the legacies and other costs properly payable by the estate are to be met by her.

Although the circumstances of the three sons differ as between themselves their needs are broadly the same and I do not think that any distinction ought to be made between them.

It is my view that if each of them received the sum of \$5,000 (in the case of Ronald and Raymond in lieu of the legacies of \$250 left to them) the testator's breach of moral duty would have been repaired so far as that is possible and proper having regard to his limited means and the moral claims of Mrs Nguyen.

In summary my decision is

- (a) Kenneth John Hollamby's claim for provision from his father's estate is dismissed.
- (b) Ronald Charles Hollamby, Raymond George Hollamby and

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Michael Joseph Hollamby are each to be paid the sum of \$5,000. In the case of Ronald and Raymond these payments are in lieu of and not in addition to the legacies payable under clause 3(1) of the will.

(c) Each party is to pay his or her own costs.

In case there is some aspect which I have overlooked or some consequential matter requiring further directions leave is reserved to all parties to apply further.

Solicitors:

Webb, Brash, Ward & Co, DUNEDIN, for Plaintiffs
Quelch McKewen Tohill & More, DUNEDIN, for Donna Nguyen
Lewis Nicholson, DUNEDIN, for Trustee.