IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

6/11

No. M.508/89

2248

UNDER The Family Protection Act 1955

IN THE MATTER of the Estate of J BYRNE late of Christchurch, Retired Storeman, now deceased

BETWEEN P BYRNE

Plaintiff

A N D THE PUBLIC TRUSTEE

Defendant

Hearing: 12 October 1990

Counsel: L.H. Atkins Q.C. for Plaintiff
Russell for Defendant
P.D. Sewell for Enid Richards

Judgment: 12 October 1990

ORAL JUDGMENT OF HOLLAND, J.

Before I proceed to deliver judgment on this matter I should like to express my appreciation of the very moderate and helpful way in which all counsel have presented their submissions in this claim and in each case it has certainly done their clients no harm.

The plaintiff is the only child of the testator who died on 11 July 1989 leaving an estate of just over $40,000. The present balance of the estate, subject to costs of administration and these proceedings, is $44,000.

Under the terms of his will he provided that his estate was to be divided into four parts with one part for each of his two sisters, one for the Mother Superior of Nazareth House, Christchurch, and one for the Officer in Charge of the Salvation Army in Christchurch. One of the testator's sisters pre-deceased him and under the terms of his will his surviving sister acquires her quarter share, so that in effect the estate is divided as to one half to his sister and one quarter to each of the two charities.

The plaintiff is 32 years of age, married with two young children. He is a staff sergeant in the New Zealand Army. He is in receipt of an adequate but modest salary of $35,000 per annum. He and his wife own a house property in which they have an equity of just under $30,000 and they own a motor car and furniture. There is no indication of any ill health on behalf of the plaintiff, his wife or his children.

The plaintiff resided with the testator and his mother for the first 15 years or so of his life. At that stage his father separated from his mother and the plaintiff remained with his mother, and it is quite obvious that contact with his father from that date effectively ceased. The plaintiff is not to be blamed for the original lack of contact, nor for its continuation, but the evidence does not indicate to me any great desire or attempt by the plaintiff to have a closer association with his father. Those circumstances are not unusual with divided marriages, but this plaintiff is different from some in that for the

formative years of his life he was living in a home with his father and his mother and there is no evidence of neglect by either parent during those years. On the other hand, the testator had no other persons with a legal claim on his bounty except for his estranged son.

The two charities have taken no part in the proceedings and leave the matter to the Court.

Counsel for the plaintiff's aunt, the residuary beneficiary as to a half, recognises the validity of the plaintiff's claim, but nevertheless in a modest way claims that she was entitled to receive some benefit from the estate. Counsel for the plaintiff recognises the validity of that claim. It is quite apparent that in the last 11 years of the testator's life he was assisted by way of comfort, and probably a good deal more, from his two sisters. There is no evidence of any great association with the two charities.

Although Mr Atkins submitted that the size of this estate was a small one which might not be expected fully to meet the needs of the plaintiff in the manner in which the word "needs" is applied under claims under the Family Protection Act, I am unable to agree with him. I agree that the testator was under a moral duty to make further provision for the needs of the plaintiff but not to the extent of leaving him the whole estate, or indeed anything like it. This is not a case where a plaintiff can say he had a deprived upbringing from a baby because of the neglect of his father. Nevertheless, the plaintiff has lost

the benefit of having a father in a quite important part of his life, particularly his late teens.

It is becoming prevalent to adopt the view that a testator is bound to make provision for his family regardless of the circumstances. It is important to remind oneself that a testator is entitled to leave his estate as he wishes subject only to his obligations to provide for the needs of those limited classes of persons entitled to claim under the Act.

I am satisfied the circumstances of this case were such that the testator was entitled to make provision for the two chosen charities as well as for his sister, but he was not entitled to do so to the exclusion of the plaintiff. I am also clearly of the view that an award to be made to the plaintiff should be primarily at the expense of the charities rather than the aunt. That is not because the aunt was a relation of the testator, it is because she and her sister must have greatly assisted him in the last 10 or 11 years of his life.

However, the aunt, Miss Richards, has instructed her counsel that she considers that adequate recognition of her claims on the testator would be met by her receiving one quarter of the estate. That was a proper submission for her to make, but nevertheless quite a generous one.

In the circumstances I am satisfied that there was a failure to recognise the needs of the plaintiff and it is necessary to amend the will. That will be done by

providing for a legacy of $5,000 for each of the two charities with interest thereon in accordance with the Administration Act. The residue of the estate is to be divided as to 3/4 to the plaintiff and 1/4 to Enid Richards. The plaintiff should in the circumstances pay his own costs. The two charities can likewise pay any costs that may have been incurred. The executor needs no order as to costs. It is my view that Enid Richards should have her solicitor and client costs paid out of the estate. If those costs are agreed by the plaintiff and the executor there is no need to refer the matter back to the Court, but in the event of there being any difficulty about that matter those costs can be taxed by the Court.