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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. 41/89

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**LOW
PRIORITY**

UNDER the Family Protection Act
1955 and the Administra-
tion Act 1969

IN THE MATTER of the Estate of PAUAO
LOVRENSCAK of Christchurch
Cabinet Maker

BETWEEN GARY MICHAEL LOVRENSCAK of
9 Stable Court Lane,
Christchurch, Machinist

Plaintiff

A N D THE PUBLIC TRUSTEE of
New Zealand at Christ-
church as Executor and
Trustee of the will of the
said late PAUAO LOVRENSCAK
of Christchurch, Cabinet
Maker, deceased

Defendant

Hearing: 21st February 1990

Counsel: A.J. Cadenhead for Plaintiff
D.J. O'Rourke for Defendant
S.A. Jeffery for Katrina Sheriff

ORAL JUDGMENT OF WILLIAMSON J.

Pauao Lovrenscak died on the 25th December 1987. In a will dated the 1st August 1983 he left his entire estate to a charity, the St Vincent de Paul Society. Claims have now been made by his son and daughter under the Family Protection Act 1955.

The deceased came to New Zealand from Yugoslavia. He married and the Plaintiff, Gary Michael Lovrenscak, is the only child of that marriage. The deceased had one other child,

Katrina Jane Sheriff, who was born after the deceased's marriage finished.

In statements to the solicitor at the Public Trust Office who prepared the deceased's last will, the following reasons were given for the provisions, and in particular for the deceased's decision not to make any provision for his children. The solicitor's note states:

"Testator and son Gary have a very poor relationship. They have had no contact since March 1983. Gary has cut himself off from the testator and apparently calls himself by his stepfather's surname 'Newton' in all his dealings. Furthermore testator has been told by Gary to stay out of the son's life.

Testator's daughter Katherina was from a de facto relationship. Testator's last contact with daughter was in 1982. He has no idea of her address and pays no maintenance. The association with the daughter's mother finished many years ago.

In leaving his estate to St Vincent de Pauls, the testator states this is just recognition of all assistance and help they have offered him in sponsoring him to New Zealand as an overseas refugee (entering New Zealand as an alien). The testator's relationship with St Vincent de Paul is still current as they have assisted him in paying part of his mortgage instalment to the Canterbury Savings Bank. Consequently the testator in light of his family circumstances wishes to benefit the St Vincent de Paul Society under his will."

Affidavits made by the son and daughter, which have not been challenged, indicate that while there was some contact between themselves and the deceased, particularly during their early years, there was not a great deal of contact in the period immediately preceding his death. That situation is not surprising since the Plaintiff was brought up by his mother in

her new family. While there was contact with his father that tended to be spasmodic after the Plaintiff reached an age where he made such decisions for himself. The daughter, Katrina Sheriff, had some periods of quite close contact with her father but had virtually no contact for some nine years before his death.

The position now is that the Plaintiff is aged 23. He trained as a Machinist but shortly after the deceased's death the Plaintiff was made redundant and was unemployed for some time. He left New Zealand and has obtained employment in a confectionery factory in Australia. At present it is not his intention to return to New Zealand but rather to endeavour to obtain other work and in particular to undertake a hotel manager's course. His assets are restricted to some furniture and a motorcar. He is now in receipt of a reasonable income of approximately \$A350 nett per week.

The other claimant, Katrina, is 18 years old. She is in receipt of a sickness benefit of \$185 approximately per week and is paying rent of \$120 per week. She was apparently severely injured in a car accident when she was aged 7. It is not known exactly what condition she is now suffering from but it is apparently accepted that it is of such a nature that she is properly in receipt of a sickness rather than an unemployment benefit.

The Plaintiff may ultimately have some future expectations of inheritance from his mother or stepfather.

while such expectations do not appear possible for the other claimant.

So far as the estate is concerned, it consisted at the date of death of a house property, furniture and a small amount of savings. After payment of the debts there was a sum of approximately \$29,000 held by the trustee. Counsel for the Trustee has today told me that, with interest, the nett estate is now in the vicinity of \$31,000.

The principles upon which claims under the Family Protection Act 1955 are approached are well understood. The classic statement appears in the case of Allardice v Allardice (1910) 29 NZLR 959. The matters raised there have been updated and re-stated by the Court of Appeal in the cases of Little v Angus [1981] 1 NZLR 126 and Re Leonard [1985] 2 NZLR 88. It is necessary for the Court to consider whether a testator has been guilty of a manifest breach of the moral duty which a just father owes towards his children. Such a judgment must be made in the light of present day standards, the size of the estate, and having regard to all of the circumstances of the particular case and especially to the circumstances of those with claims against the estate.

The sole beneficiary under the will, that is the St Vincent de Paul Society, has not been represented in these proceedings. Counsel for the Trustee has advised the Court that that Society notified the Trustee that it did not wish to be heard but would abide the decision of the Court.

There can be little doubt in this case that the deceased was in breach of his moral duty towards his two children. The fact of an absence of close contact between the children and himself certainly does not amount to disentitling conduct. No doubt the remedy for the lack of contact would have been substantially in the deceased's control. The children's circumstances at the date of death of the deceased were poor. Neither of them had good employment prospects. Katrina in particular, because of her injury and lack of training and support of a family unit, was in a position of considerable need. If anything, the evidence establishes that her need was greater than that of the Plaintiff's.

Counsel for both of the children has made submissions upon the basis that any provision for the children should be equal. In particular Counsel for Katrina has stated that she accepts the overall wisdom of any award to her being equal to that of her brother.

In making provision under the Family Protection Act 1955 the Court is required to consider a remedy which would fit as closely as possible to the provisions which the deceased himself wished to make. In balancing all of the matters which have been raised in these proceedings and in particular the needs of the two claimants with the desire of the deceased to record his appreciation of the help which he received in order to come to New Zealand and to obtain the assets which form his estate, I am of the view that the appropriate award in this case is one under which payment of \$2,000 is made to the St

Vincent de Paul Society and the balance of the estate is shared equally between Gary Michael Lovrenscak and Katrina Jane Sheriff. No orders for costs are sought since each party can pay their own costs from the portion of the residue of the estate available to them.

A handwritten signature in black ink, appearing to read "William J.", is written across the right side of the page.

Solicitors:

Quigley's, Christchurch, for Plaintiff

The Solicitor, Public Trust Office, Christchurch, for Defendant

Papprill Hadfield & Aldous, Christchurch, for Katrina Sheriff