

NZLR

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

20/9

CP.122/90

**LOW
PRIORITY**

IN THE MATTER of the Family
Protection Act 1955

A N D

IN THE MATTER of the Estate of
CHARLES FRANCIS CRONIN
late of Palmerston
North, Company Manager,
now deceased

1763

BETWEEN: JOAN WINIFRED BOWLER
of Palmerston North,
Widow

Plaintiff

A N D: LUCY EILEEN NEW of
Paraparaumu, married
woman, a n d
DOUGLAS STEWART DEAN
of Palmerston North,
Solicitor, as Trustees
of the Will of the late
CHARLES FRANCIS CRONIN

Defendants

Hearing: 22 August 1991

Oral Judgment: 22 August 1991

Counsel: C P Somerville for plaintiff
A S McIntyre for beneficiary Mrs L E New
J G Mills for defendants

ORAL JUDGMENT OF HENRY, J.

The testator, **CHARLES FRANCIS CRONIN**, died at
Palmerston North on 11 December 1990, then aged 99 years.
His last will is dated 31 March 1988 and under its terms
he provided for a legacy of \$2000 to one of his
granddaughters with the residue of the estate being

bequeathed to a daughter, **LUCY EILEEN NEW**. The present value of that residue is approximately \$194,000.

The testator was married once only, his wife having predeceased him in 1972. There were two children of the marriage - the plaintiff and the residuary beneficiary, Mrs New. There are no other claimants to the estate.

The plaintiff is now aged 74 years, she is a widow, her husband having died in 1982. She has two adult sons. Her own financial position can be described as modest. She has a leasehold property where she is presently residing, valued at \$44,000. She has investments totalling some \$37,000, and a car valued at \$3500. Her only income is from Universal Superannuation and a further superannuation deriving from her late husband's employment which together with income from the investments earlier mentioned, gives her a total income of approximately \$30,000 per annum. The plaintiff received some assistance from the testator during his lifetime, this included an insurance policy which yielded her some \$19,000, an investment of \$10,000, some articles from the family home, a diamond ring which emanated from the plaintiff's mother, some of the mother's personal effects, and from time to time some small amounts of cash. She also received some medals from the testator. The plaintiff received nothing from her mother's estate.

Mrs New is now aged 70 years. She is married and resides with her husband. They have five adult daughters, one of whom suffers from some form of intellectual impairment. They own their own house, valued at \$89,000.

Their other assets and total income are not described in any detail in the affidavits but as I understand it the income consists of superannuation, derived from Mr New, of some \$21,000 per annum. So far as other assets are concerned, it is clear that Mrs New received a net figure of the order of \$275,000 following the sale of a property sold her by the testator in 1988 and to which I will shortly refer. During the lifetime of the testator, Mrs New received some assistance from him, consisting of household items, a car, but more particularly in 1988 the transfer to her of the former family home. This was effected at the July 1983 Government Valuation of \$150,000, payment being made by way of advance from the testator to Mrs New, unsecured, constituting an on demand loan which did not carry interest. That debt forms a substantial part of the testator's present estate. The value of property as at 1988 was some \$317,500, and I am advised that it was sold approximately one month after the death of the testator for a figure of \$425,000. Mrs New received benefits from her late mother's estate, comprising cash of something over \$3000 and other personal effects such as jewellery and china.

The testator made earlier wills which contained varying provisions for the plaintiff. In 1975 a legacy of \$5000, in 1978 a similar legacy, in 1979 a legacy of \$10,000, and in 1980 a legacy of \$20,000 which was amended by codicil in 1982 to a sum of \$30,000. In the last will the testator referred specifically to his failure to provide for the plaintiff in these terms :

"I have not given or bequeathed any legacies to my daughter **JOAN WINIFRED BOWLER** for the reason that I have during my lifetime given her gifts and money of large sums."

The testator, on the occasion of making his last will, advised his solicitor that he had become perturbed at plaintiff's behaviour and that he had already adequately provided for her.

As to the relevant family history and background, some criticism has been levelled at the plaintiff by Mrs New as to the plaintiff's behaviour and attitude as a daughter over a period of years. But this appears to be more particularly directed to the relationship between the plaintiff and her mother. Reference in the affidavits has been made to some particular incidents which occurred in the past. I do not find it necessary to traverse those at all as on any approach the incidents can only be described as comparatively minor and have little real bearing on the

issues presently before the Court.

It is clear that the plaintiff did provide assistance for the testator over a period of some years, particularly after the death of her mother in 1972 and again, more particularly, following the death of her own husband in 1982 - *inter alia* those consisted of providing meals for him on a regular basis and providing overall general help as one would expect from a daughter for an elderly father. It also seems to me that there was what one could describe as some loosening of bonds between plaintiff and testator over the latter stages of his life. The real responsibility for that cannot be properly apportioned from the information before the Court, neither is it necessary to attempt to do so. I am quite satisfied that there was no conduct on her part disentitling her to benefit from testator's estate in the way which the legislature envisages the exclusion of an otherwise deserving beneficiary may take place. The matters referred to have some, but not in my view significant, bearing on the question of breach of duty and, if there be breach, the extent of it. Generally I conclude that the plaintiff can be described properly as a dutiful daughter. It is also clear that Mrs New had a close attachment both to the testator and to her late mother, and she also provided assistance to the former more particularly again in the later stages of his life. In his last will,

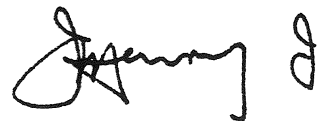
testator adverted to the transfer to Mrs New of the house property, expressing that it was in consideration of her care and attention towards him, and also acknowledging that he had agreed with Mrs New that he would continue to pay rates and insurance on that property during his lifetime.

I am satisfied that the testator was in breach of his moral duty towards the plaintiff in failing to make adequate provision for her maintenance and support within the meaning of s.4(1) of the Family Protection Act 1955 as that subsection is to be construed. The principles governing awards under this legislation are now well known, and reference need only be made to such a case as Little v Angus [1981] 1 NZLR 126. The establishment of a breach of duty was responsibly accepted by Mr McIntyre on behalf of Mr New in the course of his submissions. It is therefore necessary to determine what is required, not by way of re-making the testator's will but simply by way of remedying that breach.

The Court must have due regard to the testator's own wishes and preferences even as between two of his children. It must also have regard to Mrs New's moral entitlement to claim against his estate. I respectfully adopt the approach of Tipping J in Wilson v Wilson and Wolfe (M.19/90 Christchurch Registry, judgment 5 November

1990). The Court's obligation in this sort of situation, once it is ascertained that there has been a breach of moral duty, is to determine what and only what is necessary to remedy that breach. The plaintiff clearly requires some additional security at this time of her life to cover likely requirements which she may be called upon to meet in the coming years. Her means are modest and there are ample funds in the estate to make further proper provision for her. Taking all relevant factors into account, I have concluded that the appropriate sum to award her is one of \$120,000, to be payable from the residue of the estate. In the circumstances that sum is to be inclusive of costs.

There will be an order for further provision accordingly.

A handwritten signature in black ink, appearing to be 'J. Henry D.', written in a cursive style.

Solicitors:

Fitzherbert Rowe, Palmerston North, for plaintiff
Phillips Nicholson, Wellington, for residuary beneficiary
Innes Dean, Palmerston North, for defendants

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Plaintiff

A N D: LUCY EILEEN NEW
of Paraparaumu, Married
woman a n d
DOUGLAS STEWART DEAN
of Palmerston North
Solicitor, as Trustees
of the Will of the late
CHARLES FRANCIS CRONIN

Defendant

ORAL JUDGMENT OF HENRY J.

22/8/91