NZLR

IN THE HIGH COURT OF NEW ZEALAND 10/4
AUCKLAND REGISTRY M. 1873/90

NOT RECOMMENDED

363

UNDER THE Family Protection Act 1955

IN THE MATTER of the Estate of R KEAN deceased

BETWEEN C KEAN (a minor) by J KEAN her next friend

PLAINTIFF

A N D J SAMUEL and S HADFIELD Executors in the Estate of R KEAN

DEFENDANTS

Hearing: 26 February 1992

Counsel: B.V. MacLean for Plaintiff
M.J. McCartney for Defendants
J.G. Adams for Infant Children

Judgment: 26 February 1992

ORAL JUDGMENT OF ANDERSON J

This claim brought pursuant to the Family Protection Act 1955 lies against the estate of A Kean, who died at Auckland on 1989, in respect of which estate probate was granted by this Court on 6 November 1989. The present value of the estate is approximately $260,000, derived from real property and personal effects. The plaintiff is an adopted daughter of the deceased. Her

mother married the deceased at Auckland on 1974 when the plaintiff had turned three years of age and almost immediately the deceased and the plaintiff's mother adopted the plaintiff jointly. There were two children born of that marriage, namely C born 1976, and H born 1979.

The deceased died of leukemia, a condition known to him some time before his death. He and the plaintiff's mother separated and a matrimonial property agreement was effected. Having regard to those matrimonial arrangements, the deceased excluded the plaintiff's mother from provision in his estate, a situation accepted by all. In relation to his adopted daughter, who had lived as a child of his family in the legal and actual sense for some 17 or 18 years, the deceased merely recorded in his Will that he made no provision for her. There is an ineluctable inference that the deceased excluded the plaintiff for the very reason that the Court recognises her entitlement to claim, namely her filial relationship. There is no suggestion of any "disqualifying conduct" (to use a traditional but presently inapt term). I do not think it appropriate further to comment upon the motives of the deceased who was afflicted with a debilitating and terminal disease and who would have been suffering the emotional sequelae of matrimonial estrangement at the time the Will was made. It is sufficient to note that there has been a clear breach of moral duty to the plaintiff and that this Court has an obligation to intervene.

Anticipating his death, the deceased established a trust for the benefit of his two natural daughters, the capital for the trust being derived from the deceased's residence. That trust has a value of approximately $68,000. The effect of the trust and the testamentary dispositions was such as to share between the two natural daughters approximately $320,000 whilst totally excluding the plaintiff.

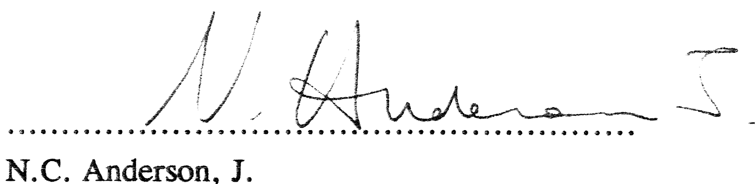
Learned counsel have committed themselves to a legally appropriate resolution of this matter and seek this Court's approval for an award to the plaintiff in the sum of $68,751.55. That figure represents 28% of the estate. That percentage has no particular magic and reference to it is made simply to indicate that this case has not been approached on the simplistic basis of equality, but with due regard to the principles of Family Protection Act proceedings.

The plaintiff is in indigent circumstances. She is in a de facto relationship with limited income. She has her own family responsibilities. I have no difficulty in approving the quantum and nature of the award sought. It is proposed that this award be transferred to a trustee for the benefit of the plaintiff until she shall attain the age of 25 years, thus reflecting the type of provision made in the deceased's Will for his natural daughters. It is inappropriate that the trustee for the plaintiff should be the same as the trustee for the natural daughters who are younger and whose needs are somewhat different and whose desire, along with their half sister, is that this regrettable family matter should be disposed of with procedures for severance of interest. The plaintiff is related to Barrister and Solicitor, Mr K G of the firm . That relationship and Mr G 's status as an officer of this Court, by virtue of his enrolment as a solicitor, makes him an eminently suitable person as a trustee, and by learned counsel for the plaintiff he indicates his willingness to accept that responsibility.

I accordingly vary the Will of the deceased pursuant to the powers of the Court under the Family Protection Act 1955 by directing that a legacy of $68,751.55 be granted to the plaintiff, to be held upon trust until she attains the age of 25 years, the terms of the trust to be the usual statutory terms, and that the trustee thereof shall be K G Esq., a solicitor of this Court.

I make an award of costs to the plaintiff in the sum of $8000 (inclusive of all disbursements) together with GST. I make an award of costs compendiously to learned counsel who have been appointed to represent the infant beneficiaries in the sum of $3000 (inclusive of all disbursements) together with GST.

I am obliged to counsel.



N.C. Anderson, J.

Solicitors for Plaintiff: Duggan & Murphy, Auckland

Solicitors for Defendant: Bell-Booth Burgess, Auckland

Solicitors for Children: John G Adams, Auckland