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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

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M 630/91

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IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the estate of JEANIE RODEN ROBSON, late of Christchurch, Widow, now deceased

BETWEEN BRIAN DOUGLAS CURRIE-ROBSON, of Auckland, Driver

Plaintiff

AND TREVOR LLOYD EVEREST Retired Farmer and PETER JOHN CORDNER, Solicitor, both of Christchurch as trustees of the estate of JEANIE RODEN ROBSON, deceased

Defendants

Hearing: 5 October 1992

Counsel: D R I Gay for plaintiff
J G Matthews for Trevor Lloyd Everest, Elizabeth Jane Everest and Lillian Smith and their respective children
B R Green for Craig Brian Currie-Robson and Sandra Currie-Robson
A J Cadenhead for the defendant trustees
H D P van Schreven for all other legatees except the grandchildren of the testatrix and the estate of Janet Ellen Smith

Judgment: 8 OCTOBER 1992

RESERVED JUDGMENT OF HOLLAND, J.

The plaintiff seeks an order for further provision from the estate of his mother. He is the only child of the deceased. He was adopted at the age of five by the

deceased and her husband. He was the nephew of the deceased, his mother having died when he was aged two years.

For the purposes of the Family Protection Act 1955 the adoption is really immaterial. He was brought up for practically all of his formative years as the only son of the testatrix and her husband.

At the time of her death the testatrix was a widow, her husband, the plaintiff's adoptive father, having died in 1977. Her age is not stated but she and her husband were married in 1934 and for the last five years or so of her life she was living in a private hospital and in the latter years of her life was said not to have had testamentary capacity.

Her last will is dated 19 December 1985 and there is no suggestion that she was otherwise than in full command of her mental faculties at that stage. She died on 17 March 1991.

Under the terms of her will she left a legacy of $2000 to the Christian Service and Missionary Trust Incorporated and specific bequests of jewellery which are also not challenged in these proceedings.

In clause (5) of her will she left 14 pecuniary legacies totalling $129,500. Included in this was a legacy of $20,000 to her son, $5,000 to his former wife and $10,000 to each of his two children. She directed that the residue of her estate was to go to three friends to whom she was not related. The nett value of her estate at the date of death was $161,000. I infer that the

instructions of the testatrix for the preparation of her will were with the intention of disposing of practically all her estate and leaving only a modest balance in residue.

It has been acknowledged by all beneficiaries in the estate that the plaintiff, in breach of her moral duty to her only child, has failed to make adequate provision for him in her will.

Following the death of the husband of the testatrix the plaintiff brought proceedings for further provision under his will. His estate was approximately $125,000 and provided for specific legacies of $28,000, a life interest in the residue to the testatrix and upon her death, a payment of some $20,000 to the plaintiff, three legacies each of $10,000 to friends and the balance to charity.

Those Family Protection Act proceedings brought by the plaintiff against his father's estate were settled by a provision that he should receive 42% of the residue of the estate of which $10,000 was to be paid to him immediately. The balance of his expectation from his father's estate was $35,836.49, of which $20,000 has been paid to him following his mother's death.

The plaintiff's financial position is not as clearly stated in his two affidavits as it should have been. There is reference to his being entitled to 42% of his father's estate and the fact that he had received $10,000 in 1981 and $20,000 on 8 August 1991 following his mother's death. He owns with his third wife a house property in Auckland said to be valued at $180,000 with a

mortgage on it for $121,000. He presumably has a motor vehicle and furniture but nowhere in his affidavit does he specifically state his total assets and liabilities. He has a claim for breach of contract in relation to a courtesy coach service conducted by him but the amount claimed and its expectations are not stated. It is incumbent on a plaintiff seeking relief under the Family Protection Act 1955 to set out clearly his or her financial position.

The plaintiff is 58 years of age and married for the third time. He has two children of his second marriage who are now aged 19 and 20 years. He is presently in receipt of a sickness benefit for which he receives $312 per week. His wife is employed as a real estate salesperson on a commission only basis but in the last six months she was earned only between $5,000 and $6,000 gross. In addition to his sickness benefit he presently receives sickness insurance of $300 per week but this was stated to cease at the end of 1991. He says that he is in poor health, suffering from high blood pressure and hyper-ventilation syndrome. His affidavit was sworn on 31 October 1991. In his later affidavit in reply sworn on 29 September 1992 he does not depose to any change in his health or employment situation.

The testatrix and her husband were both members of a religious sect known as Exclusive Brethren. In fact the plaintiff testified:-

> "My parents were ardent followers of the sect which demands from its members an entire commitment. Anyone who is unwilling to give such commitment is

> regarded as an outcast. They are "withdrawn from" and no-one from the sect is permitted to communicate or have anything to do with them socially or otherwise."

It is obvious that the plaintiff found the obligations expected of him by his parents as members of this sect as being too burdensome. He left school at the age of 16 and commenced working on his father's farm. He attended night classes in animal husbandry and farm maintenance to improve his education and skills. When he was 18 he entered the Army by way of compulsory military training and when this was completed by him at the age of 19 he refused to have anything further to do with the Exclusive Brethren and left home at the age of 20 years. He alleges that he was "withdrawn from" by his parents and had only minimal contact with them "not through any particular decision on my part, but rather because they tended to observe the rules of conduct of the Brethren and considered that it was not appropriate to have contact with me".

At the age of 24 he married in Christchurch but his parents, although invited to his wedding, chose not to come. His first marriage resulted in divorce and he married again in Australia in 1970. He and his second wife returned to New Zealand in 1976. He communicated in 1975 with his parents and found to his surprise that they had left the Exclusive Brethren and formed a different sect. He said that his parents' attitude to him was far more cordial than it had been for over 20 years and it is apparent that his parents formed some relatively close

relationship with his second wife and his two children who were their only grandchildren.

Sadly his father died in 1977 and, as earlier stated, he claimed further provision from his father's will. It is obvious that those proceedings were a cause of considerable concern and disappointment to his mother and the plaintiff and his mother again became estranged.

The primary obligation of this testatrix was to make adequate provision for the maintenance and support of her only son. Although she and her son had been relatively estranged since he was 20 years of age, it was acknowledged that there was no disentitling conduct on behalf of the plaintiff. Indeed it may be said that he was deprived of the comfort and support of his parents in his adult years. I have noted that according to her friends the testatrix expressed disappointment at the lack of communication from her son but there is no evidence of any real attempt on her behalf to compensate for the past deliberate distancing.

In the case of one of several children there may be room for differentiating from other siblings because of a close and continuous association on the one hand and a lack of association on the other. Where there is no disentitling conduct that will not often be a very material factor and here the plaintiff and his two children were the only relatives of the testatrix recognised as having claims under the Family Protection Act 1955.

There were some moral obligations resting on the testatrix in respect of the close and continuous friendship of Mr and Mrs Everest and of Mrs Smith. I accept the submissions advanced on their behalf that the plaintiff in the circumstances had some moral duty to make provision for them in her will but that moral duty was not strong. A continuous friendship is a valued thing in life and there are many services provided by friends without creating any expectation of testamentary provision in their estates. However, this testatrix, after fulfilling her duty to the plaintiff, was entitled in the circumstances essentially to leave her estate as she wished.

The plaintiff is not in a good financial position. He is 58 years of age, unemployed and apparently in receipt solely of a sickness benefit. The testatrix was entitled to take into account that the plaintiff would receive $35,000 from his father's estate on her death but that, in relation to her estate and his estate, was only a relatively small sum. In my view the testatrix was bound to provide for her son in the circumstances in a sum of at least $80,000.

In fixing this figure I have had some regard to the fact that the testatrix has provided for his two children each in the sum of $10,000. The order that I am making will reduce that provision and I acknowledge that a testatrix cannot avoid her obligation to her son by making her provision for her son's children. Counsel for the plaintiff's second wife and son supported the plaintiff's

claim but not at the expense of their legacies. Although the son was a grandson and entitled to claim under the Act he did not give evidence of any factor supporting a claim for him if his father were properly provided for. I am satisfied that their legacies should be treated the same as the others.

The incidence of the further provision for the plaintiff is a matter requiring consideration. It is trite to record that the obligation to provide for a plaintiff under the Family Protection Act 1955 is to vary the will to no greater extent than is required to remedy the breach of the testatrix. Section 7 of the Family Protection Act 1955 gives the Court wide powers as to the incidence of payments.

In this case the testatrix has in my view purported to dispose of almost all her estate by pecuniary legacies. In these circumstances it is just that the further provision for the plaintiff should be borne rateably according to all the other beneficiaries except for those receiving small amounts. On the basis that the residue of the estate might have been approximately $30,000 I have accordingly notionally added $10,000 to each of the legacies payable to the residuary beneficiaries. I propose to exonerate all legacies under $2000.

It appears to me in the circumstances to be just to award the plaintiff a legacy of $80,000 payable to him with interest thereon under the Administration Act as if the legacy were for that sum in the original will. The remaining legatees will be entitled to the residue of the

estate which I direct to be divided into 27 shares. Those shares will be proportionate to the legacies provided under the will after allowing for the additions for the three original residuary beneficiaries in respect of their bequests.

There will be the following formal orders:-

1) Further provision made for the plaintiff by substituting a legacy of $80,000 for the legacy of $20,000 contained in the will.

2) The pecuniary and specific legacies contained in paragraphs (3) and (4) of the will are confirmed.

3) The following pecuniary legacies contained in paragraph (5) of the will are confirmed:-
to Veronica Anne McLean, $1,000;
to Peter John Cordner, $1,000;
to Jocelyn Croft, $500;
to Morris Rose, $2,000.

4) The residue of the estate shall be divided into 27 parts to be divided as follows:-
to Elizabeth Jane Everest, six parts;
to Trevor Lloyd Everest, six parts;
to Lillian Smith, four parts;
to Pamela Wilson, two parts;
to Tracey Melissa Currie-Robson, two parts;
to Craig Brian Currie-Robson, two parts;
to Jewel Fife, two parts;
to Janet Ellen Smith, two parts;
to Sandra Currie-Robson, one part.

The costs and disbursements of all parties are to be paid from the estate. Counsel for the trustees is to assemble memoranda as to those costs from the solicitors concerned and to submit those costs to me for approval.

A D Holland J

Solicitors:
Wadsworth Norton, Auckland, for the Plaiintiff
Parry Field, Christchurch
Cameron & Co, Christchurch
Quigley Wolfe & Cadenhead, Christchurch
Clark Boyce & Co, Christchurch

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RESERVED JUDGMENT OF HOLLAND, J.