NZLR YELLOW STICKER NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND 13/11
DUNEDIN REGISTRY CP 144/90

UNDER THE FAMILY PROTECTION ACT 1955

IN THE MATTER OF the Estate of MINTON LANGLEY MORRIS late of Clyde, Retired Plasterer, Deceased

2181

BETWEEN SUZANNE MARGARET WILSON of Wellington, Married Woman

Plaintiff

A N D VIOLET MARGARET MORRIS of Dunedin, Widow as Administratrix of the Estate of MINTON LANGLEY MORRIS late of Clyde, Retired Plasterer, Deceased

Defendant

Hearing: 7 October 1992

Counsel: J G Butler for plaintiff
S J Alexander for Administratrix
J G O'Neill for defendant in her personal capacity
Mrs B E R Gordon for grandchildren

Judgment: 15 OCT 1992

JUDGMENT OF FRASER J

This is an application under the Family Protection Act 1955 by the daughter of Minton Langley Morris deceased for further provision from his estate.

Mr. Morris died intestate on 3 July 1990. His net estate at date of death was approximately $132,000 and, at 2

October 1992, $169,500. The major asset is a house in Clyde.

The plaintiff,who is the deceased's only child, is aged 41 and is married with a family of three children aged approximately 12, 10 and 2. Her husband is a Telecom engineer earning $57,000 per annum. They own a house in Wellington where they live which has a government valuation of $220,000 and is subject to a mortgage for $15,000. Their other assets are household contents, a motor vehicle, life assurance on the husband's life and modest savings. Mr and Mrs Wilson and their children are all in good health.

The defendant is the administratrix of the deceased's estate and his second wife, although he was living apart from her at the date of his death. She is also the principal beneficiary under the statutory scheme by virtue of which she would receive the personal chattels, a charge on the estate for $90,000 and interest, and one-third of the residue.

She is 72 years of age and resides alone in a flat in Dunedin for which she pays $95 per week in rent. Her sole income is National Superannuation and her only assets are household furniture and a small sum in savings. Her health is poor.

The deceased separated from his first wife in 1975 and in the latter part of that year he and the defendant began living together. The deceased's first marriage ended in divorce in 1981 and on 5 November in the following year, the deceased and defendant were married. By 1983 they had moved to Clyde to live and part way through that year the defendant suffered ill health following which, according to her, there was a marked adverse change in the deceased's behaviour to such an extent that she eventually left him. The date of this is uncertain. It seems likely that she left about the end of 1984 but returned from time to time until after Matrimonial Property proceedings were heard in the latter part of 1985. I do not think the exact date, although it is in dispute, is of great significance. It is material, however, that since about the end of 1985, and following a matrimonial property order made by the Family Court, the deceased and defendant thereafter lived apart.

She says that towards the end of his life they were on amicable terms and a reconciliation was in prospect although there is other evidence, especially from Mrs S E Nicholson, which casts some doubt on these assertions. On the affidavit evidence it is impossible to resolve the conflict but in any event it is another factor which I do not see as of great significance. The fact is that these two people had lived together in a de facto marriage relationship for about seven years following which they married, but the marriage lasted only about three years,

and thereafter the parties lived apart leading separate and independent lives.

The Court's jurisdiction in these matters is well-known. It is sufficient to refer to Little v Angus [1981] 1 NZLR 126 at p 127, per Cooke P:

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

The deceased had made a will on 11 September 1980 under which he appointed the Public Trustee executor and left his estate in three equal shares, one each to his then wife, the plaintiff and the defendant. This will was revoked by his later marriage to the defendant on 5 November 1982. It is not known whether the deceased was aware that the later marriage revoked the will. The plaintiff understood from what her father said that he wished to benefit her and her children but the evidence is rather vague, as is understandable in the circumstances. All one can say, I think, is that there is no evidence of any considered decision or wish on the part of the deceased to benefit the defendant in the

manner in which she prima facie benefits under the relevant provisions of the Administration Act 1969.

I do not consider that the Family Court Matrimonial Property Act order, made about the time defendant and the deceased began living apart precludes consideration of her competing interest on the present claim. I accept, however, that the circumstance that there had been a matrimonial property order and that she and the deceased had been living apart for a period of some five years prior to the testator's death during which they had lived separate and independent lives weighs against her moral claim notwithstanding her health and lack of means.

Plaintiff is settled in life and in relatively good circumstances. On the other hand she is deceased's only child and has the responsibility,with her husband of bringing up her three children,the deceased's grandchildren.

I think that,having regard to the size of the estate,a wise and just testator would have recognised a responsibility to make a limited provision for his separated wife,despite the property division on separation,because of her need,but a greater responsibility and moral duty towards his daughter.

It is my view after weighing and considering all the circumstances that in lieu of the distribution under the

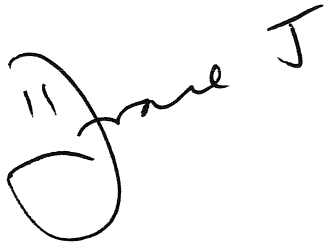
Administration Act plaintiff should be awarded two-thirds of the deceased's estate and that the the remaining one-third should go to the defendant.

Insofar as the estate was distributed by the interim distribution made on 17 December 1990, an order is made requiring re-transfer to the defendant in her capacity as administratrix. There seems to be no practical difficulty about this but leave is reserved to all parties to apply further in case that should be required.

The solicitors for the defendant,as administratrix,are entitled to charge their costs in connection with the litigation against the estate in the usual way and no order is required in that respect.

Mrs Gordon's fee as counsel for the grandchildren is also to be paid from the estate. She is invited to submit a memorandum as to amount.

Plaintiff and defendant (in her personal capacity) are each to pay their own costs.



Solicitors

Caudwells, Dunedin for plaintiff
O'Neill Devereux,Dunedin for defendant

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BETWEEN **SUZANNE MARGARET WILSON**

Plaintiff

A N D **VIOLET MARGARET MORRIS**

Defendant

RESERVED JUDGMENT OF FRASER, J.
