JUDGMENT DISTRIBUTION LIST

NAME OF PROCEEDING: WRIGHT ESTATE

REGISTRY AND FILE NUMBER: ROTORUA M. 100/88

JUDGMENT DATE: 17/02/92
DESCRIPTION AND CATCHPHRASES
FAMILY PROTECTION - Able bodied sons - weak claim, general principles
TESTAMENTARY PROMISES - Principles - Promise not testamentary

LIMIT ON PUBLICATION :

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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M. 100/88

IN THE MATTER of the Law Reform (Testamentary Promises) Act 1949

AND

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the ESTATE OF ALAN WRIGHT

BETWEEN DOUGLAS STUART WRIGHT and ANGUS MacDONALD WRIGHT

Plaintiffs

AND DOUGLAS STUART WRIGHT ANGUS MacDONALD WRIGHT and MAURICE LEONARD SYDNEY WRIGHT

Defendants

LOW PRIORITY

Hearing: 13 February 1992

Counsel: RA Houston QC and PT Hall for Plaintiffs
MS McKechnie and J Bergsen for Mr Maurice Wright as Beneficiary
P Crombie for Defendants

Judgment: 13 February 1992

ORAL JUDGMENT OF FISHER J

The deceased left the majority of his estate to the youngest of his three sons. The older two now seek a larger share under the Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955. The claims were brought out of time but no point is taken by the defence as to that. Extensions of time are accordingly granted under s 6 of the Testamentary Promises legislation and s 9 of the Family Protection Act. All three sons have their own children, that is to say the grandchildren of the deceased but there is no evidence to suggest that any of those grandchildren would have a claim under either Act. The proceedings therefore come down to a simple contest between the deceased's three sons.

Facts

The deceased was born in about 1904. By his first marriage he had three children: the plaintiff Douglas Stuart Wright ("Douglas") born 13 March 1932, the plaintiff Angus MacDonald Wright ("Angus") born 4 November 1936 and the residuary beneficiary Maurice Leonard Sydney Wright ("Maurice") born 14 December 1942.

The deceased was a sharemilker and later the owner of his own farm. All three sons assisted him with his farm work during their early years while still at school. His first wife died at the age of 40 in about the following year. In 1948 Douglas left school and home and went into the merchant navy for two years. In about 1950 when the deceased moved to his Matamata farm, Douglas returned home and thereafter worked for his father on that farm over the next five years. As with the other two sons who were to follow in that role, he was paid a very modest wage for doing so. In 1952 Angus left Tauranga Boys High School at the age of 16 years and he too worked for his father on the farm. In his case he worked there for a period of seven years through to 1959 whereas Douglas worked there for a period of five years from 1950 through to 1955. In the early 1950's the deceased remarried. In 1957 Maurice left school at the age of 15 years. As with his brothers he worked on the farm for his father similarly at a modest wage. There was an overlap of about a year or so between Maurice and his older brother Angus in working on the farm. After Angus left, Maurice continued working on the farm.

The upshot of all this was that the deceased had the assistance of work on the farm at a low wage from all of his three sons, Douglas, for about five years, Angus for about seven years and Maurice for about twelve years until 1969 when he married and left home. In about 1963 the deceased's second wife and he were separated. She left the farm never to return and they were ultimately divorced in 1970. Presumably associated with that separation, the deceased sold his Matamata farm in about 1963 and moved to a 55 acre dairy property which he purchased at Tauranga. The significance of the departure of his second wife was that particularly from about 1963 onwards, the deceased became reliant upon Maurice and from about 1969, Maurice's wife as well, not merely for support in farming and allied matters, but also for emotional and family support as well.

In 1969 having married Diane Wright, Maurice moved to a house in Mount Maunganui which is in the same general district as that of the deceased's farm. It seems no coincidence that at about that time the deceased sold his dairy herd and changed to dry stock. He of course must have been aged about 65 years by that stage and no doubt with the departure of Maurice, was unable to continue the more intensive form of farming. Although Maurice moved to another residence, I find that the contact between him and his father continued on a very close basis over the next fourteen years with constant visits by Maurice and his wife to the farm, physical farm work on weekends and other such occasions by Maurice, and general forms of family support.

No doubt partly or wholly in recognitiion of this, the earliest of the four wills of which I have had evidence, namely the will of 1972, conferred the farmlet and livestock upon Maurice with only provision for the other two sons from the residual assets. That remained the pattern of the wills from at least that date forwards. It was fully in conformity with the undertakings which the deceased regularly gave to Maurice that the various forms of assistance which Maurice and his wife were providing would be fully recompensed by Maurice's ultimate receipt of the farm under the deceased's will.

In 1973 Maurice moved to a residence in Tauranga some five miles from his father's farm and was able to keep up this close contact to which I have referred and which is amply corroborated by the deceased's neighbours and his solicitor. The deceased sold two lots by way of subdivision from his farm reducing it to a farmlet of twelve acres. He was able to continue on in his home by virtue of a resident housekeeper but in 1983 she had a stroke and since by that stage the deceased was about 79 years of age the deceased could not have continued on in the home on his own. Maurice and his wife therefore responded by moving lock, stock and barrel into the deceased's house taking their children with them. From that time on they provided full care for the deceased, not simply in a housekeeping fashion but from the following year when the deceased himself had a stroke, their activities amounted to a form of nursing support with growing intensity over the next two years. Eventually in May 1986 a point was reached where the deceased's disabilities were so great that he required 24 hour care which simply could not be provided by lay persons in his own home. There was then a family meeting and as a result the deceased spent the last few months of his life in a rest home ultimately dying on 23 September 1986.

Estate

The deceased left an estate with a net value of about $280,000 consisting of the farmlet then worth about $210,000 and the balance made up of livestock, life insurance and a modest car and some cash. He left the bulk of his estate to Maurice in the form of the farmlet, some livestock and a third interest in his life insurance, those assets having a total value of about $221,000. The remainder consisted of a car of $800 which he left to Maurice's wife Diane and the balance was divided in equal shares between Douglas and Angus. The result was that Douglas and Angus received half the residue each worth approximately $28,500 each. The value of the estate has since grown in a modest fashion to a level of about $297,000.

Testamentary Promises Principles

Section 3 of the Law Reform (Testamentary Promises) Act materially provides that a person may make a claim against a deceased person's estate "founded upon the rendering of services to or the performance of work for the deceased in his lifetime and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant whether or not the provision was to be of a specified amount or was to relate to specified real or personal property then subject to the provisions of this act the claimant shall to the extent to which the deceased has failed to make that testamentary provision, or otherwise remunerate the claimant..... be enforceable against the personal representatives of the deceased....." It will be seen that the essential ingredients which a plaintiff must prove to succeed in such a claim can be summarised as

(a) the rendering of services to the deceased

(b) an express or implied promise to reward by testamentary provision

(c) a nexus between the services and the promise, and

(d) a failure to make that testamentary provision or otherwise remunerate.

Even when those four threshold requirements have been satisfied the court must move on to broad matters of discretion and value judgment for the purpose of arriving at the amount, if any, which may be warranted by way of an award.

Services during the deceased's lifetime

I have had the benefit of very detailed and helpful submissions from counsel concerning the evidence in this case and I do not think it necessary to proceed through these matters in great detail. The essential services upon which Douglas and Angus rely consist of the period in their early life when they worked upon their father's farm, principally at Matamata. All three sons assisted to a degree while they were at school but it could not be suggested that having regard to the normal parental support there was anything of a residual nature which could provide the basis for a testamentary promises claim at that earlier stage. The

services then that were relied upon by the plaintiffs were the five years that Douglas worked on the farm and the seven years that Angus worked there. It is established in the evidence that that work was performed for a very modest wage which was below that which could have been procured on the open market. On the other hand, it equally is established that the deceased provided board and lodging throughout that period and also provided some form of funds from the sale of heifers to a level which has not been clarified. Perhaps it is of significance to note that over the seven years that Angus worked for his father, notwithstanding the modest level at which he was paid, he was able to accumulate about $2,000 which was sufficient to provide a 25% deposit upon the purchase of a herd which he was then able to use to embark upon his own sharemilking venture. Taken overall, I find that Douglas and Angus did provide valuable services to their father over those periods. However when one deducts the benefits that they received over the same periods, the net benefit to the father was tangible but relatively modest in the scale of the lifetimes and assets of the individuals involved in this case.

Testamentary Promise

Both Douglas and Angus averred in evidence that during those critical years in working for their father, they raised with their father the fact that there wages were inadequate and that his response given repeatedly was "I will see you right if you stick with me" or words to that effect. I accept Mr Houston's submission that there was there contained a promise and that it was connected with the services which they were providing. On the other hand I accept Mr McKechnie's submission that the manner in which the deceased was to "see them right" was quite unexplained and furthermore there was no express connection with any testamentary provision. Given the fact that at the time that those promises were made the deceased was aged only in his late 40's to early 50's I think it a very long inference indeed to draw the conclusion that the parties contemplated some form of testamentary provision. What is more it will be noted that the deceased appeared to tag his promise with the words "if you stick with me" or words to that effect. In fact the two plaintiffs did not "stick with" the deceased. For perfectly understandable reasons they went off and chose to live their own lives elsewhere. I see

it as no coincidence at all that the one who did "stick with me" namely Maurice, was the one who received the testamentary provision. As I see it the probability is that the deceased was saying that anyone who was prepared to stand by him would ultimately be rewarded for that. There is I think a degree of vagueness about the promise which precludes it from being relied upon as an operative testamentary promise.

Failure to make testamentary provision

In case I am wrong in my interpretation of the promise which the deceased made to the two plaintiffs one must turn to the provision which he did ultimately make for them in his will. As I have said that was worth approximately $28,500 each. In some submissions which I considered to be objective and responsible, Mr Houston pointed out that on certain assumptions as to the difference between the commercial value of their farming services on the one hand and the wage which they in fact received on the other, it would in very extremely approximate terms be possible to arrive at a figure not too far different from the bequests which the two plaintiffs ultimately enjoyed under the will. Whether or not there were intended to be any concessions for the plaintiffs in that regard I have independently arrived at the view that if there had been a testamentary promise to reward comensurate with the value of the services received, then in fact that promise was fulfilled. The real substance of the plaintiff's complaint today is that they received little or nothing over and above the value of their services. For that complaint they must turn to their claim under the Family Protection Act.

Family Protection Act principles

Section 4 (1) of the Family Protection Act materially provides that "if any person (in this act referred to as the deceased) dies, whether testate or intestate, and in terms of his will . . . adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this act as aforesaid, the court may, at its discretion on application so made, order that such provisions as the court thinks fit shall be made out of the estate of the deceased for all or any of those persons." A helpful summary of the way in which that provision is to be

applied in the modern context is to be found in the dictum of Cooke J in Little v Angus [1981] 1 NZLR 126 at p 127 as follows:

> "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."

It will be observed that some of the essential criteria involved are

> (i) that there must be a breach of moral duty - not the substitution by the court of its own opinion as to a just or fair or even-handed will,
>
> (ii) if breach of such a duty is established then the will still has presumptive force and is changed no more than may be necessary to remedy the breach,
>
> (iii) one cannot look at the plaintiff's claim in isolation but must compare it with the competing claims upon the deceased's bounty and therefore in this case, the various moral claims which Maurice himself had against the estate, and
>
> (iv) the primary focus lies upon the circumstances as at the date of death in 1986. Only if a breach of moral duty as at that date is established does one need to turn to consideration of changes in the parties' circumstances since that date.

Plaintiffs' moral claims

I have already referred to the help provided by the two plaintiffs to the deceased in their early years. They are justified in drawing upon that credit which they have already established for the purposes of a family protection claim but on the other hand as I have indicated, they have been rewarded for that already. The second matter they can draw upon is the simple fact that they are the natural sons of the deceased and all else being equal, might have expected to find some recognition from their father. In that regard however, the plaintiffs must accept that without in

any way penalising the plaintiffs for wrongful conduct, over the last portion of the deceased's life - nearly 30 years in fact since they each left home - their contact with the deceased was minimal. Notwithstanding their relative proximity to the deceased, particularly Angus, they saw the deceased only about two or three times a year and then frequently even those occasions occurred by virtue of meetings at the races where they shared a common interest. The third factor concerns that of need. The modern view is that need does not have to be established in any narrow and economic sense in order to succeed in a claim under the Family Protection Act but on the other hand it does no harm to recall that the statutory provision from which the whole jurisdiction stems does rest on the premise that "adequate provision is not available from the estate for the proper maintenance and support" of the claimant. The financial circumstances of claimants under the Act therefore continues to be of great importance in these cases.

Here the position of Douglas at the date of death was that he owned his own modest home valued at $56,000, had his own car, a modest life assurance policy and savings of $10,000. He was aged 54 years and suffered from deafness although apparently not to a degree which interfered with his earning capacity as a watersider. His brother Angus owned a dairy farm with his own dairy herd and plant all having a total net value in the order of $300,000. Neither Douglas nor Angus had dependent school-aged children. Since the date of death their circumstances have improved to a modest degree particularly in the case of Angus. I accept a point made by Mr Houston that particularly in the case of Douglas it is relevant to note that in the type of work he does his earning years must now be drawing to a close and although he has accumulated some useful superannuation rights taken overall, his circumstances could fairly be described as modest but not necessitous. Angus on the other hand would have to be described as being in comfortable circumstances.

Maurice's position

It is important to recall that under the Family Protection Act it is not a case of the plaintiffs establishing a meritorious claim in isolation. They are competing with the moral claims of Maurice and indirectly Maurice's

wife. They do so moreover with the substantial disadvantage that Maurice is simply seeking to uphold a testamentary provision which already exists whereas they must show that those testamentary provisions breach a moral duty and must be changed.

Maurice's contributions to the welfare of his father both personally and through the assistance of his wife were very substantial indeed. These have been corroborated by the deceased's neighbours and the deceased's solicitor. They can be summarised as a period of 12 years working fulltime on the deceased's farm after Maurice left school at a very modest wage (except for the last year during which Maurice had part time work as a watersider at Mount Maunganui) followed by a period of 14 years of regular but only part time assistance on the farm and general family support followed by a final period of three years of very intensive support in the home dealing with an increasingly difficult patient. The contribution made particularly in the final two years by Maurice's wife Diane was of very great magnitude and took its toll in her own health at quite a significant level as has been independently medically verified. All of that tangible and intangible support over a period of 29 years not only contributed to the mental welfare and happiness of the deceased but also contributed very substantially to his material welfare and indirectly the size of his estate. Against that one needs to set off certain benefits derived by Maurice and his family in the way of accommodation during the last three years and of course the board and lodging in the earlier years but I conclude that the contributions far exceeded the benefits received in turn. To that one must add the promises made to Maurice which no doubt played their part as the quid pro quo for those contributions and finally there was Maurice's own circumstances. He by 1986 had sold his own home and some of that money had been spent, the result being that by 1986 he had no more than a car and about $20,000 in cash. He had two dependent school aged children.

Reasons for will

The court may have regard to the deceased's reasons for making the dispositions in his will. The approach of the courts has always been to do so, partly from respect for the deceased's own testamentary intentions

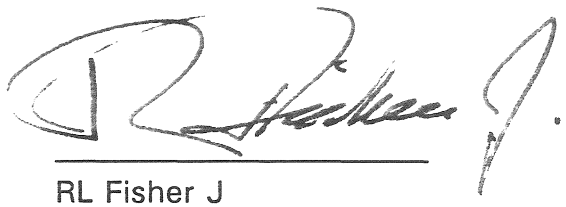
and parly because of all people, the deceased is likely to be the best placed to assess where the various competing claims upon his bounty lie. In the evidence from the deceased's solicitor Mr Cooney, which I regarded as extremely helpful in this case, Mr Cooney said that the essential reason given for the scheme of the will was that Maurice was the only member of the family who had helped him and that he had seen very little of the other two sons who were quite independent from him and the only time he saw them was at the races. That must be regarded as a significant consideration in these proceedings because the deceased's reasons are perfectly rational ones and are fully consistent with all of the evidence.

Conclusions

I would summarise the essential points in the case as I see it as follows. This was a substantial estate of about $280,000. The two plaintiffs in their early years made a significant and helpful contribution to the deceased but were adequately rewarded for that in his will. Maurice and his wife made a very major contribution over a period of about 29 years, the net benefits to the deceased far exceeding the benefits returns to Maurice and his wife. Maurice did so on the clear understanding that he would receive the farm. .That bargain was struck by the deceased and kept to in his will. Comparing the circumstances of the three sons, Maurice had the greatest need, Douglas was in modest but not necessitous circumstances, Angus was in comfortable circumstances. On the other hand one should not go overboard in penalising sons who have been energetic and enterprising in improving their own circumstances. Maurice has the significant advantage that he is simply seeking to uphold a will which is in his favour. The deceased had perfectly rational reasons for making the will in the way that he did and the premises which he assumed for that purpose are corroborated by other evidence.

When I weigh all of those factors I consider that this is a very weak claim under the Family Protection Act but that it just qualifies for some modest increase in the amount which was left to the two plaintiffs. In the result there will be an award of an additional cash sum of $10,000 to the plaintiff Douglas Stuart Wright and the sum of $5,000 to the

plaintiff Angus MacDonald Wright. I have given considerable thought to the subject of costs. Given the small size of the residue in this estate and the very modest degree of success in the plaintiffs' claim I think it appropriate that there be no order for costs in favour of any party to the proceedings. All parties will therefore bear their own costs.



RL Fisher J