IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY 10/4 M.87/90

LOW PRIORITY

405

UNDER	The Family Protection Act 1955
IN THE MATTER	of the Estate of MILDRED HILDA WHITE
BETWEEN	SHARON MILDRED TEN BROEKE Plaintiff
A N D	JOHN WILLIAM WHITE AND LUANA MARY WHITE Defendants

Hearing:

Counsel: Mr RM Bell for Plaintiff
Mr SM Henderson for Defendants

Judgment: 19 March 1992

(ORAL) JUDGMENT OF WILLIAMS J.

These are two family protection claims. They involve the estates of WILLIAM EDWARD WHITE and MILDRED HILDA WHITE who were husband and wife. The plaintiff, Sharon Mildred Ten Broeke, is their daughter. The estates are both modest in size. In relation to the mother's estate the net value is said to be approximately $57,000. In relation to the father's estate, the figure given is $53,000. There is a

difference of view as to the value of a property at Whangaroa which is the major asset in each estate. The plaintiff contends it is worth $100,000 whereas the defendants contend it is worth $75,000. The value of the house affects both estates because it was jointly owned. For reasons which will become apparent later, it is not necessary for me to decide whether the $75,000 or the $100,000 is the more accurate valuation and to say what is the precise value of each estate.

It is common ground that the two estates and the two claims can properly be dealt with together.

Mr Henderson for the defendant beneficiary, Mr John William White, sought leave to appear both for the defendant Mr White as beneficiary and as trustee. It was pointed out that separate affidavits had been filed by Mr White in his separate capacities. In view of the relatively small size of the estates that seemed a very sensible suggestion and there was no later occasion to require separate representation.

The broad background to the claims that the daughter makes in respect of the two estates can be summarised relatively briefly. William Edward White ("the father"), and Mildred Hilda White ("the mother"), had two children - the defendant, John William White ("the son") and the plaintiff. The plaintiff daughter is now aged 47 years, is married but has no children. The son is aged 48 years, is married and has five children whose ages are 25, 23, 20 and 19, the latter being twins. I was informed that the two youngest children are still, at least to some extent, dependent on support from their parents.

The father's will was dated 29 June 1989. The relevant provisions, so far as the plaintiff and the son are concerned, were that the plaintiff received a bequest of $500. After the provision of some war medals to a grandson, a bequest of a car to a friend (which lapsed) and a life interest to the mother (which also did not operate because she died some nine days after her husband), the residue was left to the son.

The mother's will basically mirrored the structure of the father's will and in the same way the plaintiff received that same small bequest of $500. There were some other minor bequests with the residue again being left to the son.

Put shortly the end result was that the plaintiff received, in both cases, approximately 1% of each estate whereas the brother received 99%. To his credit the defendant son acknowledged, through his counsel, that he had some "discomfort" over the effect of the wills by which I understood he meant that such a gross imbalance as between himself and his sister led him to have some concerns. However, he did defend the claim (for which he is not to be criticised). He felt there were factors which should be brought to the attention of the Court which, in his view, would explain in whole or in part the reasons for this apparent gross inequality.

Coming to the essential background facts, both parents were born in 1910. They married in 1942 and lived in Whangaroa. A year or so later the son was born and adopted. In 1944 the plaintiff was born and she too was adopted. In 1955 the matrimonial home at Whangaroa was burnt down and a new boarding house was built in its place. For a fair number of years the parents ran that boarding house. There is evidence (which I will come to later) as to the participation of the daughter in that

venture. There was a dining room added on to that property in 1959. In 1960 the plaintiff ran away to Auckland for a time in circumstances which I will describe later. In 1962 she began work at the Kaeo Hospital. In 1963 the son married Luana Mary White. In 1965 the plaintiff joined the Air Force and eventually married her husband, who she met in the Air Force, in 1971 and they settled in Henderson. In 1972 the parents subdivided the Whangaroa property and travelled overseas in 1974. In the 1980's the plaintiff daughter's husband retired from the Air Force. They now live at Matapouri. They went overseas in 1989.

The wills in question were executed in June 1989 and the parents died very closely together, the father on 14 January 1990 and the mother on 23 January 1990. There were previous wills to which reference was made. It was pointed out that identical provision was made for the plaintiff each time a will was made. For the plaintiff it was said that this demonstrated agreement between the parents or, alternatively, one parent succeeding in getting the other to fall into line with his or her decision as to provision for the daughter. In either case it was said that the extent of the provision - which was nominal always for the plaintiff, never exceeding a bequest of $5,000 - showed a pattern of studied rejection of the plaintiff. There were two exceptions; a will in 1979 where the plaintiff was to take half the residue and another in 1980 where she was to take a one-third interest in the house. For the defendant however, it was said that that consistency in approach signified a deliberate and justified decision to provide little for the plaintiff because she had not really been a very dutiful daughter and that the son, with his large family, was much more entitled to benefit.

As to the general principles, I was referred to passages from the leading authorities of Little v Angus [1981] 1 NZLR 126 and Re Leonard [1985] 2 NZLR 88. From these cases it is sufficient to conclude that in the case of adult married daughters it is now clear that the modern approach is to treat daughters more liberally than was done in the past. It was also pointed out that there may be enhancing factors in relation to family protection claims including assistance to the testator during the lifetime and neglect of a claimant.

The plaintiff's claims are said to arise from essentially these factors:-

(a) dutifulness as a child to both parents, both in childhood and as an adult;

(b) deficiencies in the plaintiff's upbringing by her parents.

As to the moral claim against the mother's estate based on the dutifulness as a child reference was made to unpaid work in the guesthouse at Whangaroa, household chores, work and assistance given until May 1962 when the plaintiff started work and as to continued contact with the parents after the plaintiff grew up.

The plaintiff also relied upon alleged shortcomings in her upbringing, the absence, it was said, of a normal mother/daughter relationship, the absence of emotional support, an inability to confide in her mother; the absence of support and interest in school work and, perhaps a more serious criticism, verbal abuse and punishment from the mother. It was apparent from not only the plaintiff's affidavits but also those filed by the defendant that, putting it at its lowest, there had been significant difficulties in the relationship between the plaintiff and her mother. At

this time it is hard to assess the precise cause for that. Counsel for the defendant was inclined to suggest this was because the plaintiff was a difficult and unco-operative child.

My assessment of all the material before me indicates that while that may have been so to some limited degree there was certainly, in a number of respects, the absence of the normal support that a mother would provide for a daughter. It was said for the plaintiff, however, that bearing in mind the lack of those normal mother/daughter aspects in the relationship the paintiff had, to her credit, become practical and independent but that some of her adverse childhood experiences had prevented her having a completely fulfilled adult life, the inference being that this was the reason, coupled with the conduct of the father (which I will come to later), why the plaintiff did not have children herself and why she felt inadequate in the area of social relationships.

As to the plaintiff's moral claim against the father's estate, again reference was made to work in the guesthouse, assistance given to the father with fishing and some continued contact with the father in later years although, as with the mother, this was really of a rather unsatisfactory kind. It was again said that there had been shortcomings in the father's upbringing; that he was lacking in parental abilities and showed little interest in supporting the plaintiff in relation to school work and sports. On a more serious basis, there was an allegation that the father had been guilty of sexually abusing the plaintiff. This was said to have led to the plaintiff's decision to run away from home, her inability to turn to her mother for help, the refusal of others to help her because of the unwillingness in those days to discuss such unpleasant matters. It was said, a good deal more forcefully in the case of the father, that his

alleged behaviour had had a direct effect on the plaintiff's later life, in particular, in relation to an unsatisfactory sexual adjustment, fear of sex, frigidity, awkwardness with children and the choice not to have children. In these respects it was said that she missed out on the full life that most people enjoy.

The position of the Court in a situation where allegations of sexual abuse are made is, of course, one of exceptional difficulty because the Court is usually faced with a situation where one hears only one side of the story. These difficulties were mentioned by Jeffries J. in Re A, 1988 4 FRNZ 688 where the same unhappy topic arose. There the learned Judge felt that the issue having been raised he was obliged to deal with it. He found the allegation to be sustained. In that case there was corroborative evidence since the complainant had complained to others over the years. As counsel for the defendant points out here, we do not have such corroborative evidence in this case. I have examined with care the affidavits of the plaintiff - and I speak here of the second and fourth affidavits in particular - in an endeavour to decide for myself whether the allegations have credence.

I find in terms of the civil standard of proof - which is on the balance of probabilities - that sexual abuse has been established in relation to the father. Apart from the unfortunate fact that an allegation of a similar kind against the son, which as counsel for the plaintiff properly conceded is wholly irrelevant in these proceedings, was allowed to be made (in circumstances I will describe later), there is nothing in the way in which the plaintiff decribes all of these events which leads me to think that the account she gives is not truthful. In fact the description of the reasons why she ran away from home seem to me to convincingly support the

allegation that she was at the time regrettably the object of improper sexual attention from her father.

I mention the allegation against the brother. This surfaced in the affidavit of the psychiatrist. Since there appears to be some distance between the plaintiff and her brother it is unfortunate that this occurred because it is, of course, a most unpleasant accusation and its emergence here did nothing to assist in the resolution of the case. But I am inclined to give the plaintiff the benefit of the doubt and accept that it surfaced inadvertently through the consultation with the psychiatrist. I do not attribute any blame to counsel for the plaintiff for not screening it out although with the benefit of hindsight it may have been better to invite the psychiatrist to rewrite his report. But as I say apart from that incident, for which there is a reasonable explanation, there is no act or behaviour in this case on the part of the plaintiff which signifies she is prepared to be less than truthful in order to advance her claim. As I have said, I find that her affidavit evidence has an undoubted ring of credibility about it, not just in this respect but in other respects. It is therefore appropriate in my judgment to bring into consideration the fact of that mistreatment by her father.

The next aspect of the plaintiff's claim was to point out that the words "proper maintenance and support" in s 4 of the Family Protection Act refer not to pure economic need but rather require consideration of the merits of the claim having regard to the plaintiff's circumstances at the time of death, relations between the deceased and the plaintiff in the past, the extent of the estates and the strength of other claims.

The suggestion made by the defendant that the plaintiff is well-off appeared to be offered as an explanation for there being virtually no provision for her. I do not find that convincing. Nor could the fact that the plaintiff complained about the lack of provision made for her - and there seems to be real doubt on the evidence whether she did so complain - come anywhere near justification for the imbalance that exists in her case in both estates.

I do find that the plaintiff is of modest means and has a case for proper maintenance and support. She is now middle aged and has not been in paid employment for many years. She receives a guaranteed retirement income at the married rate and is also dependent upon her husband's Air Force pension. The home she owns with her husband is still subject to a mortgage of $23,000 and the couple qualify for the community card. Their combined income is $382 pw and the mortgage payments are approximately $142 per month. The plaintiff and her husband have a Fiat Uno car which they bought in 1986 which has a modest value of perhaps $8,000. If her husband predeceases her she would have to survive on the widow's benefit. She faces possible widowhood without the clear prospect of being able to go back into the work force. She does not have a close family who could come to her assistance in times of need and therefore has a very uncertain future.

I agree that she is entitled to an award and to receive further maintenance and support.

As to the position of the son, which I must consider in order to weigh his competing claim, he owns a house which has a Government valuation of $100,000 but is subject to a small loan of $9,000. Both the son and his

wife are in paid employment and they own two cars. Counsel for the plaintiff properly acknowledged that the brother had a moral claim but submitted that the brother had survived his childhood better than had the plaintiff; that he retained his parent's affections unlike the plaintiff and he did not have to suffer the abuse that the plaintiff had encountered.

It was submitted that the plaintiff had a stronger claim against her father's estate than did the son especially if the allegations of sexual abuse, which I found to be sustained, were taken into account. Certainly that was the position against the father's estate. In the mother's estate it was also argued that the plaintiff had a more meritorious claim having persisted in the face of an adverse attitude from her mother compared to a brother who again had experienced no real difficulties in relation to his parents. Counsel for the plaintiff concluded his submissions by stating that the proper approach here was to fix a percentage of the residue of each estate to be awarded to the plaintiff because the Whangaroa property would have to be sold and there was uncertainty as to its value. It was submitted that the sale would fix the value and the parties' cash entitlement could then be ascertained.

For all those reasons I find the plaintiff has made out a valid claim and the question becomes one of quantum.

I should say that I have considered, before reaching that conclusion, the submissions for the defendant especially the proposition that a plaintiff must always overcome the jurisdictional hurdle of showing that adequate provision has not been provided, Notwithstanding that submission I find the disparity in the provisions made and the wholly inadequate amount made available to the plaintiff do enable the plaintiff easily to overcome

that preliminary jurisdictional hurdle. I do, however, take into account the defendant's submission that the need of the defendant's family may have been greater because of his children, thus giving the brother the stronger claim on the bounty of the parents.

I have considered some of the cases cited by the defendant including Re Siegert (deceased) (1990) 6 FRNZ 458 which shows that even where there is a gross imbalance there may be some occasions where that gross imbalance will not be rectified. I do not consider that the circumstances here are similar.

The son really summarised succinctly through his counsel his case in this way; that the claim was one of a dutiful daughter whose upbringing was deficient; but that the son was also dutiful and really was in the same position apart from the sexual abuse matter. The son says that the plaintiff was a highly critical and consistently complaining daughter, that that disparaging attitude toward her parents was revealed in the affidavits and that that was the true nature of the daughter as she was throughout the lives of the parents. To the extent that the parents were said by the plaintiff to be unduly harsh in their upbringing, counsel for the defence submitted that both were subjected to the same disciplines but the simple fact is that the son took the treatment whereas the plaintiff was either unwilling or unable to do that.

While it may be that there is some element of validity in that submission I do not consider that it can possibly justify the truly gross imbalance between the plaintiff and her brother in these wills. To the extent that it was also submitted by the defendant, in relation to the mistreatment allegations, that there was a moral obligation on a family member to

confront such issues during the lifetime of the parties, it seems to me that it was perfectly understandable that the plaintiff would not raise such unhappy complaints during the lifetime of her parents. She may have had the hope or expectation that those sordid events would not have to be re-examined. So I do not hold in the scales against her the fact that these matters were only brought before the Court in these proceedings.

The other matter that was mentioned by defence counsel was the psychiatrist's report. As I said at the time I do not place any great weight, or indeed any weight at all, on that except to the extent that it provides the Court with some way of evaluating the kind of emotional harm which may flow in a sexual abuse case. I certainly disregard entirely the psychiatrist's unwise involvement in commenting on the provisions in the will. But to the extent that he simply recites what the Court is able to infer as to the possible consequences of abuse, it does no more than confirm what one already understands. I do not mean to be critical of counsel for the plaintiff for securing the report but it is just that in this case, what the psychiatrist said in areas where he had the right to say anything, does not already add to what one can really infer from the evidence.

The crux of the case comes down to the quantum which is to be awarded to the plaintiff because I have no doubt at all that the plaintiff has demonstrated that both parents failed in their moral duty in terms of the Family Protection Act. Here reference was made to Re Allen [1922] NZLR 218 and Re Stubbings [1990] 1 NZLR 428.

Counsel for the defence pointed out that in Re Stubbings there had been an increase in the daughter's award, in a much larger estate, to 33% and in Re Leonard [1985] 2 NZLR 88 there were increases from 1% to 6%, but again in a very large estate. I take the point that the Court should not automatically assume that children are to be treated equally: see Re Frost, M.674/88, Christchurch Registry, Williamson J., 18 February 1991.

I do however find that the need of the son was greater than that of the plaintiff. I do not believe that the percentages suggested by the plaintiff of 55% for her and 45% for the son would be appropriate. Nor would simple equity be appropriate.

Giving the matter the best consideration I can, it is my judgment that the plaintiff should be awarded in each case 40% of the value of the estate and I so determine believing that a percentage approach is the best way in view of the uncertainty of the value of the Whangaroa property. I invite counsel to submit a draft order in due course. I also award the plaintiff costs in the lump sum of $3000. That award is to cover the claims in both estates. I order that those costs should come out of the residue i.e. the balance remaining after payment of the award in the plaintiff's favour. It was submitted by the plaintiff that as to the executors' and beneficiary's costs, since they had been tardy in taking steps in the proceeding, the balance remaining to the brother after payment of the plaintiff's award should bear the costs of the beneficiary and executors. There have been delays and other complications. I think it is appropriate to order that the balance remaining to the brother after payment of the plaintiff's award should bear such costs which I fix at

$2,500. I invite counsel to produce a draft order which encompasses all the matters I have referred to.

Solicitors:

Webb Ross Johnson, Whangarei, for Plaintiff;

Henderson & Reeves, Whangarei, for Defendants.

NZLR

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IN THE MATTER	of the Estate of MILDRED HILDA WHITE
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(ORAL) JUDGMENT OF WILLIAMS J
