IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY SC No 3/91

Under
The Status of Children Act 1969 and
The Family Protection Act 1955

193

IN THE MATTER of Applications for a Declaration as to Paternity pursuant to Section 10 of the Status of Children Act 1969
AND
Orders pursuant to the Family Protection Act 1955

BETWEEN ANTHOLEEN CAROLYN GINGLES known as CAROLYN GINGLES
PLAINTIFF

AND GRAHAM KIRK VETTE and JOHN CHARLES KINDER as Executors and Trustees in the ESTATE OF BERNARD JAMES MCLATCHIE (DECEASED)
DEFENDANTS

DATE: 25 February 1993
COUNSEL: Miss Wells for Plaintiff
Mr J J Martin for Defendant Executors and Trustees
Mr Martin for National Heart Foundation
Mr Revington for Pacific Leprosy Foundation

ORAL JUDGMENT OF SMELLIE J

INTRODUCTION

There are three matters before the Court. First a declaration of paternity is sought pursuant to s 10 of the Status of Children Act 1969. Secondly there is an application for leave to commence a family protection action out of time. Thirdly there is a claim by the Plaintiff under the last mentioned Act.

Directions for service were given at an earlier stage and all parties directed to be served are either the subject of affidavits of service on the file or have entered appearances.

Nonetheless when the matter was called only two of the five charities directed to be served entered appearances and other specific beneficiaries chose not to appear. The trustees and the two charities who did appear by Counsel all indicated that they would abide the decision of the Court in this matter.

DECLARATION AS TO PATERNITY

The relevant provisions of s 7 of the Statute of Children Act 1969 read as follows:-

"7. Recognition of paternity

(1) The relationship of father and child ... shall ... for the purpose of any claim under the Family Protection Act 1965 be recognised only if -

(a) ...

(b) ... paternity has been admitted (expressly or by implication) by the father in his lifetime (whether before or after the birth of the child and whether by one or more of the types of evidence specified by section 8 of this Act or otherwise) ..."

The Plaintiff's evidence was that throughout the period until the testator's death on or about 3rd November 1985 she was treated by the testator as his child. Her evidence was that within the family and close friends everybody knew she was his child and that he acknowledged this by introducing her as his daughter on a number of occasions.

The Plaintiff's mother's evidence was that prior to the Plaintiff's birth on 2nd December 1970 she had formed a relationship with the deceased and that it was a result of intercourse between her and the deceased that the Plaintiff was conceived. She swore that when she became pregnant the deceased acknowledged that he was the father of the child and said that he was looking forward to its arrival. Furthermore immediately after the Plaintiff was born the deceased arrived at the hospital with an armful of gifts and clothes for her and expressed delight at the arrival of his daughter, the Plaintiff.

The evidence of the Plaintiff and her mother is corroborated from two sources. First the deceased's family were obviously aware of his long time de facto relationship with the Plaintiff's mother and that family held a reunion (after the deceased had died) which the Plaintiff attended and at which she wore a name badge prepared by the organiser of the reunion which called her Caralyn McLatchie, McLatchie being her father's surname. A book was published and available for purchase at the reunion and was produced for my perusal at the hearing. Pages 94 to 96 inclusive deal with the deceased and on page 95, sandwiched between pictures of the deceased as a young Naval rating and as an older man taken not long before his death, the following is recorded of the deceased:-

"Even though he never married he spent many years with Star and her two children Phillip and Vivienne living on a small block of farm land at Ormond, they planted grapes.

Bunny and Star had one daughter, Anthelene, who was brought up by Star's sister."

There cannot be the slightest doubt but that that entry in the book recording the history of the deceased's family, refers to the Plaintiff. In addition there is on the file an affidavit by Mr Kinder, Solicitor of Gisborne, in which he records that on one occasion when visiting the deceased's home the deceased, referring to the Plaintiff and pointing her out, said:-

"They all say she is my daughter because she looks like me".

Mr Kinder further deposes that the deceased went on to say:-

"I suppose they could be right, but it could be Robin's too".

Mr Kinder points out in his affidavit that Robin McLatchie was the deceased's brother.

It is now well established that the proof required of an applicant for a declaration of paternity pursuant to s 10 of the Act is to the standard on the balance of probabilities. I am fully satisfied that on the balance of probabilities the Plaintiff is the daughter of the deceased and I make a declaration under s 10 of the Act to that effect.

LEAVE TO COMMENCE OUT OF TIME

The action was not commenced until March of 1991 although I note that the Plaintiff did not attain her majority until December of 1990. The estate, however, has not been distributed, there is no opposition to the leave sought and accordingly it is granted.

THE FAMILY PROTECTION CLAIM

In his will the deceased made two specific bequests of $1,000 each, provided for interest on a sum of $5,000 to be paid to Philip Ratapu and for Vivienne and the Plaintiff each to receive $5,000 on attaining the age of 25 years, with a further conditional bequest of $1,000 each should either of them become pregnant before the age of 25 and remain unmarried after that date. The residue of his estate he left to five charities to be divided equally among them.

The deceased's estate is modest and now consists in round figures of $50,700.

The Plaintiff is the only person with a right to claim under the Family Protection Act and there is no opposition raised to her claim. To succeed on such a claim a Plaintiff must prove a breach

of moral duty on the part of the testator and the need for provision from his estate. The principles to be applied by the Court are well known and set out in such cases as Little v Angus, [1981] 1 NZLR 126 and R v Leonard [1989] 2 NZLR 88.

Clearly in my view there was here a breach of moral duty. The deceased had only one child and she had an immediate claim upon his estate. At the time of his death she had no prospects and was entirely dependent upon what she could earn herself or upon an unemployment benefit. The wise and just testator would surely have regarded her as the person having the sole claim on the majority of his estate. Need is also established judged on the Plaintiff's position today. She is 23, she is unemployed and about to begin a fulltime course at the Polytechnic in commercial fishing. She has been sharing a flat with three other people and her evidence is that out of the benefit there is nothing left week by week when she has paid her share of the rent, gas, power and food, and met her other reasonable living and entertainment requirements. She has personal debts including $1,000 as a student loan, $2,000 she has borrowed from her sister.

Obviously provision must be made for her and the charities are the inevitable source from which such provision must come. There have been a number of recent decisions dealing with situations where testators disinherit their children and leave their estates to charity. One of them is the case of O'Leary v Martelli, decided by Barker J in the High Court at Auckland on 24.6.91 (A 1420/85). At page 6 of his judgment the Judge said:-

"The Court cannot do the right thing or make a new will for the testator. It can only repair the breach of moral duty. That breach is to be measured in generous terms where there are no competing claims and where the estate is of modest proportions."

Miss Wells has submitted that in this case the Court should leave each of the charities with a bequest of $500 but that otherwise the balance of the residue of the deceased's estate, which would be a bit over $35,000 should go to the Plaintiff outright. In all the

circumstances of this case I consider that is a responsible and realistic submission and is the appropriate way of repairing the deceased's breach of his moral duty and meeting the Plaintiff's need. Accordingly the bequests to the charities under the will are struck out and in their place each charity will receive a specific bequest of $500. The balance of the residue is to be paid to the Plaintiff without qualification or delay. The other terms of the deceased's will will stand.

COSTS

There will be no order for costs, save that Mr Martin sought and I awarded to him $100 costs on behalf of the National Heart Foundation for his appearance as Counsel.

Robert Smellie J.