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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1114

CP No 568/92

IN THE MATTER	of the Family Protection Act 1955
AND	
IN THE MATTER	of the estate of THORA ESTHER HANSFORD DUKE SCOTT
BETWEEN	MURRAY ALLAN LANG
	Plaintiff
AND	THE PUBLIC TRUSTEE
	Defendant

Hearing: 18 July 1994

Counsel: H B Rennie for Plaintiff
T J Tso for Defendant
Linda Stevens for Beneficiaries

Decision: 18 July 1994

ORAL DECISION OF McGECHAN J

This is a claim by a son and only child against his mother's estate. It has some unusual features.

The late Thora Scott was born in 1912. She married, as a first marriage, the plaintiff's father in 1938. The plaintiff, as I have said an only child, was born on 4 January 1940.

The deceased, as I will call the mother, and the father, as I will call the plaintiff's father, divorced some 21 years later in 1961. Evidently it was a bitter divorce based on alleged cruelty on his part. The plaintiff, then 20 or 21, considers that the deceased wanted him to take her side. On his perception he took, instead, his father's side. It appears that the deceased's and the father's assets were in the deceased's name. The father left with little or nothing, and the plaintiff left with him, and helped the father re-establish himself in a new home. That new home ultimately passed under the father's will to the plaintiff in 1985.

Now it appears that the deceased and the father, as the years went by, managed to reconcile their feelings and to get on again, at least superficially, when they met. The plaintiff was unable to do so. Clearly he remained bitter toward the deceased over the separation, and that bitterness survived for the rest of their joint lives. It coloured the plaintiff's relationship with the deceased throughout.

The deceased, after the divorce, formed other relationships. Details are not necessary. The first, which appears to have been a de facto relationship, brought the deceased further property by will in about 1963. The second, which was a marriage, brought her yet further property by will or survivorship after the second husband's death somewhere between 1976 and 1979. That property so acquired by the deceased included 224A Waiwhetu Road, which is at the heart of the present proceeding.

Meantime, the plaintiff met and ultimately married Aliitasi Lang as she became. The marriage appears to have been in January 1965. It took place in Western Samoa, which I mention only as an explanation for the fact that neither the father nor the deceased was invited.

The plaintiff and Aliitasi then lived with the father for some years afterwards. Three children followed: Tania, born 17 November 1965, who now has a daughter of her own, Aimee born 7 March 1990; Francis, generally known as George, born 27 September 1967; and Vanessa, born

20 November 1969. Unfortunately the plaintiff's and Aliitasi's marriage also met difficulties. These may have been so as early as the late 1970's, but whether that is so or not they ceased to live together on 31 October 1988, and a separation agreement was signed in June 1989. Aliitasi was given the matrimonial home, which appears to have been that inherited by the plaintiff from his father, and a car. She had employment. The three children by that stage were not dependent.

The plaintiff re-established himself elsewhere with another partner, and has since bought with her a residence. He had small savings at the point of separation, and it seems some insurances, but otherwise was starting again from scratch. He was in modest employment.

He and Aliitasi informed the deceased that they would be parting. The plaintiff asked the deceased to lend him some money to assist in purchasing a new house at the point of separation, but she did not agree to do so.

Against this background, the deceased made a series of wills with the Public Trust at Lower Hutt. Those made in 1959, 1979 and 1983 left her estate, or at least the bulk of it, to the plaintiff. That made in 1984 was a little more complex in that it left the residence at 224A Waiwhetu Road and a life interest in residue to the plaintiff, with remainder to the children. I comment that notwithstanding the plaintiff's long-standing attitude towards the deceased she appears to have recognised him down to and including 1984, as the appropriate major beneficiary. Then on 14 and 17 November 1988 she made wills in totality reducing the plaintiff to a legacy interest, with residue to Aliitasi and the grandchildren. She stated that her son had recently left his wife and gone to live with another woman, and that she wished to preserve the bulk of her estate for the grandchildren. This was, of course, in fact after the plaintiff had parted from Aliitasi. I comment that it seems clear that the fact of the plaintiff leaving his wife, and forming another relationship, precipitated this reappraisal of what she should do with her estate. A codicil followed in 1990 which provided for legacies of $10,000 to Aliitasi and the three grandchildren and $5,000 to Aimee. The eventual last will is dated 29 May 1991 not long before her death on 15 June 1991. In it she finalised her dispositions as a legacy of $5,000 to the child Aimee; a devise of the

property at 224A Waiwhetu Road and personal effects to the son George; a legacy of $20,000 to the plaintiff; legacies of $10,000 each to Aliitasi, Tania and Vanessa and gifts of one fifth of residue to the plaintiff, Aliitasi, Tania, Vanessa and George.

Her estate at date of death, as it would have appeared to her, was worth approximately $400,000. It comprised the property at Waiwhetu Road, which then had a 1990 government valuation of $203,000; personal effects which the Public Trustee now estimates (no doubt roughly) as worth $5,000; and cash at date of death of some $214,000; a total of $422,000, which less predictable expenses came to the $400,000 approximately I have mentioned.

Her last will, as outlined, operating on that $400,000 then seen by her, after disposal of the property at Waiwhetu Road and contents to George, and after the legacies provided for by the will would have left a residue of some $137,000 approximately, which would be divided in terms of that will in one fifth shares. The result on these approximate residue figures would have been a legacy to Aimee $5,000; a legacy to the plaintiff of $20,000 plus residue of $27,000, namely some $47,000; a legacy to Tania and to Vanessa and to Aliitasi of $10,000 plus one fifth residue to each in the sum of approximately $27,000, meaning each of these three received about $37,000; and a gift to George of the Waiwhetu Road property and contents, totalling as it would then have been thought some $208,000, plus one fifth residue of $27,000, totalling ultimately some $235,000. There were, it is plain, some obvious disparities.

The question is whether this scheme was a breach of moral duty in relation to the plaintiff. There are no other cross-claims made, although all other beneficiaries seek to maintain the will as it stands. The question is what a wise and just testator would have done in the circumstances at date of death and those reasonably foreseeable at that stage. I do not intend to go over the well known authorities. The principles are distilled in ***Little v Angus*** [1981] NZLR 126 (CA) and more recently in ***Re Leonard*** [1985] 2 NZLR 88 (CA). It must be remembered, however, that the Court does not re-write a will more than necessary to repair any breach, and that the proof of disentitling conduct lies upon those who so allege. In answering that question I look, of course, at the size of the estate and the range of

potential claimants upon it. I look also at the relationships between the deceased and those involved, and the needs of those involved.

I consider first the relationship between the deceased and the plaintiff. As I have indicated, so far as the plaintiff was concerned, relationships were poor. He states in the course of his affidavits that he was "reserved" towards her. I view that as something of an under-statement. It is clear from the evidence overall that he was often frosty, and at times downright hostile. There were extremes from time to time such as slamming doors, and emotional statements that he regarded her as effectively "dead"; but not too much is to be made of matters of that sort. The more general run of the relationship over the years is the more important. At that level it seems clear he did not want contact with the deceased, and indeed avoided it where practicable. Visits were relatively infrequent. He was reluctant to assist her, and resented any expectation that his children would do so without payment. Such expectations may have come very easily to a woman who had been through the Depression and war afterward. He considered that she could afford to have home help, and indeed given her cash reserves at death he may well have been justified in that; but the same comment as to her perceptions of paying for home help may well apply. Their contacts, when they did occur, tended to frequently enough involve him telling her to spend money for her own good, and her declining to do so; indeed to some extent viewing that as a request on his part for money. The episode as to engaging cleaners not long before death is an obvious example. There were these communication problems and I think they were very real. Overall it cannot be said he was an affectionate son and nor can it be said that he was a particularly helpful son. If anything, the conclusions to be drawn are rather the other way. However, having said that I will come in due course to the further question whether this entitled her to restrict provision to the extent which she did.

Her relationship with Aliitasi seems to have been variable over time. There were evidently some suspicions as at 1984, and there are signs of concern that her estate might get into Aliitasi's hands. However, as time passed, it is clear relationships with Aliitasi were good. She, meaning Aliitasi, endeavoured to heal the breach between the plaintiff and the deceased by having the deceased around at times, and toward the end she took the deceased meals on a regular basis.

Likewise the deceased's relationships with her three grandchildren appear overall to have been good, although there was one episode where she considered she had been slighted. I think it likely that her relationship with the three grandchildren is due in significant part to Aliitasi's apparent wish to heal the family breach. Whatever the background, there appears to have been regular contact to the extent one would expect it between these generations. The deceased was particularly close to her grandson George. She built a sleep-out on the property when he was about 12, ostensibly so he could study, although one suspects that it may have been so she would have more of his company. He did indeed live with her for 18 months at some point during his teens. There was regular contact between them, and George did odd jobs around the place for her as well as providing company. In her eyes, to at least some extent, he became the son which the plaintiff declined to be. She also may have experienced some understandable concern when George developed a suspected heart condition which required exploratory surgery. Grandmothers have a way of becoming concerned about grandchildren when such matters arise.

I turn from relationships with these various persons to their various needs. I take these in this assessment of moral duty as at date of death in mid 1991.

The plaintiff then was 52. He had a house, or an interest in one, and a job, although it was at modest salary and, like so many in those days, not absolutely secure. He had a partner. He was not facing any immediate crisis, but had only relatively small savings, and to any objective observer did have a need for some security for his rapidly advancing old age. Aliitasi had a house and a car, and a job. Much the same perhaps is to be said. The granddaughters were in somewhat different positions. Tania was a solo mother, who had nothing, and clearly warranted some provision. I note that she married on 13 March this year, but that was a long way ahead as at 1991. Vanessa had a job, but it seems nothing else, and likewise warranted some start in life. George had a job on a commission only basis, and without particular job security. He had nothing else. There were the concerns as to a possibly coronary problem, to which I have referred, and clearly he warranted some provision by way of a start in life and some security.

Against that background I turn back to the question of moral duty. The plaintiff was the only child. He was not well off on a longer term perspective, and in ordinary circumstances his situation would warrant very substantial provision, given the nature of other claimants and size of the estate. However, there was a factor which counted strongly against him, and it was his rejection, at times almost to the point of some cruelty, of the deceased. That well justified a rather narrower approach. How far should the deceased have gone? She was required to be wise and just in the circumstances prevailing. Parents who break up should realise the profound effects this can have on children, even mature children, and it is not altogether surprising the plaintiff was affected in his views of her. He may have gone much too far, as there is room for reciprocity of understanding, but wisdom and justice required some indulgence and understanding towards him. Indeed, the deceased gave it, until the 1988 and subsequent wills following his separation. There was some indulgence due also toward the break-up from Aliitasi. These things do happen, and when children are adult there is no call these days to insist upon the continuation of a dead relationship. I rather wonder whether after years of putting up with the plaintiff's obvious anger over her own separation from his father, she then over-reacted against him, when he himself separated from his wife. She may also have been rather too indulgent toward the grandson George in consequence of his medical condition. She was entitled to be concerned, but was required to be realistic. It was not in fact, fortunately, so very serious as far as could be seen.

With those matters in mind I consider her duty was this. She was to leave him a capital sum which would give him some security for his old age. It need not be generous, in the light of his treatment of her, but it should have been sufficient. That much was required. I do not think the envisaged gift of approximately $47,000 being the legacy of $20,000 plus one fifth estimated share in residue as seen by her was sufficient to meet that minimum requirement. Nor, however, do I consider, particularly in view of those attitudes I have canvassed, that it was incumbent on her to leave him as much as 50% of her estate which was the ultimate submission to me. I consider the deceased should have left the plaintiff at least $100,000, and that least is what should now be provided.

Now after that is allowed for, it is proper that the deceased's wish George should have the property at 224A Waiwhetu Road, and contents, be accommodated. .Whether he continues to live there after the proceedings are concluded, or sells out for elsewhere, is a matter for him. To enable that to be done I consider the present over-provision for George in the form of a share of residue must go, and it also becomes necessary for a relatively small reduction in the yield from the two granddaughters and Aliitasi's residuary shares to be made. In precise form the will be varied as follows:

1 George will receive 224A Waiwhetu Road and personal chattels in terms of the will, but no share in residue.

2 For avoidance of doubt Aimee's legacy of $5,000 stands. It was not attacked.

3 The plaintiff will have a legacy of $100,000 in place of his present legacy and residuary share. It will not carry interest to date.

4 Each of Tania, Vanessa and Aliitasi will retain their present legacies each of $10,000, and will have one third shares in residue.

As to costs the trustee needs no order but for assistance in case there be doubt, may charge costs against the residuary estate (as opposed to the real estate and personal effects). I will hear other counsel as to costs if counsel wish to be heard. There is an obvious difficulty that any award against the estate generally will fall upon the two granddaughters and Aliitasi in their residuary shares, and if upon the son George upon a man who at this stage may not have liquid funds available for payment. I simply make those obvious observations so they are not overlooked.

Having heard counsel, who wish to take instructions, I will reserve costs. Memoranda may be filed and exchanged within seven days or within any further mutually agreed period.

R A McGechan J

Solicitors:

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Office Solicitor, Public Trust Office, Lower Hutt for Defendant
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