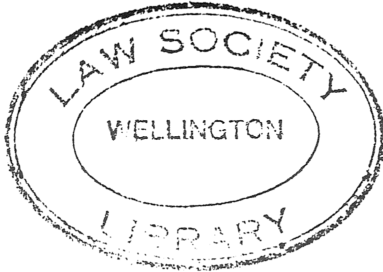
IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP51/93


LAW SOCIETY
WELLINGTON
LIBRARY

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the ESTATE OF GLADYS ROBERTA ELLIS Deceased

BETWEEN ELIZABETH PATRICIA NIELSEN

Plaintiff

A N D THE PUBLIC TRUSTEE OF NEW ZEALAND as Executor and Trustee of the Estate of the said GLADYS ROBERTA ELLIS

Defendant

Hearing: 13 September 1994

Counsel: A.K. Monagan for the Plaintiff
P.F. O'Leary for the Defendant
M.A. Courtney for residual beneficiaries

Judgment: 15 September 1994

JUDGMENT OF ELLIS J.

Solicitors:
Carlile Dowling, Napier for Plaintiff
Public Trust Office, for Defendant
Langley Twigg, Napier for residual beneficiaries

The plaintiff is the only child of the late Gladys Ellis who died on 24 September 1993 aged 80 years. Probate of her will dated 24 July 1992 was granted to The Public Trustee as executor. In it she made bequests of $2,000 to her only grandchildren, the plaintiff's two children, three other bequests totalling $5,000, a bequest of her car to Lynley Alach and of all her jewellery and watches to Lynley Alach and June Collinge equally. She left the residue of her estate to them also. She excluded the plaintiff altogether, who now claims relief under the Act. She does not challenge the pecuniary legacies, but claims the whole of the balance of the estate now comprising the car, jewellery and watches, chattels and some $113,000 in cash.

The Family History

The plaintiff was born in 1940 and raised by her parents. She was the apple of her mother's eye and was given every attention. While the family was in modest circumstances, both parents worked and the father had a property in Taupo and they lived in a jointly owned family home. The mother however displayed an overpossessive nature towards her only child which made it difficult for her to introduce young men into the family circle. When the plaintiff introduced her husband to be in 1963 there was hostility expressed verbally and incessantly. In her view no-one was good enough for her daughter. The plaintiff's evidence goes into detail, which I accept as true. Notwithstanding the mother's unhappy disposition to her daughter's husband, the couple persevered in filial duty, and relationships were sustained during the father's lifetime. He died in 1978. Two years before he contemplated selling his Taupo property as it had become a burden to maintain, although most of this was done by the plaintiff and her husband. The father decided however to transfer it to the plaintiff. He did

so at its Government Valuation of $25,000 and subsequently forgave the resultant debt by gift and will. By his will he left his wife a life interest in his estate with remainder to the plaintiff and her two children. The father and mother's matrimonial home passed to the mother as survivor. The present value of the residue is in the order of $26,000, of which the plaintiff is to receive half, and the children one quarter each.

After the father's death there was a request by the mother from the trustees of the father's estate for $1,200 to cover the cost of painting her home. The plaintiff and Mr Wilson, a solicitor, were the trustees. There was insufficient funds available immediately, so only $300 was advanced at that time. The mother blamed the plaintiff. The plaintiff's and Mr Wilson's evidence put it beyond doubt that the mother's allegations were baseless.

Another incident in 1980 is related by the plaintiff as critical to her relations with her mother. She relates how until then she and her husband had been virtually at the mother's beck and call. The mother rang and demanded to be driven to town in the morning. This conflicted with a prior engagement the plaintiff had made and was unable to postpone so she said she could not oblige. The mother had a car which she could but did not drive and the plaintiff suggested she drive herself. Alternatively she offered to drive her mother in the afternoon. Things deteriorated rapidly from then on despite endeavours by the plaintiff and her family to improve relations.

In 1981, nearly five years after the transfer of the Taupo property to the plaintiff, she decided to sell it and did so for $35,000 and applied the funds towards the purchase of a family home. Out of the blue in 1984 the

mother instructed her solicitor to write a letter claiming that the plaintiff had wrongfully disposed of her chattels in the Taupo property. Fortunately the plaintiff had records which enabled her to refute this hurtful allegation. Her evidence was that she had been at pains to ensure her parents had everything from Taupo they wanted and in addition had bought her parents a colour television for $900.

I shall touch later on the brief contacts between the plaintiff and her family and the deceased since 1984.

The Relevant Testamentary History

In 1984 the deceased made a will in which she gave sundry legacies, but left her residuary estate to her two grandchildren. In August 1987 she made another will leaving $2,000 to each grandchild and the residue to the present beneficiaries Mrs Collinge and her daughter Mrs Alach. Another similar will was made four months later and left written instructions with The Public Trustee relating to the possibility of these proceedings. I will deal with those later. There was a codicil in November 1990 and then the will of 24 July 1992. It is plain that the animosity felt by the deceased for her daughter and her husband had not extended to her grandchildren by 1984, but her affection for them gradually became replaced by her affection for the Collinge family and that continued virtually up to her death.

The Collinge Family

Mr Collinge was a cousin of the late Mr Ellis, the plaintiff's father. Following the increasing rift with her daughter, the deceased transferred her affections to Mr and Mrs Collinge and their daughter Lynley, now Mrs Alach. The Collinges responded with affection and attention and treated

her as part of their family. While there was some criticism of their failure to try to effect a reconciliation between the plaintiff and her mother, I think that criticism is unjustified. The deceased presented a very different side of her personality to them, just as she did to her lifelong friend Miss Buckley, who swore an affidavit for the Court to read. She returned their friendship in kind and recognised their affection by her testamentary provisions. While she did not owe them any moral duty to provide for them, her generosity is easily understood.

There was an incident which occurred shortly after Mr Ellis' death in 1978 which the deceased related to the Collinges in terms that naturally affected their assessment of the plaintiff. While the plaintiff and her husband were away, their house was being minded by Mrs Nielsen senior. The deceased called to reclaim a stole earlier given to the plaintiff. She insisted on entering and taking it. Later the plaintiff and her husband remonstrated with the deceased. She said she was verbally abused and coarse language was used. Mr Nielsen denies this but admits the confrontation. There is evidence that the deceased was a user of coarse language, and because of other examples of her exaggeration and misreporting of events, I conclude that she misrepresented the incident to the Collinges.

The Reasons for Exclusion of the Plaintiff

These are based on the rift between mother and daughter. In her notes to the Trustee she said:

"38/2 Sanders Ave
19-5-84

Dear Jack & The Public Estate

Being my trustee, I feel it is high time I put on paper, as advised by Mr Alan McLeod, my solicitor at the time, but now of Kiri Keri, the reasons for excluding my daughter (Mrs Brian Nielsen) from my will.

Two years before Albert died, he was going to sell our Taupo property, as he realised he couldn't maintain the grounds, however I persuaded him to let Patsy have it, the contents did not go with the house naturally, as I had hoped to have a holiday and thought we would all use the house, as in the past, but it wasn't to be. Patsy sold the property two years later, claiming the contents of the house as hers. She denied me the $1,200 I paid for the painting of 328 Kennedy Road.

Her father had made arrangements with Mr Bickers to paint the house before he died and Patsy being a trustee also, denied me the money from the Estate, consenting to my gifting $300 only.

Patsy is not to enter my home and certainly not entitled to any of my belongings, my only hope is that her children do not treat her the way she has treated me.

Please Jack just dispose of my belongings not listed in my will and if there is anything of use to you and Jean, I want you to have it.

Haven't been feeling too good today, so thought I had better finish this letter.

Love to you both
Glady"

"38/2 Sanders Ave
Napier 19-5-84

Dear Jean (Olsen)

Will you please dispose of my personal belongings, other than those stated in my will. There are numerous things that my granddaughter (Kathryn Nielsen) might like, but on no

account is my daughter Elizabeth Patricia Nielsen to enter my home and remove anything, or be given anything, she had her share when her father died. Thank you Jean.

Love Glady"

Evidence in the affidavits was relied on by Mr Monagan to refute the deceased's claims and could not be effectively countered by Mr Courtney. I conclude:

(a) The deceased did not persuade her husband to transfer the Taupo property to the plaintiff. He did this, and so drew his will, anticipating friction between mother and daughter, and to ensure she would not be dependent on his wife for her inheritance. If anything, the deceased resented the transfer.

(b) The property was sold five years not two years later. The evidence shows it was the deceased who failed to enjoy Taupo, not the plaintiff's actions which prevented such.

(c) The claim relating to the $1,200 is ill-founded as I have already related.

(d) It is true she inherited half her father's estate, her share is now valued at $13,000.

Overall I conclude that the plaintiff's claimed misconduct is not established. Indeed I am prepared to conclude that the allegations are the delusions of an excessively demanding mother who became consumed by jealousy.

There is evidence of incidents leading up to the mother's death or attempted contact by the plaintiff at a family funeral, of the sale of tools meant for her grandson, of invitations received and declined by the mother, of refusals by the mother to invite the plaintiff to her 80th birthday celebration, and of efforts made to take her granddaughter's wedding photos. Saddest of all is the final acknowledgment by the deceased on her deathbed of her failure in her relationship with her daughter.

Conclusions

I am satisfied that the deceased owed a moral duty to her daughter to provide for her maintenance in her will, and that there has been no conduct on her part which would disentitle her to such. There has therefore been a failure to provide such that would justify the intervention of this Court. The claims of adult daughters who live with husbands who are able to contribute to their support has changed over the years.

The present position is summarised in the new edition of Patterson's Family Probation and Testamentary Promises in New Zealand (1994) at para 12.5. Married daughters claims must be treated on their own merits and balanced against competing claims if any. Plainly where there are no competing moral claims, or where the testator chooses to favour strangers to whom she feels well disposed, the daughters claims will be the stronger and more likely to succeed.

In this case both the plaintiff and her husband are able to work and have a family home fully furnished, cars and some cash reserves. The plaintiff does not therefore present as being needy. On the other hand, a

just and wise, though not generous testatrix would have recognised the need for recompense for the hurt caused to the plaintiff and her family over the years, and to provide for her daughter's future comfort and security.

Here the net estate is just over $100,000 when costs have been deducted. The Collinges do not claim to be in need. At any event they present as strangers under the Act. However I think the just and wise testatrix would have wanted to leave them some recognition of their friendship and that is especially so in the case of Lynley Alach. Notwithstanding the modest size of the estate, I think there is room for some testamentary recognition of the Collinges. I should perhaps add that Mr Courtney submitted in accordance with the plain statements in the Collinges affidavits that their position was not so much to support their own claims, but to honour their undertakings to the deceased to maintain her wishes.

The orders will be on the basis that all pecuniary legacies and the gift of the car to Lynley shall stand as they are in the will. The bequest of jewellery and watches shall be cancelled. In my view the chattels of the deceased with the exception of the car should go to the plaintiff. There will be an order accordingly. I therefore refrain from making any final order disposing of the chattels. Costs relating to their storage and disposition by the Trustee shall be borne out of residue. I consider that the deceased should have recognised Mrs Collinge and her daughter by giving each a pecuniary legacy, however for the administrative reasons mentioned by Mr O'Leary, and because the residue is known precisely, I will give effect to my decision by dividing the residue into ten parts. Eight are to go to the plaintiff and one each to Mrs Collinge and Mrs Alach. The costs of the

plaintiff and the residuary beneficiaries are to be calculated on a reasonable solicitor and client basis and met out of the residue of the estate. If they cannot be agreed they can be settled by the Registrar.

....