

NZLR

**LOW
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CP 9/96

IN THE MATTER OF The Family Protection Act 1955

AND

IN THE MATTER of the Estate of LILIAM
BEATRICE HENDERSON

Deceased

BETWEEN

SUSAN MARY AUCUTT

Plaintiff

AND

JAMES RONALD WILLIAMS
& HAMISH WATSON
RIDDOCH

Defendants

Hearing: 10 May 1999

Counsel: G M Downing for Plaintiff (elder daughter Mrs Aucutt)
W M Patterson for Beneficiary (younger daughter Mrs
Williams)
A M Powell for Grandchildren of Mrs Williams
H W Riddoch for Trustees

Judgment: 31 MAY 1999

RESERVED JUDGMENT OF HERON J

Solicitors:
McFadden McMeeken Phillips, Nelson for Plaintiff
Rudd Watts & Stone, Auckland for Beneficiary
Duncan Cotterill, Nelson for Grandchildren
H W Riddoch, Nelson for Trustees

These are proceedings for further provision out of the estate of Lilian Beatrice Henderson (the deceased). The plaintiff (Susan) is the elder daughter of the deceased and the principal contest is with the younger daughter (Christine) who received the bulk of the estate.

The deceased died aged 88 on 3 January 1996 leaving a will dated 17 February 1992. Her will appointed two Nelson lawyers as executors and trustees, left some specific legacies to Susan and three of her sons and to Christine's children also. She also left specific articles to Christine. Her residuary estate was charged with the payment of debts and then a transfer to Christine of the deceased's principal residence, \$1,000 to each of her grandsons, and the residue to Christine. She specifically provided the following clause:

"I DECLARE that this my Will makes greater provision for my daughter Christine than for my daughter Susan not because of any lack of affection for my daughter Susan but because I consider that my daughter Christine's financial position is much worse than that of my daughter Susan who is well provided for from other sources and it was the wish and intention of my late husband that Christine's greater need be recognised."

The will making history shows an earlier will in October 1988, although there were approximately seven wills, but the penultimate will reveals once again the gift of specific items to the two daughters and grandchildren, once again transferring the principal residence to Christine, providing however that if Christine did not survive the deceased without leaving issue, then Susan's three sons, Anthony, Scott and Ross would take a share in that property. Again the residue went to Christine. Her handwritten will instructions "to make a declaration setting out the reasons for the dispositions set out in my will" were produced recording "such as difference in financial position and circumstance and according to the wishes and intentions of my husband." It is of interest to note that, despite the assertion by the deceased that the will was in accordance with the wishes of her husband, his will as admitted to probate shows that he left all his property to his wife with a provision that if she did not survive him for 28 days, then the residuary estate would be divided between his two daughters with a gift over to children if any daughter died during their father's life. The Will was made less than three years before his death in 1975.

Susan is the elder daughter, has three adult sons. Her sister, effectively the defendant in these proceedings has two children aged 12 and 9. Susan, was born in 1937 and her sister in 1946. The family, prior to the birth of Christine lived in Batavia, but their father was taken prisoner by the Japanese in the second World War. The reunited family commenced to live in Hong Kong after the war. At 13, Susan returned to boarding school in Australia leaving her parents and sister in Hong Kong. She lived for some time in the Philippines and in the early 1950's Susan remained on in England where she took employment, her parents and her sister returning to Singapore. Their father retired in 1970 and moved to Nelson where he purchased the home where the deceased died and which property is the subject of a specific bequest in the will.

In 1979 Susan and her husband moved from Singapore to Nelson to live permanently, Christine in the meantime was receiving her tertiary education. From 1979 through to the date of her death, Susan and the deceased lived in the same city in New Zealand. She says that to begin with she saw a lot of her mother and they would visit regularly but as time went by she became hostile to her. There is other evidence that confirms that the closeness between Susan and her mother was not as great at the end of the deceased's life. Susan describes the relationship as always being strained as she was fiercely independent and would only allow such assistance from Susan and her husband as was absolutely necessary, and even then reluctantly. She says that on many occasions she only ascertained that there were difficulties with her health or other crises when told by others. It is clear also that due to the deceased's ill health there was a need to discuss arrangements for her care and throughout this she demonstrated that she was adamant that she did not want anyone living in the house with her, nor would she move anywhere. On one occasion she was moved into a nursing home but resisted it strenuously and after a few days returned home. At about this time Christine arrived with her son aged four, to visit her mother and according to Susan, there was a very happy relationship between her and her husband and Christine and her husband.

It is plain that notwithstanding a decline in the deceased's health, she remained adamant that she was to live in her house. Arrangements were made; in particular the employment of a loyal housekeeper, but there were difficulties even with that

arrangement and further suggestions were made about her going into an old persons home. On 3 October 1995 Christine arrived in Nelson and took over the running of the deceased's affairs including revoking Susan's husband's signatory rights, he having volunteered to help her with the accounting after some difficulties in the payment of income tax. According to Susan, on Christine's arrival, or shortly thereafter, they were dismayed to find that Susan's mother had turned against them.

Susan considered there had been a breach of moral duty on her mother's part and that inadequate provision has been made for her in her mother's will, but accepts that the relative financial positions of her sister and herself make it appropriate that Christine should receive more.

Christine was married on 20 March 1972. She is presently living in the family home, the subject of her bequest. There are two sons who have kept their family name Henderson. She confirms the history of the family indicating that her father had succeeded in arranging safe passages for her mother and sister out of Java. She describes her life in Hong Kong until 1954.

Whilst the sisters between them disagree on some details, the overall picture is much the same. Both girls it seems to me were provided with educational opportunities by their parents. Whether they were taken up by them to the fullest extent is not important. It seems to me that in that part of their life their father and mother were dealing with them on an equitable basis and I can see nothing in the evidence to suggest anything different. Obviously having regard to the age difference between them, they were likely to go their separate ways and as it happened, Susan, after working as a single woman for some time, married.

Christine boarded at Cheltenham Ladies College in England until 1965 and confirms that her parents came to New Zealand in 1967 building a house in 1968 in Upper Motutere. Christine undertook an honours degree course at the University of London and graduated in 1970 becoming thereafter self-supporting. She contrasts that with her sister who she says lived at home until she was nearly 22. Susan was however employed and I do not see a great deal of difference, as I have already said, in the

circumstances between them any differences there were, arose out of the different ages and respective needs. Although living together for a period of time and then marrying her husband in Australia, Christine delayed children for some considerable time, hence there is a difference not only in age of some nine years between sisters, but difference in overall circumstances. Susan's three sons in their middle 30's contrast with Christine's two sons of 12 and 9 respectively, with a great deal ahead of them so far as upbringing and education and the related expenses are concerned.

Christine is critical of the attempts that were made prior to her arrival in Nelson to restrict her involvement in the management of her mother's affairs. Although Christine has it that there was a serious breakdown in relations between the two of them, contemporary correspondence suggests that they were keeping in touch with one another and exchanging information about their mother. I think both of them were dutiful daughters laying emphasis on different matters, Christine concerned about keeping her mother within her home which was obviously her wish and Susan considering the practicalities of it and also the management of her financial affairs.

In the end, based on the medical evidence that I have seen, plainly she was unable to manage her financial affairs and some formal steps had to be taken. For my part it seems that both daughters are to be congratulated on the extent of the attention they gave to this matter, although undoubtedly Christine gave more direct assistance in the last few years but that cannot overlook the degree of support and comfort and reassurance that Susan presented by virtue of her being in Nelson close by at times when Christine was in Australia. Those are the practical ramifications where parents are concerned, and often those closest to the deceased are sometimes overlooked in the interests of others who are further away. In this case it seems to me that whilst there was undoubted disagreement as to the manner and method as to the treatment of their mother, both daughters had acted with the best of motivation. This was one of the reasons why I refused any right of cross-examination which Mr Patterson sought. This case did not call for that. This case is concerned with the respective positions of the two daughters in relation to their mother as will maker which it seems to me have not been seriously challenged by any form of discrediting conduct. To the contrary it seems both daughters have rendered services in different but creditable ways.

The principal issue between them was whether she was to live at home or whether she was not. Fortunately she had sufficient funds to have the choice and for a while was looked after adequately by persons coming to the house to help. In the last years she could not have existed at home without the services of Christine.

In a letter dated 9 October 1995 Susan says:

“I repeat that I am delighted that you are here to look after our mother”

Having read Christine's letter which brought forth this response it seems to me the subsequent details of difficulty between them have been exaggerated and made worse and need not take the Court's time unduly in my view. They are no more than the normal concerns one has about the welfare of the elderly in circumstances such as this. It was a genuine difference of opinion as to the best method of doing that and in the end Christine gave an enormous amount of physical service in order to make her mother's few remaining years as enjoyable as possible.

Of concern to Christine has been the action taken in the proceedings to have her children separately represented in the proceedings. She has taken from that that there is some criticism of her custodial care of the children but she may be over sensitive as to that. In any event what has caused the difficulties in this case is the prolongation of the proceedings themselves and the need for her to remain in New Zealand until they are resolved. This has made significant inroads it seems to me into her own domestic arrangements and hopefully matters will improve when this case is resolved.

On any measure Christine's assets are modest. She owns a section of land valued at approximately \$100,000 and has an old motor vehicle and the conventional amount of furniture and fittings. She says that her net worth is something in the order of \$78,000. At present they are renting a property in Yarrow, Victoria and she occasionally works part time. Her husband is a self-employed designer of furniture and children's books and has an income of \$A32,000 after tax. Some criticism has been made as to the adequacy of the revelation of the amount of assets owned by both

daughters. Mrs Aucutt by contrast discloses assets jointly owned by her husband which I accept are in the reality worth close to \$1million. Christine has attributed the difference between their asset position to her husband's original occupation. The fact that he was a university lecturer is contrasted with Susan's husband who has been a successful businessman.

Counsel for Susan submits that the testator was probably ill-informed as to the net worth of her estate. Certainly from 1994 onwards there was clear evidence of a lack of full mental capacity, but even at the time of her 1992 will, a gift of \$1,000 to each grandchild was only made subject to their being sufficient in the estate and to otherwise abate. Furthermore it seems that the deceased thought her house property was her most valuable asset and spoke of Australian shares of no great value but subsequently discovered to be worth close to a quarter of a million dollars. The chattels which had been insured for \$20,000 at the time of her death were subsequently reinsured for \$231,000 once the executors became aware of their true value.

For Christine, Mr Patterson points to the disparities in the financial position of the parties and is critical that perhaps the full amount of the Aucutt assets which must be remembered are jointly owned and not solely that of Susan, have not been fully disclosed. There may be some basis for this criticism but the differences between them are already so great that I do not think any increase in value of Susan's position is likely to be decisive. It is plain that the testatrix was entitled to distinguish between the two of them based on that ground alone. The question is whether the difference that she made was an appropriate one for a just and wise testatrix to make. Mr Patterson agrees that the estate is worth now approximately \$1 million but says that there is a strong moral claim on Christine's behalf having regard to the regular visits that she made to New Zealand. Some of those were funded by the deceased but obviously considerable sacrifices on her behalf were made and are not to be denigrated simply because they were funded by the deceased who clearly wanted to have regular visits from her younger daughter. Christine has greater needs, to do with the education of her children, expenses which the Aucutts now do not have to meet but it seems would have done so without any assistance from the deceased during her life time. Mr Patterson has been careful to submit there is no doctrine of equality in these

circumstances and has referred me to the conventional authorities of *Little v Angus* [1981] 1 NZLR 126, 127 and *Re Leonard* [1985] 2 NZLR 88.

I am clearly of the view that there is a breach of moral duty in this case. The history of this family cannot be overlooked. It seems to me that both daughters and their respective children would have brought great joy to their mother. Susan makes a complaint about her father's attitude towards her which she perceives made her early childhood difficult, but that attitude was certainly not expressed, as far as I can see, in any respect by her mother. It was also not manifested in her father's will. Susan was the undoubted support and mainstay for her mother for a continuous period of time in Nelson, in the years following her husband's death and before her death. Likewise Christine took over that role in 1995 and undoubtedly performed it excellently and in a manner that I find Susan could not and would not have necessarily done.

The assets comprise a large number of valuable chattels and represent to some extent the history of this family and it would seem inappropriate that but a small number should be the final reward for Susan in this case. It seems to me that the testatrix was in breach of her moral duty to her albeit well off daughter to recognise the contribution that she had made over this period of time. The estate in my view even by modern standards is a large one and I reject Mr Patterson's submission to the contrary. There is ample in the estate to provide for Christine recognising her limited circumstances and future needs. Mr Patterson was inclined to formulate her entitlement on the basis that the assets that she might receive would need to reach the same level as her sister, but I do not see that as important.

Furthermore, I consider that the deceased was probably unaware of the extent of her estate and possibly laboured under a misapprehension as to how much she could provide. I have also not overlooked some assistance given by the deceased to Christine during her lifetime.

The primary breach of moral duty in this case is the failure to recognise the position of Susan in the overall life of the deceased and the contribution that she made in that

respect. That was a serious breach of moral duty in my view and it cannot be outweighed by the obvious greater claim to the estate as the testatrix saw it so far as Christine was concerned.

Relief

As counsel both agreed, given a breach of moral duty there is a wide discretion reposed in the court, Mr Downing suggesting one third to Susan and two third to Christine with the chattels left to the parties to divide in the same proportions with leave to return to the Court for further directions. I personally would like to see the chattels divided equitably between the parties based on their ultimate share of the estate overall, but that is really a matter for the executors and trustees and Susan and Christine.

Mr Downing pursued the suggestion that the grandchildren should be the subject of some share of the estate, saying that the estate is large enough to accommodate a separate provision for the grandchildren from at least part of the estate. He suggests two trusts, one for the Aucutt grandchildren and one for the Williams grandchildren. It seems to me that there is no particular need for the Aucutt grandchildren, who are all adults, to be the subject of a trust which will only have administrative charges and costs for them and there is no evidence before me that they will not enjoy the fruits of their parents estate in due course.

A trust for the Williams (Henderson) grandchildren may have some merit but it has caused considerable concern to Christine that I feel to pursue the matter without her consent might be counterproductive. If she wishes to set up a trust for the children, and she feels there is sufficient in respect of the estate to be left to her, then it is a matter that the Court would do as part of the order, if it was asked to do so, or it can be done independently of the estate.

As to costs it seems to me that the parties should bear their own costs and there should be no charge on the estate for costs, both parties succeeding to a significant sum, when the estate is ultimately realised. The solicitor client costs of the Williams (Henderson) grandchildren are to be paid from the estate.

Accordingly I consider that the plaintiff is entitled to further provision from the estate by way of a share of the residue of the estate but including the house property to the extent of 25% and that Christine is entitled to the balance of 75%. The specific gifts as to chattels remain as they are and the will in all other respects remains as drawn.

Leave to apply further if required.

Radner J