IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2008-454-736

IN THE MATTER OF	the Family Protection Act 1955
AND IN THE MATTER OF	the Estate of AVIS UNIS BRODERICK
BETWEEN	MALCOLM ANDREW CHALK First Plaintiff
AND	LYNDA SUZANNE BOWEN Second Plaintiff
AND	KATRINA SHARON CHALK Third Plaintiff
AND	MERLE UNIS HOARE AND BERYL MAVIS STOUT AS EXECUTORS OF THE ESTATE OF AVIS UNIS BRODERICK Defendants

Hearing: 24 February 2009

Counsel: G A Paine for Plaintiffs
G Mason for Defendants as beneficiaries
M Fennessy for Estate

Judgment: 18 March 2009

JUDGMENT OF SIMON FRANCE J

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[1] This is a claim by adult grandchildren for a share in the estate of their grandmother.

[2] Mrs Avis Broderick died in February last year aged 100. She had had three children from her first marriage. Two of those children survived her and essentially

the estate was left to them. The third child, Melvin, predeceased his mother by fourteen years. He had had three children who are the plaintiffs in this case.

[3] The final will of Mrs Broderick was made five days after her son's death and left nothing to his children. By way of background it should be noted that Melvin had divorced his wife about ten years prior to his death. At the time of the divorce he moved into his mother's house and lived there until his death.

Overview of wills of Avis Broderick

[4] Because there is an allegation of pressure concerning the last will, I set out in some detail the history of Mrs Broderick's latest wills. Four are of relevance.

[5] In 1968 Mrs Broderick made a will which gave $200 to each surviving grandchild and otherwise divided the estate between her three children. If any of her children predeceased her, their surviving children were to take that share. A 1971 codicil divided off the household and personal effects to her two daughters (i.e. Melvin was excluded from that aspect). A 1977 codicil noted a $5,000 loan to one of her daughters and instructed any unpaid balance to be debited against that share.

[6] The next will was made in 1982. It repeated the provisions from the previous will but made it clear that stepchildren from Mrs Broderick's second marriage were not included. A codicil to that will, made in 1985 so not long after Melvin had moved in to live with his mother, directed the trustees to offer her home to Melvin to be purchased at market value.

[7] The third will was made in 1993, about a year before Melvin's death. I apprehend that Melvin was by this point in time unwell. He died in 1994 due to emphysema. This will made the following changes:

a) the two daughters became sole trustees and executors;

b) the residue was still divided equally between the three children. However, the arrangements in the event of a child predeceasing

> Mrs Broderick changed. If either of the daughters predeceased her, their children took that share. However, if Melvin predeceased, his children were to receive $1,000 each, but were not take their father's share.

[8] The final will was made in 1994, five days after Melvin's death. The primary change from the 1993 will was to remove the specific legacy of $1,000 to each of Melvin's children. In explanation of this, clause 6 states:

> I WISH to record that I have excluded the children of my late son MELVIN ALLEN CHALK from this my will because I have provided adequately for my said son for the last eight years of his life. I believe that the children of my said son have received adequate provision from my said son because I took care of him at my home at no cost to him thus enabling him to build up his cash reserves.

[9] By way of explanation of the last line of this clause, it can be noted that each of the plaintiffs received a pay out of approximately $16,000 from their father's estate.

The evidence

(a) Neutral sources

[10] Mr John Macfarlane is a Palmerston North solicitor. He met with Mrs Broderick in 1997, at which point Mr Macfarlane had been in practice for more than forty years. The purpose of the visit was for Mrs Broderick to discuss her existing will, and to deposit it with Mr Macfarlane's firm.

[11] Mr Macfarlane deposes that the existing will met Mrs Broderick's wishes. Hence, no change was made. Concerning Mrs Broderick herself, Mr Macfarlane notes he has no doubt that the will represented her personal wishes, and was not the product of pressure. A file note made by Mr Macfarlane of his original telephone contact with Mrs Broderick indicates a person well aware of the issues. Of Mrs Broderick, Mr Macfarlane observed in his affidavit:

> I recall then when I met her I was surprised to learn her age, which she belied by her clear mind and confident presentation.

[12] Counsel for the beneficiaries submits the circumstances, and the content of the file note, do not provide assurance as to whether the whole of the will meets Mrs Broderick's wishes. The focus in the note is her desire to exclude her stepchildren. The will was made three years earlier and Mr Macfarlane was not present then, nor involved.

[13] Finally by way of neutral evidence I note that the executors have filed formal affidavits appending wills, and setting out the position of the estate. Mr Fennessy appeared on behalf of the estate at the hearing to provide the Court with an updated statement. He was then given leave to withdraw. Included under this heading of neutral evidence would also be an affidavit from Melvin's former wife who confirms he received a matrimonial property settlement sum of $36,000.

The other evidence

[14] Affidavits have been filed:

a) by each of the plaintiffs, together with a reply affidavit by Malcolm on behalf of all three;

b) by the beneficiaries, and also by the husband of one of them;

c) by relatives of the beneficiaries primarily being other grandchildren of the testator and therefore cousins of the plaintiffs. A spouse of one of these grandchildren has also provided an affidavit.

[15] For the purposes of this case I do not consider it necessary or helpful to detail the evidence. As is usually the case, perceptions of events and relationships differ. By way of general comment I note that none of the evidence describes what would be disentitling conduct, and the testator has herself explained the reasons why the plaintiffs were excluded from her will. The untested evidence filed for this hearing does not provide a basis on which the Court might infer some different reason to that

stated by the testator. Hence it is not necessary to comment on the specifics of much of the evidence. However, some particular topics do need addressing.

[16] The plaintiff grandchildren would have had what could be seen as a reasonably typical relationship with their grandmother. When they were younger there was greater contact. As they grew older, that lessened but was maintained. Mr Paine made it clear there was no claim being made by the plaintiffs of a relationship of a special nature with their grandmother. But nor was there anything less than the norm. My assessment is that Katrina was the plaintiff who had most contact and perhaps worked more at it than the others. I generally accept Mr Paine's submission and do not understand the defendants to be disagreeing to any extent on this aspect.

[17] The second matter to comment on is the nature of the relationship between the testator and her two daughters who are the beneficiaries under this will. It is plain that both daughters gave their mother much love and support. Mrs Broderick was able to remain at home until her death at the age of 100. This was no doubt in no small part to the support she received. Her estate would no doubt have been diminished had different arrangements been necessary.

[18] A third aspect requiring comment is the nature of Mr Chalk's time with his mother. The parties are at odds over the extent to which he contributed to the household, and indeed the quality of his mother's life over the period he lived with her. It is not possible to resolve this. The Court has not heard the witnesses and the affidavits are relatively sparse. I do not know, for example, whether Mr Chalk worked at all over this period. To the extent it is needed I make the following observations:

a) it is clear Mr Chalk never paid rent;

b) what he is said to have done to assist tends, in my view, towards the minimum end of what one could expect;

c) over this period, Melvin's matrimonial property settlement of $36,000 seemingly grew to $50,000. It is this money that formed his estate and which was divided equally amongst his three children.

[19] Clause 6 of the will indicates that Mrs Broderick considered that Mr Chalk's capacity to leave this $50,000 to his children was due to her supporting him over this period when he lived with her. While there is no evidence of Mrs Broderick directly giving Melvin anything other than what was involved in him living with her, it is fair to say that his own money would probably have been used up had he had to fend for himself over this period.

[20] A fourth aspect of the evidence is the claim of pressure to change the will. A change to a will five days after a death is always a matter of interest from a timing viewpoint. However, the important change was in fact made in 1993 before Melvin died. It was in the 1993 will that Mrs Broderick first excluded Melvin's children if he predeceased her.

[21] I do not pretend to fully understand what Mrs Broderick was doing. The change she made in the 1993 will is more consistent with conduct directed against the grandchildren than against her son. He was still to get a third of the estate if he survived his mother. It was his children who were targeted to miss out. And somewhat oddly, they would of course have an expectation to downstream inheritance if Melvin did in fact survive his mother and take his one third. Some sort of life interest in the house for Melvin would seem to have been a better way to give effect to her views about not leaving anything more to him and his family but wanting to look after him while he lived.

[22] The final 1994 will is again something of a contradiction. It is hard to see that changing a will just to take $1,000 off each of the plaintiffs, and to thereby exclude them wholly, is anything other than conduct aimed at them. Yet we know that is a change explained by a view that Melvin had had his share.

[23] As I say, I cannot fully see the logic in what has happened. If Melvin had already been given enough in his lifetime, why was he still getting a share in 1993?

If Mrs Broderick's motivation in 1994 was, as she said, this view about Melvin, it does seem with respect rather excessive to make a change just to take away a small legacy of $1,000 each to the plaintiffs. Be that as it may, the 1994 will is consistent with what was signalled in 1993 before Melvin died, so I see no basis to infer that there was pressure from the daughters.

[24] Against those background points I turn to consider the claims under various relevant considerations.

Decision

(a) Applicable Authority

[25] I consider the following passage from a judgment of Fisher J usefully summarises the law in this area in relation to grandchildren:

> For grandchildren one can go on to draw some assistance from cases such as *Re McGregor* [1961] NZLR 1077, 1104-1105 and *Re Horton* [1976] 1 NZLR 251, 255. These cases and others of a like nature indicate that it is often difficult for a grandchild to establish a claim where the grandchild's parent is *a living child of the deceased*. As a starting point one expects that the bounty for that particular family will filter down to the second generation via the first. But it is no more than a starting point and it is easily departed from whenever there is a reason for doing so. For example, in the present case the child of the deceased who was the immediate parent of the claimant grandchildren has died. In those circumstances there can be a readiness to make an award in favour of the grandchildren on a basis which in its total value may not differ greatly from the claim which the immediate child would have had. (*Fraser* v *O'Grady* M262/96, Auckland, 20 May 1997.)

[26] In relation to the last sentence about the size of any award, Mr Mason emphasised that the grandchildrens' claim must be in their own right. They do not step into the shoes of the parent. I accept that is correct, and my reading of the not particularly numerous cases suggests that a sum rather less than what the deceased parent might have got is the more common outcome, if an award is made at all. Mr Mason also emphasised that of recent times there has been a recognised shift in favour of testamentary freedom, and that cases predating that change must be read within that new context. I also accept that proposition. Whilst generalisations are

usually to be avoided, it seems generally accepted that *Williams* v *Aucutt* [2000] 2 NZLR 479, and *Auckland City Mission* v *Brown* [2002] 2 NZLR 656 "swung the pendulum" back towards a more conservative approach. (See Patterson, The Law of Family Protection and Testamentary Promises, 2004, at 2.5.)

[27] Mr Mason referred to a decision of Gendall J in *Kale* v *Cowley* (CP23/2000, Napier, 22 February 2002). It was the most relevant decision of which counsel were aware that dealt with a grandchild family protection claim and which had arisen since *Williams* v *Aucutt*. It is important to have brought the case to my attention. However, having read it, I consider it represents an example of applying the recognised factors to its own set of facts and does not need detailed discussion.

(b) The testator

[28] The reasons why Mrs Broderick excluded her grandchildren are clearly stated by her. She considered that she had discharged her duty to her son, and that his children were direct beneficiaries of that, in that they received under his will.

[29] The basis for Mrs Broderick's view is what happened during the period her son Melvin lived with her prior to his death. The timing of the wills of 1993 and 1994, made as they were after Melvin had been with her for around a decade, is consistent with Mrs Broderick feeling she had done enough. None of the evidence filed leads me to the view that it was an irrational assessment. I am not in a position to assess how correct it was but it is plainly what Mrs Broderick thought.

[30] There is no evidence that the testator provided particularly for the plaintiffs who were adults by the time their father died. The plaintiffs are being treated the same as all the testator's grandchildren in the sense that there is no direct provision made for any grandchild.

[31] The main concern I have concerning the testator is whether, at the time of her death (the operative time for assessing breach of moral duty) there was any real appreciation of the size of her estate. The will was made in 1994. It was reaffirmed in 1997 when Mrs Broderick visited her new lawyer. There is no evidence that at

that time the size of the estate was discussed, or that Mrs Broderick's stance in relation to Melvin's children was confirmed after consideration of that. It may have been, but there is no evidence that it was.

[32] In 1994 the three children of Melvin each received about $16,000. Comparing the real value of a sum of money is difficult, but at the time of her death over thirteen years later, the testator's estate was valued at $500,000. Merle Hoare notes that her mother acquired most of her assets after Melvin had died. I am not sure how that is so since she was in her late eighties by then, and she obviously already owned her house which provides half the estate's value, but I have no reason to dispute the accuracy of what is said. I am not confident that Mrs Broderick had reassessed whether, given the value of her estate, and the situation of the plaintiffs, she still considered she had met all obligations to Melvin's children by her assistance to Melvin in 1984-1994.

(c) *The plaintiffs*

[33] None of the three plaintiffs are well off. I accept Mr Mason's criticisms concerning the information provided as to any expectations they have through their mother, and bear that in mind.

[34] Katrina is in a long term relationship, and reasonably well placed in that together the couple have a solid income, a mortgaged house and other assets. Their nett value is probably around $100,000 and it is a reasonable inference that Katrina's partner's parents have some independent wealth.

[35] Lynda has two children whom she has raised on her own since 1999 when she separated from their father. She is on a benefit, has no assets, and has debts. She obtains some part-time income to supplement the benefit.

[36] Malcolm has been in several relationships. He has two children who live with their mother. He lives in rented accommodation with no current partner, has a solid income and no assets.

[37] Concerning this information Mr Mason is critical of its general paucity, and the lack of accounting of what was done with the 1994 legacies of $16,000 each. He suggests negative inferences should be drawn from the lack of explanation:

> It is submitted that the appropriate inference in respect of both Lynda and Malcolm is that they have been the authors of their own financial misfortunes and have not managed the money they have received from their father well.

[38] In my view, in the context of a legacy of only $16,000, and given the life experiences each has described, this is going too far and I decline to draw such inferences.

[39] My assessment of the plaintiffs' needs, relevant to the extent of any moral duty which may have been owed by Mrs Broderick, is that Lynda was in a situation of very significant need, Malcolm was in a position of moderate need and Katrina some need.

[40] There is no evidence of disentitling conduct by the plaintiffs, nor any evidence of a particularly close relationship meriting greater recognition.

(d) Other claims

[41] Mrs Broderick was able to live at home until her death. The evidence is clear that this was due to a large measure of comfort and physical assistance from her daughters, particularly Beryl. The two daughters are rightly the main beneficiaries under the will. They were their mother's primary support, and their actions no doubt did much to protect the size of the estate. I have no evidence about their financial circumstances.

(e) Conclusion

[42] Grandchildren stand in their own right. They do not take the place of a deceased parent in terms of a grandparent's moral duty. That said, it has several times been recognised that there may exist a moral duty where a child had died,

leaving children. Plainly those grandchildren have no expectation of downstream inheritance. Depending on the timing of the respective deaths, they may have particular needs, especially if young at the time the parent dies.

[43] Here we have adult grandchildren whose father died eighteen years ago. They have not provided any special care to the grandmother, nor do they have a particularly close relationship. To that extent it is not a compelling claim.

[44] On the other hand, in terms of a moral duty to her deceased son's children, I do not consider the testator has adequately discharged this by the assistance she provided their father. The assistance enabled him to keep his modest nest-egg, and increase it in circumstances where it would otherwise have gone, but Mrs Broderick did not give him the money. Neither he nor his children have received direct financial assistance.

[45] The sum left by Melvin to his children in 1994 was not large. In 2008 those children, the testator's grandchildren, were in varying situations of need but Lynda was particularly in difficult circumstances. There is no basis I can see not to have acknowledged that they are part of her family, that they lost a parent comparatively early in the context of the family, and that they are a part of her family that was in some financial need. The primary obligation on Mrs Broderick was undoubtedly to her daughters but the size of the estate meant it was also possible to have recognised the plaintiffs' membership of the family.

[46] The decision was made in 1994. It was arguably revisited in 1997. In my view, Mrs Broderick was wrong in her assessment that she had done all she needed to do for Melvin and his children. She has also undervalued the need to recognise membership of a family. There seems to have been an over-reaction to the size of Melvin's estate, and arguably an over-estimation of her role as regards it. Whilst Mrs Broderick did much for her son, and no doubt that enabled the preservation of the sum of money, she had not given him the money. His time with her does not seem to have been wholly one way. In my view in 2008 at the time of her death there was an obligation to the plaintiffs that a wise and just testator would have met.

Quantum

[47] The estate is presently valued at $520,000. It is a case where I consider the estate should meet the costs of the litigation so I bear that in mind when fixing the sums. I also consider that there should be a greater award to Lynda who is in the situation of most need. I do not differentiate between Malcolm and Katrina.

[48] I remind myself that an adjustment is to be made only to the extent needed to meet the moral duty. It is clear that Mrs Broderick wished the bulk of her money to go to her daughters and that is undoubtedly where her main obligation lay. It is not a matter of achieving fairness and I do not venture any opinion on what might have been fair.

[49] The moral duty by no means required Mrs Broderick to treat the plaintiffs in a way comparable to her surviving children. She considered she had done more for her son during his lifetime than she had for her daughters and she is entitled to reflect that in her will.

[50] Weighing as best one can the various factors, I award:

a) Lynda the sum of $35,000;

b) Katrina and Malcolm the sum of $22,500 each.

[51] As noted, unless there are matters of which I need to be made aware, I consider that the reasonable costs of the litigation should be borne by the estate. Counsel may file memoranda if there is not agreement, or if they wish to be heard on it.

Simon France J

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