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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**FAM-2015-009-000901
[2016] NZFC 2543**

IN THE MATTER OF	ESTATE OF EDNA NEWMAN
BETWEEN	LOU NEWMAN Applicant
AND	PUBLIC TRUST OSCAR NEWMAN ANTONY NEWMAN ROXANNE RYE-NEWMAN IAN RYE-NEWMAN Respondents

Hearing: 23 March 2016

Appearances: P Maciaszek for the Applicant
D O'Leary for the Public Trust (via telephone)
No appearance by or for the Respondent O Newman
B Pelham for the Respondent A Newman
No appearance by or for the Respondent R Rye-Newman
No appearance by or for the Respondent I Rye-Newman

Judgment: 23 March 2016

ORAL JUDGMENT OF JUDGE R J MURFITT

[1] The testatrix, Edna, died on 31 March 2014 at the age of 71.

[2] Her last Will, dated 5 April 2012, provided for each of her three grandchildren to receive a legacy of \$1000. That is not challenged.

[3] The residue of the estate was subject to a life interest in favour of her two sons, Lou and Oscar.

[4] Lou is the applicant in these proceedings. He is supported by his son, Antony, who, though aged 17, has a partner and a recently born son, and who has instructed Mr Pelham.

[5] The relationship between Lou and Oscar is described in the trustees affidavit as a fractious and uncooperative one. That puts it mildly.

[6] The terms of the Will also provided that on the cessation of the life interests, the net residue of the estate was to be divided amongst the three grandchildren.

[7] This estate essentially involves one primary asset, namely Mrs Newman's home at [address deleted]. It has a market value in the range of \$325,000 to \$335,000. It is subject to a mortgage of approximately \$96,000. The only other asset of significant value is an AMP Life Policy which Mr O'Leary for the Public Trust advises will return approximately \$20,000 when processed.

[8] After Mrs Newman died, her son Oscar occupied the home for a period of about two years paying for much of the time a rent of about \$200. He mistakenly believed he was entitled to an immediate half-share of the estate. When he realised his mistake in June 2015 he stopped paying rent or outgoings and both rates and mortgage payments have fallen into significant arrears. Arrears of mortgage amount to \$6605 and there are arrears of rates of \$1533. Eventually Oscar was evicted from the property by the trustee and left in January 2016.

[9] He has two children, Roxanne, aged about 21 and Ian, aged around 19. Both have been served. Neither Roxanne nor Ian nor their father Oscar, have taken any step in these proceedings.

[10] The Court has been assisted by the submissions filed by Mr Maciaszek acting for Lou and Mr Pelham, acting for Antony.

[11] The Court is also indebted to the evidence of and submissions on behalf of the Public Trust.

[12] They indicate that already the funeral and administration costs have amounted to \$19,645 and the Public Trustee or the Public Trust, have been able to stave off mortgagee sale action.

[13] The same mortgagee is willing to advance assistance to Lou to acquire this property but presently has simply a life interest in the income it would produce.

[14] This is a claim under the Family Protection Act 1955. The well known authorities of *Little v Angus*¹ and *Williams v Aucutt*² make it clear what steps an applicant has to negotiate in particular an applicant for relief under the Family Protection Act must establish that the testator owed a moral duty and failed to provide adequate support in her Will to fulfil that moral duty.

[15] In this case the testatrix has indicated her reasons for almost leap-frogging a generation in a note taken by the Public Trust in preparing the instructions. It is clear she believed each of her sons were alcohol[ic] and wasteful.

[16] Lou acknowledges that in the past he has been a heavy drinker but says on oath that over the last three years he has been a moderate drinker only, triggered in part by his diabetes. I note that his mother died at the age of 71 as a diabetic too.

[17] The circumstances of Oscar are less clear because he has taken no step to file information about his own life circumstances. It is apparent though reading between the lines that he is relatively impecunious and his children, Roxanne and Ian, would also be in significant need of support well before their father passes on.

¹ *Little v Angus* [1981] 1 NZLR 126 (CA)

² *Williams v Aucutt* [2000] 2 NZLR 479

[18] Lou is not well furnished with material wealth. As a son of the testatrix, he stands as a candidate who is entitled to consideration for support in his mother's moral duty to provide.

[19] She has recognised to some extent that moral duty by providing a life interest in the income that would be produced by her estate. However, given the modest size of her estate, the income available for Lou and Oscar during their lives would be minimal, particularly given the administration costs of a modest estate over several decades. The net benefit to Lou and to Oscar would be negligible. Similarly, insofar as Antony, Roxanne and Ian are concerned, the erosion of the capital value of the estate would be such as to leave them with very little benefit when the time came for them to receive the residue.

[20] So I am easily persuaded that this is a case where the applicant Lou Newman has established that the testatrix, his mother, has failed to fulfil a moral duty and further provision should be made from the estate for him.

[21] His brother, Oscar, will also, as a shadow in these proceedings, benefit from the argument presented by Mr Maciaszek and Mr Pelham. Oscar is in no better position than Lou and should be treated relatively similarly.

[22] Lou and Antony are close. They intend if all goes well to in fact acquire the subject property from the estate and have organised finance to do so. They hope to establish a trust which would be for the benefit of them both and perhaps Antony's child as well. [T]hat is for them to establish but I am satisfied that it is appropriate to modify the terms of this Will by dividing the residuary estate into two parts and after payment of all debts and costs of administration to provide that one of those parts be for the benefit of Lou Newman and his son, Antony Newman.

[23] The second of those two parts is to be held for and distributed for the benefit of Oscar Newman and his two children, Roxanne and Ian in equal shares. By so doing I am ensuring that Roxanne and Ian will receive some immediate capital assistance in their lives. If the testatrix' assessment of the economic wisdom of her son Oscar is accurate, then the damage will be minimised.

[24] Ian of course is still a minor and the receipt by him of his share will be subject to him attaining the age of 20 years.

[25] In the case of the distribution to Antony Newman, that is subject to him attaining the age of 18 years.

[26] In the meantime a distribution may be effected to his father Lou for the purpose of acquiring the subject property, but that advance will be subject to a trust in favour of Antony for one-half of the sum.

[27] In the event that Lou and Antony previously establish a trust which is for the benefit of them both, then the trustee may pay the sum to which they are both due to that trust instead at their election. This is a case where there may be a need for further directions and I reserve leave to the trustee to seek further directions should there be a need within the next three months.

[28] In this case given that Oscar and his children have also received some benefit and advantage from the proceedings brought by Lou and supported by Antony, it is an appropriate case where the legal costs of Mr Maciaszek and Mr Pelham and, of course, the trustee, could be met from the estate as a first charge.

R J Murfitt
Family Court Judge