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**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2013-019-001076
[2016] NZFC 5637
[2016] NZFC 4137**

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	ESTATE OF ALFRED ERNEST GEORGE
BETWEEN	PETER WILLIAM GEORGE Applicant
AND	PAULINE JUNE BLOMFIELD First Respondent
AND	ALAN GEORGE BLOMFIELD Second Respondent

Hearing: 21 January, 19, 20 May 2016

Appearances: Ms S McKenna for the Applicant
Mr M Branch for the Respondents

Judgment: 30 May 2016

RESERVED JUDGMENT OF JUDGE R H RIDDELL

Introduction

[1] The deceased, Alfred Ernest George died on 25 September 2012. He was survived by his four children; Alan, Peter, Colin and Pauline (now Blomfield).

[2] Alan and Peter George filed proceedings on 23 August 2013 alleging their father breached his moral duty by failing to make adequate provision for them in his Will.

[3] Alan George died on 16 January 2015. His executor negotiated a settlement of his claim with the estate and his proceedings were subsequently discontinued.

[4] Peter George continued as sole applicant. He filed an interlocutory application for discovery which was heard on 18 June 2015. He sought discovery of various family trusts, loan documents, financial statements, personal bank statements and access to the father's solicitor's file.

[5] Peter, who represented himself, argued there were three issues in the proceedings namely;

- (a) Whether Pauline Blomfield exercised undue influence on their father during his lifetime and in the preparation of his Will;
- (b) Whether his father breached his moral duty to make adequate provision for Peter's maintenance and support;
- (c) If so, how the breach can be remedied.

[6] His Honour Judge Twaddle dismissed the application in its entirety. The Judge noted that any claim of undue influence was outside the realm of the Family Court. The issues were confined to the question of breach of moral duty.

[7] His Honour also found:

- (a) Assets disposed of prior to death (including to a trust in which the settlor has no interest other than as settlor) are outside the jurisdiction of the Court;
- (b) It was not necessary for Peter to have access to the solicitor's file as he sought, because the estate had fulfilled its statutory obligations under the Act and no reason had been shown why the Court should go beyond the evidence filed on behalf of the estate.
- (c) If a breach of moral duty existed, then any award to beneficiaries could be adjusted. Therefore no question of distributive justice would arise.
- (d) The deceased's bank statements from 2005 to the date of his death had no relevance to the issues in the proceeding.
- (e) Costs were reserved.

[8] Generally family proceedings' applications are by way of submissions only. However most of the deponents were required for cross-examination. Colin George was granted leave to give his evidence earlier on 21 January 2016 as he has terminal cancer.

[9] The Court heard the remainder of the evidence and counsels' submissions on 19 and 20 May 2016.

[10] The relevant issues were whether there was a breach of moral duty by the deceased and, if so how could any breach be remedied.

Will

[11] The deceased made his last Will on 30 January 2004. He appointed his daughter Pauline and her husband Alan as executors of the Will. He made the following provisions:

- He forgave all loans that he had made to the trustees of the A E George No. 2 Trust.
- He forgave all loans that he had made to the trustees of the A G Blomfield Family Trust and P G Blomfield Family Trust.
- He forgave all loans he had made to his sons, Alan, Colin and Peter.
- He forgave all loans made to his daughter Pauline and to his friend Naomi Game.
- He gave his shares in the company [name of company 1 deleted] to his sons Alan and Peter in equal shares.
- He gave his shares in the company [name of company 2 deleted] to his friend Naomi Game and his son Colin in equal shares.
- He gave the land and buildings at [address deleted] and all household chattels in the property to Pauline and Alan Blomfield.
- He gave his motor vehicle to his friend Naomi Game.
- He gave the residue of his estate to be divided between his daughter Pauline and her husband Alan Blomfield.

[12] The deceased made a number of Wills in his lifetime. With each Will, he met with his solicitor and discussed his instructions which were recorded in file notes. He also provided his solicitor with hand written clarification about his wishes and, on occasion an explanation about why he wanted to change his Will.

[13] A copy of ten Wills was annexed to his solicitor's affidavit for the period 1986 to 2004. Three other Wills made during that time had been destroyed.

[14] Each of the Wills varied in their provisions. However all contained the wish to make additional provision for his daughter saying that she had provided a

considerable source of comfort and friendship to him. In the deceased's last Will that was expressed as follows:

[15] I have strong reasons for making different provisions in my Will for my daughter, son in law and my three sons:

- (a) As referred to herein the various bequests that I am making to my daughter, her husband and my friend Naomi Mary Game are in appreciation for the substantial support which they provided towards my wife for many months prior to her death and also after her death and also for their care and concern for my comfort and wellbeing.
- (b) All four of my children have received a substantial benefit prior to my death from the distribution of the AE George Trust. Each of my children received approximately \$250,000.00 from the distribution of that Trust and I believe that this sum in addition to the further provision they will receive under my Will is a fair and reasonable distribution from my estate.
- (c) In particular my daughter Pauline has been a considerable source of comfort and friendship to me. This is not the case as far as my three sons are concerned who for reasons of their own have chosen to have very little contact with me and my late wife over the years. Although I appreciate that Pauline and her family will receive a greater benefit from my estate than my three sons, my sons will receive an adequate share.

The estate

[15] As at 15 November 2013 the assets of the estate comprised the following:

1000 shares in [name of company 1 deleted] based on a rateable value of the land at \$371,000 less loans and capital adjustment	\$135,833.00
1000 shares in [name of company 2 deleted] based on a rateable value of the land at \$341,000.00 less loans and capital adjustment	\$105,150.00
Two accounts with the National Bank	\$4,732.99
Refund from the rest home	\$563.35
Two Tower life policies	\$40,340.45
Bonus Bonds	\$5,850.00
Shares in [name of company 3 deleted] traded at \$5.12 on 14/11/13	\$5,488.64
[Name of company 3 deleted] dividend payments	\$252.52

1999 Volvo car (bequeathed to Ms Game) estimated value	\$2,500.00
Personal effects in the home estimated value	\$10,000.00
Loans:	
AE George No. 2 Family Trust	\$484,920.00
A E George No. 2 Family Trust	\$353,000.00
A E George No. 2 Family Trust	\$418,359.00
PJ Blomfield Family Trust	\$204,688.00
A G Blomfield Family Trust	\$204,688.00
[Name of company 1 deleted]	\$230,645.00
[Name of company 2 deleted]	\$231,500.00
Net interest received on funds held by solicitors	\$570.65
Total liabilities incurred after death by Pauline	\$35,691.75

[16] The net assets of the estate total \$2,403,389.85. The amount for distribution is considerably less than that given that a large portion of the estate is represented by loans which were forgiven by the deceased to family trusts, companies and to individuals.

Discussion

[17] Mr and Mrs George were married in 1940 in Hamilton. Mrs George died on 24 April 1986. Her death was a severe blow to Mr George. As Pauline put it poignantly:

Dad was a self-made man in every sense of the word. He knew how to make money and was forever giving it away to those he felt were in need. He knew what that was like and now, with mum's diagnosis, I found my forever strong, capable father sitting in his favourite chair in tears offering up to a God in rarely spoke to, all his wealth, his own health and the shirt off his back, if only the love of his life would be spared.¹

[18] At that time, just before Mrs George's death, Pauline deposed that her mother took her aside and asked if Pauline would take care of her father. Pauline promised that she would always be there for her father, no matter what.

¹ Affidavit Pauline Blomfield 16/12/2013 [15]

[19] Pauline's evidence was that after Mrs George died in 1986, she maintained a very close relationship with her father until he died in 2012. In the intervening 26 years, she cooked and cleaned for him, did much of his washing, went shopping and visited him daily while he lived at home and regularly from 2009 when he went into a rest home. There was no challenge to that evidence.

[20] Mr George had bought and sold property around Hamilton for many years. His business ventures were successful. Increasingly he involved Pauline both before and after his wife's death. He became a business mentor to Pauline.

[21] For example one of the properties he owned was a site in Greenwood Street where he had built a large building for tenants. When the lease was due to expire in 1983, Mr George wrote instructions for Pauline on how to negotiate a new lease. A copy of those instructions was annexed to her affidavit.

[22] When the lease came to an end and he decided to sell the property, he asked Pauline to handle the sale. While the building was empty and for sale, Pauline contacted the Police Dog Section who were looking for areas in which to train their dogs. She made an arrangement with them and as a result the Dog Section had somewhere to train and Mr George had free security for his building. Ultimately the property sold. According to Pauline's evidence the sale was above Mr George's expectations. That property had been owned by the A E George Family Trust No 1. Following the sale Mr George decided to wind up the trust and make an equal distribution to each of his four children. His subsequent Wills recorded that he advanced approximately \$250,000.00 to each of his children.

[23] Peter claimed that he did not receive that sum but rather a lesser sum of \$150,000.00. There is no available evidence of the precise amount he received.

[24] I note that in a number of his Wills after the sale, Mr George made reference to the distribution he had made equally to his children.

[25] With her share of the distribution, Pauline sought advice from her father and bought some land. Colin also invested in land while Alan bought a block of flats.

[26] Peter bought a motel lease. According to him, he discussed it with his father. He disputed whether his father approved of the purchase or not.

[27] According to evidence by Pauline and Colin, their father was fervently opposed to the purchase of a lease, primarily because Peter would not own the land on which the motel sat. He did not think such a purchase was a wise business move.

[28] Pauline deposed:

Dad tried desperately hard to talk Peter out of buying the motel lease, offering the services of his accountant and other professional people (paid for by Dad) to look at alternatives. Dad talked to me about it and shared his frustration but conceded it was Peter's money and his decision.²

[29] Colin's evidence was that his father did not consider the motel purchase to be financially wise:

I can remember having a number of conversations with Dad about Peter's desire to purchase this lease. I suggested to Dad that this was not a very prudent idea. All he was doing was purchasing a rentable time slot and perhaps the previous goodwill of the existing tenant. There was no purchase of any freehold title land and buildings and at the end of the lease Peter would have nothing to sell.

I can categorically state that Dad was not very happy with this business arrangement. Dad did convey this to Peter and supplied him with a number of names of professional people to contact to seek further clarification with regard to the implications of such a move.

Peter did not utilise this advice and option.³

[30] Colin also considered that Peter's decision to remove a restraint of trade clause allowed the vendor to establish a new motel complex across the road from Peter's motel and that contributed to the demise of the investment.

[31] Peter denied in evidence that his father was opposed to the motel purchase.

[32] In his affidavit of 23 August 2013 he said:

² Affidavit 16/12/13 [45]

³ Affidavit 19/12/2013 [69 – 71]

My father did not raise any particular concerns. My father was aware that the money that he had given to me earlier was going into the motel business and he seemed ok with that.⁴

[33] That is at odds with a written document that Mr George had prepared on 25 February 2006 to go with his Will. A copy of that document was annexed to the solicitor's affidavit. The pertinent part read:

Peter made an unsuccessful venture into the motel business primarily through his inability to accept some sound business advice concerning this field of endeavour.

[34] Mr George's friend and companion Ms Game swore an affidavit in which she said:

Ernie felt sorry for Peter as he was a good father to his children but he would not take sensible advice when it came to business matters. I do know Ernie asked Peter to speak to his lawyer, Ron Backhouse, about the pitfalls of buying the motel...

I don't think Peter considered his father's advice and that was a great disappointment to Ernie. At the time he told me Peter was taking a huge risk buying a motel lease but said he was a grown man and he would have to live with the choices he made.⁵

[35] In cross-examination Ms Game confirmed that Mr George had conversations with her about his disappointment that Peter would not take his business advice.

[36] That view is confirmed therefore by the evidence of Pauline, Colin and Ms Game. While Peter downplayed any advice given to him, I consider that such advice was given. Firstly, Mr George was a financial businessman who had views about the property market and had amassed successful experience in his property dealings. Secondly, he told other family members he was disappointed that Peter would not take his advice. Thirdly, he recorded that disappointment in a memo provided to his solicitor.

[37] The motel venture did collapse. Mr George was very concerned about Peter's welfare as Peter had poured all his available monies into the purchase in 1996 and still had an outstanding debt of around \$100,000.00 to the bank.

⁴ [58]

⁵ Affidavit 16/12/2013 [13 – 14]

[38] Consequently Mr George offered to provide a home for Peter and his family. Peter then located a piece of land outside of Hamilton on which he wanted to relocate an air force barracks as living accommodation. His father did not consider that was a good idea and asked Ms Game, Pauline and the real estate agent to look for a suitable home in Hamilton. When Peter learned that the home would be purchased by a family trust and that Pauline would be one of the trustees, he declared he did not want anything to do with it and so the purchase did not go ahead. Ultimately Peter could not repay his debts and he was bankrupted.

[39] By that time Peter's animosity towards Pauline was very clear. He maintained a view that Pauline had unreasonably influenced her father after their mother's death. He believed that she had taken over responsibility for his finances and had shaped the way his father carried out various business transactions.

[40] When Pauline was appointed an enduring power of attorney for her father's welfare and jointly with her husband for financial matters on 30 June 2003, Peter's view about Pauline's influence intensified.

[41] It is clear from reading Peter's affidavit in support of his application, that he believed Pauline held great sway over her father:

From a reasonably early age I witnessed Pauline being able to manipulate my father to her own ends as the only girl. She could get what she wanted.

When my mother died my father was at a loss. My father was devastated by my mother's death. Pauline over time became the person who had most influence and say over my father and his business affairs.⁶

As the years rolled on after my mother's death I believe Pauline influenced and controlled my father more and more and little by little.⁷

[42] That view was reflected in the interlocutory application for discovery where Peter submitted that:

It must also be remembered that Pauline Blomfield was effectively writing my father's Wills from 21 July 2003.

⁶ Affidavit 23/8/2013 [91], [93]

⁷ [121]

[43] Peter relied on that date because the solicitor's affidavit annexes a letter from Pauline of that date saying:

Dad has asked me to forward the attached, being changes he would like made to his Will.

[44] At the time Pauline had just been made an enduring power of attorney and Peter felt that Pauline's letter was evidence of her particular influence.

[45] That assertion must be read in the context of who Mr George was. He was acknowledged to be a very astute businessman. He held strong views. He had helped each of his children by making a distribution to them from the sale of land in the A E George Family Trust No. 1. He changed his Will on a fairly regular basis and on each occasion met with his lawyer to discuss those changes. His lawyer had the impression that Mr George was a man who was more than able to make his own decisions, even when he was advanced in years, at least until his dementia took hold.

[46] On a number of occasions I had to remind Peter that his role was to cross-examine Colin and not to make observations or comments to the Court. I accept that as a self represented litigant (at the time) that he may not have been aware of the constraints involved in cross-examining a witness. What is clear though is how Peter perceived the litigation as an opportunity to expose what he saw as some kind of manipulation perpetrated by Pauline:

Q. How would you describe our relationship over the years?

A. Ah, you are my brother. We've gone from good to bad and at the present time I see you as um my brother only for what you're trying to do.

Q. What am I trying to do?

A. You are trying to um perhaps perceive to gain more out of your father, out of my father's Will than what has been left to him ah, sorry left to other people.

Q. Or as if I'm trying to expose the influence in a manipulation that went on which led us to this point. Could you consider that as actually a legitimate possibility?

A. No I've already stated in my affidavit that I saw no manipulation. I presume you are referring to Pauline, my sister, ok manipulating my

father I already stated that in my affidavit I saw no evidence of that at all.⁸

[47] Peter's wholesale dismissal of Pauline was unfortunate and coloured his view about how he fitted among the children. Yet Peter was acknowledged by his father to be an important part of the family. The offer of a house was not the only example of assistance given to Peter. There was no record of any other family member being offered a house. According to the evidence Peter received money for a business:

My parents did visit Peter in Wellington. This was during the time Peter was married to his first wife Linda. Peter and Linda owned a dairy. I believe mum and dad also lent Peter money to support his business.⁹

[48] Peter denied any such loan when he questioned Colin about it. It is noteworthy that Peter did not deny the loan in his reply affidavits.

[49] On another occasion the deceased loaned Peter \$16,000.00 to pay off a mortgage. That was acknowledged by him in a question he put to Colin.¹⁰ He also acknowledged that his father gave him \$10,000 for television sets for the motels.

[50] Peter also received \$150,000.00 from the distribution out of the A E George Family Trust No. 1. It seems possible that no one received precisely \$250,000.00 as the deceased claimed, but perhaps he included other sums loaned during his lifetime.

[51] The deceased's care and concern for his children was observable in a question put by Peter to Colin when he asked him:

Q. Were you aware that he actually approached me and said that he had a fund available in the event of any of his children suffering adverse setbacks?¹¹

[52] Then there was of course the offer of a home. Peter's refusal to accept that offer was apparent in the following question he put to Colin:

Q. Are you aware of the reasons why it was declined?

A. No.

⁸ NOE p 36 lines 25 – 32 and p 37 lines 1 - 7

⁹ Affidavit of Colin George 19/12/2013 [67]

¹⁰ NOE p 12 lines 18 - 19

¹¹ NOE p 25 Lines 6 - 9

Q. It was declined because if Pauline had anything to do with it I didn't want anything to do with it.¹²

[53] Peter deposed a number of reasons for declining the offer in his affidavit evidence; the house was too small; it was on a busy road. But the real and defining reason was his dislike of Pauline.

[54] On the evidence, I do not share Peter's rather jaundiced view of Pauline. The assistance provided by Pauline was not scheming or calculated in any way. Rather it was the actions of a dutiful daughter who had promised her mother she would look after her father and was loyal to that promise. As a result of her close relationship with her father, she gained some experience in business which she put to good use. Her involvement in Greenwood Street was an example.

[55] It is most unfortunate that attempts have been made to blacken her character in these proceedings. I found that to be wholly unwarranted.

[56] The forgiveness of loans to three family trusts and two companies was part of the basis for the application for discovery. Peter sought to obtain the release of a large range of documents arguing it was necessary to determine the issue of undue influence, whether monies had been siphoned away for Pauline's benefit and whether anything of relevance to his claim should be disclosed and in particular information about the A E George No. 2 Trust.

[57] In opposition to the discovery application, it was argued that assets disposed of prior to death fell outside the Court's jurisdiction; the authority for that proposition being *Law of Family Protection and Testamentary Promises*, 4th edition, WM Patterson [5.3].

[58] The Court accepted that argument and declined to direct the disclosure of any documentation. That decision has implications for the Court in considering the family protection claim. The Court can only make findings on the evidence available.

¹² NOE p 27 lines 30 - 34

Law

[59] The principles that apply in a family protection claim are well settled.

[60] A testator's freedom to determine how an estate should be distributed is very important. However that autonomy in Will making has its limits. It must be balanced with the recognition that a testator has a moral duty to those persons defined in s3 of the Family Protection Act 1955 ("the Act"). They include the spouse, children of the deceased, grandchildren and stepchildren.

[61] The term moral duty does not have a statutory definition. However the basis for any claim is found at s 4(1) of the Act which states:

Claims against estate of deceased person for maintenance

- (1) If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the court may, at its discretion on application so made, order that any provision the court thinks fit be made out of the deceased's estate for all or any of those persons.

[62] Therefore the Court has jurisdiction to make an order only if adequate provision has not been made for the proper maintenance and support of a claimant.

[63] "Proper maintenance and support" is a term which has been the subject of much scrutiny in case law. The Court of Appeal in *Williams v Aucutt*¹³ held that "support" is not limited to meeting economic needs but extends to a recognition that a child has been part of the overall life of the deceased in that family. So support means "sustaining, providing comfort":

A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased.¹⁴

¹³ [2000] 2 NZLR 479, 492

¹⁴ *Williams v Aucutt* [2000] 2 NZLR 479 at [52]

[64] The first task of the Court requires an examination of the testator's wishes. The Court must ask if those wishes represent what a wise and just testator would have done. That is an objective exercise which measures the actions of a wise person, who recognises there may be some friction or disagreement among his children, but nevertheless acts in a just fashion and does not allow that friction to blind him to his children's needs.

[65] Where the testator has expressed reasons for any disposition, then careful regard should be paid to those reasons, pursuant to s 11 of the Act. If the reasons are borne out by the evidence, the Court is entitled to have regard to them.

[66] It is for a claimant to establish a breach of moral duty. That breach must be more than mere unfairness to invoke the Act. As the High Court put it in *Henry v Henry*¹⁵:

The claims of adult children must be closely scrutinised, and claims allowed only if there is a very clear case of breach of moral duty.¹⁶

[67] It is not the Court's job to rewrite a Will but simply to award a sum as it thinks fit to correct any imbalance.

[68] Friction between the testator and his children is not necessarily determinative of any breach. A whole range of factors must be considered. These include the testator's treatment of his children during his lifetime, the applicant's financial need, particular care of the respondent given by a child of the deceased, the degree and quality of the relationship between the testator and the claimant and any benefits received during the testator's lifetime.

[69] The quality of the relationship between the testator and claimant will have a bearing on the extent of the moral duty:

The Family Protection Act recognises that a parent's obligation to provide for both the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is, however, an obligation which is largely defined by the relationship which exists between parent and child during their joint lives.¹⁷

¹⁵ [2006] NZFLR 502

¹⁶ [108]

¹⁷ *Flathaug v Weaver* [2003] NZFLR 730 at 737

[70] The size of the estate may also be an important consideration, particularly if the estate is a large one.

[71] The strength of other competing moral claims on the estate will similarly be a significant factor.

[72] Assessment of whether there has been a breach of moral duty is tested as at the date of the testator's death. Determining how to remedy any such breach may take later events into account.

[73] It is accepted wisdom that a testator may treat his children differently in the provisions of his Will. That was affirmed in *Henry v Henry* where Justice Asher said:

To state the obvious, as a general proposition a child who has had a close relationship throughout the parents' lives, providing emotional and financial support, has a stronger moral claim on a testator or testatrix than a child who has had no such relationship with the parents and provided them with little or no assistance.¹⁸

[74] There is no presumption that children of the deceased should receive equal shares of the estate. Therefore the Court will not intervene merely on the grounds that one child was preferred over another:

It is not the Court's job to make those children feel better but it is the Court's role to apply the law.¹⁹

[75] The equality between children is merely a starting point. That is subject to an infinite number of circumstances. As one Judge put it, "sometimes inequality is justice".²⁰

[76] Judicial attention has focused on testator's wishes where there is a provision for forgiveness of debts. It is an accepted principle that a forgiveness of debt to a named person is an asset of the estate.

¹⁸ [66]

¹⁹ *FRB v WAM* FC Auckland FAM-2010-004-1965, 8/4/2011 at [21]

²⁰ Temm J in re *Merrick* (High Court, Auckland, M483/91, 11/5/1992) at [8]

[77] In the case of a forgiveness of debt to a family trust, the starting point is that the Court needs to be able to identify the beneficiaries of the trust, the particular circumstances of the debt that has been forgiven and establish that the forgiveness of debt derives from assets owned by the testator.

[78] *Re Crozier*²¹ was an appeal by the deceased's de facto partner against a decision of the Family Court to increase the provision for the deceased's two daughters. One of the issues was the effect of the debt to his family trust that the deceased forgave in his Will.

[79] The Family Court did not treat that forgiveness of debt as an estate asset. That view was upheld on appeal and the Court said that while the trust deed had not been provided to the Court, the solicitor for the estate gave evidence that the final beneficiaries were the two daughters and the discretionary beneficiaries were the deceased's children and their partners and the deceased's grandchildren.

[80] The Court accepted that it was correct for the Family Court Judge not to equate the daughters with the trust as a matter of law. However, in that case, the Court accepted that in practical terms it was difficult to distinguish between the trust and its main beneficiaries.

[81] The more cogent reason for disregarding the forgiveness of debt in that case was that it represented shares held by the trust in the deceased's refrigeration company. The amount forgiven was only as good as the shares in the company and the Judge at first instance took a pessimistic view of the company's fortunes.

[82] In another decision *Edmondson v Green*²² the deceased forgave a debt owed by the son who sought further provision from the estate.

[83] While the Court took the forgiveness of debt into account, there was evidence that the son had made regular repayments of the debt during the father's lifetime. He also provided labour on the deceased's home which also reduced the debt owed. Further provision was accordingly given to the son.

²¹ [2003] 23 FRNZ 999

²² HC Auckland M1039/96 13/10/1997

Decision

[84] I do not find that there has been a breach of moral duty by the deceased. Nor do I consider that Peter's share of the estate is unfair to the extent that the Will should be disturbed. I consider the following factors are significant in reaching my decision.

[85] Firstly, Mr George had carefully considered views about his testamentary wishes. He met regularly with his solicitor, made notes as to his instructions and reviewed his Wills throughout the years and made changes where he considered necessary. The file notes recorded by his solicitor together with the notes from Mr George himself paint a picture of a meticulous and vigilant man who was careful to express the reasons for his various dispositions. I have no sense of any petulance on Mr George's part and certainly no slight towards any of his children. He recorded the particular help given to him by Pauline over the years and was intending to reward that assistance but concluded "my sons will receive an adequate share".

[86] Secondly, Peter failed to take up the offer of a home when the motel business collapsed. His primary reason for refusing his father's offer was because Pauline might be involved in the trust that would purchase the property. It is not unreasonable to conclude that, had Peter taken up the offer made to him, he would have had accommodation available for him and his family. As a builder he could have improved the property. The evidence of Pauline and Colin was that his father wanted to do the property up and then another would be purchased for Peter. There was undoubtedly going to be a benefit to Peter by having his family housed via a family trust established by his father. He declined that offer. Had he accepted, he may well have been in a more secure financial position today. His father had already demonstrated his wish to support his children by distributing all of the funds held in the A E George Family Trust No. 1.

[87] Thirdly, a family protection claim must be determined within certain parameters. There are limits to the Court's ability to treat a forgiveness of debt as an asset of the deceased's estate. While I have referred to certain cases in which the debt forgiveness *was* regarded as an asset of the estate, the circumstances were quite

different. In one case the prime beneficiaries of the trust was the two daughters. Here, it was argued that the debts forgiven did not constitute assets of the estate because the trust was never intended to benefit either the deceased (who was not a beneficiary) or his estate. A more compelling reason is that the Court has no information about the circumstances leading to the forgiveness of debt, or even who the beneficiaries were or what were the terms of the various family trusts. No cross-examination was directed to Pauline or her husband about any family trust matters and there was simply no evidence on which the Court could conclude that Pauline had received any benefit personally from her father via a forgiveness of debt.

[88] The relevance of forgiveness of debts to named family trusts was argued in the application for discovery and the Court found in favour of the respondents. To that extent the matter has already been determined and the Court cannot go behind that decision.

[89] Had the forgiveness of debt been directed to a named person, then that would have been different. Indeed Mr George did forgive debts incurred by all four of his children and by Ms Game and those forgiveness of debts do form part of his estate.

[90] Fourthly, I find that the imbalance of the residuary estate is not particularly significant. Counsel for Peter submitted that the estate had net assets totalling \$2,403,389.85 as at 15 November 2013. That sum does not take into account debts incurred by five family trusts which are outside the jurisdiction of this Court. The total of those five loans was \$1,670,655.00. The loans to the two companies should also be taken off as they are not to named persons and the Court has no information about those loans either. The total is then \$2,132,800.00. When that sum is deducted from the net assets, there is a relatively modest amount remaining of \$270,589.80. Peter's share of \$67,916.50 represents just under 25% of that net estate. Moreover it is likely that the land owned by [name of company 1 deleted] (left to Peter and Alan) has a higher value than its rateable value in November 2013, so that share may be an underestimation.

[91] Fifthly, there was clearly a close and trusting relationship between the deceased and Pauline. I have not found evidence of any deception on Pauline's part. She provided consistent support for her father over many years. There was no

evidence of that kind of level of support between Peter and the deceased. In saying that, I am not making a particular comment on Peter's relationship with his father, but rather am of the view that the degree of relationship between Pauline and the deceased is a significant factor. The deceased made reference in a number of Wills to the closeness of that relationship and his gratitude for it. By his Will, he was effectively repaying that gratitude, which he was entitled to do.

[92] Sixthly, Mr George has provided for all of his children. He has ensured that each has benefited under his Will. He cannot be said to be a testator who wilfully omitted one child from consideration or favoured another without good cause.

[93] Seventhly, I consider that Peter's animosity towards Pauline was of his own making and did not derive from anything Pauline did or said. As such he is the author of his own misfortune when it came to receiving benefits from his father. He could have received further benefit from his father by way of a home, but chose to reject that offer.

[94] Eighthly, the applicant does have some financial need. He works full time and his wife works part time. They rent a home. They have no savings. It could be viewed as unfair that Peter's situation is not redressed by an award. But unfairness is not the barometer by which an application is successful.

[95] I have formed the view that the deceased was cautious and just in the way he distributed his estate. He carefully made provision for all of his children in his various Wills. He set out reasons for those gifts. He assisted all his children in his lifetime. The assistance provided by Pauline went well beyond that offered by the other sons.

[96] The Court must be satisfied that the claimant has been recognised as an important part in the overall life of the deceased. Support is not limited to meeting economic needs. It seems clear to be that the deceased was well aware of his obligation to support Peter.

[97] Peter acknowledged that the money that he used for the motel was an early inheritance.²³ He also agreed that the motel failure upset his father and affected his view of Peter's financial skills.

[98] On the evidence I consider that Peter minimised his father's objection to the purchase and downplayed the degree of frustration his father felt.

[99] After the motel collapse his father changed his Will. Peter's share was to go to a family trust, perhaps because of a fear that Peter might be bankrupted as he owed money to creditors. Ultimately that fear was realised.

[100] Later Wills reverted to bequests in Peter's name so there is no suggestion that Mr George thereafter refused to trust his son with direct bequests. The concrete support offered by his father seemed to have extended throughout Peter's adult life.

[101] There is no suggestion that Peter felt alienated from his father or that his father cut him out of consideration. No doubt his father was angry and disappointed that Peter did not take his advice on the motel purchase and that would have created friction in the relationship. Even so, when drafting his next Will, his father continued to provide for Peter. That demonstrated a degree of fairness despite his disappointment.

[102] Accordingly I find that adequate support was made for Peter by the testator and the claim of breach of a moral duty has not been upheld.

[103] Costs apply in regard to the application for discovery. I consider that costs should also be a live issue on the outcome of this proceeding. Counsel may file submissions as to costs within 14 days.

R H Riddell
Family Court Judge

²³ NOE p 10 line 24