EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2014-009-000451
[2017] NZFC 7531

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	PUBLIC TRUST Applicant
AND	[D F] Person In Respect Of Whom the Application Is Made
AND	[B L] [C T] [E N] [N F] Other Parties

Hearing:	20 September 2017
Appearances:	R Calvert for the Applicant P Sewell for the Subject Person No appearance by or for the Other Parties
Judgment:	20 September 2017

ORAL JUDGMENT OF JUDGE E SMITH
[Reasons as to s 55 disposition]

Application

[1] This is an application by the applicant Public Trust (as appointed property managers) for the Court to authorise that manager to execute a will on behalf of the subject person [DF] ("[DF]").

[2] After some slight differing of views as between the property manager and [DF]'s Court-appointed counsel Mr Sewell, the parties had reached an uncontested position where they were both submitting to the Court that it exercise its discretion in s 55 of The Protection of Personal and Property Rights Act 1988 ("the Act") to authorise a will that would see an even division of [DF]'s estate as between three persons: his elderly sister; and her two daughters (that is [DF]'s nieces). In so doing that would exclude from that disposition any bequest or other benefit for his only other living relative, being his elderly brother, [NF].

[3] I indicated that I agreed with that course but would provide my reasons in writing.

Background

[4] By way of background I am satisfied that in 2014 the Public Trust was appointed as [DF]'s property manager, he having no capacity to undertake on his own behalf the management of his financial and property affairs.

[5] As a result, Mr Sewell was appointed at that time [DF]'s Court-appointed counsel. He filed a most comprehensive report dated 9 May 2014. Within it Mr Sewell properly queried if [DF] had a current will and posited that it would be advantageous that a will be made, particularly appointing the Public Trust as executor.

[6] As a result of that advice the Public Trust formed the view that Mr Sewell's advocated course was an efficacious one and applied in or about November 2016, pursuant to s 55 of the Act, for the Public Trust to execute a will, such being submitted to the Court and if approved, sealed.

[7] That application advocated that the will in essence provide that [DF]'s estate be divided in four unequal shares to be held as follows:

(a) As to one share being one fifth for his brother [NF], of [location deleted];

(b) As to one fifth share to [his sister] , of [location deleted];

(c) As to one share being three tenths to his niece, [EN], of [locations deleted];

(d) As to the final share being three tenths for his niece, [CT] of [location deleted].

[8] From a procedural perspective I confirm that service of that application was effected as directed by the Court and no party has sought to be heard and for completeness, although there is no contest to this extent, I confirm that I am satisfied that [DF] does not have the capacity to complete and make a will on his own account.

[9] Upon receipt of that application Mr Sewell as counsel for [DF] took some issue with its content and in particular, concerned that it might take no account of the views of [DF] which he had prior reported about and secondly, no supporting material that might justify the fractions accorded to the beneficiaries as the will was drafted by the Public Trust.

[10] Mr Sewell advocated that perhaps the "fractions" advocated in the Will were arbitrary and that the will in accordance with what he knew of [DF]'s views (although as will be seen, there is a paucity of information about that) that his brother ought to be excluded and the relations in [location deleted] enjoy interests equally. That said, Mr Sewell was attracted to the idea of [DF's sister] being provided a protected trust given her advanced age and capacity and accommodation in supported residential care with herself having advanced cognitive difficulties and little other than benefit (New Zealand and Country deleted]) income.

[11] To be fair to the Public Trust, by way of explanation they responded that their rationale for the fractions they originally thought ought to be provided to the four family members was because that would largely replicate intestacy outcomes as provided in s 77(6) Administration Act 1969 and other material[1].

[12] It appears agreed in broad terms [DF]'s estate is currently about $NZ 300,000.00.

Analysis

[13] While the Public Trust and Mr Sewell have reached an agreed outcome and accommodation of resolution, it is appropriate that the Court provide its reasons for ratification of that agreement.

[14] Very briefly, in terms of my approach, I have been attracted to and implement the approach to provisions of a will approved by the Court as outlined in the decision of Judge Twaddle in *B v F* [1992] NZFLR 279 and in particular the principles referred there in with respect to the judgment of Sir Robert Meggary V-C in *Re D (J)* [1982] 2 All ER 37 where His Honour stated at page 41:

> *It is to be assumed that the patient is having a brief lucid interval at the time the will is being made.*
>
> *During that brief lucid interval the patient has full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the acute mental state that previously existed.*
>
> *It is the actual patient who has to be considered, who may have had strong antipathies or deep affections for particular persons or causes, and not a hypothetical patient. The court must take the patient as he or she was before losing testamentary capacity, with allowance made for the passage of years.*
>
> *During the hypothetical lucid interval the patient is to be envisaged as being advised by competent solicitors.*
>
> *In all normal cases "the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen".*

[15] Further, at page 44 of the report, Meggary V-C said:

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[1] See memoranda of Public Trust of 17 May 2017.

> *Now I certainly do not say that these principles or factors are either exhaustive or very precise, nor am I altogether convinced that the notion of the lucid interval is the best way of expressing what the Court has to do… however it has found its way into this branch of the law; in most ordinary cases I think it will suffice and so I have adapted and perhaps expanded it.*

[16] In addition to the guidance contained in that decision, I have also taken into account Mr Sewell's advocacy that a broad approach this Court ought to take in the circumstances is also found in the *Manzoni*[2] case [1995] NZLR 498 where the Judge in that matter in considering settling the terms of the new will took into account other matters but in particular, in reference to that subject person, said:

> *With his inherent sense of fairness, I do not believe that today he would leave that money to what I will term "his family". I think a man of his independent character would do the fair and proper thing, particularly when the members of his family… are already receiving considerable sums.*

[17] I simply see the above as a continuing statement that the Court must try and understand the character, nature and disposition of the subject person as best it can. In the *Manzoni* case, however, in contrast to the one before me the Court had the significant benefit of evidence about the subject person with detailed affidavits. In the present case I have scant information, if any, to draw certain conclusions about [DF]. But I do have some information.

[18] In coming to the decision that I have, I have taken the following material matters into account together with the above guiding case law as material to the outcome. Firstly, I must try to consider [DF]'s views. There is a paucity of information about them. What I do have is the views [DF] gave to Mr Sewell firstly in his February 2017 report which included:

> *It was difficult to get anything concrete from [DF]. When I raised the topic of the will (as I had to do several times after he had drifted off to another story), he would say, "I haven't given it a lot of thought – I know I need to do something". It was hard to get him past this but some points emerged from our discussion:*
>
> *a. [DF] does not favour his brother, at different times saying he had a drink problem, that the brother has "done all right", whereas [DF] did it hard, that the brother never asked about [DF] after the earthquakes and that the brother had showed no consideration to*

[2] *Re Manzoni: Kirwan v Public Trustee* [1995] 2 NZLR 498.

[DF]. [DF] also had an old grievance from when his brother left him behind at the pub one day and [DF] had to wait for a train to go home.

b. [DF] does not want his brother to get anything under the will.

c. [DF] favours his "relations in [location deleted]", meaning I think [his sister] and her two daughters. I tried to get a sense of what proportions they should share the estate in, but that was too hard for [DF].

[19] During the submissions to me at the hearing, perhaps encapsulating the time that [DF] hails from and his understanding Mr Sewell said [DF] thought his brother had done well because he had a horse and a pig.

[20] With respect to the question as to whether the will would meet the test of the actual subject person on the basis also that the person would have recognised the broad terms of any claims on the estate and would have been advised by a competent solicitor – I agree with the advocacy of Mr Sewell (not contested by the Public Trust) that the test is at times difficult to understand or implement. In my view it means that I must consider [DF] as a subject person distinguished from a hypothetical subject person (see above).

[21] There is very little information about [DF] the actual person. Some cursory material is found in paragraph 7 and 8 in the affidavit of 28 November 2016 by [MO] filed in support which said in general terms:

(a) Subject person had a brother, sister and two nieces;

(b) They had very little or no contact with the subject person;

(c) Subject person's brother [NF] has had no contact for many years;

(d) [The subject person's sister, CT and EN] are all residing in [Country deleted], with [the subject person's sister] having unstable mental capacity and her daughters acting on her behalf.

[22] I do, however, have some further information in circumstances where the Public Trust emailed the nieces in [Country deleted] with a questionnaire hoping they

could provide some better insight into their uncles and indeed their own mother's needs. I agree that their extra information is properly summarised as follows:

(a) That the subject person and his brother fell out over 30 years ago; and both had lived fairly reclusively and remotely and had mutually chosen not to have much to do with each other;

(b) That subject person's sister is in a high-level care facility where it appears her accommodation costs are met but her daughters are paying for other expenses.

[23] There is broad evidence to suggest that over the years [DF] has provided some cash sums to his nieces, made payments to them prior to entering care, and that he has only ever talked about his family in [Country deleted] but is fond of his nieces. It is obviously clear that the nieces would also inherit from their own mother's estate.

[24] On any view, the above information is limited and amounts to "gleaning" rather than a fulsome enquiry.

[25] I am also satisfied that had [DF] a competent solicitor, it is likely in those circumstances the subject person might have been encouraged (but whether or not he accepted this advice would be a matter for him) to provide a protective trust for his sister so as to enable the topping up of her income but keep her capital safe.

[26] While I have acknowledged I have some information it is not of a degree to provide sufficient evidence to determine whether the proposed will gives effect to [DF]'s traits or foibles. I am left with the very broad impression that for whatever reasons, [DF] simply did not favour his brother and would unlikely have not, even with competent legal advice and even the passage of time for his thoughts about his brother may have softened, made provision for him.

[27] When I stand back and look at that circumstance I am easily led that all the material matters point to the Court approving not only the making of a will but its terms being as advocated by Mr Sewell. I do not think that this outcome would offend

[DF] in any way or offend the righteousness and moral obligations that ought to also form and shape a disposition.

Outcome

[28] For the above reasons, therefore, with my thanks to counsel, I make the following orders and directions, namely:

(a) The Public Trust is directed to prepare a will for [DF] pursuant to s 55 of the Act on the following terms and conditions:

(i) Appointing the Public Trust as trustee.

(ii) Dividing the estate into three equal parts as follows:

a. One third by way of protected trust to [the subject person's sister] with a gift over to her daughters in equal shares.

b. One third to [EN].

c. One third to [CT].

(iii) All usual incidental clauses to a Will to meaningfully effect the above.

(b) The costs of the Public Trust in bringing the application is to be met from [DF]'s estate.

(c) The costs of Mr Sewell, with the Court's considerable thanks, to be met from the consolidated fund.

(d) I do not intend to give a decision as to the ancillary matters one would expect in a will. They are well-known and not objected to either by Mr Sewell and I expect the Public Trust to implement those things and

accordingly, I invite the Public Trust to file and serve Mr Sewell within 21 days a draft will and I will consider that in chambers (after 28 days of today's date) for approval and execution by way of sealing by the Court. Should Mr Sewell seek to be heard on the final draft he is to advise the Court by memorandum within 28 days.

E Smith
Family Court Judge