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

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IN THE FAMILY COURT
AT HAMILTON

FAM-2013-019-001076

[2017] NZFC 7553

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	THE ESTATE OF ALFRED ERNEST GEORGE
BETWEEN	PETER WILLIAM GEORGE Applicant
AND	PAULINE JUNE BLOMFIELD AND ALAN GRAEME BLOMFIELD Respondents as trustees of the estate

(On the papers)

Appearances:	Mr S McKenna for the Applicant Mr M Branch for the Respondents
Judgment:	21 September 2017 at 3pm

RESERVED JUDGMENT OF JUDGE R H RIDDELL
[re-hearing of Family Protection Claim]

Introduction

[1] This family protection claim was remitted back from the High Court to determine the applicant's claim of a breach of moral duty in the light of further discovered documents.

Background

[2] The deceased died on 25 September 2012 leaving an estate of $2,616,324.85.[1]

[3] The deceased was survived by his four children namely:

Peter George ("the applicant");

Colin George;

Alan George (who is now also deceased);

Pauline Blomfield.

[4] Under the terms of the deceased's last will of 30 January 2004 the estate was distributed as follows:

(a) All loans to the A E George No 2 Trust were forgiven;

(b) All loans to the A G Blomfield Family Trust and P G Blomfield Family Trust were forgiven;

(c) All loans to his sons Alan, Colin and Peter were forgiven;

(d) All loans to his daughter Pauline and to his friend Naomi Game were forgiven;

(e) The shares in the company Newstead Group Limited were to be transferred in equal shares to his sons Alan and Peter;

[1] Based on the accountant's affidavit of 24 March 2017.

(f) The shares in the company Ernie's Holdings Limited were to be transferred to his friend Naomi Game and his son Colin in equal shares;

(g) The land and buildings at [address deleted] and all household chattels were to go to Pauline and her husband Alan Blomfield;

(h) The motor vehicle was to go to his friend Naomi Game;

(i) The residue of his estate was left to Pauline and Alan Blomfield.

[5] The will (like earlier wills) contained the acknowledgement that Pauline would receive a greater share of the estate as she was described as having 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 anticipate that Pauline and her family will receive a greater benefit from my estate than my three sons, my sons will receive an adequate share.[2]

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

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

[8] Peter George continued as the sole applicant.

Decisions

[9] During the family protection proceedings, the applicant sought disclosure of the various trust entities referred to in the deceased's will. The respondents resisted that claim and it was heard by Judge Twaddle who declined to make an order for discovery.[3]

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[2] [15]c.
[3] George v Blomfield [2015] NZFC 5637.

[10] His Honour concluded that there had been no undue influence by Pauline on her father's decision making, particularly in regard to his estate. The date at which any breach of moral duty is considered is the deceased's date of death and therefore it was not appropriate to consider transactions that pre-dated that death. His Honour found the application amounted to a fishing expedition.

[11] In my judgment of 30 May 2016 I commented on Judge Twaddle's findings:

> That decision has implications for the Court in considering the family protection claim. The Court can only make findings on the evidence available.[4]

[12] On that basis when the loans to various family trusts were set aside from consideration, the effect of that was to omit $1,665,655.00 from deliberation of the claim.

[13] The applicant appealed my decision which found there was no breach of moral duty given the small estate available for division. The High Court issued its judgment on 16 December 2016. The Court found that the decision to decline an order for discovery was in error. Justice Courtney said:

> The estate was very substantial and the forgiven loans represented such a significant part of it that the extent of any breach of duty could not be properly determined without information about the trusts and their beneficiaries.[5]

[14] Her Honour also concluded that one aspect of the evidence on which I had made a determination was speculative saying:

> I do, however, consider that the Judge made an error in finding that, had Peter accepted his father's offer of a home when the motel business failed "he may have been in a more secure position today". As it is framed, this conclusion is speculation and there is no evidence that might have supported a finding that Peter would have been better off. It may well have been foolish of Peter to reject the offer of help at the time but even on Pauline's evidence it was clear that the property was to be purchased by a family trust and would not add directly to Peter's own wealth.[6]

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[4] [58].
[5] [26].
[6] [37].

[15] Accordingly Her Honour allowed the appeal and set aside both my decision and that of Judge Twaddle's remitting the entire proceeding back to the Family Court for rehearing. Her Honour also made orders directing the discovery of documents relating to the trusts.

[16] This decision is a rehearing of the family protection claim which, by consent consisted of written submissions only.

Discovery

[17] As the result of the order for discovery, the Family Court was provided with a copy of the trust deeds for:

(a) The A E George No 2 Family Trust;

(b) The A G Blomfield Family Trust;

(c) The P J Blomfield Family Trust.

[18] In addition a deed of family arrangement has been disclosed. This was the settlement entered into between the trustees of the George estate and the executors of Alan George's estate by which his Family Court claim was discontinued.

[19] It is fair to say that the disclosure of those documents has made a significant difference to the claim and the way that the Court must now view the breach of moral duty.

Trust deeds

[20] The A E George No 2 Family Trust was settled by the deceased on 9 June 1995. The trustees were the deceased, Pauline Blomfield and her husband Alan.

[21] The discretionary beneficiaries were Pauline and Alan Blomfield, their children and grandchildren.

[22] The P J Blomfield Family Trust was set up on 20 April 1995 by Pauline Blomfield as settlor. The trustees were Pauline Blomfield and John Law of Auckland a group advertising manager. The discretionary beneficiaries of that trust were spouse Alan Blomfield, children and grandchildren of the settlor.

[23] The A G Blomfield Family Trust was established on 20 April 1995 by the settlor Alan Blomfield. The trustees were Alan Blomfield and John Law. That trust deed established the discretionary beneficiaries to be the spouse Pauline Blomfield, children and grandchildren of the settlor.

[24] Each of those three family trusts contained the same clause 13 which reads:

> **General unrestricted powers of the trustees**
>
> 13.1 The intention of the settlor is that the trustees have and may in their discretion exercise the fullest possible powers in relation to the trust fund and that they may do everything they think desirable notwithstanding that it is something which they would not normally have power to do in the absence of an expressed power or an order of the Court.
>
> 13.2 Therefore, the settlor declares that the trustees have the same power in relation to the trust fund as they would have had if they were the absolute owners beneficially entitled to it.

[25] That provision gives the trustees very wide and unrestricted powers to deal with the trust fund as they see fit.

[26] There was another trust deed established on 8 March 2000. The explanation for this was given by Alan Blomfield in his affidavit of 17 March 2017. A significant bequest had been made to each of the children by the deceased before his death and the applicant elected to use his share to purchase an interest in a motel lease. The venture failed and the applicant was subsequently adjudged bankrupt. Alan Blomfield deposed:

> I clearly remember dad talking to me about his wish to buy Peter a house. Despite his disappointment with Peter, dad wanted his youngest grandchildren to have a home of their own. He also wanted Peter to have an asset that he could build on for the future.
>
> I believe he did not ask Peter's view of the property because after the motel venture he did not greatly value his judgement.

> Dad told me that he was concerned about the financial implications of buying a house for Peter following his bankruptcy and sought a resolution. It is in evidence how dad proceeded in his effort to purchase a house for Peter. His wills clearly outline the change from bequests to Peter personally, to a trust created for Peter during his bankruptcy period, then back to Peter personally. Peter was a beneficiary of this trust as can be seen from the trust deed attached and marked "A".[7]

[27] The deceased was the settlor of that trust. The trustees were Pauline and Alan Blomfield and McKinnon Trust Management Limited. The discretionary beneficiaries were the applicant, his children and grandchildren.

[28] Alan Blomfield deposed in his affidavit that the intention was to purchase a house in the name of the trustees for the applicant but it would ultimately be gifted to the applicant.

[29] It is somewhat surprising therefore to read clause 13 of that trust deed which varies from the other three trusts referred to above. In particular clause 13.2 reads:

> Therefore, the settlor declares that the trustees have the same powers in relation to the trust fund as they would have if they were the absolute owners beneficially entitled to it *including the right to retain any asset of the trust if they are of the opinion that the settlor would have wished them to do so for reasons other than its investment value*.[8] (emphasis added)

[30] So while it is claimed that the intention was for the trustees to purchase a house and ultimately gift it to the applicant, clause 13.2 contains the provision that the trustees may retain the asset rather than gift it to the applicant if, in their absolute discretion, they considered that to be appropriate. That clause was not in any of the other three trust deeds. It represents somewhat of a caveat to the idea that the applicant would ultimately acquire the property outright, particularly if the trustees had any misgivings about the applicant's decision making.

Deed of family arrangement

[31] The applicant's counsel submitted that his client did not know the nature of the settlement for Alan George which led to him withdrawing from the family protection

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[7] [5] – [7].
[8] 13.2.

claim. That cannot be right as the applicant was a signatory to the deed of family arrangement signed by the trustees and all family members on 20 July 2015.

[32] The agreement was reached with Alan George's widow and the other executor of Alan George's estate.

[33] Under the will the applicant and Alan George inherited 50% each of the shares in Newstead Group Limited. At the time of the deceased's death, the company had a debt to the estate of $230,645.00. That debt was not forgiven in the deceased's will. So the applicant and Alan George were each responsible for half of the debt being $115,322.50 which, when taken into account left a modest amount to each of the brothers of $67,916.50 (based on the land value at the time of death).

[34] The deed of arrangement dealt only with partial forgiveness of that loan. The deed provided that:

> (a) The trustees of the deceased's estate would pay Alan George's executors $73,996.50;
>
> (b) The trustees would assign fifty percent of the loan to the executors for the sum of $115,322.50 being its face value; and
>
> (c) The executors would pay that sum by:
>
> (i) the trustees of the estate retaining $73,996.50 and
>
> (ii) by paying the trustees $41,326.00 within 180 days of the shares in the company being distributed to the entitled beneficiaries once all claims against the estate had been settled or decided.

[35] The provision went on to state:

> For the avoidance of doubt the share of Alan George in accordance with clauses 5 and 8 of the will remains in full force and effect except as varied by this deed.

[36] So the compromise solution was to reduce Alan George's half share of the debt from $115,322.50 to $41,326.00, to be paid once final resolution of all matters had occurred.

[37] The deed makes it clear that the late Alan George's interest in the company shares has not been forfeited or compromised in any way. To that extent counsel for the applicant is in error by stating in his submissions that:

> It can readily be assumed that Pauline (or a trust that she and her husband control) is now set to inherit the other fifty percent share in the company.[9]

[38] In fact the estate of the late Alan George has not relinquished entitlement to half of the shares as provided for in clause 8 of the deceased's will.

Legal principles

[39] I am not going to traverse in any detail the legal principles which apply in a family protection claim. They have been well set out in my decision of 30 May 2016 and referred to in the High Court decision of 16 December 2016.

[40] Suffice to say that the Court's task is to make an order only if adequate provision has not been made for the proper maintenance and support of a claimant. It is not for the Court to rewrite the will, but simply to award a sum as it thinks fit to correct any imbalance.

[41] The Court must be satisfied that there has been a breach of moral duty taking into account the relationship that each of the beneficiaries enjoyed with the deceased, any provision made during the deceased's lifetime and the financial and other circumstances of the claimant.

[42] The deceased was a person who regularly updated his wills, set out his reasons for doing so and was a very astute businessman.

[43] Therefore any claim of breach of moral duty must be founded on more than unfairness in the terms of the will. There must be a significant imbalance which calls out for redress.

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[9] Submissions [43].

[44] A trilogy of Court of Appeal decisions looked at what was necessary in terms of providing "proper maintenance and support". Each of those cases concluded that fairness between siblings was not the issue but rather a determination of what support was proper taking all other factors into account. In those cases the Court looked beyond an equal entitlement to consider other issues.

[45] The first of those cases was *Williams v Aucutt*[10] where a daughter was left 5% of the estate. The High Court increased that to 25%. On appeal, the Court of Appeal found the different treatment of the two daughters in the will was not the test. Rather the inquiry should have focused on whether the provision was adequate for proper maintenance and support. The Court determined that an additional $50,000.00 to that daughter would remedy that breach which increased her overall share of the estate to 10%.

[46] The second case was *Auckland City Mission v Brown.*[11] In that case the daughter brought a claim against the father's $4.6 million estate as she had received only $30,000.00. The question was what amount was necessary to remedy that breach of moral duty. The High Court awarded her $1.6 million or 35% of the estate. The Court of Appeal reduced that sum to $850,000.00 or about 18% of the estate.

[47] The final case was *Henry v Henry*[12] in which one son was left a quarter of an $800,000.00 estate and the rest to the other son. The Family Court directed that the sons should share equally. The High Court set that aside and restored the testator's original intentions. The Court of Appeal confirmed that there should be a conservative approach to the determination of whether adequate provision had been made and if not what was necessary to remedy any failure:

> In cases of financial need, the amount necessary to remedy the failure to make adequate provision in the will will be able to be determined with greater precision, and with less room for broad value judgments, than in cases where the need is more of a moral kind. The conservative approach requires that the Judge makes the assessment of what is required on a basis which focuses on what is necessary to make adequate provision, but … no more than that.

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[10] *Williams v Aucutt* [2002] NZLR 479.
[11] *Auckland City Mission v Brown* [2002] 2 NZLR 650.
[12] *Henry v Henry* [2007] NZCA 42

> Broader questions of desirability of greater awards or the Judge's views of fairness should not come into play.[13]

[48] Ultimately the matter was remitted back to the Family Court as additional evidence was required.

[49] The need to redress any breach of moral duty requires the Court to do no more than the minimum necessary to make adequate provision for that particular claimant. That does not mean equality with other beneficiaries and nor does it mean wholesale rewriting of the will. Due regard must still be had for the testator's wishes.

Discussion

[50] The applicant submits that by virtue of significant forgiveness of debts to three family trusts in which Pauline Blomfield and/or her husband and family are the discretionary beneficiaries, the bequests to Pauline and Alan Blomfield amount to the bulk of the estate. On appeal, the High Court identified the correct starting point is that the loans were unquestionably assets of the estate.

[51] In my earlier decision, I was unable to identify who the beneficiaries of the various trusts were. Disclosure of the trust deeds has now made that clear.

[52] The forgiveness of debts provided for in the deceased's last will, benefitted three family trusts by $1.66 million. It would be naïve to deny that Pauline Blomfield and her family have directly benefitted from those forgiveness of debts.

[53] First, she and her husband have unrestricted powers over the assets of the trusts to the extent that they can deal with the trust fund "as if they were the absolute owners beneficially entitled to it" (clause 13.2 of each of the three trust deeds).That is subject to the professional trustee's consent but the power to remove a trustee lies with Pauline and Alan Blomfield as personal representatives and trustees of the estate under Clause 8.1 (b), so I regard their powers as ultimately unfettered.

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[13] [58].

[54] Second, the deceased was a precise and careful businessman who fully intended that Pauline would receive a greater benefit from his will than any of the deceased's three sons. He would have understood that his forgiveness of debt to the three trusts would have made up the bulk of his estate.

[55] So the disclosure of the trust deeds puts the claim in an entirely different light.

[56] On the calculation of the estate's value as at 2013, the applicant's share amounted to just under 3%. The updated net values as at January 2017 mean Pauline and Alan Blomfield were effectively bequeathed assets amounting to just over 73% of the deceased's estate. The applicant's share is 4.9%. By any measure that cannot be justified.

[57] I remain of the view that the applicant failed to take up the offer of a home when the motel business collapsed and there may have been churlish reasons for that decision, given his dislike of Pauline and knowing that she was a trustee of the family trust intending to purchase the home.

[58] However on my reading of that trust deed, it is not reasonable to conclude that the applicant would inevitably have been gifted the home. The provision in the deed for the trustees to retain the assets suggests that the deceased left in the possibility that the applicant might not acquire the home outright in the future. Certainly when the motel business collapsed, the deceased changed his will and set up the family trust with the applicant as beneficiary. At the time the deceased was concerned that the applicant might be bankrupted as he owed money to various creditors. That fear was ultimately realised.

[59] The applicant submits that he does have financial need. He works full time and his wife works part time. They rent a home. They have no savings. At the time of the original family protection claim, the applicant was servicing a debt of $12,550.00. It is not clear whether that debt has been repaid or not.

[60] There are no other competing claims for the estate.

[61] The applicant argues that his need is more than simply an economic one, but is also a need for a sense of inclusion and recognition within the family. He does not seek an equal share of the estate but a settlement which would represent 15% of the total estate value.

[62] In considering the applicant's entitlement, I remind myself that he is still entitled to his share of the Newstead Group Limited shares. However the company loan owed to the estate of $230,645.00 has now been reduced.

[63] That is because of the deed of arrangement between the estate of the late Alan George and the trustees. That deed reduced Alan George's liability from the half share of $115,322.50 to $73,996.50 in consideration for withdrawing his family protection claim. The applicant and all other beneficiaries including Pauline and Alan Blomfield as trustees were party to that deed and the effect was to assign half of the loan and deal with it under the terms of the deed.

[64] It is somewhat surprising then that the loan to the estate is still recorded in the books at $230,645 as at 20 March 2017 when the effect of the deed dated 20 July 2015 has been to reduce that debt by $73,996.50.

[65] The estate of Alan George has dealt with his liability for 50% of the loan. That is a separate arrangement with the trustees.

[66] The applicant remains liable for the other half of the debt of $115,322.50.

Decision

[67] I find there has been a breach of moral duty by the deceased who made significant provision for his daughter Pauline Blomfield directly or indirectly and failed to provide adequately for the applicant.

[68] The applicant's lack of business acumen, his conflicting relationship with Pauline Blomfield and his rather strained relationship with his father at times are all factors I have drawn from the evidence, both oral and written.

[69] But they do not justify what is a niggardly provision when compared with that received by Pauline Blomfield. The imbalance is too great and demands redress.

[70] A Court must be cautious before disturbing a testator's wishes. While testamentary freedom is not absolute, it does have limits where unfairness is found to exist. And that unfairness must be more than de minimis or even moderate.

[71] It must be apparent that adequate provision has not been made by the deceased. An applicant does not need to demonstrate financial need for support. Being part of the deceased's family demands recognition in itself. The degree to which the Court recognises that place in the family and the subsequent breach is a matter of the Court's exercise of a wide discretion.

[72] In this case the applicant has argued for one of three remedies. They are:

(a) That the applicant's 50% share in Newstead Holdings Limited vests back to the estate and the applicant is given a cash bequest amounting to 15% of the estate; or

(b) Vest the late Alan George's share in the company in the applicant and forgive the company debt owing to the estate; or

(c) In some other way uplift the provision to the applicant to 15% of the estate.

[73] The immediate difficulty with option (b) is that it would be unfair to Alan George's estate for them to forfeit his share which was specifically preserved under the deed of arrangement to which the applicant was a signatory. I see no reason why his modest share should be taken from him. That would have the effect of his estate having no share in the deceased's estate but still owing a debt under the deed of arrangement.

[74] The accountant prepared an updated affidavit setting out the assets and liabilities of the estate as at 24 March 2017. In that affidavit, the accountant drew attention to two factors.

[75] The first is that liabilities in the estate have increased as a result of the legal fees incurred for litigation. Those fees totalled $71,264.42 to 20 March 2017 and will have increased since then. To date the trustees have personally met those fees.

[76] The second is that the shares in Newstead Group Limited have increased significantly because of the increase in value of the land. A valuation was provided dated 16 January 2017 showing the land has a current market value of $500,000.00. It is reasonable to conclude it has increased further in value in the intervening nine months.

[77] I see no reason for adopting the applicant's first proposal by vesting that share of the land back into the estate. The shares are currently owed by the applicant and the estate of Alan George. While Pauline Blomfield is the sole director of the company, her counsel's submissions were that Pauline Blomfield would undertake as soon as possible to transfer the shares to the applicant and Alan George's executors and resign as a director. That leaves the way free for both parties to deal with the shares as they choose. For those reasons I am not inclined to disturb that provision.

[78] That leaves only a determination of the amount that must be paid to the applicant to remedy the failure to make adequate provision in the will. I do not consider that 15% of the estate is appropriate; although the figure is a more realistic one taking into account the testator's wish to provide a significant benefit to Pauline and Alan Blomfield.

[79] The Court must determine what monetary sum would redress the imbalance. That is reached by taking into account a number of factors including the applicant's place in the family, his own financial need, other distributions to him during the deceased's lifetime and the importance of Pauline Blomfield to the father and the significant assistance she provided to him over the years. I have not discussed those factors in detail. They were canvassed in my original decision.

[80] Calculation of a percentage is not always appropriate in considering a claimant's entitlement. The Court must award an amount that redresses the wrong in a way that is the minimum necessary to make adequate provision for the claimant.

[81] However there is ample authority for awards in the region of 10% and I regard that as being a reasonable recognition of the part the applicant played in the life of the deceased and further, a recognition of his more straitened financial circumstances.

[82] That award will be achieved in the following way.

[83] The remaining debt by the company to the trustees of the estate is $115,322.50. That is effectively the applicant's debt since Alan George's estate have made their own arrangements for his half of the debt. So I propose to discharge the applicant's debt to the trustees.

[84] When that debt is disregarded, the figures for the company look as follows. The land has a value of $500,000. When the working capital account of $11,943 is deducted, the shares are worth $488,530. The applicant's half share is $244,028. That represents about 9.3% of the total estate. It cannot be precise because other liabilities must be taken into account including further legal fees for the litigation and estate matters. But I consider that amount is sufficient to redress the wrong done by the deceased in failing to make adequate provision for the applicant.

[85] So orders are made as follows:

[86] The applicant's claim for breach of a moral duty against his father's estate is made out.

[87] The applicant's liability for half of the Newstead Group Limited loan to the estate of $115,322.50 is discharged.

[88] The applicant's entitlement to half of the value of the shares is approximately $244,028. That sum represents about 9.2% of the estate, albeit it is not precise in terms of the estate's final value or the value of the company land. I consider that sum makes adequate provision for the claimant.

[89] I am not inclined to make any award of costs given that the burden of costs to date falls most heavily on the estate and ultimately Pauline and Alan Blomfield as they

are the beneficiaries of the residuary estate. Should counsel wish to pursue costs, then Memoranda should be filed within seven days.

R H Riddell
Family Court Judge