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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2018-004-001089
[2020] NZFC 8974

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	THE ESTATE OF LEWIS RICHARD JOHNS
BETWEEN	STEPHEN HENRY CYRIL JOHNS Applicant
AND	CHRISTOPHER NORMAL LORD COLIN CLIVE HOLLOWAY First Respondents
AND	GAIL PATRICIA JOHNS Other Party

Hearing: 1 October 2020

Appearances: S R Mitchell for the Applicant
R Gay for the Estate
G C Jenkin for the Other Party

Judgment: 16 October 2020

RESERVED JUDGMENT OF JUDGE D A BURNS

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[1] The applicant Stephen Henry Cyril Johns has applied for further provision from the Estate of his late father Lewis Richard Johns who died at Auckland on or about 26 September 2017. Probate of his Will dated 15 May 2002 was granted on 1 November 2017 to the respondent Christopher Normal Lord of Auckland, Solicitor and Colin Clive Holloway, Accountant.

[2] The respondents contend the application for further provision must fail because there are no assets in the estate. The applicant does not accept that and contends that the respondents have failed in their duty as executor and trustees to take appropriate steps to recover or clawback assets into the estate. The respondents do not accept that they have not taken up all appropriate steps.

[3] The proceedings were filed in October 2018. They were set down for hearing in November 2019 but were adjourned. The proceedings were set down before me for hearing in October 2020. The applicant seeks an adjournment of the hearing on the basis that the respondents have failed to take appropriate steps to ensure assets are properly brought within the estate. The respondents together with the widow opposes the adjournment application and contend that the application under the Family Protection Act should be dismissed.

[4] The late Mr Johns was a successful businessman. He was a cabinetmaker and operated a cabinetmaking business for many years. The company owning the cabinetmaking business was sold. The proceeds were retained in a family trust. The assets of the family trust did not fall into or form part of his estate. In addition he and the widow owned a home which was sold for the sum of $2.8M. That home had been settled under the Joint Family Homes Act and therefore the net proceeds of sale passed by survivorship to the widow. They did not fall into or form part of the estate.

[5] The deceased received an inheritance together with his brother from their father. It was a residential property. That property sold prior to his death but at a time when he no longer had capacity. Prior to losing capacity he had signed an enduring Power of Attorney in favour of his wife. The property sold and each brother received $394,000 in round figures net. A decision was made by the widow pursuant to the powers under the enduring Power of Attorney to transfer that sum which was an

inheritance from the deceased's father and instructed the solicitors to pay that sum into their joint account. From that sum the late Mr Johns rest home fees were paid and approximately $170,000 was paid up to the date of his death.

[6] The applicant contends that the widow acted inappropriately in placing the funds into the joint account of the parties and says that she should have preserved that sum as an inheritance so that it would fall into and form part of the deceased's estate. The widow contends that she acted entirely appropriately and in accordance with the wishes of the deceased prior to his losing capacity and consistent with his Will.

[7] Part of the relevant background is the applicant and the deceased were involved in extensive litigation in the High Court which was acrimonious and went over a period of about eight years. The proceedings were dismissed. It is argued by Mr Jenkin and Mr Gay that the behaviour of the applicant in this case is very similar to the way that he approached the litigation in the High Court.

[8] Part of the argument for the transaction being inappropriate was a claim by Mr Mitchell that the placement of the funds into the joint account was a form of self-dealing and that it was in breach of her fiduciary obligation.

[9] The Court has received the following submissions:

(a) submissions from Mr Mitchell in support of the adjournment application and the merits behind that;

(b) submissions from the estate;

(c) submissions from Mr Jenkin on behalf of the widow.

[10] It was clear at the date of the hearing before me that the estate has no assets and therefore the claim under the Family Protection Act can only succeed if there is a successful clawback application. The executor and trustees say very clearly that they do not intend to bring such an application. It follows that the applicant has to apply under the Administration Act or the Trustee Act to have the executor and trustees replaced. Such an application would only be successful if the applicant can

demonstrate that there is merit in his contention. In order to determine the adjournment application I have to firstly consider whether there is merit or whether there is an arguable case for some form of clawback application or for an application to the High Court to have the executor and trustees directed to bring such an application.

[11] From the applicant's point of view for him to succeed in his application it hinges on whether he would persuade a Court to reverse or overturn the transaction occurred in April 2014 when $394,142 was paid into the joint account.

[12] The details of the transaction were advised to the applicant in a letter from Craig Griffin & Lord dated 21 February 2018.[1] I need to set out the letter in full:

> Ms Joanna Louise Johns
> C/- Davenports City Law
> Via email : Geraldine@dclaw.co.nz
>
> Mrs Lynette Raewyn Zarnic
> C/- Mrs Johns
> [Address deleted]
> AUCKLAND 0610
>
> Mr Stephen Henry Cyril Johns
> C/- Mrs Johns
> [Address deleted – same as above]
> AUCKLAND 0610
>
> RE: ESTATE OF LEWIS RICHARD JOHNS
>
> We are writing to advise the current position that we have reached in the administration of the estate. We have assessed the extent of the assets and liabilities of the estate, and have concluded after examination of the evidence referred to below, that the assets and liabilities are those referred to in the attached interim statement.
>
> That statement shows the assets of the estate, and the debts that have now been paid. There will be further debts relating to the costs of administration. There may also be further costs if the executors are required to seek the Court's determination on the point referred to below, or if the estate is otherwise involved in litigation. You will note that, taking account of only those debts that have already been paid, the current net value of the estate is $710.00.
>
> There are accordingly insufficient funds currently held to cover the specific legacies made under clause of 4 of the deceased's last will dated 15 May 2002, which provides for the following legacies:
>
> Joanna Johns $30,000

[1] Page 68 Bundle of Documents.

Lynette Zarnic	$40,000
Stephen Johns	$20,000

In the course of our administration and determination of the assets comprising the estate, we were referred to the sum of $394,142 which was paid to the deceased on or about April 2014. Our enquiries revealed the following:

1. The sum of #394,142 represented the deceased's half share of the net proceeds of sale of his father's house at Somerset Road, which was sold in April 2014.

2. The other half share (after adjustments) was paid to the deceased's brother, Bruce Johns.

3. AT the time of payment in April 2014, the deceased's wife, Gail Johns was acting as the deceased's attorney under an enduring power of attorney dated 10 November 2005.

4. Upon receipt of the $394,142 the deceased gave specific instructions to Mrs Johns to pay the sum into the bank, and Mrs Johns lodged the sum to the credit of their account at ANZ bank, held in their joint names. The deceased held no bank account solely in his own name.

5. The funds in the ANZ joint account were used subsequently for family living expenses, and to cover the deceased's rest home fees at West Harbour Lodge rest home (from September/October 2014), and at Kumeu Village rest home where the deceased resided from April 2015 until his death on 26 September 2017.

6. The deceased's rest home fees from September/October 2014 until his death in September 2017 totalled approximately $170,000.

7. All bank accounts that were jointly held by the deceased and Mrs Johns vested in Mrs Johns as the survivor upon the death of the deceased, pursuant to the doctrine of survivorship.

Accordingly, in the considered assessment of the executors after taking the advice of senior counsel, neither the sum of $394,142, nor any balance remaining of that sum, fell into the deceased's estate.

In the course of making the enquiries in relation to the information referred to above, the executors advised Mrs Johns of the correspondence received from Ms Joanna Johns and Mr Stephen Johns last year that indicated a possibility of claims being made against the estate, and that any such application, and/or any litigation resulting from a claim made against the estate, would further deplete the funds available for distribution in accordance with the deceased's will. The executors also advised Mrs Johns that if they receive any positive indication that a claim is likely to be pursued against the estate, they may be required to make an application to the High Court for a determination whether the sum of $394,142 or any part thereof should be regarded as falling into the deceased's estate.

As a consequence, the executors have received an offer from Mrs Johns which we have set out in the attached "without prejudice" correspondence. We would be grateful if you would advise us in writing within 15 working days

of the date of this letter, whether or not you accept the attached offer, and return to us the signed acknowledgement.

Yours faithfully
CRAIG GRIFFIN & LORD

C N LORD
Email: chris@cglord.co.nz

[13] The analysis of the estate's solicitors in my view is correct. I observe that the transaction took place well before the deceased died. That the widow and the deceased had been married for a very long time. That the deceased only had one bank account which was the joint account. It is unlikely he would have opened another account to pay the money into. The widow says that he gave his consent and instructions for the money to be paid into the joint account. The applicant says that he did not have capacity at the time but in my view the probability is that if he had capacity that is exactly what he would have done. This is particularly so that the deceased and the widow were happily married and there was no suggestion of any separation. I also observe that the Power of Attorney had been in place for a long period of time without being revoked. I also observe that a considerable amount of the money received was used to pay for rest home fees which would have been known at the time of the transaction and anticipated. It is also consistent with the way that other assets were treated particularly the family home passing by survivorship pursuant to the Joint Family Homes Act to the widow. Therefore I find no suggestion that the widow was in any way trying to defeat the claim of the applicant because at the time of the transaction such a claim would have been only a remote possibility. I also observe that the payment to the joint account was consistent with the Last Will dated 15 May which provided for specific legacies in favour of the three children from the deceased's first marriage.

[14] Mr Mitchell in his written submissions in paragraphs 7-9 argued as follows:

> 7. Annexure SJ2 of the Applicant's Affidavit of 31 October 2010, is a letter from Craig Griffin & Lord, dated 21 February 2018. This letter sets out what has occurred with the funds from the sale of the property. It sets out that the funds were paid to the deceased in April 2014. It refers to instructions being made by the widow, that the funds, despite being the separate property of the deceased, to be deposited into a joint bank account. The letter of the Executors refers to the possibility that the Executors could make an application to the High Court, seeking directions as to whether the funds should be part of the estate.

8. As far as the Applicant is aware, no such application has ever been made. It should have been.

9. It is submitted that the issue of whether the funds should be part of the estate, is an important one, and that this proceeding should not be determined, until such time as this issue has been resolved. Further, the first responsibility is upon the Executors to address this issue. It is surprising that they have not made demand of this sum from the widow.

[15] I observe that even if there was such an action which the applicant urges the executor and trustees to take the economics of the Family Protection Act proceedings are very questionable. Mr Mitchell says that the applicant relies not only on family recognition for further provision but also the need. He is an adult claimant. If there was a successful clawback application and $394,000 was brought back into the estate there would have to be deducted from it the rest home fees which would leave $224,000. He has already received a legacy of $20,000. The other two legatees have not taken any steps. I understand the widow has paid those legacies from her own resources. After deduction of legal fees even if he was to get 20% of the estate it could only be a further at best $20,000 on top of the specific legacy of $20,000. The legal cost could in recovering such an amount well exceed that. I think it unlikely that the Court would order legal fees to be paid out of the estate. Proceeding with such an application would in my view be pointless.

[16] Mr Mitchell has argued that the widow was involved in self-dealing and breached her fiduciary obligation as Attorney. Mr Mitchell argues in paragraphs 12-18 of the submissions as follows:

12. The funds having been inherited were the separate property of the deceased. It is clear from the letter of February 2018, that the transfer into the joint account was made on the instruction of the widow relying on an Enduring Power of Attorney, dated 10 November 2005.

13. It is also clear, that the payment using the Power of Attorney, benefitted the widow. The widow received an immediate benefit of half of those funds, being $197,071. In addition, she received the full benefit of the funds upon the death of the deceased, when they passed to her by survivorship. Such benefit was clearly able to be anticipated. It is submitted that this was not a proper use of an Enduring Power of Attorney.

14. Section 97A of the Protection of Personal & Property Rights Act 1988 provides:

1) This section applies to an attorney acting under an enduring power of attorney in relation to the donor's property if the donor of the power becomes mentally incapable;

2) The paramount consideration of the attorney is to use the donor's property in the promotion and protection of the donor's best interests, while seeking at all times to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.

15. Section 107 provides:

> An attorney under an enduring power of attorney must not, at any time while the donor is mentally incapable, act to the benefit of the attorney or of a person other than the donor, or …

16. In this case, the widow was not exercising the Power of Attorney in relation to joint property, so cannot rely on the provisions of Section 107(1)(c)(i). The inheritance was clearly separate property which was then intermingled immediately upon receipt, to the benefit of the widow who gave the instruction.

17. It is clear that the solicitors for the deceased, were well aware that the transaction was taking place pursuant to the provisions of the Power of Attorney. Indeed, this is stated explicitly in the letter of 21 February 2018. This was an appropriate circumstance, if the funds were appropriately to be paid to a joint account, for a direction to be sought from the Court. It was not appropriate for the widow to simply give this instruction.

AUTHORITY

18. The application of these provisions of the Protection of Personal & Property rights Act 1988 has been considered by the Court of Appeal in Vernon v Public Trust. In that case, referring to a use of a power of attorney, the Court found at paragraph 37:

> To the contrary, equity imposes enforceable duties upon an agent to ensure that he or she discharges a power for the purpose for which it is granted. Fiduciary obligations are a necessary incident of the relationship of principal and agent. Unless the instrument or statute requires otherwise, the agent must discharge his or her duties towards the principal with the outmost loyalty, honesty and good faith. He or she must ensure that he or she does not benefit himself or herself at the donor's expense. As he or she must act always in the donor's best interests, in particular where a power is granted for the purpose of preserving and managing the donor's property.

[17] Mr Jenkin gave consideration to that line of argument. He submits the PPPR Act was significantly amended after the EPOA was signed by the deceased. In anticipation of a possible application by the executor and trustees to review the

Attorney's decision he refers to s 183 of the PPPR Act. He refers to the Attorney's duty to consult in s 99A. He refers to s 107 which relates to self-benefit which he submits was amended when the PPPA Amendment Act 2007 came into force on 25 September 2008. Section 108AA was introduced by the Act by the amendment and provides as follows:

> 6. Section 107, which relates to self-benefit, was amended when the Protection of Personal and Property Rights Amendment Act 2007 came into force on 25 September 2008. Section 108AA was introduced into the Act by the amendment and provides as follows:
>
> "108AA. Enduring powers of attorney created before Protection of Personal and Property Rights Amendment Act 2007
>
> (1) In this section, commencement date means the commencement date of s23 of the Protection of Personal and Property Rights Amendment Act 2007 (25 September 2007).
>
> (2) . . .
>
> (3) If an enduring power of attorney is effective before the commencement date, -
>
> (a) Sections 94A and 107 do not apply to it; and
>
> (b) Sections 95(1),(2) and 107 (as they read before the commencement date) continue to apply to the enduring power of attorney."

[18] In paragraph 7 he submits that some sections referred to are not relevant and then sets out in paragraphs 8 and 9 of his submissions the old s 107 and the new s 107. He submits in paragraphs 10-11 therefore that there is no jurisdiction. Further the Act was amended after the EPOA came into being. It is clear from the EPOA which is set out on page 3 of the bundle of documents that it operated right from inception and was not one of those EPOAs that came into force when the deceased lost capacity but operated right from the outset and remained operative even if he did lose capacity. It is clearly under the old form. Mr Jenkin sets out the widow's position in paragraphs 12-23 of his submissions which I set out in full as follows:

> 12. The marriage of the deceased to his wife Gail was a long and happy one. The widow nursed her husband full time from February 2006 when he suffered a debilitating stroke until August/September 2014 (approximately 9½ years) when he went to live in a rest home.
>
> 13. Craig Griffin & Lord (Mr Lord) were the deceased's solicitors for many years and Mr Lord and his accountant, Mr Holloway, were

named as his executors and trustees in each of his wills and remained as trustees of the Lewis Richard Family Trust.

14. On 14 December 1995 the deceased settled the Lewis Richard Family Trust by deed for the benefit of his wife Gail and her children Philip and Vicky and their children.

15. Over the years the deceased transferred his assets to himself and his wife Gail jointly, as well as to the Lewis Richard Family Trust.

16. As per his memoranda of wishes dated 15 May 2002 (BD – pg 320), and 22 January 2008 (BD – pg 321), it is clear that the deceased wished that the trustees would apply the trust fund for him and his wife and then his wife's children and their children.

17. In his last will dated 15 May 2002 (BD – Tab 14 – pgs 323-327) the deceased provided legacies of $30,000.00, $40,000.00 and $20,000.00 respectively to his children Joanna, Lynette and Stephen. On the date of the will the deceased told Mr Lord that his children had received benefits over the years from his former family trust, the L R Johns Family Trust (para. 9, executors' affidavit, 20/8/19) (BD – pg 295), and particularly in relation to Stephen referred to the significant cost of bailing him out of unwise financial ventures and "the stress and cost of the High Court litigation and the callous way in which Stephen was conducting it". Shortly thereafter the deceased told Mr Holloway that he intended to send a message to Stephen via his will of his dissatisfaction with the drawn-out legal proceedings that Stephen had prosecuted and the effect on their relationship. (Para. 10, executors' affidavit, 20/8/19). (BD – pg 296). See the widow's affidavit (para. 5, GPJ, 6/8/19). (BD – pg 282)

18. In April 2014 the deceased received $394,142.00 being his share of an inheritance from his mother. The widow says that the money was paid into the ANZ Bank joint account in April 2014 by her in reliance upon the power of attorney. (Para 10, GPJ, 6/8/19). (BD – pg 284) The executors corroborate this evidence.

19. In recognition of the statutory obligation referred to in s99A the widow consulted with the deceased, her husband, and obtained his consent to the deposit, which was made with his full knowledge. The evidence shows that the funds were then used to pay his living expenses and rest home fees from August/September 2014 to 26 September 2017 when he passed away. As per the letter from his solicitors, the amount was approximately $170,000.00.

20. The widow's position is that the payment was with her husband's consent and although on the face of it it was in part for her benefit it was clearly what he wanted and the moneys in any event were expended for his benefit. Even if the funds had been kept in an account in the deceased's sole name (which did not exist) the funds would have been nevertheless used for the same purpose, namely the cost of his living expenses and in payment of fees for rest home expenses for a period of some three years.

21. The widow complied with her obligation under s99A to consult with the deceased and in terms of s99A(3) made the payment in good faith in accordance with the deceased's obvious wishes. In addition the widow has offered to pay the legacies to the children from her own funds which she has done with respect to Joanna and Lynette. The offer to pay his legacy to the applicant was ignored.

22. The old s107 does not expressly prohibit self-dealing. To the contrary, the section expressly permits the attorney acting to his or own benefit and/or for the benefit of third parties if ". . . the donor might be expected to provide for the needs of the attorney or those other persons". It would be the widow's case that in the circumstances the deceased would be expected to provide for his wife and also for her children because that was clearly his wish in terms of the documents before the Court.

23. The widow's case therefore is that it is not reasonable in the circumstances of this case for the Court to review that decision, or any other decisions for that matter, made by the widow and that therefore the jurisdictional basis for the orders sought is not made out.

[19] Mr Gay supported the widow's submissions and the position taken by his instructing solicitors in his capacity as executor and trustee. He contended that there was no prospect of success by the applicant and no basis for any form of clawback application being lodged. There was no basis for challenging the executor and trustees' decisions.

Judgment

[20] I decline to adjourn the proceedings for the following reasons:

(a) the proceedings have been before the Court for some time and there have been considerable delays. The schedule of steps taken in the proceedings provided by Mr Jenkin clearly demonstrates that;

(b) in my view there is little or no prospect of success if the applicant was to seek to set aside or review the transaction;

(c) the economics of proceeding further are highly questionable and I consider that the costs will outweigh any benefit;

(d) I accept the submissions made by Mr Jenkin that the amendment to the law occurred after the EPOA came into force and therefore weakens considerably the argument advanced by Mr Mitchell that there is inappropriate self-dealing;

(e) the widow and the deceased had a happy and long marriage. The transaction occurred well before the deceased died. That even if it had been paid into a separate bank account it is likely that the rest home fees would have been debited to that account. That it is arguable that s 10(2) of the Property (Relationships) Act 1976 applies and the funds would have merged or intermingled with relationship property and not remain a separate property in any event;

(f) that even on the merits if he was to succeed in clawing back the amount under the Family Protection Act as an adult claimant on the caselaw that presently applies he is unlikely to be successful significantly more than the specific legacy that has been provided and the costs of obtaining that would well exceed the likely benefit.

[21] He is unlikely to persuade the Court that the other specific legacies should be reduced and the Court would probably not have jurisdiction to do so, so the estate would have to get $110,000 before there is any positive assets in the residuary estate for which a claim could be launched under the FPA. While I understand the widow has paid from her own resources the other specific legacies she would no doubt have an ability to recover that if the estate was placed in funds. So the estate would go from $394,000 less $170,000 for the rest home fees less $110,000 for the specific legacies less costs of administration. This probably leaves a figure of around $100,000 for which the applicant would have a claim. Even at 50% the best he could achieve would be about $50,000 which I think is unlikely and I think he claims more in the region of 10%-20%. The widow would have clearly have a claim herself although the wider circumstances could be taken into account. The Court would have to give consideration to the other siblings who have not taken steps but would have to be taken into account.

[22] Accordingly for all those reasons I have reached the conclusion that there is little or no merit in the claim. That the matter has been considerably delayed and I am not persuaded it should be adjourned any longer. The Family Protection Act claim must fail because there are no assets in the estate. I think it improbable that any steps if in fact taken by the executor and trustees would successfully produce any significant sum for which the applicant would have any entitlement. The cost would exceed the amount claimed. Therefore the application is dismissed and the file closed.

[23] I order costs on a 2B basis in favour of the widow who has had to bear the costs of defending the application because there is no asset in the estate. That should cover Mr Jenkin's appearances and also Mr Gay's. I direct counsel to confer and see if they can reach agreement on the appropriate quantum. If there is disagreement memorandum can be filed and placed before me for resolution of the disputed quantum issue.

Dated at Auckland this day of October 2020 at am/pm.

D A Burns
Family Court Judge