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

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IN THE FAMILY COURT
AT HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2020-019-000599
[2023] NZFC 2599

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	THE ESTATE OF [RONALD GILES]
BETWEEN	[LORRAINE GILES] Applicant
AND	[MARISSA CAIN] [JOHNNY GREEN] Respondents

Hearing:	10 March 2023
Appearances:	S Barker for the Applicant K McDonald and D Shahtahmasebi for the Respondents
Judgment:	27 April 2023

RESERVED JUDGMENT OF JUDGE G S COLLIN

Introduction

[1] On [date deleted] May 2004 [Ronald Giles] died. Probate of his will was granted on 14 June 2004. When he died, Mr [Giles] had four living children, [Bryan Giles], [Oliver Giles], [Marissa Cain], and [Lorraine Giles].

[2] In Mr [Giles]'s will dated 13 June 1997, $5,000 was set aside to [Lorraine Giles], "to be held on trust to use so much of the income or capital of the trust fund as my trustee thinks necessary for the maintenance, or benefit of my daughter [Lorraine Giles]".

[3] Mr [Giles] must have realised that the $5,000 was inadequate so on 16 March 2004 a codicil to his will was signed, increasing the amount to $10,000.

[4] On 7 June 2005 [Oliver Giles] made an application pursuant to the Family Protection Act on the grounds that Mr [Giles] had failed to make adequate provision out of the estate for him.

[5] Ultimately the Family Protection claim was settled by consent. The orders made included increasing the amount to be paid to the trust fund for [Lorraine Giles] to $60,000.

[6] Notwithstanding the provisions made for [Lorraine Giles], she deposes that she has not received any benefit from the trust fund. For that reason, [Lorraine Giles] has made a further application under the Family Protection Act, seeking a variation to the terms of the will, and orders, that the trust fund, the interest on the trust fund, and costs in their entirety, be paid to her.

[7] In response the trustees apply to have [Lorraine Giles]'s application struck out as an abuse of the process of the Court.

Issues for determination

[8] The matter proceeds on the application of the trustees to strike out [Lorraine Giles]'s application:

(a) In this hearing the sole issue for determination is whether [Lorraine Giles]'s application should be struck out as an abuse of the Court's processes.

(b) If the Court declines to strike out the application, further directions need to be made as to how the substantive proceeding should be advanced.

The law

[9] The respondents seek to strike out Ms [Giles]'s application in reliance on Rule 193 of the Family Court Rules 2002, which states:

> **193 Striking out pleading**
>
> (1) The Court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
>
> (a) discloses no reasonable basis for the application or defence or other pleading; or
>
> (b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or
>
> (c) is otherwise an abuse of the Court's process.
>
> (2) An order under subclause (1) may be made by the Court—
>
> (a) on its own initiative or on an interlocutory application for the purpose:
>
> (b) at any stage of the proceedings:
>
> (c) on any terms it thinks fit.

[10] Also relevant may be the provisions of Rule 194 which deals with stay or dismissal, and which reads:

> **194 Stay or dismissal**
>
> The Court may order that proceedings be stayed or dismissed, either generally or in relation to a particular application by which an order or declaration is sought, if the Court considers, in relation to the proceedings or to the application, that—
>
> (a) there is no reasonable basis for the proceedings or application; or
>
> (b) the proceedings are frivolous or vexatious; or
>
> (c) the proceedings are an abuse of the Court's process.

[11] Although the Rules are worded differently, the same principles apply under both rules.[1]

[12] When considering a strike out application, the Family Court is likely to focus on whether the evidence contained in the affidavit is sufficient to disclose a reasonable basis for the claim.[2]

[13] The threshold for a strike out application is high with the authorities making it clear that a decision to strike out or dismiss an application must not be made lightly. It is a discretion to be exercised sparingly and only when a very clear case is made out.[3] When considering the threshold, the Court should consider whether the claim expressed is arguable, prefaced by the assumption that all pleaded facts are provable.

[14] Conversely, the threshold is described as a low one to establish whether a claim ought, at least, to be heard.[4] The jurisdiction should not be exercised if the application could be sustained by appropriate amendment or if there remains a realistic possibility that evidence could emerge that overcomes what appears to be a gap or flaw in the applicant's case.[5]

[15] It is not sufficient that the claim is merely weak, it must be clearly untenable.[6] The quantum of relief which might be in the end be available, is not relevant to strike out.[7]

[16] If the claim is in a developing area of the law, or involves difficult questions of law requiring extensive argument, the jurisdiction is not excluded. Where the law has not been settled at the highest level, or a case is novel, the proceedings should be allowed to go to trial unless the Court is satisfied that the proposition of law advanced by the applicant is completely unarguable.[8]

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[1] *Garrick v Max Pennington Motors Ltd* [1996] DCR 244 at 252 and 262; and *Cross v Cross* [2017] NZHC 1272.
[2] *TD v T* [2019] NZHC 2490 at 16.
[3] *Seward v Goosen* [2016] NZFC 1884 at 41.
[4] *Re Coyne* [2005] 24 FRNZ 922.
[5] *Re Coyne* [2005] 24 FRNZ 922 (Judge Murphy).
[6] *Bean v Bean* [2019] NZHC 20.
[7] *R v Coyne*.
[8] *Porter v NZ Guardian Trust Co Ltd* [1996] 7 TCLR 322.

[17] When an application is struck out or dismissed, the door of the Court is effectively shut before the merits of the case can be looked at. For that reason, it needs to be abundantly clear that the application cannot possibly succeed. However, a stay can be removed on proper reasons being established.[9]

Family Protection Act Proceedings 2005

[18] At the time of [Ronald Giles]'s death, [Lorraine Giles], who is the eldest of his children, was 45. In the affidavit filed in the Family Protection Act proceedings by [Oliver Giles],[10] he says:

> [Lorraine] is a person with special needs because she is mentally handicapped as a result of brain damage at birth. [Lorraine] has a functional age of about 12 years, although her chronological age is 45. [Lorraine] is unable to live independently and requires supervision.

[19] Peter Gorringe, a barrister from Hamilton, filed an undertaking indicating his willingness to be appointed to "represent the grandchildren of the deceased and [Lorraine Giles] (being a daughter of the deceased who is mentally disordered)".

[20] In [Bryan Giles]'s affidavit, he states:[11]

> I accept that [Lorraine] has special needs. She was placed in a sheltered workshop in [location A], approximately 20 years ago as she could no longer live with our mother and her second husband. With training and supervision, [Lorraine] has become an independent person and to the best of my knowledge could support herself.

[21] On 16 November 2005 Peter Gorringe sought leave to relinquish his position as counsel for the grandchildren on the basis that he had met with [Lorraine Giles], who wanted to make a claim for further maintenance and support. Mr Gorringe considered that there was a conflict which prevented him from acting for both [Lorraine Giles] and the grandchildren. On 18 November 2005 the Court noted that Mr Gorringe had relinquished his position as counsel for the grandchildren and that new counsel would be appointed to act for them. Mr Gorringe continued to act for [Lorraine Giles].

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[9] *Balich v Talyancich*, 4 February 1987, Henry J, High Court CP500/86.
[10] Affidavit of [Oliver Giles], 4 June 2005, at para [6].
[11] Affidavit of [Bryan Giles], 5 July 2005, at para [5].

[22] Notwithstanding the comments made about [Lorraine Giles], and the questions raised regarding her capacity, it was not thought necessary for an application to be made appointing her a litigation guardian. Mr Gorringe continued to act for [Lorraine Giles], presumably having satisfied himself that he was able to receive instructions from her and act accordingly.

[23] In respect of these proceedings, I raised with counsel the possibility that [Lorraine Giles] was incapacitated, and ought to have had a litigation guardian formally appointed. However, counsel is satisfied that [Lorraine Giles] can give instructions. I have looked at the 2005 file. Despite comments made in the affidavits, there is no information contained raising concerns that Mr Gorringe was unable to receive instructions from [Lorraine Giles] to the extent that he could not sign a consent on her behalf. Accordingly, I am satisfied that the consent signed by Mr Gorringe, and the order of the Court based on that, must be treated at face value.

[24] In the 2005 proceedings Mr Gorringe filed a memorandum dated 24 March 2006 which identified the issues relating to [Lorraine Giles] as "being whether, and the extent to which, [Lorraine Giles] had a claim for further provision, relevantly:

(a) Her status as a child of the deceased: whether that has been recognised by the will;

(b) Her need for dependence on others and inability to provide for herself;

(c) How her position compares with that of the other beneficiaries, or the grandchildren;

(d) How her position compares with [Oliver Giles]'s:

(i) Should he establish a breach by their father;

(ii) If there has been a breach, what greater share of the estate would be appropriate to remedy it, and in which form. The choice appears to be between cash at present and cash at the end of the

life interests in the two properties, or a combination of both: or cessation of those life interests;

(iii) The form of the trust in favour of [Lorraine Giles]."

[25] The proceedings were ultimately settled by consent. Relevant to [Lorraine Giles], paragraph 3 of the consent memorandum, reads:[12]

> Clause 6 of the will, will be amended to the extent that the amount to be paid to the trust fund for [Lorraine], will be increased to $60,000 in total.

[26] Paragraph 7 reads:

> This agreement is in full and final settlement of any claims [Oliver] and any other party may have against the estate [Ronald Giles].

[27] The consent memorandum was signed by Mr Gorringe on [Lorraine Giles]'s behalf.

[28] Based on the consent filed, on 11 September 2006 Judge Brown made an order:

> By consent, orders accordingly.

[29] Judge Brown's order concluded the Family Protection Act proceedings.

[30] In respect of the 2005 proceedings, I therefore conclude:

(a) That Mr Gorringe was able to accept instructions from [Lorraine Giles] and signed the consent to resolve the Family Protection Act proceedings based on instructions received from her;

(b) That Mr Gorringe turned his mind to the relevant issues contained in the will of [Ronald Giles], including the extent and nature of the provisions made for her. This included the provision that the $60,000 was held in a trust for her benefit, with the trust to be administered by the trustees of [Ronald Giles]'s estate;

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[12] Consent Memorandum dated 29 August 2006.

(c) That the order made was in full and final settlement of the claims under the Family Protection Act.

What has happened since the Family Protection Act proceedings were finalised

[31] Since the settlement of the Family Protection claim, [Lorraine Giles] says that she has received no benefit from the $60,000 set aside for her benefit. It is because of the trustees' failure to give her anything, that [Lorraine Giles] has made another application under the Family Protection Act to vary the terms of the will so that her entitlements are paid in a lump sum.

[32] After settlement, it appears that the $60,000 was held by Norris Ward McKinnon for the benefit of the trust established for [Lorraine Giles].

[33] On 23 June 2008 Norris Ward McKinnon held $65,939.02. On that day the fund was transferred to Ian Orr and Associates.

[34] Soon afterwards, [Bryan Giles] set up a bank account and arranged for the funds held by Ian Orr and Associates to be transferred into that account. [Bryan Giles] then used the funds for his own purposes. Because of business failure [Bryan Giles] was subsequently bankrupted. Following an investigation [Bryan Giles] was convicted on charges, some of which related to the misuse or misappropriation of [Lorraine Giles]'s trust fund.

[35] On 22 August 2014 [Bryan Giles] was removed as a trustee of [Lorraine Giles]'s trust. [Johnny Green] of Hamilton accountant was appointed in his place. Accordingly, since that date the trustees of the estate have been [Marissa Cain] and [Johnny Green].

[36] The Trustees say that they have offered [Lorraine Giles] a distribution of $10,000, with more to be forthcoming, but that this was declined by her.

[37] The background, as set out in an affidavit of [Marissa Cain] filed on 16 February 2023, does not deny [Lorraine Giles]'s assertion she has received no benefit from her father's estate.

[38] In her affidavit of 16 February 2023, Ms [Cain] states:

> [32] Following [Johnny]'s appointment, [Johnny] and I have done our best to account for the funds received and manage the trust fund, as well as our respective obligations to all the beneficiaries.
>
> [33] Not long after [Johnny] had been appointed, [Johnny] and I passed a resolution to distribute $10,000 to [Lorraine]. This resolution was made on the basis that the instructions of my father's will were that we were to hold the trust funds on trust to use so much of the income or capital of the trust fund as we sought fit, for the maintenance or benefit of [Lorraine]. The intention was to continue to provide her with distributions ie, the $10,000 offered was not to be a one-off payment. [Lorraine] expressly rejected this advance and would not provide a bank account in order for us to provide the distribution.
>
> [34] As we were not authorised by [Lorraine] to make any further distributions, with the exception of the entire funds of $60,000 plus interest, and as we had not been provided with a suitable bank account, we were not able to make any further distributions.

[39] After [Lorraine Giles] filed the current Court proceedings, the trustees endeavoured to reach a settlement to avoid unnecessary legal costs. However, the agreement was conditional on the consent of the residuary beneficiaries of [Lorraine Giles]'s trust fund. Unfortunately, not all the residuary beneficiaries consented.

[40] The position remains unchanged. The trustees maintain that they are willing to make a distribution. [Lorraine] seeks a lump sum based on the $60,000 ordered in 2005, together with interest and costs. The residuary beneficiaries remain unwilling to settle. Accordingly, there is an impasse which cannot be resolved without the intervention of the Court.

[41] The trustees maintain that the current application under the Family Protection Act should be struck out on the basis that:

(a) There have been previous proceedings filed pursuant to the Family Protection Act. The orders made settled all claims;

(b) In any event the Family Protection application is out of time and leave has not been sought to file proceedings;

(c) The application is an abuse of the processes of the Court.

Should the application filed by [Lorraine Giles] be struck out

[42] Before answering the question whether the application should be struck out, I make the following observations:

(a) [Ronald Giles] intended that [Lorraine Giles] receive some benefit from his estate. To date she has not received anything;

(b) The adult beneficiaries of [Ronald Giles]'s estate likewise intended that [Lorraine Giles] benefit from [Ronald Giles]'s estate because they consented to the orders made in the initial Family Protection proceedings;

(c) The actions of [Bryan Giles] have compromised [Lorraine Giles]'s trust fund;

(d) On the information obtained, I am satisfied that [Marissa Cain] and [Johnny Green] have acted responsibly in endeavouring to resolve the difficulties created by [Bryan Giles]'s misappropriation of funds;

(e) If the evidence in [Marissa Cain]'s affidavit is accepted, the current trustees have faced significant difficulties caused by:

(i) The actions of [Bryan Giles];

(ii) The diminution of the trust fund caused by [Bryan Giles] and the legal proceedings and costs necessitated as a consequence;

(iii) The rejection by [Lorraine Giles] of the $10,000 offered as a partial distribution;

(iv) The willingness of [Lorraine Giles] to reach a settlement which has not been reciprocated by the residual beneficiaries.

(f) I have commented that it is morally repugnant that [Lorraine Giles] has received no benefit from her father's estate in the 18 years since his death. The fact that [Lorraine Giles] is vulnerable heightens the repugnancy, which remains ongoing. After I made these comments, [Marissa Cain] clarified, by affidavit, that the trustees attempted to pay money to [Lorraine]. If this is the case, then the blame attributable to the current trustees is diminished.

(g) That, if possible, this Court should resolve the current proceedings because:

(i) The amount at stake is modest;

(ii) Legal costs are likely to diminish the amount available. This would be to [Lorraine Giles]'s disadvantage;

(iii) If the proceedings need to be issued in the High Court, there will be further delay.

[43] Despite the comments made above, I have reluctantly concluded that this Court must either strike out or stay this application. For the reasons below I have determined that the application should be struck out. The reasons are:

(a) There have already been proceedings under the Family Protection Act. These determined the issues in full and final settlement of all claims.

(b) I am satisfied that it is an abuse of the process of the Court to attempt to relitigate a matter which has been finally determined;

(c) It is 18 years since the Family Protection Act proceedings were finally determined;

(d) Even if a second claim could be made under the Family Protection Act, this application has been filed out of time. No application has been made for this to occur;

(e) This is not a case where [Lorraine Giles] was unrepresented or where there was a failure to properly consider the amount she received from her father's estate, or the way in which it was to be received. The 24 March 2006 memorandum filed by Mr Gorringe confirms this.

(f) That ss 126 and 127 of the Trusts Act 2019 provides jurisdiction for [Lorraine Giles] to have the trustees' acts, omissions or decisions reviewed by the High Court. The High Court has jurisdiction to examine the actions of the trustees and make determinations as to [Lorraine Giles]'s entitlements and how these are to be received by her. Proceedings issued under the Trusts Act are the appropriate way of dealing with the issues raised by [Lorraine Giles], not proceedings issued under the Family Protection Act.

(g) I have considered whether s 141 of the Trusts Act 2019 gives this Court jurisdiction to deal with this application. I have concluded that it does not. I have reached that conclusion for the following reasons:

(i) Section 11 of the Family Court Act 1980 gives the Family Court jurisdiction to hear and determine a proceeding. Section 11(1)(gc) of the Family Court Act gives jurisdiction to hear and determine proceedings under the Family Protection Act;

(ii) Section 141 of the Trusts Act 2019 applies where the Family Court has jurisdiction under section 11 of the Family Court Act, and s 141(2):

> (2) The Family Court may, during the proceeding, make any order or give any direction available under the Act if the Family Court considers the order or direction was necessary –
>
> (a) To protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved; or
>
> (b) To give proper effect to any determination of the proceeding.

(iii) Accordingly, if the Court has jurisdiction, then it could make orders under ss 126 and 127 to review the trustees' acts, omissions or decisions and make any orders that the Court considers necessary,[13] including that the trust fund be paid in its entirety to [Lorraine Giles].

(iv) However, although this may provide a gateway to the Family Court having jurisdiction under s 141(2) of the Trusts Act, two hurdles remain. There must be a proceeding before the Court that can be properly resolved, and an order or direction needs to be necessary to protect or preserve property from future risks to the property.[14]

(v) If an application for strike out is successful there is no proceeding, and therefore no jurisdiction for the Family Court to review the acts of a trustee pursuant to ss 126 and 127 of the Trusts Act.

(vi) Past conduct in relation to the trust property is not relevant if it does not impact on future protection or preservation of the trust property. Therefore, it is not possible to consider the previous trustees conduct of inappropriately removing funds from the trust as a factor regarding protection or preservation of the trust property, when there is no ongoing risk,[15] and s 141 does enable the Court to look at the conduct of the trustees for failing to make a distribution.

(h) To preserve the position of [Lorraine Giles], I considered either staying the proceedings until the filing of applications in the High Court or transferring these proceedings to the High Court pursuant to s 141(6)

[13] Section 127(3)(c) Trusts Act 2019.
[14] Section 141(2) Trusts Act 2019.
[15] *Green v Hing* [2021] NZFC 4687.

of the Trusts Act. Again, and reluctantly, for the reasons set out above I decline to do so.

Order

[44] Pursuant to Rule 195 (1) (a) and (c) I now strike out the application brought by [Lorraine Giles] under the Family Protection Act 1955.

[45] I make no order as to costs.

G S Collin
Family Court Judge