

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

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**IN THE FAMILY COURT
AT TAURANGA**

**I TE KŌTI WHĀNAU
KI TAURANGA MOANA**

**FAM-2022-070-000153
[2023] NZFC 6755**

IN THE MATTER OF THE ESTATE OF [MARK INNES]
(DECEASED)

AND

IN THE MATTER OF THE FAMILY PROTECTION ACT 1955

BETWEEN [BETH INNES]
Applicant

AND [BETH INNES] and [HANNAH INNES] as
executors of the estate of [MARK INNES]

AND [ISABELLE BOYLE]
[LUKE INNES]
[RUBY DAY]
[SOPHIE HOOPER]
[NICK INNES]
[DOUG INNES]
First Respondents

AND [HANNAH INNES]
[CARLA INNES]
Other Party

Hearing: 12 June 2023

Appearances: S Hartley for the Applicant
A Cavanaugh for the First Respondents
K Waklin for the Executors
[Hannah Innes] appears in Person
[Carla Innes] appears in Person

Judgment: 3 July 2023

**RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO APPLICATION TO TRANSFER
PROCEEDINGS TO THE HIGH COURT]**

[1] [Mark Innes] died at Tauranga on [date deleted] 2020. He left a Will dated 27 August 2015, probate of which was granted to [Beth Innes] and her sister, [Hannah Innes], on 22 March 2021. [Mark]’s Will provided that his estate was to be divided equally between his nine children. The net value of [Mark]’s estate is approximately \$2,800,000, meaning that each of the nine children of [Mark] would stand to receive approximately \$311,110 from his estate.

[2] On 16 March 2023 [Beth Innes] filed an application for orders under s 4 of the Family Protection Act 1955 for further provision from [Mark]’s estate for her “proper maintenance and support”. All of the evidence in relation to the FPA application has been filed, and the matter is ready to be set down for hearing.

[3] On [date deleted] 2023 the High Court made an order removing [Beth] and [Hannah] as executors of [Mark]’s estate and appointing an independent professional executor, Mr Christopher Darlow, in their place.

[4] On 13 March 2023 [Beth] filed an interlocutory application seeking to have the substantive proceedings transferred from the Family Court at Tauranga to the High Court at Auckland. On the same date, [Beth] filed proceedings in the High Court against the assets of the [Innes] Property Trust, a trust of which [Mark] was the settlor, trustee and beneficiary. Counsel advises that the [IPT] in essence deals with [Mark]’s commercial interests, as opposed to his private interests.

[5] Ms Cavanaugh, in her written submissions, sets out that the High Court proceedings against the [IPT] pleads causes of action based on: breach of contract; promissory estoppel; proprietary estoppel, and quantum meruit. The damages sought in the High Court proceedings are against the assets of the [IPT], and not the estate of [Mark].

[6] The issue I need to determine therefore is whether the FPA proceedings should be transferred to the High Court, and from Tauranga to Auckland, or not. Ms Cavanaugh’s clients, and [Carla], all oppose the transfer. [Beth] seeks the transfer, and her sister, [Hannah], supports her application.

[7] The basis of the opposition is centred in the submission that the FPA applications and the civil proceedings in the High Court relate to entirely different matters, against different parties. While accepting that, it is Mr Hartley’s submission of behalf of [Beth] that the factual matters relied upon by [Beth] in support of her contention that there has been insufficient provision to recognise her proper maintenance and support under [Mark]’s Will, are similar to the factual matters upon which she asserts the civil and equitable remedies pleaded in relation to the High Court proceedings.

The Legal Position

[8] [Beth] relies on s 14 of the Family Court Act 1980, s 3A(3) of the FPA 1955, and rr 189 and 191 of the Family Court Rules. I agree with Ms Cavanaugh that s 14 of the FCA 1980 expressly states that it is “subject to the Act under which any proceedings are brought ...”. Accordingly, s 14 of the FCA 1980 is of limited relevance to the present application.

[9] It is s 3A(3) of the FPA 1955 which is of more relevance, stating:

The court to which an application is made may refer any proceedings resulting from the application, or any question in those proceedings, to any other court referred to in subsection (2A) if it considers that the proceedings or question would be more appropriately dealt with by the other court.

[10] If an order for transfer is made, as Mr Hartley concedes in his submissions, this Court has no jurisdiction to subsequently direct pursuant to r 10.12 of the High Court Rules 2016, consolidation of the High Court proceedings. As Ms Cavanaugh submits, if the decision is made by the Family Court to transfer the FPA proceedings to the High Court, the High Court may choose to refuse a request for consolidation. Furthermore, it seems to me that the Family Court also has no power to direct the transfer of the FPA proceedings from the Tauranga High Court Registry to the Auckland High Court Registry.

[11] As Fogarty J stated in *Hodgkinson v Public Trust*:¹

¹ *Hodgkinson v Public Trust* HC Dunedin CIV-2009-412-981, 11 December 2009.

[10] However, there is a crucial difference between subs (3) and (4) [of s 3A(3)]. Where an application is made to a Family Court Judge the Judge has a discretion whether or not to refer the proceedings or the question to the High Court. In the absence of an application the Family Court Judge also has a discretion

[11] However, where an application is made to the High Court the High Court has a duty to remove the proceedings to the High Court; if the criterion applies.

[12] Thus, this Court has a discretion as to whether to remove FPA proceedings to the High Court or not.

Submissions

[13] Dr Mackenzie does not dispute that transferring consolidation will delay the disposal of the FPA claim which is ready to be set down for hearing to proceed by way of a submissions only hearing. As she further submits, the High Court proceedings were only filed in March 2023 and are unlikely to be heard before the end of this year. They are also notably more complex than the FPA claims.² In Dr Mackenzie's submission it has already been two and a half years since [Mark] passed away, and that there is a practical and moral interest in his family being able to settle the estate and begin to move on with their lives. As she submits there is likely to be lengthy delay in the High Court and an increase in legal costs which inevitably come with High Court proceedings.

[14] Mr Hartley submits that there is a risk of inconsistent findings as between the Family Court and the High Court. In Mr Hartley's submission the factual matrix from [Beth]'s perspective is identical. That is, she is alleging that because of extraordinary levels of care and support from her towards her parents, but her father in particular, that she should receive a greater than equal share of the estate assets.

[15] Thus, in his submission the facts are relevant in relation to both sets of proceedings. He is understandably concerned, I accept, that there is the potential for the Family Court to make certain factual findings, and the High Court to subsequently make different factual findings.

² Written submissions dated 28 April 2023 at [27].

[16] What that submission ignores, as submitted by Dr Mackenzie and Ms Cavanaugh, is that [Beth]'s claims are made in different capacities, on different grounds, governed by different law and legal principles, against separate and distinct parties, with different duties and obligations regarding distinct assets, for different relief. I agree with the submission that it is important that those distinctions are maintained and are not "muddled", and that the relevant legal principles which apply in respect of each claim are not blurred.

[17] The legal issues are quite different. In relation to the FPA claims, the issue is whether [Mark] has breached his moral duty towards [Beth], and if so, how that moral duty should be rectified, taking into account the size of [Mark]'s estate, and the interests of the other beneficiaries, as well as the need to quantify the breach of moral duty. The claim, for example, in the High Court in relation to breach of contract involves entirely different considerations. That is, was there ever a contract between [Beth] and [Mark], if so, has the term or terms of the contract been breached, and what is the remedy, in terms of contractual principles. The equitable claims might conceivably involve consideration of similar factual issues, but the legal issues to be determined are entirely different.

[18] Fundamentally, these are claims against two entirely different entities. The FPA proceedings are against the personal assets of [Mark] which make up his estate. The High Court proceedings are against the [IPT] established by [Mark] which includes his commercial property dealings. Distribution of the [IPT] assets are pursuant to the terms of the trust and the discretion of the trustees. Distribution of [Mark]'s estate is governed by his Will, unless varied by the Court pursuant to the FPA.

[19] Mr Hartley acknowledges in his submissions that resolving the FPA claim in the Family Court does provide closure of the estate issues and allow for a distribution of the estate assets. However, in his submission it does not provide "total closure" because the High Court proceedings would remain outstanding, and the parties would then face the stress, inconvenience and expense of a second trial on the same issues regarding the other pool of assets. That submission however ignores the issue that I

have identified above; namely these are two distinct and disjoint claims against two entirely separate entities.

[20] Furthermore, as submitted by Ms Cavanaugh, in relation to the issue of the potential of inconsistent determinations to be made, as she sets out in her submissions, the parties are different. The causes of action are different. The assets claimed against are distinct.

[21] Section 3A(3) of the FPA gives the Family Court a discretion in relation to an application being made under the FPA, to transfer the proceedings to the High Court. I decline to make any such order. I decline to do so for the following reasons:

- (a) The proceedings are against two distinct entities.
- (b) There is no similarity in the legal issues as between the FPA proceedings and the High Court proceedings founded in contract and equity and equitable remedies.
- (c) Given the disjoint nature of the entities involved ([Mark]'s estate and the [IPT]), there is the potential for significant and unmeritorious delay in transferring the FPA proceedings to the High Court, when they are ready to be set down in this Court.

[22] Even if the proceedings were to be transferred, there is no guarantee that the proceedings would be consolidated. The issues around consolidation are in a sense identical to that around the opposition to transfer; namely no common areas of fact or law, and no common parties. An outcome whereby I transferred the proceedings to the High Court, and the High Court then declined to exercise its discretion to consolidate the proceedings would, from the remaining beneficiaries' perspective, be entirely unpalatable as it would lead to an unwanted and unnecessary increase in their costs, delay in resolution, and protracted time until resolution.

[23] I can see no proper or principled basis upon which I should exercise my discretion to transfer the proceedings to the High Court.

[24] Consequently, the application to transfer the FPA proceedings to the High Court is dismissed, as is the application to transfer the proceedings to the Auckland registry.

[25] As [Beth] has been unsuccessful, I anticipate there may well be an application for costs on the interlocutory application. To that end I make the following directions:

- (a) Any party seeking costs against [Beth] is to file their submissions within 21 working days from the release of this judgment.
- (b) [Beth] is to file any submissions in reply 14 working days thereafter.
- (c) Thereafter the registrar is directed to refer the file back to me for a chambers reserved decision in relation to the issue of inter partes costs.
- (d) Having made the decision to decline to transfer the proceedings to the High Court, the registrar should now ensure that the FPA proceedings are placed on the ready-for-event list and that they are set down for hearing on the next date that is reasonably available.

S J Coyle
Family Court Judge

Signed this 3rd day of July 2023 at

am / pm