

LOW
PRIORITY

3

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 492/83

821

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the estate of ROBERT ARTHUR GARRICK late of Wellington, Geophysicist

BETWEEN LYNN AALTJE GARRICK
First Plaintiff

AND FAY SASKIA GARRICK
Second Plaintiff

AND PETER HEIN GARRICK
Third Plaintiff

AND THE PUBLIC TRUSTEE OF NEW ZEALAND
Defendant

Hearing: 4 June 1986Counsel: Miss S. Taylor for Plaintiffs
R.P.A. Da Vanzo for Defendant
B.R. Boon for J.C. GarrickJudgment: 3 July 1986

JUDGMENT OF HERON J.

Robert Arthur Garrick died on 28 October 1982. He had twice married, and was survived by both his wives. His first wife was the mother of his three children: Lynn, born 17 May 1962, Fay, born 18 September 1963, and Peter, born 1 October 1964. The deceased and his first wife separated in 1965 and were divorced in 1972. In 1974 the deceased married his second wife, Janet Craig Garrick. Pursuant to his will he left the whole of his estate to his wife, should she survive him, and in the event that she should not survive, then to his three children.

When the deceased separated from his first wife his three children were then aged three, two and one respectively. Their mother considered it necessary to move away from Wellington, and took up residence in Foxton. The deceased continued to live in Wellington. The three children were brought up largely by their mother, but it is plain the deceased continued to keep in touch with his children. He kept up insurance policies on their lives, and attended school functions in which they were involved. According to the children's mother, he did not send the children Christmas presents, and refused to receive any presents from them. She says that the visits that I have referred to were only six or seven in number, and that they generally were when the children were involved in prize giving ceremonies at their schools. Despite the difficulties that were plainly present in the separation, the children speak in affectionate terms of their father, and suggest that relationships between them and their father improved as they grew older, and they were able to visit him at his home in Wellington. I think it is clear that the circumstances must have been difficult for the three children and their mother when they were quite small and living on the maintenance that the deceased paid, and the domestic purposes benefit. The children appear to have surmounted any difficulties there were, and have all achieved a level of education and satisfactory employment, and they reflect well on their mother and the undoubted effort she must have made. It is to the children's credit that they have achieved as much as they have

individually. I come to review their respective positions as at the date of hearing, but I think their situations, whilst they have changed in material ways since the date of the deceased's death, are nevertheless such as could well have been contemplated by the testator at that time.

Lynn Garrick is now aged 24. She is a dentist by occupation. She did well at school, and was obviously academically gifted. She was the dux of Manawatu College in 1979, and went on to Otago University to obtain her dentistry qualifications. She was also an able sportswoman. It is plain that she must have made sacrifices to pay for her university education. Whilst she acknowledges some assistance from her father, it was modest. She has now purchased a dental practice and is clearly making her way in her professional career, her prospects must be regarded as excellent.

Fay is 22. She appears to have done well at school, not only academically, but in other school activities. First she elected a career in kindergarten teaching, but after a period of time decided it was not the occupation that she wished to pursue. She is interested in cooking, and wants to make that her career. She has worked as a waitress and as a kitchenhand, but has lately progressed to becoming head cook at a rest home in Palmerston North. She speaks in affectionate terms of her father, and records that the relationship between her and him improved as she grew older. She is financially independent, but feels that she will in time wish to go into business as a

restaurateur. It is clear that her father provided her with little or no financial assistance during his lifetime, and she has achieved what she has by dint of her own efforts.

Peter is now aged 21. Originally his mother took proceedings on his behalf, but he continues present proceedings in his own right. Peter was also gifted academically. He obtained School Certificate, University Entrance and an A Bursary from Manawatu College, as well as taking part in a large number of community and school activities. He worked for a year on a dairy farm after leaving school, and in 1982 commenced at Massey University, completing a Bachelor of Science in 1985, having majored in computer science. He in turn supported himself as he completed his university education from a bursary and earnings from holiday jobs. In 1985 he completed his BSc Honours Degree in Computer Science. He is now employed with a well known computer company and enjoys a good income. His prospects look excellent.

It is probably appropriate here to mention that Mrs Carolina Garrick continues to live in a rented state house in Foxton. Apart from her household possessions she has no other assets, no motorcar and no savings. It is plain that the children will receive no financial advancement from her estate, and indeed it is possible that they may be called upon to support their mother in some respects in the future. At the moment that is prospective only.

The deceased had a modest estate. He had savings of approximately \$5,000, a motor vehicle valued at \$1,300, and some salary and tax refunds with a combined value of approximately \$3,400. He owned a house property at 147 Karepa Street, Brooklyn, which, at the date of death, had a government value of \$23,000, but is more realistically valued at \$58,000. This property was subject to a small mortgage to the Housing Corporation of approximately \$2,200.

The deceased's widow has some assets over and above those to which she succeeded, and whilst these funds have become mixed for reasons that will become clear later, it would seem that in her own right she had, at date of death, savings of approximately \$18,000. Combined with the monies to which she has already succeeded by virtue of the distribution of the estate she now has cash assets of \$26,000, and a 1981 motor vehicle. She is in receipt of National Superannuation and National Provident Fund Superannuation amounting to approximately \$700 per month. She is required to maintain the mortgage payments on the house property, which amount to \$30.56 per month. There is little contest in this case that the widow must have for her lifetime the property at Karepa Street, Brooklyn, or an equivalent. It is also not seriously contested except perhaps as to the extent, that should the property be sold the income arising from the proceeds should go to the widow for her lifetime. Miss Taylor has submitted that it would not be necessary to provide all the proceeds of the house property at Karepa Street for the benefit of the widow during

her lifetime. I do not accept that, and in the event that I was to make orders altering the absolute gift of the property to a life interest, then I would consider that the proceeds of the property would always have to be charged with the responsibility of providing the widow with a home of one kind or another until her death.

I come now to consider the question of breach of moral duty. I think there is little doubt that the testator was in breach of his moral duty to these children, who have done extremely well by him, despite adversity in their situation when they were young. As I have already recorded they have risen above that adversity and all of them have achieved considerably without any real assistance from their father. I think they have suffered the deprivation that all children suffer from the absence of a parent in their early years, but despite that they have acquitted themselves excellently so far, and the prospects are that they will continue to do so. I am sure the path would have been considerably easier if the parties had not separated, and that the testator's income was not required to be divided between more than one household. I think that all speaks for itself. But the testator had an overriding responsibility to his second wife. Whilst she had some income of her own she was by no means financially independent and her welfare must be the primary concern of the court in this case. She not only discharged the usual wifely responsibilities, but nursed the deceased through a long period of illness, he apparently had suffered a stroke and suffered from epilepsy and diabetes. She

says that she intends to leave the residue of her estate to her husband's three children in any event, and to her nephew. There are no other persons who could claim on her estate by virtue of the Family Protection Act. She demonstrates that intention by exhibiting a copy of her present will dated 22 January 1975 recording that intention. If that intention continues there could be little argument that the plaintiffs in this case will receive the entitlement that they would receive if the assets remain much as they are now by virtue of a remainder interest in the Karepa Street property. There is of course no guarantee that the assets in the estate will be the same as they are now. It can be argued that they could indeed improve. Another contingency is, of course, that the widow's testamentary intentions remain as they are now. I think it is unlikely that they would change, but it is impossible to say.

Having regard to the general statement of principle to be applied, Little v. Angus 1981 1 NZLR 126, I think that a capital provision could and should have been made for the testator's children but deferred until after a life interest in favour of the widow. Miss Taylor rightly submits that comparison between cases is difficult but I have taken a similar approach to Savage J. in a recent decision in Anderson v. The Public Trustee A170/82 Wellington Registry 13.9.85. Whether a life interest is appropriate for a surviving spouse as contrasted with receiving the complete corpus of the estate will often be a fine point. If children's interest can be preserved by deferring them until after the life interest

without unduly jeopardising the financial independence of an elderly surviving spouse then in my view it should be done. It will depend on the facts in every case.

This case is complicated by the fact that the estate has been distributed. Probate was granted on 11 January 1983, and it was not until 23 September 1983 that the Public Trustee received notice of an intended claim. By that time, apart from some \$600, all the assets in the estate had been transferred to the widow, including the Karepa Street property. Application is made pursuant to Section 49 of the Administration Act 1969, to follow the assets of the estate into the hands of the beneficiary. There seems to be no contest that such an application may be made, the particular time limits of Section 49(3) having been met. That subsection reads:

"Subject to the provisions of subsection (4) of this section, no application for an order under subsection (1) of this section shall be heard by the Court,-

(a) In the case of an application for an order under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949, unless the application for an order under the said subsection (1) is made within twelve months from the date of the grant in New Zealand of administration in the estate:"

Section 51 of the Administration Act 1969 provides as follows:

"In any case where an administrator or a trustee has made a distribution of any assets forming part of the estate of any deceased person, or subject to any trust relief (whether under subsection (1) of Section 49 of this Act or inequity or otherwise) against any person other than the administrator or trustee or in respect of any interest of .

any such person in any asset so distributed and in any money or property into which they have been converted, may be denied wholly or in part if:

(a) The person from whom relief is sought received the assets or interests in good faith and has altered his position in the reasonably held belief that the distribution was properly made and would not be set aside; and

(b) In the opinion of the court it is inequitable to grant relief or to grant relief in full, as the case may be."

This presupposes a two fold test. In the present case, it is submitted by the widow, that as the widow has inherited the family home and spent money on maintaining it in the belief that she had her own home, it would be inequitable to make any order that disturbed her ownership and enjoyment of that home. What the widow has done, in fact, is that since her husband's death she has paid the rates and mortgage payments on the property. She also speaks of the needs of the property so far as maintenance and repair is concerned. I do not think that the maintenance of the normal outgoings, which would be payable by a life tenant in any event, constitute an alteration of the position as required under Section 51. Nor, in the circumstances, do I think it would be inequitable to grant relief in the circumstances of this case. That depends, however, on certain other considerations which are relevant to the respective competing claims under the Family Protection Act. Section 49 makes it clear that I may make an order on terms that I consider appropriate requiring the transfer of any interest to which a person has succeeded, provided the two conditions which I have dealt with have been complied with. Here the application is made in time, and it is made by a separate and distinct application. See Re Selby (deceased)

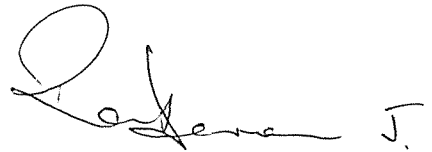
1966 NZLR 650; Re Due (deceased) 1977 1 NZLR 696; Walmsley & Another v. The Public Trustee 1973 1 NZLR 702. The following of assets involves a consideration of the discretion by virtue of the two fold test set out in Section 51. That section read with Section 49 entitles me to have regard to the orders that I consider appropriate, which give rise to the need to trace. In this case, the widow succeeded to the freehold of Karepa Street. It was proper that she should maintain the responsibilities for the small mortgage. The monthly outgoings are small, but they will substantially involve repayments of principal. The concern I have for the widow's ongoing situation would be relieved if that outgoing could be eliminated. I think the small balance held by the Public Trustee, which will have accumulated interest, should also be used to repay the mortgage, and to that extent the plaintiffs are entitled to that amount subject to that condition.

It follows from what I have said that I regard the testator in this case to be in breach of moral duty to his children, and that that breach can be adequately repaired having regard to the interests of competing claimants, in this case the widow, by allowing the plaintiffs the remainder interest in the property at Karepa Street. In order to give effect to this order, an order directing the transfer of the property by the widow, back to the Public Trustee (who has indicated a willingness to continue to act) is required. There will be such an order, and henceforth the Public Trustee, as executor and trustee of the will of the deceased, is to hold the

property on trust for the use and occupation of the widow during her lifetime. The widow is to meet the usual outgoings on the property and be responsible for repair. There is to be a power to purchase an alternative property. In the event that the property is sold, the income arising from the proceeds is to be paid to the widow for her own use absolutely. The order transferring the property back to the Public Trustee is subject to the plaintiffs repaying the Housing Corporation mortgage and they will have to pay to the Public Trustee the amount required. They are awarded, however, the net amount presently held by the Public Trustee to be used for that purpose. I will approve a draft order relating to the life interest and any further orders that the Public Trustee considers necessary to give effect to the life interest on the terms that I have ordered. In addition the plaintiffs are to pay the reasonable solicitor client conveyancing costs of the widow, giving effect to the order to re-transfer. There will be leave to apply further. In other respects the will is to remain undisturbed.

As to the costs on the Family Protection proceedings it is plain from the orders that I have made that there are no assets in the estate which can assist in the payment of costs.

In respect of the Family Protection proceedings and the following of assets proceedings, the parties will bear their own costs apart from the specific order relating to the retransfer of the property that I have made.

A handwritten signature in black ink, appearing to read "Robert J. Garrick". The signature is written in a cursive style with a large initial 'R' and a distinct 'J' at the end.

Solicitors

Castle Pope for Plaintiffs

Public Trust Office for Defendant

Chapman Tripp Sheffield Young for Mrs J.C. Garrick