IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY 21/2

A.1135/84

[redacted]

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IN THE MATTER of the Estate of CLARENCE LYEL GRANGE of Auckland, Retired, deceased

BETWEEN LYEL LESLIE GORDON GRANGE

Plaintiff

AND THE PUBLIC TRUSTEE New Zealand as Executor and Trustee of the Estate of the said CLARENCE LYEL GRANGE

Defendant

Hearing: 3 February 1986

Counsel: Miss Doogue for Plaintiff
R.H. Hansen for Mrs Crosby
P.J. Ryan for Defendant
Miss K.S. Urlich for Widow

Judgment: 3 February 1986

(ORAL) JUDGMENT OF BARKER J

This is an application under the Family Protection Act 1955 in the estate of Clarence Lyel Grange, late of Auckland, retired ("the deceased"). The application is brought by his two children.

The deceased died at Auckland on 17 May 1984, leaving a will bearing date 24 April 1972. The deceased left the whole of his estate to his widow, should she survive him for 28 days, which she did. The will went on to provide that, if she did not so survive him, then with the exception of some minor bequests, the whole of the estate was to go to his two children, Lyel Leslie Gordon Grange and Margaret Mary Crosby.

The will also contained a precatory provision addressed to the widow to the effect that, without creating a binding trust, she would, on her death, ensure that property she received from the deceased would pass to his children. However, there is no evidence in her affidavit whether she has any intention of fulfilling that request.

Before coming to the details of this case, there are two preliminary matters that ought to be mentioned; they have relevance to other family cases as well as to this.

The first concerns the late filing of affidavits. Now that the new Rules are in force, they will be strictly enforced. The Court office received, on 29 January 1986, a letter from the widow's solicitors in Napier, enclosing a further affidavit for filing on behalf of the widow, stating that this had been sent to other parties. This was sent in apparent ignorance of the new Rules which permit postal filing only in respect of interlocutory and probate matters. Apart from that difficulty, the affidavit contained contentious material; it said that the matrimonial property deed, to which reference will later be made, was not in fact made in the context of separation, but was a device to ensure that the widow received maintenance from her then husband.

Mr Ryan, counsel for the Public Trustee, advised that the Public Trustee was not favoured with a copy of this affidavit by the widow's solicitors. Under r.432, leave of the Court must be obtained before any affidavit may be filed after a matter has been set down for trial. R.432(2) makes a sensible exception in the case of affidavits which are updating information to be placed before the Court. For that reason, one could not object to - but can only applaud - the affidavit of the Public Trustee filed today which updates the information

regarding the estate.

I decline leave to the widow to file this further affidavit under r.432 because it contains contentious material which should have been placed in her first affidavit; besides, it should have been served on the Public Trustee; the Public Trustee entered into the matrimonial property deed as manager of the deceased's estate under the Aged and Infirm Persons Protection Act 1912 and might have been able to reply to the contention in the widow's affidavit.

I therefore think it important to note in this, the first family protection case that has come before me under the new Rules, that no affidavits, after setting down, ought to be filed unless with leave or unless they are updating affidavits; normally speaking, some sort of reasonable ground must be shown before leave can be granted, where an affidavit is other than in the category of an updating affidavit.

The second preliminary matter concerns the vagueness of the information given in the affidavits by the two claimants and the widow as to their financial position. I refer to the comments of McMullin J in the Court of Appeal in Re Franich (deceased) (Judgment 18 June 1981) where His Honour was considering affidavits which, like the present, had been sparse in the information about the claimants' circumstances.

> "The failure on the part of a claimant to make a disclosure of material circumstances may in some cases render it difficult for the Court to decide that there has been a breach of duty and so result in the total failure of the claim. The maxim "He who alleges must prove" is no less applicable to claims under the Family Protection Act than it is to other classes of litigation. Consequently there is an onus on a claimant to adduce evidence of his means as part of his overall onus to prove his case. What evidence

> will discharge that onus will depend on the circumstances of each case. In the instant case a breach of moral duty has been admitted by appellants and, the concession apart, I think that there was enough in the total material of the case to justify that concession being made. For that reason the claims of the daughters to not fail in liminte. But the inadequacy of the affidavits remains relevant to the quantum of any award."

I note in this context that no counsel made any point of the inadequacy of the financial information given by either the claimants or by the widow. For example, the claimant Mrs Crosby, stated that she owned a home unit but offered no evidence as to its value or situation or whether it was encumbered. The plaintiff himself offered a valuation but it was obviously self-assessed; no reference was made to any Government valuation or private valuation. The widow did not make any reference in her affidavit to national superannuation which I presume she receives, although her age was never mentioned in any affidavit; counsel agreed that she is over the age of 60. Her affidavit does not disclose details of her shares in public companies may have increased or diminished in value.

I make these general remarks because, in my experience, the standard of affidavits in family protection proceedings has not improved in recent years, and I think that, given the remarks of the Court of Appeal, quote above, it is salutory to remind counsel that they owe a duty to their clients to ensure that all relevant information is placed before the Court.

I turn now to the facts of this case. Both the claimants are in their 60s. The affidavits are again rather light on the details of the contact that particularly the plaintiff had with his father over the years. One can infer from the fact that the father, in 3 separate wills including the last will, made substitutionary provision for them, that there was no

estrangement between them of a disentitling sort. The claimants are the children of the deceased's first marriage which ended in separation about 40 years ago. Mrs Crósby says that her mother received only a pittance from the deceased and that her mother, who died in 1965, left an estate of only some $400.

The mother of the claimants and the deceased were divorced; the deceased married the widow on 23 March 1960. Some time in 1980, the deceased became mentally disturbed. He was admitted in January 1981 to the Geriatric Ward of the Thames Hospital; the plaintiff eventually found him accommodation in a rest home. Shortly after that, the deceased became a protected person and the Public Trustee dealt with his affairs. Even when in the rest home, the deceased had a habit of wandering. The plaintiff claims that he took him for drives, brought him to his home for meals and to Mrs Crosby's home.

The widow, for whatever reason, separated from the deceased around the end of 1980. When she left him, she claimed that she felt that he would be able to look after himself. She ackowledges that she did not see much of him in the last 3 years of his life because he did not recognise her; she did not visit him because she claims she could not have rendered him any practical assistance; she felt she could have done no more, after he had gone into the rest home, although he had 3 more years of life.

The widow entered into an agreement with the deceased under the Matrimonial Property Act 1976 on 25 August 1982. This was concluded on behalf of the deceased by the Public Trustee as his manager. Only certain assets were dealt with. In short, the widow received maintenance of $1300 a year until the death of the deceased and a lump sum of $26,000.

Mr Hansen is correct to submit that the property

comprised in the agreement was jointly owned property; there may have been property which both excluded from this arrangement. What the widow sought to do in the affidavit which I have not permitted to be filed was to say that this deed was merely a device to pay her maintenance. I must take the deed as it reads on its face. The fact of the matter is that the parties appear to have been separated for the last 3 years, and that the widow did nothing for the deceased over that period.

The widow's situation is that she has assets which she claims are worth $50,000 in round figures, but subject to some doubt because of the fluctuating value of shares. She has income, inclusive of the Universal superannuation, of $8,609. Her affidavit is not specific as to the arrangement under which she lives with her sister.

The plaintiff is aged 65. He has two children, both of whom are married with their own children. He and his wife own a house with an equity of $90,000. He and his wive have an interest in a small business called Electronics for Hearing Limited from which they, between them, earn $25,000 per year. Both receive national superannuation; their interest in the business amounts to $40,000 according to a recent valuation. I note that most of this information was provided to me by counsel from the bar without any opposition from other counsel; otherwise, it could not have been received.

Mrs Crosby is aged 62; she is divorced; she lives in a home unit, the value of which was not stated. She does have income from national superannuation and an unstated amount from $16,000 worth of investments. She says she does not keep good health. She suffers from arthritis and some years ago contracted encephylitis which resulted in some brain damage and which has affected her memory. Two of her four children have health problems. Patricia, who has two children of her own, suffers from arthritis and a

circulatory condition. Debra had a stroke 6 years ago at the age of 18; she has a residual disability, although she has made a remarkable recovery. There is no suggestion in the affidavit that either of these children with health problems has been dependent on Mrs Crosby at all. She claims to have visited her father reasonably frequently but that, towards the end of the marriage between the deceased and the widow, she felt she was discouraged from visiting by the widow. She says that the deceased was "careful" with money; she had to train herself as a pharmacist; she received no financial assistance from him.

The estate of the deceased was valued, at the date of death, at about $129,000. However, according to the updating affidavit of the Public Trustee, the estate of the deceased is now worth $286,568, largely because of a spectacular increase in the value of certain shares. That clearly puts the estate into the second Allen v. Manchester category.

Against this background, counsel for the widow properly conceded that both claimantss had made out a case for further provision.

Miss Doogue for the plaintiff stressed the assistance given by the plaintiff to the deceased in his last years and the fact that the deceased did not spend money on his children. Mr Hansen and Miss Doogue both pointed out that there was a property settlement under the Matrimonial Property Act 1976 between the deceased and his widow and that she had therefore received some capital from this source. They also stressed the lack of interest, let alone care, in the deceased shown by the widow at a time when one might reasonably have expected that a dutiful wife would have taken some interest in the deceased, despite his mental problems.

Both counsel for the claimants stressed the attitude of the Court taken in claims by separated wives where the fact of the separation and the conduct of the wife, whilst not disentitling, is a factor to be taken into account; see, for example, Re Jackson, (1954) NZLR 175. They also stressed the testator's wishes, as recorded by officers of the Public Trust Office, when he had the provisions of the Family Protection Act explained to him. On each occasion, he had stated his confidence that the widow would make provision for members of the deceased's family; as I have indicated earlier, there is no intimation in the widow's affidavit that she has any intention of doing that.

The widow was married to the deceased for 20 years; there is no evidence that there was any disharmony or misconduct other than the fact that the widow did nothing for the deceased in his declining years. Her assets are not great; because of her 20 years of marriage, she is in a somewhat different situation from that not infrequently encountered of a young widow married to an older man in a second marriage for only a few years who is in contest with the grown-up children of his first marriage.

I agree with Mr Hansen that this is an unusual claim; I am not surprised that counsel's researches have not been able to find anything quite similar. We have here the situation where the deceased was, for the last 3 years of his life at least, without testamentary capacity, where his manager had, on his behalf, made a matrimonial property settlement of sorts with his widow, and where, in view of the separation, one might have expected that the deceased would have at least reviewed his testamentary dispositions prior to his death; of course he was in no position to do so.

Although the information as to the assets and means of both plaintiffs is not as specific as it should have been and comes close to falling foul of the strictures of the

Court of Appeal in the Franich case, because of the lack of opposition, I hold that, not only can I find breach of moral duty but, in the totality of the circumstances, I have sufficient information upon which I can base an award.

It has been said many times, of course, that the Court cannot do the "fair thing" or make another will for the testator, although quite often what the Court does might give that appearance. I think I must still leave the widow with a reasonable amount because of the fact that she was married to the deceased for 20 years; but I must take into account also the fact that she did nothing for him over the last 3 years. Admittedly, there might not have been a great deal that she could do since he was, on her account, unable to recognise her and his physical and accommodation needs were being met from his own assets. However, I must also take into account the fact that she entered into this settlement; whilst it may have been a device for obtaining maintenance, it still yielded her a lump sum.

The widow and the plaintiffs have perhaps benefited from the "windfall" aspect of the rather dramatic increase in the value of a certain block of shares which the deceased owned; this increase has come about in the last 12 months.

I think that, looking at these matters "in the round" as one must do, justice will be done by making an award to the plaintiff of $75,000 and to Mrs Crosby of $95,000 by way of legacy; provision is made for them accordingly out of the estate.

I think Mrs Crosby is justified in receiving more out of the estate than the plaintiff because of the two children with problems. She is on her own, whereas the plaintiff has a wife who earns an income. I bear in mind the respective ages of the parties.

In addition, I award costs to both plaintiffs to be paid out of the estate; counsel may submit a draft order including suggestions as to costs.

R.D. Barker J.

SOLICITORS:

Cairns, Slane, Fitzgerald & Phillips, Auckland, for Plaintiff.
Simpson, Grierson, Butler, White, Auckland, for Mrs Crosby.
Solicitor, Public Trust Office, Otahuhu, for Defendant.
Carlisle, McLean & Co., Napier, for Widow.