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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.183/85

LR 359

UNDER THE Family Protection Act 1955

IN THE MATTER of the estate of ARTHUR WILLIAM LISTER of Rotorua, retired farmer

BETWEEN J.M.J. LISTER

Plaintiff

A N D THE PUBLIC TRUSTEE

Defendant

Hearing: 10 June 1987

Counsel: Royayne for Plaintiff;
Steed for Defendant;
Fenton for Arthur Morris Lister and Maureen Winifred Lister;
McKechnie for Carena Lister, Angela Lister and Ian Lister.

Judgment: 29 June 1987

JUDGMENT OF SINCLAIR, J.

At the commencement of these Family Protection proceedings, Mr Ronayne indicated that the sole order being sought by the Plaintiff was the vesting of a house property in the Plaintiff's name. As that did not then affect the interests of Mr McKechnie's clients, he applied for and was granted leave to withdraw.

The deceased, Arthur William Lister, was the former husband of the Plaintiff who died in Rotorua on 28 September 1983 leaving a will dated 23 February 1983 and probate being granted to the Public Trustee on 20 October 1983. These particular proceedings were not commenced until 14 October 1985 and are out of time, but counsel for the Plaintiff and Mr & Mrs Lister indicated a desire to argue the case on its merits in view of the limited relief sought. Nonetheless, the Court must still be satisfied that it is appropriate to extend the time. I will deal with that particular aspect of the matter more fully later. The will of the tesetator firstly forgave Mr & Mrs Lister a total of $20,000 which he had advanced to them and $500 was left to each of the five named charities. The will went on to leave $10,000 and any motor vehicles owned by the testator at the date of his death to his wife, the abovenamed Plaintiff, with $2,000 being left to his daughter Vera Cliff. In addition, $1,000 was left to each of his three named sisters. The house property which was owned by the testator and his wife as tenants in common in equal shares was left, as to the testator's interest in the property, upon trust, to permit the Plaintiff to have the free use thereof during her lifetime subject to her paying all outgoings on the property and keeping it in good order and repair. Upon the Plaintiff's death, the testator's interest in the house property was to be divided into two parts, one going to his son and the remainder to his daughter-in-law provided that if either predeceased the testator, then that beneficiary's share was to be divided equally between their four named children.

Both Mr & Mrs Lister survived the testator so that the gift over has no effect. The residue of the estate was left to eight named grandchildren in equal shares all of whom survived the testator, one of whom is still a minor.

The affidavit from the Defendant indicated that in the course of administration, all the pecuniary legacees, with the exception of that payable to Angela Lister, had been paid out and there was held by the Defendant as trustee, as at the date of hearing, the sum of $8,745.00 in cash, $2,655 in respect of Angela Lister, and the estate's half interest in the property valued as at September 1986 at $37,500. As at the date of death, the half interest had been valued at $18,000. As indicated earlier, there was no desire to set aside or attack any of the distributions already made and the Plaintiff accepted that I could regard the money set aside for Angela as having in fact been a distribution to her. Thus, the concern of this application was merely the estate's half interest in the property situated at 25B Fairview Road, Rotorua.

The facts show that this was a second marriage with the Plaintiff now being 79 years of age. She and the testator were married for almost 6 years. The Plaintiff had had a previous marriage lasting 29 years and of which there were no children. On the death of her first husband she was left owning a property at 100 Eruera Street, Rotorua, as well as two flats in Ruihi Street, a car, her personal effects and furniture. She subsequently sold the Eruera

Street property and moved into one of the Ruihi Street flats and let the remaining flat. Later still, the two flats were sold and the Plaintiff acquired a unit at 14B James Street. The sale price of the flats was $23,000 and the cost of the James Street unit was $16,000 which was later sold for $28,000 shortly before the purchase of the Fairview Road property for $33,500. At the time the Fairview Road property was acquired, it seems apparent from the affidavits filed that the Plaintiff herself contributed about $31,500 towards the purchase price with only about $2,000 coming from the testator. At the time of the hearing, the Plaintiff had, besides her interests in the house property, some $30,000 in investments and it would appear that some of that has come from the excess which resulted when the flats were sold and the James Street property was acquired as well as the sale of a motor vehicle. The balance appears to have come from savings over the years, including the time when she was living with the testator. At the time of their marriage, the testator himself, according to the Plaintiff's affidavit, had assets of some $40,000, and the property at Malfroy Road. At the time of his death, the testator had invested the sum of $22,398 and had advanced to his son and daughter-in-law some $20,000. In addition, according to his son's affidavit, the testator had gifted him a further $1500.

The history regarding the testator's property in Malfroy Road is of some interest. According to the Plaintiff, when it was sold, the testator was to make up to her his half interest in the property which had been acquired in Fairview

Street and while she acknowledges that some money was paid to her over the years by the testator, she never did receive the full half value of the property nor did she receive any interest on her original outlay. At the time of the marriage, it is apparent that the Malfroy Road property was let at $70 p.w. It was sold in November 1979 for a total price, including an interest content, of $29,120. The mortgage advance, according to the Defendant's records, was dated 6 November 1979 and as at the date of death, there was still outstanding the sum of $14,980. $14,140 therefore had been paid off during his lifetime. Both the testator and the Plaintiff were in receipt of pensions with some money coming from investments. The household expenses were shared equally and the Plaintiff deposed to the fact that from time to time, as the testator received his pension, rent and other income, he would make advances to his son. The Plaintiff in her affidavit says that not long after the marriage, her husband deteriorated, he suffering from arthritic hips and osteo arthritis in his legs with the result that he required considerable care and attention from the Plaintiff. Some six months after the marriage, it became necessary for the Plaintiff to give the testator his breakfast in bed every morning. She cooked all the meals and did all the housework although the son does say in his affidavit that his father was keen on working outside and maintained a garden in good order and condition and a good vegetable garden as well. There is no challenge to that by the Plaintiff. Following her husband's death, the Plaintiff stated that she became ill and her condition

was subsequently diagnosed as pernicious anaemia. A medical certificate was annexed to her affidavit from Dr Leigh which stated that the Plaintiff, in March 1984, developed a severe viral illness whilst she was staying in Whangarei. Dr Leigh saw her at the end of May 1984 when she was unwell with pleuritic chest pains and shortness of breath with signs of persistent chest infection. She was subsequently diagnosed as having pernicious anaemia which resulted in her being admitted to hospital and finally being discharged on 28 November 1984. According to the doctor, the Plaintiff's general health was such that from March to the end of November 1984, she would have been quite unable to attend to legal matters or a Court hearing. A notice of the intended claim was first given on 14 May 1985 with the Plaintiff being asked by her solicitors to supply further information - which she subsequently did - resulting in the issue of the proceedings.

The affidavit filed by Mr Lister states that he believed that instalments from the sale of the Malfroy Road property went into the common pool of matrimonial funds. Without being unfair to Mr Lister, that is really supposition and the preponderance of the evidence in my view is to the effect that it was in the main the Plaintiff's money which was utilised in the purchase of the Fairview Road property with the advances made to the son from the testator coming at least in part from the instalments from the sale of the Malfroy Road property as deposed to by the Plainitff. Mr Lister does accept that his father suffered badly from arthritis

and also osteo arthritis in his legs, but that this did not inhibit him from doing general work about the house including the garden. The son is working in a private consultancy capacity. However, that is a venture of recent date and figures as to his financial position were not available. His wife was working part-time as a horticultural assistant earning approximately $7,000 p.a. He is currently in the process of building a house and it is to that property that the various advances from the testator have gone. He also deposes to going to Rotorua relatively regularly to see his father and step-mother and there is no reason to doubt that he was other than a dutiful and supportive son. The Paintiff in her affidavit stated that at no time had she received any gifts or presents from the testator. Mr Lister's comment is that while his father was not said to be a generous man, his stepmother lacked for nothing.

The totality of the evidence available to my mind shows that the Plaintiff herself was a dutiful, caring and loving wife who gave of her time and attention to her husband who obviously suffered from considerable physical disabilities. It is little wonder that upon the testator's death, she herself should fall ill with the strain and worry of what had gone on over the previous few months. Despite his disabilities however, I am prepared to accept that the testator did work around the property and maintained a garden in a workmanlike manner. His estate is not by any means large but he did, during his lifetime, assist his son and daughter-in-law. He even made provision for some charities as well

as his sisters and grandchildren. At the time of making the last will, the Defendant's file indicates that there was a discussion about the provisions of the Family Protection Act with a notation that the testator was confident that his wife would be perfectly content with the provisions he had made for her and that she had far more money than did he. In making that statement, I am satisfied that the testator was in error. He further referred to his daughter and her husband being in the millionaire category and that the other beneficiaries needed the money far more than did she. I do not know what the daughter's position is but she has made no claim against the estate and one can but infer from that that she is not in any way in need.

What then should be done in relation to the Plaintiff's claim? So far as the extension of time is concerned, the matter was recently discussed in the Court of Appeal in the decision of In Re Magson (1983) NZLR 592, where the following appears at p.598:-

> "With regard to the widow's appeal against the refusal of an extension of time to her under the Family Protection Act, factors relevant to the exercise of the discretion to extend time have emerged from such Supreme Courts decisions as Hoffman v. Hoffman (1909) 29 NZLR 425; Sheehan v. Public Trustee (1930) NZLR 1; Re Brown (1949) NZLR 509; Re McGregor (1960) NZLR 220 (affirmed without separate discussion of this point (1961) NZLR 1077). Compare Re Hale (1981) 1 NZLR 704, 709. The factors include the length of the delay; the extent to which it is excusable because of ignorance of rights or otherwise; the strength of the claim that there was a breach of moral duty by the deceased, and the extent of any prejudicial effect on beneficiaries who have ordered their lives in reliance on the will or intestacy. The motives of the applicant are also relevant, but in the present as in most other cases

> one has to be cautious before giving major weight to them, for they can be difficult to assess fairly - especially on affidavit evidence."

In this case, Mr Lister has suggested that the real motivation behind the Plaintiff's claim is that she was somewhat irked by the periodic visits from the Public Trustee's office. I do not think that is so. I think the real reason is that she feels she is entitled, having regard to all the circumstances, to have the home vested in her name solely.

Insofar as the general principles applicable in Family Protection cases are concerned, they were restated in broad terms in Little v. Angus (1981) 1 NZLR 126 and I quote from p.127:-

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events. Experience in administering this legislation has established the approach in this Court that on an appeal the Court will not substitute its discretion for that of the Judge at first instance unless there be made out some reasonably plain ground upon which the order should be varied. All this is so familiar that authorities need not be cited."

On behalf of Mr & Mrs Lister, counsel referred to two decisions

namely Re Wilson (1973) 2 NZLR 359 and Re McNaughton (1976) 2 NZLR 538. Both of these cases really have facets of their own. The Wilson decision involved a very small estate indeed and reference was made to the fact that, in the main, the attitude of the Courts had been against the making of awards of capital sums to widows firstly because it meant that children would be deprived of their patrimony by such a grant and secondly the husband's capital should not be utilised to support the widow in the event of remarriage. In the McNaughton decision (which involved a second marriage), the situation was more complicated by there being concurrent applications under the Family Protection Act 1955 and the Matrimonial Property Act 1963. In that case, Beattie, J. referred to the decision in Re Snow (1975) Current Law (NZ 1192) and compared the facts of that case with those in the McNaughton case as being somewhat similar. But the same considerations in relation to the facts do not apply in my view in the present case. I am conscious of the fact that counsel for Mr & Mrs Lister relied fairly strongly on one passage in Beattie, J's judgment which appears at p.543 as follows:-

> "As I have already mentioned, generally speaking, where there is a conflict between the second wife and the only child of an earlier marriage, a life interest is a reasonable basis because the capital ultimately is preserved for the child and is not unfairly passed on to strangers in blood."

I simply comment that there is no conflict between the parties in this action save for their differing prejudices in relation to this present application. I note that in the above case, the Judge pointed out that he was concerned with a situation

that might arise where capital may be unfairly passed on to strangers. I do not think that the same considerations apply in the instant case. Firstly, the Plaintiff had no children of her first marriage and there is no indication as to the possible destination of her estate. Secondly, I am satisfied that it has been demonstrated that it was her money, and her money alone with the exception of about $2,000, which resulted in the acquisition of the Fairview Raod property. I am satisfied that whatever payments were made to her by the testator during his lifetime, they were certainly not regarded as 'paying up' the testator's share of the purchase price but may more properly be regarded as contributions towards the marriage partnership. Thus, in my view, the question of unfairness does not really arise.

When one has regard to the changing econimic and social attitudes in the community it is not against principle, in the circumstances which exist in the instant case, for there to be an order vesting the whole of the property in question in the Plaintiff. Each case must depend upon its own facts. There is no ability on the part of the Plaintiff to demand that the present property be resold and the proceeds reinvested in a more appropriate property if that should become necessary by reason of her state of health or her inability to cope with the type of property which she now lives in. Prior to her second marriage, she had owned her own unencumbered home and it does not seem to be unjust or unreal for her to now request that she be placed in a position somwhat similar to that which she enjoyed prior

to her second marriage having regard to all the attendant circumstances. I do not think too much can be said about her investments. Any surplus cash which she had from earlier property transactions, plus the proceeds of sale from her motor vehicle, appear to have been accumulated. With the legacy from her husband's estate, and some degree of prudence, her present level of investment could have been reached without difficulty.

To my mind the testator, in making the statements which he did to the Public Trustee, erred as to his wife's financial position. Had he directed his mind to her requirements in later life, he would have seen that she may have needed alternative accommodation or even required prolonged hospital and nursing attention having regard to her age - and he ought to have directed his mind to those matters.

In all the circumstances of this case, I am of the view that it would be unjust not to accede to the Plaintiff's request - which involves holding that the testator has failed in his moral duty to the Plaintiff. Accordingly there will be an order extending the time for bringing the proceedings to 14 October 1987. There will also be an order vesting the estate's half interest in the property situated at 25B Fairview Road, Rotorua, in the Plaintiff, she thereby becoming the sole owner thereof. The Plaintiff, Mr & Mrs Lister and the parties represented by Mr McKechnie are entitled to have their costs paid out of the estate and I would ask counsel to submit a memorandum in relation

to those costs bearing in mind that the Public Trustee's costs must also be met from the cash which he at present holds.

P A Davis J.

Solicitors:

East Brewster Urquhart & Partners, Rotorua, for Plaintiff;

The Solicitor, Public Trust Office, Rotorua;

K. Flavell, Papatoetoe, for Arthur Morris Lister & Maureen Winifred Lister;

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