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CP 433/92

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

c 93/723

UNDER	The Family Protection Act 1955
IN THE MATTER	of the Estate of MARGARET HENDERSON late of Wellington, Retired, Deceased
BETWEEN	JASMIN ANN MORRELL of Wellington, Married Woman Plaintiff
AND	DAVID MAXWELL LYNN and JOHN GEORGE SWAN of Wellington, Solicitors Defendants

re.

Hearing: 18 March 1993

Counsel: M.F. Quigg and Mr A.M. Stevens for the Plaintiff
Peter Henderson in Person (son of the deceased)
Megan Evans for the Trustees

Judgment:

JUDGMENT OF HERON J

In these Family Proceedings Act proceedings there is a contest between adult brother (Peter) and sister (Jasmin) in respect of the estate of their mother, who died at Wellington on 2 September 1991.

She made a will some seven months earlier on 25 February 1991 which gave her grandchild Rowan Morrell, on his attaining 20 years the sum of $10,000. The contents of a safe deposit box containing personal effects worth $5,370 were left to her daughter Jasmin. The will forgave the

Margaret Henderson Trust any amount owing the testatrix at date of death, apart from $10,000 to be used to pay the legacy to Rowan. The residue of the estate was given to Peter.

Clause 7 of the will says:

> "In making the provisions of this my will I am mindful of the obligations that I have to both my son Peter Anthony Henderson and my daughter Jasmin Ann Morrell. I have considered these obligations carefully and have determined that because of the care and devotion that my son Peter has afforded me over the years, and that I believe my daughter Jasmin's financial position to be markedly superior to that of Peter, I have determined that through the creation of the MARGARET HENDERSON TRUST I have discharged my obligations to my children."

On 2 November 1990 the testatrix, then aged 83, settled a family trust on her son and his partner, Lorraine Isobel Easthope as trustees, which provided Peter, his wife and their children would be the discretionary beneficiaries. Whilst the complete picture did not appear from the papers, Jasmin understood that the trust fund included proceeds from the sale of 15 Ratanui Road, Paraparaumu, the home of the testatrix and her husband, and a property at 2A Wanaka Street, Johnsonville. In transferring those assets to the trust a debt had been created in favour of the testatrix and is forgiven in the will. This asset is central to any relief that Jasmin may be entitled to, for without recovery of that asset there is very little left in the estate.

It seemed curious to me that in the absence of any death duty considerations a woman of this age (84) and in the testatrix's position should be settling property by way of family trust. However Peter confirmed the details, and indeed volunteered that

the plan had been to forgive the debt every year to the extent of $27,000, the maximum allowable without incurring gift duty, until the debt and the major asset in the estate disappeared. I received no satisfactory explanation as to why the deceased should embark on that enterprise, but Peter was quite candid so far as the long term plans were concerned. He agreed with me that the outcome of the gifting arrangement would mean that the deceased's estate would be insignificant.

In the interim the debt was dealt with in the will by way of forgiveness. The daughter is left with $5,370. Her son receives $10,000. In round terms Jasmin's family interests take in the order of $15,000, the Henderson family interests directly or indirectly take the balance of the estate, some $135,000.

Jasmin is now aged 52 and came with her parent to New Zealand in 1952. Peter is aged 45. The family lived at 2A Wanaka Street, one of the properties now held by the trust. She lived with her parents at home until she married in 1970. In 1959 she worked in the Reserve Bank and made a significant contribution by paying board and purchasing a number of chattels for the use of her parents. Peter acknowledges that contribution by indicating that his sister provided constant reminders of it.

Jasmin paid most of the costs of her wedding. Her brother agrees this is so, but says he lent money to his father to help with the wedding also.

Rowan was born in 1972. Peter and Lorraine Easthope had their first child in 1974 and lived together on a permanent basis in 1976, and have had three further children, already referred to. Some

time in the 70s Peter and Lorraine lived in a Newlands property owned by their parents. There is a contest as to whether they paid rent. Peter says that he met all the outgoings on the property and paid rent. In any event the property was apparently in a dilapidated condition.

In 1978 Jasmin was diagnosed as suffering from Graves' disease, a thyroid condition, which requires continuous medication. To this information, contained in Jasmin's affidavit, Peter responds:

> "I have no medical knowledge, but does Graves' disease sometimes lead to irrational and unreasonable behaviour in those afflicted?"

Whilst I did not see the parties in the witness box, I saw them in person in the Court, and I have read their affidavits. I saw nothing to suggest that Jasmin's behaviour was either irrational or indeed unreasonable. This comment and others in the affidavit are a small window onto the difficulties that have developed between brother and sister in this case. Relationships between brother and sister seem to have deteriorated in 1978, when the testatrix and her husband were overseas, and Peter and Jasmin had responsibility for their affairs in New Zealand. It is perhaps interesting to contrast their versions. Jasmin says:

> "During this time Peter and myself shared responsibility for looking after the family home and feeding the cat. I was eager to brighten the house for their return by undertaking cleaning, such as washing curtains, while our parents were absent. Peter appeared to be upset by this and suggested I was stealing this property from our parents' home."

Peter agrees that he made the key available to his sister and that they shared the responsibility for looking after the cat. He said:

> "This seemed reasonable enough and would save me a couple of trips from Lyall Bay, so I gave her a key. Did I ever live to regret that. Now that she had access to the house she set about shifting things around inside the house, taking curtains down and generally interfering with things she had no mandate to do. I knew Mum and Dad would not be happy, especially my father, and I began to feel as if I had let him down. Jasmin could not be reasoned with. She could not be persuaded to leave things alone. I had a big problem and I solved it in a very passive way. I changed the lock. Phew!! Back to square one. I continued as I had before until Mum and Dad came back Christmas 1978."

On her parents' return Jasmin says that she welcomed them home with flowers and groceries, but that Peter became very agitated, and their followed a physical assault on her. This is strenuously denied by Peter. Jasmin's husband, Kerry Morrell, whilst not witnessing the assault, says:

> "On the day of the assault, Jasmin arrived home after visiting her parents at their Johnsonville home. She had bruising down her right side and her clothes were torn. Jasmin was very distressed as a result of the assault and remained so for a long time. She was clearly very shocked by what had happened."

Kerry and Jasmin decided that in those circumstances she should not be alone with Peter but they decided not to lay a complaint because it would cause further division in the family. Kerry Morrell confirms that after the assault he spoke to the testatrix about what had happened, and she did not dispute the assault had occurred. As can be imagined after that the respective families saw little of one another.

In 1982 Jasmin and her husband moved to Washington DC, United States of America, where Kerry was employed with the International Monetary Fund. In 1984 they returned to live in Wellington. It is suggested that during that time the Newlands property was subdivided and two houses built and sold off. According to Jasmin the testatrix told her that she had sold them to Peter at a very favourable price, and Jasmin believes that Peter would have received a very considerable benefit from this transaction. Peter does not deny that the transaction which he entered into was of benefit to him, and made money, but he says that was due to his own enterprise, his willingness to take risks, his own personal effort and that the transaction was not subsidised by his mother in any way. What is clear is that Peter is not unfamiliar with property, and the returns that it may provide, and the advantages of owning it.

Up until her father's death Jasmin says that she continued to supply improvements to her parents' property after they sold the Newlands property and went to live at Ratanui Road, where the testatrix lived until her death. Despite the difficulties with her brother she says she kept in touch when they were living in Johnsonville and after they shifted to Paraparaumu. She says that she endeavoured to ensure that Rowan had a great deal of contact with her as well, and if the bequest is any reflection of that she seems to have been successful.

The testatrix's husband died in September 1989, and again there were difficulties between the two. It is difficult to get to exactly what happened in the events surrounding their father's death, both Peter and Jasmin give different accounts of it. What

does seem clear is that advice to her of her father's condition was delayed by Peter, but Lorraine Easthope did telephone and as a result Jasmin and her husband were there when her father died.

There were continuing difficulties following efforts by Jasmin and her husband to visit the testatrix. Shortly after her husband's death the testatrix moved into the home of Peter and Lorraine in Trafalgar Street, Johnsonville. According to Jasmin, a visit to her mother was facilitated in December 1989, but the telephone number was never made available. She was unable to ring her mother. She says she was consistently refused the number, and both Lorraine and her mother declined to give it as it might upset Peter. The barrier thus erected preventing Jasmin from ringing her mother is in my view extraordinary. I was unimpressed with the response to that allegation made by Peter. He said:

> "I was never asked at any time by the plaintiff or her husband Kerry for my telephone number. Had I been asked openly, I might have acceded."

Peter says that when his mother went to live with him in Johnsonville he resolved that no-one would ever be denied access to her. If his attitude to the telephone is anything to go by those were empty words.

Another incident needs to be viewed to balance where the merits of the case lie so far as this conflict of personalities is concerned, and that is best done by looking at some of the circumstances where those are largely accepted by the parties. Jasmin says:

> "When I attended the funeral Peter was again very rude to me and at one point in the church ordered me away from Mother."

Peter's response to this was:

> "Mum was a little slow to move away after the coffin had left the church. I was supporting her when I saw a large hand reach for her arm. I could not allow Mum to be treated like a rag doll in a tug of war. I said two words, "Leave her". Mercifully she did. At the graveside Mum sat in the car with her door open and Jasmin had a long conversation with her. I did not intrude."

There is an element of possessiveness about Peter's attitude which comes through even the cold print of affidavits. On any view of it such behaviour at a funeral seems extraordinary. I had the opportunity of assessing Peter's demeanour when he made his submissions in Court. While I thought his submissions well presented, and he had researched them, there was an aggressive, uncompromising and domineering attitude that was plain to see.

Jasmin says that from the time that her mother moved into Peter's house she was never informed of any developments in respect of the Ratanui Road property, or the family home at Johnsonville, and says that she was completely denied any opportunity to share in care giving or to maintain normal contact with her mother. She says that her medical condition now reveals hypertension.

Events culminated in learning of her mother's death several hours after it occurred. She received this information not from her brother, but from Lorraine Easthope. Peter's explanation for that is that she had changed her telephone number and her new number was unlisted. Friends known to Peter had her number. It is all very sad that Jasmin was not advised when her mother's health deteriorated. The

responsibility for that plainly lies with Peter and the excuses that he gave for not doing so are unimpressive.

In the event Jasmin did not attend her mother's funeral, although her husband and Rowan did. I accept Jasmin's explanation that she had written to her mother advising her of the unlisted number, also her husband's place of work was known.

Jasmin wanted to tape some parts of the funeral service so they could be sent overseas to relatives. Apparently this had been done without objection at her father's funeral. Peter's blunt response is:

> "I consider this to be macabre and bizarre and not something Mum would have wanted. I did not allow that to happen."

In discussing the contents of the will the plaintiff considers that she did all she could considering her health and the adverse situation brought about by Peter's attitude towards her. She acknowledges that Peter and Lorraine loved her mother dearly and gave the best caring for her mother in the last two years of her life. That is a significant concession, one born of a genuine witness.

In discussing the contents of the will the plaintiff considers that she has been excluded, and that undoubtedly is the effect of it. Peter would argue with that, saying that the beneficiaries of the Henderson Trust have no further entitlement under the will. But the substantial assets had gone across to the trust and they all belong at the discretion of Peter and Lorraine Easthope to whomsoever they choose. Although Rowan's bequest

must be taken into account in any consideration of the entitlement of the Morrell family as against the Henderson family there is serious inequality raising a clear suggestion of breach of the testatrix's moral duty.

I have not seen a family trust used in circumstances such as these. The only satisfactory inference to be drawn is that it was designed, if it could, to defeat family protection claims. This would be the case if an estate's assets were depleted by transfers to the trust followed by gifting arrangements reducing the resulting indebtedness.

I was not required to consider and heard no argument on whether such an alientation of property to the trustees was a voidable alienation at the suit of the plaintiff pursuant to s.60 Property Law Act 1952.

The plaintiff's submissions centred on general principles, firstly those referred to in Little v Angus [1981] 1 NZLR 126, and the further statement in Re Leonard [1985] 2 NZLR 88 at 92, where the Court of Appeal said:

> "The question of whether the testator was in breach of his moral duty to his daughters as claimants on his bounty must be determined in the light of all the circumstances and against the social attitudes of the day. Mere unfairness is not sufficient and it must be shown that in a broad sense the applicant has need of maintenance and support. But an applicant need not be in necessitous circumstances: the size of the estate and the existence of any other moral claims on the testator's bounty are highly relevant and due regard must be had to ethical and moral considerations, and to contemporary social attitudes as to what should be expected of a wise and just testator in the particular

circumstances."

In Re Anderson High Court, Wellington, A170/82 Savage J said:

> "The development of the attitude of the Court to such claims is helpfully discussed in Chapter 12 of the Law of Family Protection and Testamentary Promises in New Zealand by W M Paterson. I note the general statement that in the case of adult children able to support themselves the Courts have progressively moved from an attitude of reluctance to make substantial provision for them to a point where orders granting lump sums of the share of the capital of the estate are clearly made."

Mr Henderson had carefully done research into the authorities and referred me to In Re Blakey [1957] NZLR 875; and Re Young [1965] NZLR 294 and other cases. These cases remind the Court that the first inquiry is as to need, but that is tempered, as was said in Little v Angus (supra), by assessing need as not necessitous circumstances, but need in the broad sense. Mr Henderson claimed, with some justification, of the devoted time and attention he paid his mother. That however did not entitle her to be as generous as she was. She had a responsibility to another child as well. No doubt the time spent in looking after his mother was time that might have been used in looking after his own interests, and I have some regard to that.

In Blakey, a wealthy man left his residuary estate to charity, leaving the income on that estate to his son as to one-third and daughter as to two-thirds. The case is very different from the circumstances here. In the course of this case North J reaffirmed the principles of In Re Allardice v Allardice [1910] 29 NZLR 959. The Judge considered that the son's needs were not such as to require capital, as might have been the case

had he been younger, and that one-third of the income was sufficient notwithstanding that the Judge felt it unjust not to leave him with the residue as well. The daughter's circumstances had so changed that she was in no need of any capital at all, and indeed was a protected person under the Aged and Infirm Persons Protection Act 1912. What the Judge said, and what Mr Henderson relies on here, is (877):

> "As I understand the matter, I have no jurisdiction to do so unless I am first satisfied (whatever my views are of the wisdom or otherwise of the testator's provisions) that there is a need for maintenance. And I just cannot say that in the case of the son - we will deal with his case first of all - because, while I think a father should leave a substantial part of his estate to his immediate relatives, other people might think otherwise, and this testator, being free to make his will as he chose, subject only to the duty to make provision for his son if he was not sufficiently provided for, in my view was free to make the will he did. The testator knew his son was a mature man approaching the age of retirement. There was no need for a lump sum to set him up in business, as might well be the case with young children."

He went on then to review other assets that the son had. But this is not the case here. Here the daughter has no income. She may or may not be entitled to assets from her husband's estate. The decision in this case has not been to leave the monies to charity but to leave them to her son or her son's family trust, to the virtual exclusion of the plaintiff. Recourse is best had to the sort of dicta and the tests applied enunciated in Little v Angus and other cases since that time. There is some dicta in Re Young (deceased) [1965] NZLR 294 on which Mr Henderson placed reliance and there the authorities were reviewed. However the Court of Appeal said:

> "With respect we think that the phrase "comfortably situated financially" needs defining before this dictum can become useful as a statement of principle. If, as we think was the case, the learned Judge meant no more than that the moral obligation which rests on a father to make adequate provision for the "proper" maintenance and support of his son is not to be judged solely on a narrow basis of economic needs; that moral and ethical consideration is required to be taken into account as well, we agree, so long as the words "comfortably situated financially" are not to be understood too literally. But in Bosch's case their Lordships said:
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> > "The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy but the Court has to consider what is proper maintenance and therefore the property left by the testator has to be taken into consideration."

In Young's case it is important to remember that the Court considered the scheme of the will was ensuring two younger sons should in due course reach similar financial positions to that enjoyed by their eldest brother. In that case as in this there was not a complete disinheritance, but there is no such scheme in this will, and the whole circumstances of the case and the way in which the will was made and the surrounding circumstances that I have reviewed have to be taken into account as well.

I have no doubt there was a serious breach of moral duty in the circumstances of this case. Jasmin was a loving attentive daughter, and her efforts to develop the relationship were largely thwarted by the actions of a possessive brother. I have no doubt that the testatrix was heavily influenced by the actions of her son. All the evidence points in that direction, particularly that she should be a party to divesting assets at her age. The terms of the will suggest a similar influence.

The real question is the extent of the breach of moral duty. In this case no particulars of Jasmin's husband's circumstances were given. She has not worked for 20 years, and I can only conclude that the nature of her husband's job would suggest they are comfortably off, but I have no particulars and the onus, as Mr Henderson rightly reminds me, is on the claimant in these cases. To some extent that is foreshadowed by the plaintiff in saying that she accepts that her financial position was and currently is more secure than that of her brother. He has four children, she has one. She accepts that her contribution to her mother has been less, but says that is due to the brother's behaviour, a submission I largely uphold. Some regard must be had to the earlier contribution she made to her parents' circumstances. It is noted that Lorraine Easthope's income is not given, but taking a commonsense view of it it is unlikely to be the equivalent of the Morrell's income. There appears to have been certain opportunities given the brother during his lifetime with regard to the testatrix's property, which has enabled him to improve his position. No such opportunity was given to Jasmin. In this regard Mr Quigg urges me to remember that the beneficiaries under the trust may be grandchildren, who should rank after children. It is a discretionary trust and the beneficiaries of course may be Peter and Lorraine Easthope.

This is a case involving a serious breach of moral duty, contributed to in my certain view by the actions of Peter and the dominant role he played. I consider that nothing short of an equal interest can redress that breach of moral duty. Whilst

there is no presumption of equality, equality is largely justice in these type of cases.

In the course of the hearing it is now revealed that the proceeds of the Raumati property have been used by the trust for the purchase of a property now occupied by Peter Henderson and his family at 13 Kapil Grove, Khandallah. Trust funds have been mixed with other monies to acquire this property. I was informed the Kapil Grove property is in the name of Lorraine Easthope alone. That would appear to be in breach of the trust itself, which would require trust property to be held by both trustees. I received an unequivocal undertaking, pending this judgment, that there would be no interference with or alteration of the assets of the trust, and that the trust's interest in Kapil Grove as acknowledged will be preserved.

Having regard to the concession made as to the relative financial positions of the parties, the bequest to Rowan Morrell and the gift of the contents of the safe deposit box, proper provision for the plaintiff, Jasmin, would be to divide the residue of the estate as to 40% to Jasmin and 60% to Peter. In this way approximate but not exact equality is preserved. To achieve proper division it is necessary to cancel the provision forgiving the trustees of the Margaret Henderson Trust the amount owed by them, and that provision in all respects is cancelled. This means that clauses 1, 2, 3 and 4 of the will remain. Clause 5 is struck out. Clause 6 is to provide for the residue of the estate to be divided between Peter Anthony Henderson and Jasmin Morrell as to 60% and 40% respectively. Peter is entitled to a refund from the residuary estate of the funeral expenses paid by him.

Each party is to bear their own costs.

R A Jeram J.

Solicitors
Kensington Swan for the Plaintiff
Morrison Morpeth for the Trustees