

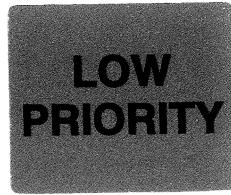
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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M NO 1363/95

872

IN THE MATTER of the Administration Act 1969



AND

IN THE MATTER of the Estate of GLENWORTH HENRY LAWRENCE
JENNINGS of Auckland, Retired, Deceased

AND

IN THE MATTER of an application for the recall of probate

BETWEEN IRENE PATRICIA HALLIDAY

 Plaintiff

AND CHARLOTTE ANN HILL and DAVID ANTHONY LYON

 Defendants

Hearing: 18-20 September 1996 & 16 December 1996

Counsel: Mr Hooker & Mr Simmond for plaintiff
 Mr Munro for defendants

Judgment: 17 March 1997

RESERVED JUDGMENT OF MORRIS J

Solicitors

Vallant Hooker (Auckland) for Plaintiff
Haigh Lyon (Auckland) for Defendants

Glenworth Henry Lawrence Jennings died on 13 August 1995. He was then in his 80s. For a time prior to his death he had been looked after by the first named defendant Mrs Hill. His will dated 22 April 1993 appointed the defendants his executors. Apart from seven legacies of a thousand dollars each to various beneficiaries and the gifting of his motor car to his neighbour the whole of the deceased's residual estate was left to Mrs Hill provided she survived him by one month. She has done so. On 21 August 1995 probate in respect of the will was granted by the Auckland High Court and sealed on 28 August 1995.

The plaintiff who is one of the specific legatees under the will in these proceedings seeks an order recalling the grant of probate made on 21 August 1995. She is supported by the other specific legatees. Her case is:-

- (a) The will dated 22 April 1993 was signed by the deceased whilst he was under the undue influence of Mrs Hill and,
- (b) As from the 22 April 1993 Mr Jennings was deprived of the opportunity to dispose of his estate in accordance with his wishes due to the undue influence being exerted upon him by Mrs Hill.

Specifically, the plaintiff claims Mrs Hill took advantage of the deceased's old age, poor health and alcoholism so as to assume complete domination over him and in particular she:-

- (a) deprived the deceased of the presence of his friends in his home by ordering these friends to leave,
- (b) deprived the deceased of necessary means, namely access to food and money and his motor vehicle,

- (c) deprived the deceased of necessary medical attention,
- (d) subjected the deceased to verbal abuse,
- (e) led the deceased to believe that she was his girlfriend,
- (f) with the knowledge that the deceased was an alcoholic supplied him alcohol on a regular basis.

All allegations levelled against her are denied by Mrs Hill. She says this was simply a case of an elderly man with no relatives who had shown any real interest in his well being rewarding her as someone who had looked after him in his last years.

The question which I must determine is whether because of extraneous pressures from Mrs Hill, Mr Jennings signed a will contrary to his wishes. This principle is well founded in the authorities referred to me by counsel. It is accepted the onus of proving the allegation lies on the plaintiff.

Mr Jennings was 83 when he died. Mrs Hill first met him in mid 1989. He telephoned her. He had been given her name by the Social Welfare Department. He needed a caregiver, someone to look after him. Mrs Hill had been approved as such a person by the Social Welfare in 1980. Subsequent to that time and before being contacted by Mr Jennings she had looked after a number of people in the capacity of a caregiver. The task normally involved spending a certain amount of time in a person's home helping him/her with household chores, cooking the meals, helping them bath and carry out such other essentials. Clearly the work at times could be unpleasant. It is not particularly well paid. Initially Mrs Hill worked six hours a week. However, these hours increased to 14 hours per week in October 1992. They were subsequently reduced to nine

hours a week by her employer because of a suggestion made by some friends of the deceased's that he had become too dependent upon her.

It is accepted by both parties Mr Jennings suffered multiple medical problems. He had a long history of alcoholism. This was confirmed by Dr Addis whose patient he had been for many years. Despite such problems I am satisfied he was clearly a very independent person. Father Ward, a regular visitor to Mr Jennings' unit so described him. The general testimony given by neighbours and others who knew him is to the same effect.

Mr Lyon, a partner in the Auckland firm Haigh & Lyon, solicitors, was Mr Jennings' solicitor for many years. He acted for Mr Jennings in the mid 1970s and continued to do so until Mr Jennings' death. In 1979 Mr Jennings sold a property in Balmoral Road which he and his wife had occupied. He bought a unit at 1/4 Patterson Street, Sandringham which he occupied for the rest of his life. His wife died in 1977. She left everything to Mr Jennings. They had no children. The sale of the Balmoral Road property left Mr Jennings with sufficient funds to see him through the rest of his days.

Mr Lyon was instructed to draw up the will dated 22 April 1993. This was by no means the first will he had drawn for Mr Jennings. He drew up many. I have been given details of them. Between May 1975 and April 1993 Mr Jennings made 16 wills. The only consistent pattern to be drawn from the wills is Mr Jennings had no hesitation in awarding his friends or people whom he considered he owed a favour and likewise he had no hesitation in removing someone from his will if he felt they were out of favour with him. I accept from the evidence of Mr Lyon the deceased felt he owed little to his family because they had done very little for him.

Mr Lyon took instructions from Mr Jennings on 20 April 1993. He went to the unit in Patterson Street as a result of having been telephoned by Mr Jennings. He was given clear and concise instructions. Mr Jennings told him he rarely saw or heard from his sister or any of her daughters. He was told Mrs Hill had looked after Mr Jennings so very well and Mr Jennings mentioned to him how poorly people like Mrs Hill were paid. The will was drawn up. Mr Lyon attended again on Mr Jennings on 22 April. He took his secretary with him to be a witness. He found Mr Jennings in good spirits. He read the will over to him. A neighbour was called in to act as a second witness and the will signed.

Mr Lyon stated:-

“And you accept someone could have influenced him away from his family? ... I accept that is possible but certainly didn't see signs of him being dominated or bullied by anyone into doing anything. I was quite sure this man knew what he was doing and he wanted to do it and I knew from my knowledge of his position he was free to do so.”

It is not disputed Mrs Hill was present when this will was signed. Nor is it disputed she was aware of the letter forwarded to the deceased with a copy of the will for his perusal. She was also present when Mr Lyon saw Mr Jennings in February 1995 again at Patterson Street. Mr Lyon has told me there was some discussion about an alteration in the will and talk of the possibility of Mr Jennings' will being attacked subsequent to his death. He specifically noted Mrs Hill did not want to be involved in any way, particularly if there was going to be trouble over the will with family. The file note prepared by Mr Lyon confirms the extent of the discussion and his input into it. I can find nothing in Mr Lyon's evidence to support any contention of undue influence on the part of Mrs Hill whether at the time of the signing of the will now in dispute or at any time preceding or subsequent thereto.

Counsel for the plaintiff has made something of the fact that in February 1995 Mrs Hill arranged to obtain an enduring power of attorney in her favour through the Public Trust office. I consider this step to be nothing more than the practical thing to do in the situation as it then existed and nothing sinister can be drawn from it.

The plaintiff submits the presence of Mrs Hill at the signing of the will indicates the extent of the power which Mrs Hill had over the deceased. Counsel submits this is the first will which in effect leaves the bulk of the deceased's estate outside the family members. That may well be so, but of course this alone does not establish the allegations levelled at Mrs Hill. Such an allegation must be considered taking into account all of the evidence including in particular Mr Lyons. Mr Lyon is a senior practitioner of high repute. His attention to Mr Jennings' affairs over the many years he acted for him has been meticulous. There was clearly a close bond between the two men. I am absolutely certain Mr Lyon would have picked it if there had been any true influence by Mrs Hill or had in any way Mr Jennings been acting against his wishes. There is a total lack of evidence supporting the claim that at the time the will was executed undue influence was exerted in any shape or form by Mrs Hill on Mr Jennings so as to cause him to execute a testamentary document which other than represents his true wishes.

I turn now to discuss the specific allegations raised in the pleadings.

Depriving Mr Jennings of the presence of friends in the home by ordering friends to leave:-

The plaintiff relies upon the evidence of Mr Gribble, Mrs Wagstaff and Mrs Deere. All three of these persons had been friends of the late Mr Jennings for many years. Much of what they depose to is clearly hearsay. Mr Gribble acknowledged Mrs Hill never warned him away personally, as did Mrs Wagstaff. Mrs Deere claims she visited Mr

Jennings almost every day. Other witnesses such as Mr and Mrs Salt called on Mr Jennings regularly.

There is some evidence Mrs Hill told a young couple to leave Mr Jennings' house. It seems they had possibly been stealing some articles from him. This allegation is not established.

Depriving the deceased of necessary means, namely access to food, money and his motor vehicle:-

Again, to support this allegation the plaintiff relies upon the evidence of Mr Gribble, Mrs Wagstaff and Mrs Deere. Mr Gribble has spoken of occasions when he would make some sandwiches or get a hamburger or some fish and chips for Mr Jennings. Likewise, Mrs Wagstaff stated she often took him in some fresh food, bread and the like. This seems to have occurred once a fortnight or thereabouts. Similar evidence was given by Mrs Deere. There is nothing in the evidence of Mr & Mrs Salt to suggest Mr Jennings was starved. Dr Addis, while agreeing the deceased was undernourished stated this was consistent with his medical condition and he was never made aware of the deceased being denied food.

The allegation must be considered bearing in mind Mrs Hill spent only a few hours a week with Mr Jennings. When she was not there he had to look after himself. The other caretakers, a Mrs Payne and a Miss Bell gave no evidence in support of this allegation. Father Ward said Mr Jennings appeared well looked after and never complained to him about anything.

Mrs Hill accepts she would take Mr Jennings' cheque book when she left on a Wednesday so she could do the shopping on the Thursday or Friday. The cheque book was then left in Mr Jennings' bedroom drawer with such cash as she had obtained. The plaintiff here relies upon the

evidence of Mr Gribble, Mrs Wagstaff and Mrs Deere. Their evidence in this regard goes nowhere near to establishing the allegation particularly as Father Ward said Mr Jennings always seemed to have money on him. When he took communion Mr Jennings would always give him some money as a donation and he would also ask him to go and buy cigarettes for which he would give the Father cash.

The allegation concerning the motor car was not proceeded with.

I am satisfied there is no substance in these allegations.

Depriving Mr Jennings of necessary medical attention

Mrs Hill acknowledges she did not want him wasting his money on doctors visits. She accepts she did not call a doctor unless there was good reason. It is not claimed she unreasonably withheld the obtaining of medical advice. The district nurses who attended Mr Jennings were never concerned about his care. Father Ward saw no sign of a failure to obtain any necessary medical attention and Dr Addis made regular visits to Mr Jennings and rebuts any suggestion Mr Jennings had been deprived of medical care or treatment.

This allegation is accordingly rejected.

Subjecting the deceased to verbal abuse

Mrs Deere claimed towards the end of 1992 Mrs Hill became short with Mick (Mr Jennings) and would yell at him a lot. Nowhere else can I find any suggestion of Mrs Hill abusing or raising her voice to Mr Jennings. She herself has acknowledged she did raise her voice to him, especially over his taking his medication. She acknowledges she argued with him and he with her. He obviously wasn't the easiest of persons to look after. I find there is no substance in this allegation.

Leading the deceased to believe that she was his girlfriend

There is no doubt Mr Jennings thought highly of Mrs Hill. He said as much to Mr Lyon. On this aspect Mr Gribble said "it was all nod, nod, wink, wink stuff" and Mrs Deere referred to Mrs Hill encouraging Mr Jennings by doing things like patting him affectionately on the head and also putting her face up close to his. Having had an opportunity of observing the witnesses, I am satisfied much of this was in the mind of the beholder and there is no truth whatsoever in this allegation.

With knowledge that the deceased was an alcoholic supplied him with alcohol on a regular basis

It is common ground Mr Jennings was an alcoholic. It is established he would drink regularly. Occasionally he would go on "binges" when he would drink to excess. Mrs Hill acknowledges she attempted to ration Mr Jennings' intake of alcohol in an attempt to ensure he always had some alcohol available but never enough in the house to drink to excess. I think she was doing her best to cope with a very difficult situation and at times with a very difficult patient. Furthermore, on the evidence before me it is plain Mr Jennings was able to get drink despite restrictions placed upon him by Mrs Hill.

I have considered the detailed submissions made by both counsel on this aspect. Having done so and having regard to the manner in which the various witnesses gave their evidence I am satisfied there is no substance in this allegation.

I have endeavoured in the foregoing paragraphs to deal in some length with the various contentions raised. I have done so because I felt it essential to the parties, they could follow my reasoning and understand why I have rejected the claims. While I have dismissed the claims I do not for one moment suggest the various witnesses called by the plaintiff were deliberately endeavouring to give me a false picture of what was

happening in Mr Jennings' home. In my view the passage of time has coloured their thinking. I am satisfied having had an opportunity of assessing the witnesses and particularly Mrs Hill the will of 22 April 1993 properly represented Mr Jennings' wishes. No pressure was put on him by Mrs Hill to make the provisions for her which he did. Indeed throughout her association with the deceased I find she has always acted in a proper and professional manner. I am also completely satisfied subsequent to 22 April 1993 Mrs Hill did nothing to interfere with Mr Jennings exercising his right and freedom to alter his will had he desired to do so.

I have received detailed submissions as to costs. The plaintiff seeks an award of full solicitor and client costs from the estate. The defendants seek costs.

The plaintiff relies upon the principles stated by Henry J in Neil Estate (17-12-92, P 3102/91, Auckland Registry). Counsel submits the litigation originated in the fault of the testator, there were reasonable grounds for suggesting a claim of undue influence and therefore in the circumstances I should not adopt the general rule that costs should follow the event. Specifically counsel relies upon the evidence establishing the relationship between the deceased and his family which had remained secure and constant over many years right up to the deceased's death; that there existed evidence to suggest the deceased was heavily dependent upon Mrs Hill and that she therefore had both the ability and the opportunity to exert undue influence on the deceased and that there was a lack of contemporaneous file notes or records of any kind to explain or substantiate the difference between the last of the deceased's and all earlier wills. I must say the evidence does not establish to my satisfaction a constant and close relationship between the deceased and members of his family right up to the time of his death and the evidence of Mr Lyon explains very fully the reason for the terms

of the will. Such material must have been before the plaintiff when she elected to proceed to hearing.

The defendants' counsel has drawn my attention to the remarks of North J in Re Blakely [1957] NZLR 875, particularly at 878 where he stated -

"I cannot allow it to be assumed that people who come along and make applications under this Act can do so in the confident hope that even if they do not succeed at least they will get their costs."

He submits the plaintiff's claim was weak and there was always a total lack of direct evidence of undue influence. He submits the evidence of the deceased's lawyer Mr Lyon, his doctor and the district nurses and others was before the plaintiff before she elected to proceed to a hearing. The evidence of these people clearly shows how very weak the claim in fact was. He submits further the estate is not large and the home unit is worth only \$170,000 to \$180,000. Costs to the estate so far are approximately \$35,000. He submits the plaintiff must have been aware litigation would considerably diminish the estate.

The practical situation is if I award the plaintiff costs these must come out of residue and Mrs Hill's rightful share to the estate is reduced when she has done nothing wrong and has gone about her business in a workman like and professional manner. This would be unjust.

The estate is already faced with substantial costs. This will reduce Mrs Hill's legacy considerably through no fault of hers. The claim in my view had no real prospect of succeeding at any time and particularly after the evidence of Mr Lyon, Dr Addis and others was known to the plaintiff. She elected to proceed. I do not consider it equitable for Mrs Hill to bear the cost of what I can only describe as stubbornness.

Having regard to all the circumstances justice in my view will be met if I order the plaintiff to pay \$10,000 towards the defendants' costs and I so order.

A handwritten signature in black ink, appearing to read "W. G. Linn", followed by a period.

