IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2008-463-96

UNDER	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	the Estate of S E Elliott, deceased
BETWEEN	JUDITH ELIZABETH O'CONNOR AND LYNNE ASHCROFT Appellants
AND	PETER JOHANNES DENEE AND TODD ARTHUR ELLIOTT Respondents

Hearing: 26 May 2009

Appearances: P G Mabey QC for appellants
B A Corkill QC for Mr Elliott

Judgment: 5 June 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Friday 5 June 2009

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[1] On 16 January 2008 the appellants' claims for further provision out of the estate of their late mother under the Family Protection Act 1955 were dismissed in a reserved judgment delivered by Judge Twaddle in the Taupo Family Court.

[2] On 22 December 2008 I allowed an appeal from that judgment. I held that the testatrix was in breach of her moral duty to make adequate provision for the maintenance and support of the appellants, her two daughters, and awarded Ms O'Connor the sum of $100,000 and Mrs Ashcroft the sum of $150,000.

[3] Mr Elliott, the residuary beneficiary and the sibling of the appellants, now seeks leave to appeal to the Court of Appeal against my judgment.

Leave principles

[4] Applications for leave are governed by s 67 of the Judicature Act 1908. Leave to bring a second appeal may be granted by this Court, or by the Court of Appeal if this Court refuses leave. The relevant test is well established. In order to justify the grant of leave, the proposed appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal: *Waller v Hider* [1988] 1 NZLR 412 (CA).

Discussion

[5] Mr Corkill has formulated the following questions as warranting referral to the Court of Appeal:

a) In a case under the Family Protection Act 1955, is the correct approach on appeal to consider the exercise of discretion by the Court of first instance in accordance with the principles set out in *May v May* (1982) 1 NZFLR 165 (and in *G v G* [1985] 2 All ER 225 (HL))?

b) Specifically, does an appellate Court have to consider whether the decision made at first instance was within the range of decisions properly available to the first instance Judge?

c) If the answer to questions (a) and (b) is "Yes", was such an approach followed in the present case?

[6] Mr Corkill says that the answers to the first two questions ought to be "Yes" in each case, and that the answer to the third question ought to be "No".

[7] During the course of the hearing of the substantive appeal, significant attention was devoted in argument to the proper appellate approach in the light of the judgment of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 and the subsequent judgment of the Court of Appeal in *Blackstone v Blackstone* (2008) 19 PRNZ 40.

[8] I endeavoured in the substantive judgment to summarise the proper appellate approach in the following way:

> [36] On appeal it is not open to this Court simply to substitute its discretion for that of the Judge at first instance.: *Re Blyth (deceased)* [1959] NZLR 1313: *Little v Angus* at 127: *Henry v Henry* at [24]. These and other authorities refer to the need for an appellate Court, before intervening, to be satisfied that the Judge at first instance has given inadequate weight to a material matter, or has taken into account an irrelevant matter, or has made a material error of law or fact.
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> [37] Ms France places considerable emphasis on these principles, both in her written synopsis and in oral argument. She refers also to the decision of the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, and to my endeavour to summarise aspects of that judgment in *Rudman v Way* [2008] 3 NZLR 404.
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> [38] At [5] of *Austin Nichols* Elias CJ observed that an Appeal Court may rightly hesitate to conclude that findings of fact or fact and degree are wrong, where the first instance Tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses where such an assessment is important. Ms France places considerable reliance on those observations. She says they are of relevance here.
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> [39] I disagree. As is usual, the hearing in the Family Court was conducted on affidavit evidence without cross-examination, so the Judge had no particular advantage in respect of credibility findings. In any event, this case does not turn on matters of credibility.

> [40] Second, the Family Court cannot, in this jurisdiction, be regarded as a specialist Tribunal. Until fairly recently proceedings under the Act could be brought only in this Court, which retains a concurrent jurisdiction with the Family Court: s 3A of the Act. The relevant jurisprudence has been largely developed in this Court. A Family Court Judge exercising his or her jurisdiction under the Act is not possessed of the special technical expertise of which the learned Chief Justice was speaking at [5] of *Austin Nichols*.
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> [41] The importance of *Austin Nichols* for present purposes is that it emphasises the need for an appellate Court to form its own opinion rather than simply defer to the assessment of the lower Court.
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> [42] Ms France is right, however, when she submits that this Court ought to identify a material error in the lower Court judgment before it intervenes. In *Blackstone v Blackstone* (2008) 19 PRNZ 40, Glazebrook J for the Court of Appeal confirmed that appeals from a discretion are not affected by *Austin Nichols* and that the principles in *May v May* (1982) 1 NZFLR 165 continue to apply. Decisions under the Act are essentially discretionary. Some reasonably plain ground ought to be made out before this Court intervenes on appeal: *Little v Angus* at 127.

[9] In my judgment I concluded that Ms O'Connor was entitled to further provision by reason of a calamitous deterioration in her health between the date of the testatrix's last will and the date of her death. I said:

> [54] The testatrix obviously treated Ms O'Connor as someone who was in good health and possessed of substantial earning capacity. As at the date of death of the testatrix, the reality was quite different. In my view the Judge must have adopted the wrong approach by effectively discounting Ms O'Connor's change of circumstance in the latter part of 2003.

[10] In respect of Mrs Ashcroft, I concluded that the Judge had ascribed too much weight to the provisions of the will itself and to the reasons given by the testatrix for the scheme of the will, and that the Judge had " … arrived at the wrong conclusion".

[11] I turn to Mr Corkill's proposed questions. The first two questions would require the Court of Appeal to review the proper approach to the exercise of the Court's appellate jurisdiction in the light of the *Austin Nichols* case.

[12] In my earlier judgment, I held that the *Austin Nichols* decision did not directly affect the significant body of jurisprudence that had built up over many years, because it was not intended by the Supreme Court to govern appeals from the exercise of a discretion: *Blackstone v Blackstone*. So the principles in *May v May*

continue to apply, and some reasonably plain ground ought to be made out before this Court intervenes on appeal: *Little v Angus* [1981] 1 NZLR 126 at 127.

[13] Mr Corkill was not critical of the manner in which I set out my understanding of appellate principles, although he considered that I ought perhaps to have focused rather more on the need to identify a decision that was "plainly wrong" before interfering on appeal. The distinction between "wrong" and "plainly wrong" was emphasised in the recent judgment of Wild J in *National Heart Foundation of New Zealand v Carroll* HC NLN CIV 2008-442-495 25 February 2009 where it was said that:

> [5] The difference between the *Stichting Lodestar* and *May v May* approaches is significant. *Stichting Lodestar* requires an appellate Court to substitute its decision if it considers the decision under appeal is wrong. On the *May v May* formula, the appellate Court should not interfere unless the first instance Court erred in principle, factored in irrelevant considerations, overlooked relevant ones, or made a decision that the appellate Court considers is plainly wrong. Plainly wrong does not mean simply 'wrong'. It refers to a decision which is outside the available ambit of judicial discretion, as assessed (somewhat obviously) by the appellate Court: *G v G* [1985] 2 All ER 225 (HL) at 228h and 229c per Lord Fraser in a judgment concurred with by the other four Law Lords. In short, even though the appellate Court might have arrived at a decision different from that made by the first instance Court, it does not substitute that different decision unless it decides that the decision under appeal was outside the range of decisions available to the first instance Court.

[14] Although Mr Corkill accepts that I correctly stated the proper appellate approach, nevertheless he argues that the Court of Appeal ought to be asked to consider whether the "reasonably plain ground" test in *Little v Angus* is more rigorous than that stipulated in *May v May*.

[15] Each of these cases is now more than 20 years old. In my view there is no warrant for the grant of leave on that particular ground. The cases referred to at [36] of my earlier judgment sufficiently set out the relevant principles.

[16] It is common ground that the *Austin Nichols* judgment does not affect the Court's appellate jurisdiction, because as is explained in *Blackstone v Blackstone* the Supreme Court in *Austin Nichols* was not considering cases involving the exercise of

a discretion: see also *ERD v New Zealand Police*, HC TAU CRI 2008-470-22 9 September 2008 at [38].

[17] It seems that Mr Elliott's principal (and indeed really only) complaint, lies in the manner in which I have approached the task of determining whether the Judge in the Court below was "plainly wrong" in the sense described in the cases. That topic is the subject of Mr Corkill's proposed third question. He says that instead of simply finding that the first instance Judge "adopted the wrong approach", I ought to have found – to use the words employed by Wild J at [5] of the *National Heart Foundation* case - that " … the decision under appeal was outside the range of decisions available to the first instance Court" before I interfered on appeal. In my view, that is not a question which meets the *Waller v Hider* criteria.

[18] At the conclusion of [42] of my earlier judgment I cited *Little v Angus* as authority for the proposition that, in cases under the Act, an appellate Court ought not to interfere unless some reasonably plain ground had been made out. In my opinion there is no proper basis for Mr Corkill's inference that I must be taken to have adopted the wrong approach, simply because I did not refer again, when setting out my findings, to the requirement that the first instance judgment be shown to be "plainly wrong".

[19] In summary, Mr Corkill's first two questions do not require an answer from the Court of Appeal, because they are settled by prior authority. The third question simply seeks to review my judgment on the facts.

Result

[20] For the foregoing reasons I am not satisfied that the case falls within the established *Waller v Hider* principles. The application for leave to appeal is accordingly dismissed.

[21] The appellants are entitled to costs on a category 2B basis.

C J Allan J