

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-000993

UNDER the Administration Act 1969
IN THE MATTER OF the estate of Frederick Arthur Pearce
BETWEEN MAXWELL ARTHUR PEARCE
Applicant
AND RONALD FREDERICK PEARCE
Respondent

Hearing: 29 July 2009

Appearances: N L Penman-Chambers for the Applicant
R F Pearce in Person

Judgment: 29 July 2009

[ORAL] JUDGMENT OF WYLIE J

Solicitors:
Hesketh Henry, Private Bag 92 093, Auckland Mail Centre

Copy to:
R F Pearce, 1-23 Galvan Avenue, Pakuranga, Auckland 2010

[1] This is an application by Mr M A Pearce (“Maxwell”) under ss 6 and 19 of the Administration Act 1979.

[2] The background to the matter can be shortly stated. The deceased, Frederick Arthur Pearce, died at Auckland on 27 January 2009 at the age of 89. He left a Will dated 8 November 2004. The deceased appointed one of his sons – Mr R F Pearce (“Ronald”) – the respondent in these proceedings – to be the executor and trustee of his Will. He left the sum of \$25,000 to Maxwell, and left the balance of the estate to Ronald.

[3] Ronald has not to date obtained probate of his father’s estate. He has however given notice to the Family Court of what he terms a “claim of right”. As I understand it, Ronald asserts that it is not necessary for him to obtain a grant of probate under the Administration Act. He relies upon the words “deceased person” contained in that Act.

[4] Maxwell – who is also a son of the deceased – has issued proceedings under the Family Protection Act seeking further provision from his father’s estate. Those proceedings have been filed in the Family Court at Manukau and they have been served on Ronald. Other potentially interested parties have also been served and one of those parties is taking an active stance. Because Ronald has not to date taken out probate of his father’s estate, the family protection proceedings have been adjourned to allow the current application before this Court to progress.

[5] At present, the estate of the deceased has no legal representative. No information has been provided either to the Family Court, or to this Court, regarding the extent and nature of the deceased’s estate.

[6] As noted above, the application is made primarily under s 19 of the Administration Act. Section 19(1) of that Act provides as follows:

In any case where any executor named in a will neglects or refuses to prove the will, or to renounce probate thereof, within 3 months from the death of the testator, the Court may, upon the application of any other executor or executors or of any person interested in the estate or of [Public Trust] or of the [Māori Trustee] or of any creditor of the testator, grant an order nisi calling upon the executor who so neglects or refuses to show cause why

probate of the will should not be granted to that executor alone, or with any other executor or executors or, in the alternative, why administration should not be granted to the applicant or some other person.

[7] The section clearly envisages the grant of an order nisi prior to the making of any further orders. While Ms Penman-Chambers appearing for Maxwell today sought to persuade me to contrary, in my view it is necessary to abide by the statutory procedure rather than truncate the process and deal with Maxwell's substantive application which seeks to have the Public Trust appointed as the administrator of the estate. The way in which matters have progressed today in Court compels the conclusion that that course is appropriate.

[8] Section 19(1) has not been the subject of much legal debate. The section was however recently considered by Chisholm J in *Ruocco v Wright* AK CH CIV 2008-409-311, 16 December 2008. His Honour there noted that the failure of a named executor to obtain probate within three months of the death of a testator is not of itself sufficient to engage s 19(1). Rather the section details two threshold requirements – first the named executor must have neglected or refused to prove the Will; secondly, that neglect or refusal must have continued for three months or more from the date of death of the testator.

[9] I agree with Chisholm J that mere omission to act within the three month statutory timeframe is not enough, and that it cannot be concluded from omission alone that the named executor has neglected or refused to prove the Will.

[10] Here Ronald has omitted to obtain probate for more than the specified three month period. I am not however persuaded that he has neglected or refused to do so in terms of s 19(1). Rather, Ronald has proceeded on the basis that he does not need to obtain probate. I have some difficulty with his reasoning in that regard. It is clear that Ronald has not to date taken legal advice, but it is also clear that he believes that he has done all that is required of him.

[11] I have impressed upon Ronald this morning the need for him to obtain competent legal advice as soon as is possible, and he has assured me that he will be seeking that advice. He has also confirmed to me that in the event that that advice

confirms that he must obtain probate of his father's Will, that he will do so. I also canvassed with Ronald the possibility that the legal advisor may suggest to him that he should renounce the grant of probate in his favour, given that he is a beneficiary under his father's Will, and that the Will is being contested by his brother, Maxwell. Ronald has told me this morning that he will follow any advice he gets from the legal advisor in this regard as well.

[12] In the circumstances, it is appropriate to grant an order nisi calling upon Ronald as the named executor in the Will of the late F A Pearce to show cause why probate of the Will should not be granted to him, or in the alternative, why administration should not be granted to the Public Trustee, and I so order. The order nisi is to require Ronald to show cause within a period of 28 days from the date of this decision.

[13] Ronald is present in Court today and he has heard this judgment being delivered. A copy will also be made available to him by the Registrar. In the circumstances, it seems to me to be appropriate to dispense with service of the order nisi and I do so in terms of s 19(2) of the Administration Act. Ronald consents to that course.

[14] The matter is to be brought back before the Duty Judge on Thursday 3 September 2009 at 10.00am to review the proceedings, and to determine what further steps if any are then necessary.

[15] The costs of today's hearing are reserved.

Wylie J