IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-3717

IN THE MATTER OF	the Trustee Act 1956
BETWEEN	PUBLIC TRUST Plaintiff
AND	PUBLIC TRUST Defendant

Hearing: 16 February 2009

Appearances: K G Davenport for the plaintiff
P N Collins for the defendant

Judgment: 13 March 2009

RESERVED JUDGMENT OF PRIESTLEY J
(On application for directions)

This judgment was delivered by me on 13 March 2009 at 11 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

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The Issue

[1] This judgment does not arise out of a contest between the parties. Rather the Public Trust seeks the solace and protection of directions.

[2] The Public Trust, as plaintiff, is the executor of the estate of Margaret Josephine Bartocci ("the deceased"). The Public Trust, as defendant, is the property manager under the Protection of Personal and Property Rights Act 1988 of Kelmen David Furio Bartocci ("Kelmen") who is, for reasons which do not need to be traversed, a protected person.

[3] Kelmen has two purported sons. I use the word "purported" deliberately. The children's birth certificates named Kelmen as the father. But he, and the deceased when she was alive, believed that Kelmen was not the biological father. They contend that the boys' father is in fact a man who resided in the matrimonial home with Kelmen and his former wife both before and after the birth of the elder boy. Kelmen and his former wife appear to have separated shortly after the birth of the first boy.

[4] The relevance of this short recital so far as the issue is concerned is that both boys were minors at the date of the deceased's death. The older boy is now an adult. The younger boy remains a minor.

[5] Assuming therefore, which must be the starting point until the contrary is proved, that both Kelmen's sons are the deceased's grandchildren (her only grandchildren) they would be potential claimants against the deceased estate under the Family Protection Act 1955.

[6] The Public Trust has some uncertainty about its obligation. So too does its competent counsel, Ms Davenport, who has written a short article on the issue "*To Tell or Not to Tell*" NZ Lawyer 31 October 2008 p20.

[7] Thus the Public Trust seeks directions from this Court as to whether it should inform the two grandchildren that they have a potential Family Protection Act claim

against the deceased's estate. Has the Public Trust an obligation, on the facts of this case, to notify the deceased's two grandchildren that they are potential claimants? That is the issue.

Background

[8] There is nothing particularly remarkable about the circumstances surrounding the deceased's estate and the Bartocci family history. Developments since the first call in this Court on 16 July 2008 (when Associate Judge Robertson made directions as to service) the ground has shifted somewhat. It seems highly improbable that there is any dispute over the estate to resolve.

[9] The deceased died in Auckland on Christmas Day 2006. Her will was dated 21 September 1990. Probate was granted on 22 March 2007.

[10] The Public Trustee was appointed the deceased's sole executor and trustee. Personal effects were left to Kelmen. Kelmen received a life interest in the residue of the estate. On his death the remainder will pass to two of the deceased's elderly cousins who reside in the Republic of Ireland.

[11] The bulk of the estate comprised realty. A conservative valuation of the entire estate is $1.45 million.

[12] Mr Collins was appointed to represent the interests of Kelmen. There were initially two areas which needed investigation by the Public Trust in both its capacities. The first was whether there should be an order under s 64A of the Trustee Act 1956 to advance capital to Kelmen. The second was whether, given the reservation of only a life interest in the deceased's estate, Kelmen should bring a claim under the Family Protection Act 1955. This latter option and the moral claims which Kelmen may have had under the Act against his mother's estate became less viable when it emerged that Kelmen was a beneficiary, to the extent of $1.2 million euros, in his aunt's estate who had died in Dublin.

[13] Matters, as a result of sensible negotiations between interested parties, have now reached the stage where in all probability there will be some form of overall settlement between Kelmen and the Irish residuary beneficiaries of the deceased estate. Any such settlement would in due course need court approval given Kelmen's status as a protected person.

[14] What is clear is that Kelmen will not now be making a claim under the Family Protection Act 1955. The cut off date for both him and any other claimants, being two years from the date of the grant of probate, is 23 March 2009. Were Kelmen to have brought such a claim then clearly the standard directions for service would require formal notification of the two grandchildren. That will not occur.

[15] In the circumstances the issue which I have articulated (supra [7]) boils down to whether, in a situation where there is no likely claim under the Family Protection Act, the Public Trust should nonetheless notify the two grandchildren of the deceased, one of whom is still a minor, that there exists estate against which they have a statutory right to bring a claim.

Other Relevant Facts

[16] Evidence placed before the Court is to the effect that Kelmen and his former wife separated in September 1989. The couple signed a Matrimonial Property Agreement dated 31 October 1991. The elder grandson was born on 4 December 1987. The younger grandson was born on 27 April 1990. As I have stated Kelmen's name appears on both birth certificates. From an early stage (there is a Family Court affidavit sworn in March 1991 by Kelmen), it is clear that Kelmen disputed paternity of the two boys despite his name appearing on their birth certificates. The dissolution application filed in the Auckland Family Court by Kelmen in April 1992 states there are no children of the marriage.

[17] The Public Trust engaged a private investigator to make inquiries as to the whereabouts of the two grandchildren. Little emerged other than the information that the boys' mother owns two properties in South Auckland, one of which was her former matrimonial home. Both boys retain the surname "Bartocci". The younger

boy, who is still a minor, appears to own a motor vehicle. The elder boy appears to live at an address in a different part of Auckland from his mother.

[18] Kelmen has not seen his two purported sons since early 1990. There is no evidence that the boys have had any contact with their grandmother, the deceased, since their birth.

[19] Mr I R Cook, a trustee manager of the Public Trust gave evidence that when the deceased prepared her will in 1990 the issue of her grandchildren was canvassed. Her recorded instruction was "there is a question of whether [son] is the father of any children [testatrix believes not]". It would be in the Public Trust's normal procedure to discuss grandchildren at the time will instructions were taken.

[20] There was no evidence of any death notice for the deceased appearing in a newspaper. But there is no evidence Kelmen or anyone else was wanting to conceal the fact of the deceased's death. Advertisement for creditors was made by the Public Trust under s 35 of the Trustee Act 1955 in the *New Zealand Herald* in March 2007.

[21] Mr Cook also gave evidence of the relevant portion of the Public Trust's manual headed "Where a minor or incapacitated person is involved". Under the subheading "Established Legal Principles" the following appears.

> There is no general duty on an administrator as such to make an application under the Family Protection Act on behalf of a minor or person under a mental disability.
>
> The Court of Appeal has held that an administrator should take upon himself the duty at least to apply for advice and directions in any case where there are circumstances that reasonably lead him to the view that no other interested person is willing or able to initiate proceedings on behalf of the intended applicant.
>
> In most cases an administrator is required to do nothing more than to satisfy himself that there are persons having some measure of authority in respect of the person such as parents or guardians of a minor…. Where there is no such person or alternatively if it is thought that those who have responsibility have abrogated it then the obligation of the administrator becomes correspondingly greater.

The manual goes on to discuss briefly guidelines and some possible scenarios, none of which have relevance.

[22] In his affidavit Kelmen disposes, although on an unstated basis, that his mother would not have wanted the two boys to be notified of her death or otherwise approached for the purpose of giving them the opportunity of making a claim against her estate. It is uncertain what the basis of that belief is but, given the mother's will instructions, given the evidence of her protective attitude towards her only child, and given further the support which she gave him around the time of his separation, I have no doubt that she shared Kelmen's view that he was not the biological father of the two boys and that she did not consider she had any moral obligation towards them.

Relevant Law

[23] Section 4(4) of the Family Protection Act provides:

> An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

This statutory language is clearly cumbersome. It does no more, however, than empower an administrator to apply on behalf of any person who is a minor or under a disability to make an application on behalf of the person who has the right to apply, or to seek directions as to whether such an application should be made on a qualifying person's behalf. That power, however, is very different in kind from an obligation to notify a potential claimant. There is no evidence available either to this Court, or more importantly, to the Public Trust to suggest that an application on the part of the deceased's two grandchildren is warranted.

[24] The high point of Ms Davenport's submissions was the Court of Appeal judgment *Re Magson* [1983] NZLR 592. The Court of Appeal was involved with an unsuccessful appeal (also a cross-appeal) by a widow in a farming case whose application to bring proceedings under the Family Protection Act and the Matrimonial Property Act 1963 out of time had been refused. Delivering the Court's judgment Cooke J made the following obiter comment at 599:

> Susan was aged 9 when her father died. Although an administrator is not necessarily bound to apply on behalf of a minor – see *Spelman v Spelman* [1920] NZLR 202, 205, per Hosking J – in a clear case we think that such a duty would arise. Evidently neither the Trust Company (which must be well aware of the possibilities in such cases, nor Mrs Magson saw any breach of duty to Susan or the other daughters at the date of the deceased's death. Even in her affidavit … Mrs Magson suggested no such breach. No special point of Susan's position appears to have been made in the High Court and no affidavit by her was filed there. She is single and in employment and there is no evidence of any particular problem or need affecting her…. On balance we do not think we should allow a reshaping on appeal of the case presented to the High Court Judge so as to single her out for special dispensation.

[25] This dictum, of course, applies to the s 4(4) power. It does not extend to notification of potential claimants that there is an estate available for claims. Furthermore, in a case such as here where there is no evidential basis to suggest that the two grandsons generally, or the minor in particular, have claims, then the Public Trust can hardly form the view that this is a "clear case" in terms of Cooke J's dictum. *A fortiori*, if it is not a clear case for bringing a s 4(4) claim it can hardly be a clear case to notify the grandchildren (and in the case of the minor this would mean his presumed guardian, Kelmen's former wife) of the existence of the estate and the *possibility* of a claim.

[26] I do not for one moment accept that *Re Magson* was on point. No other authorities are on point. Some, however, are helpful by way of analogy.

[27] There is clear law that an executor has a duty to be even-handed so far as claimants are concerned. That is apparent from *Irvine v Public Trustee* [1989] 1 NZLR 67, a case involving a dispute between the deceased's adult children and her second husband. As in *Magson* there was a request to launch proceedings under the Matrimonial Property Act 1963 to claw back some of the estate. The issue before the Court was whether a deceased's personal representative could bring such a claim. Obiter comments were made by Cooke P at 70 as follows.

> In a note in 17 Halsbury's Laws of England (4th ed) para 1193, the view is expressed, without citation of supporting authority, that a personal representative's duty to be even-handed between all the beneficiaries includes persons entitled or potentially entitled as statutory beneficiaries under the family provision legislation. We think that this must be so as to persons of whose claims the personal representatives is aware. For present purposes there is no need to consider whether it is so as to persons of whose

> claims he ought to be aware, although in the case of a person not of full age or mental capacity this Court has recognised that there is a duty in a clear case to take action to safeguard that person's interests (Re Magson [1983] NZLR 592, 599). At least from the time when the Public Trustee knew that the (adult) children here intended to claim and wished the extent of the estate to be determined, we accept that the Public Trustee's duty of even-handedness did extend to them.

[28] The duty of even-handedness is important. It was confirmed by Hammond J in *MacKenzie v MacKenzie* (1998) 16 FRNZ 487 involving a dispute over a sizeable estate between the deceased's adult children by his first marriage and his second wife. In that case the executor had falsely told the plaintiffs there was no money in the estate. Proceedings were issued (the estate was worth approximately $1.3 million) alleging deceit, negligence, and breach of fiduciary duty. Hammond J found the defendant executor had been guilty of deceit.

[29] At 492 and 493 the Judge made the following points:

- A personal representative owns fiduciary duties to established beneficiaries and such duties include impartiality and even-handedness as between beneficiaries.

- On the authority of *Irvine v Public Trustee* those duties must extend to statutory claims of which the personal representative was aware.

- Cooke J's judgment in *Irvine* did not go "so far as to require the formal lodgment of a claim". There had been an indication of a claim, the plaintiffs had made their concerns known and had sought information on the true position but were entirely deflected by the defendant.

- The executor had breached her fiduciary duty by giving the plaintiffs inaccurate and misleading information.

[30] An extremely helpful judgment, referred to by both counsel, is that of Venning J in *Sadler v Public Trust* (2006) 26 FRNZ 115. Counsel inform me that the judgment is subject to an appeal to the Court of Appeal, to be heard in June 2009, 2½ years after Venning J's judgment was delivered.

[31] Again the case involved the classic dispute between a child of the first marriage and in this case a de facto partner. The estate was of modest size. The plaintiff did not discover her father's death until two years after it had occurred, by which stage the estate had been distributed.

[32] The plaintiff sued the Public Trust as executor alleging breach of fiduciary duty to her as a potential claimant. She alleged the executor had not acted even-handedly as between the beneficiary and potential claimants and had thwarted potential claims.

[33] A significant fact in that case was that the deceased, both through the Public Trust and the beneficiary, had given firm instructions (repeated to the Public Trust) that there was to be no public death notice and that the Public Trust was not to contact any of his adult children to tell them he had died. The Public Trust adhered to these instructions.

[34] Venning J accepted that an executor is under fiduciary duty to beneficiaries. However, that duty clearly did not extend to potential claimants who were not beneficiaries. The primary duty of an executor was to see that the testamentary wishes of a deceased were carried out (*Re Branson* (1911) 31 NZLR 79). The duty of even-handedness, Venning J accepted, applied to potential claimants who had notified an intention to the executor to bring a claim. On the authority of *Irvine,* the executor could not favour existing beneficiaries against potential claimants who had indicated their wish to claim.

[35] Venning J further considered that the power contained in s 4(4) did not extend to adult claimants, clearly a correct finding. He rejected the suggestion that there was any fiduciary duty on the facts before him.

[36] Venning J commented (at [63]) there could be no reasonable expectation for the Public Trust to act otherwise than in accordance with the deceased's wishes. "There is no undertaking by the executor to act on behalf of potential claimants against the estate." The Judge concluded (at [64]) there was no basis to impose a

duty, fiduciary or otherwise, on an executor to advise potential claimants under the Family Protection Act of the fact of the death of a deceased.

[37] The Judge (at [65]) also referred to the practical consideration that if there was such a duty it would extend to the entire class of potential claimants which under the Act included spouses, civil union partners, de facto partners, children, grandchildren, maintained step-children, and parents of the deceased.

[38] His Honour concluded at [67] that there was no Parliamentary intention similar to that contained in s 4(4) which created any such duty.

[39] The plaintiff in *Sadler*, as to a lesser extent does Ms Davenport, relied on the judgment of Laurenson J *Re Stewart (deceased)* (2002) 22 FRNZ 519. An appeal against that judgment was allowed, but on different grounds, in *Price v Smith* (2003) 23 FRNZ 1. The children of the deceased's first marriage sued the legal firm which had followed instructions from the deceased not to place a death notice in newspapers, to have a private burial, and not to notify her two children.

[40] At its strongest Laurenson J suggested there was indeed a duty owed by an executor to potential claimants. The Court of Appeal for its part preferred to leave that question open.

[41] Laurenson J appears to have rejected expert evidence given by a solicitor as to normal estate practice (at [52] and [53]) by suggesting that practice was "not as the law should be". He stated (at [65]) regardless of his own "inclinations as to what should be the law" his conclusion that the duty of even-handedness imposed on executors extended to potential claimants and that such a duty "cannot be expressed as going beyond a proscriptive duty not to conceal the fact of death from any such persons". As Venning J pointed out in *Sadler* at [42] there is a considerable difference between a duty not to conceal a death (particularly in a case where inquiry has been made) and a duty to advise potential claimants of a death.

[42] Venning J in *Sadler* ([32] – [42]) points out the various problems with Laurenson J's reasoning process. With respect, I consider the reasoning process in *Stewart* is unconvincing and align myself with Venning J's criticisms of it.

[43] In conclusion the New Zealand authorities fall well short of obliging an executor to notify potential claimants under the Family Protection Act that they have a right to bring a claim. A duty of even-handedness arises in situations where there are grounds to believe that a claim is being considered or where relevant information is being sought by a potential claimant.

[44] There is also an important policy consideration which lies behind what I perceive to be the current state of the law. As Venning J observed there are a number of classes of potential claimants. If a claim under the Act is filed then obviously those classes have to be cleared out. But to notify all such claimants would cause delay and expense, almost certainly unnecessarily, while such potential claimants are identified and their whereabouts ascertained.

[45] Quite apart from that consideration, notification would have the ability to encourage claimants to mount claims which otherwise they might not be motivated or disposed to bring. Human nature being what it is, to notify a person that he or she has a right to claim might well result in that person deciding to have a crack at the estate, particularly if there is a perception the estate is large. That dynamic too would add to expense and delay in the estate's administration.

[46] Over 30 years ago a venerable Auckland practitioner tested the proposal at that time of the legal profession being more proactive in advertising its services available to the public. Was it seriously being suggested, asked the practitioner caustically, that lawyers should leave information pamphlets about the Family Protection Act on pews at funerals? There is a policy echo here.

Result

[47] I accept that one of the deceased's grandchildren is still a minor. I do not, on the evidence available, regard this, using the *Magson* terminology, as a "clear case".

The authorities under the Family Protection Act make it clear, although circumstances are important and there are no rules, that it is unusual for the claims of grandchildren to be preferred to claims of an adult child of the deceased. Preference might be given in situations where infant grandchildren have been orphaned at an early age, where a parent has died, or where they have a close or dependant relationship with a deceased, or have demonstrable needs or limited financial

expectations. (See generally Patterson, *Law of Family Protection and Testamentary Promises* (3rd ed 2004).) There is no evidence of these factors here. The relationship between the grandchildren and their paternal family appears to have been non-existent since their birth.

[48] On the facts presented, and having regard to the authorities and the policies I have discussed, I thus refuse to direct the Public Trustee to notify the deceased's two grandchildren that they have a possible claim against the estate of their deceased grandmother.

[49] Ms Davenport suggested, that because a settlement was currently being negotiated and was likely to be concluded between Kelmen Bartocci and the estate's residuary beneficiaries, such notification by the Public Trustee could additionally inform the grandchildren that such a settlement was afoot. Again, for the same reasons, I decline to give such a direction.

[50] If the grandchildren have any claim under the Family Protection Act against members of the Bartocci family such a claim would be more properly directed against their father's estate (assuming that he is indeed the biological father) rather than their grandmother's. Indeed the settlement outlined will presumably augment the father's assets by a capital sum rather than the restriction of the mere life interest given in the deceased's will.

Costs

[51] I assume there are no costs issues and that the reasonable costs of counsel will be borne by the respective funds administered by the Public Trust in each of its capacities.

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Priestley J