

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2023-485-603264
[2023] NZHC 2620**

IN THE ESTATE OF DONALD ALGERNON GIFFORD
(Deceased)

BETWEEN REBECCA ELIZABETH LANE
Applicant

AND ANNE VERONICA GOLDSON and
BENJAMIN JAMES GOLDSON as
executors of the estate of
Donald Algernon Gifford
Respondents

Hearing: 2 August 2023

Counsel: D Montepara for Applicant
ML Barnes for Respondents

Judgment: 20 September 2023

JUDGMENT OF DOWNS J

*This judgment was delivered by me on Wednesday, 20 September 2023 at 12 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Kemp Barristers & Solicitors, Kumeu.
Glaister Ennor, Auckland.

Introduction

[1] This brief judgment addresses Rebecca Lane's application for an order under s 19 of the Administration Act 1969 calling on the respondents to show cause why probate of a will should not be granted to the Public Trust.¹

Background

[2] Donald Gifford died 26 February 2022, after battling Alzheimer's disease. Mr Gifford left a will dated 3 December 2015. By that will, Mr Gifford appointed two executors: Anne Goldson and Benjamin Goldson. Benjamin Goldson is Mr Gifford's adult son. Anne Goldson is Mr Gifford's partner of almost 30 years.

[3] Mr Gifford ceased all work in 2018 because of his deteriorating health. Thereafter, Mr Gifford sold some of his assets to pay for his living expenses and care. In late 2020, Mr Gifford moved into the dementia unit of a retirement home, then into another dementia unit at a different retirement home. Ms Goldson says she paid for much of Mr Gifford's care at a cost of between \$5,555.60 and \$7,243.20 each month.

[4] Mr Gifford's remaining asset of significance appears to have been his home in St Marys Bay, Auckland.² The home was in a trust called the Aldebaran Trust. However, Mr Gifford decided to dissolve the trust and place the home in Ms Goldson's name:

- (a) To ensure there was equity available to pay for his care.
- (b) To provide for Ms Goldson when he died.
- (c) Because in or about 2018, Ms Goldson had paid for approximately \$500,000 of remedial works on the home.

[5] The home is worth approximately \$3,850,000 – \$4,530,000.

¹ Ms Lane also sought an order concerning production of the will, but I apprehend this aspect is no longer contentious because Ms Lane has been given a certified copy of the will and may inspect the original at Glaister Ennor.

² Mr Gifford and Ms Goldson lived in separate homes.

[6] On 29 September 2020, the trust transferred the home to Ms Goldson. The home is not, therefore, part of Mr Gifford's estate.

[7] The evidence suggests the estate is insolvent.

[8] Rebecca Lane may well be Mr Gifford's daughter: Mr Gifford had a relationship with Ms Lane's mother; appears to have regarded Ms Lane as his daughter; and referred to her as his daughter in his will. Moreover, Ms Lane regarded Mr Gifford as her father and says she has aspects of his appearance. However, Ms Lane's birth certificate records someone other than Mr Gifford as her father, and Ms Goldson says Mr Gifford expressed doubt that he was Ms Lane's father. Science has not been called upon to settle the issue.

[9] Mr Gifford left Ms Lane \$5,000 in his will. Ms Goldson says Mr Gifford considered this satisfied his obligations to Ms Lane because:³

In 2012, [Ms Lane] brought a Family Protection Act claim against [her mother's] Estate. The Estate was in litigation with [Ms Lane] for around 4 years. I understand [Ms Lane] received about \$3 million - \$4 million from her mother's Estate.

[Mr Gifford] was aghast at [Ms Lane's] claims against the Estate and her behaviour during litigation. He believed that [her mother] had provided for [Ms Lane] both in her Will and significantly during her lifetime. He was called to provide evidence on behalf of [her mother's] Estate.

I understand from [Mr Gifford] that [Ms Lane] was very upset that he had given evidence in support of [her mother's] Estate.

[Mr Gifford] told me that he never wanted to see or speak to [Ms Lane] again. I understand that [Mr Gifford] and [Ms Lane] remained alienated from around 2016 until [Mr Gifford's] death in 2022.

[Ms Lane] never enquired about [Mr Gifford] or cared for him during his ill health. She never visited him whilst he was in the secure units at Remuera and Mt Eden.

[Ms Lane] attended [Mr Gifford's] funeral on 3 March 2022.

³ Affidavit of Anne Goldson, dated 21 April 2023, paras 48–53.

The application

[10] Ms Lane believes Mr Gifford failed to provide for her adequately in his will, and more particularly, failed to discharge his moral duty to her as his daughter. Ms Lane seeks an order appointing the Public Trust to administer Mr Gifford's estate so that it may investigate, and then prosecute, a claim against Ms Goldson under the Property (Relationships) Act 1976, so that, in turn, Ms Lane may bring a claim against Mr Gifford's estate under the Family Protection Act 1955 or rely upon s 77 of the Administration Act in relation to the estate. Or, as Mr Montepara explains on behalf of Ms Lane:

At the time of the deceased's death, Ms Goldson was his de facto partner as defined by the Property (Relationships) Act 1976 ("PRA").

The [St Marys Bay] property was the family home of the deceased and Ms Goldson at the time of the deceased's death.

Ms Goldson's interests in her business at the time of the deceased's death would have also been relationship property.

Accordingly, the deceased's estate would have a claim against Ms Goldson pursuant to the PRA for a share of:

- (a) The [St Marys Bay] property;
- (b) Ms Goldson's business interests;
- (c) Any other relationship property at the time of the deceased's death.

If such a claim was successful, it would result in significant assets being brought back into the deceased's estate. These assets would form part of the deceased's residuary estate to be dealt with pursuant to clause 6.2 of the deceased's will.

Clause 6.2 of the deceased's will leaves the deceased's residuary estate to the Trust.

As the Trust was wound up by the deceased before his death, the residuary estate would need to be distributed in accordance with the intestacy rules as set out in section 77 of the Administration Act 1969.

Accordingly, the applicant (Ms Rebecca Lane) and respondents (Ms Anne Goldson and Mr Benjamin Goldson) would stand to inherit the residuary estate pursuant to section 77 of the Administration Act 1969.

It is the applicant's case that, given the circumstances (including the possible hostility between the beneficiaries), it would not be appropriate that any of the beneficiaries who stand to benefit from the estate have a role in administering the estate.

In addition, if Ms Goldson was appointed as executrix of the estate, she would be required to bring a claim on behalf of the estate against herself for a share of the [St Marys Bay] property (currently owned by Ms Goldson), her business interests and any other relationship property owned at the time of the deceased's death.

In these circumstances, Ms Goldson's duty to the estate would conflict with her own personal interests in ensuring that no claim under the PRA is made. The conflict arises because it is really not possible for Ms Goldson to give impartial consideration to the relationship property issues. Such conflict between interest and duty would warrant the appointment of Public Trust as administrator.

Accordingly, Public Trust would be better suited to effectively administer the estate, to properly investigate all assets and liabilities of the estate and to deal with them appropriately.

Analysis

[11] Section 19 of the Administration Act requires the executor to have neglected or refused to prove the will before the Court may intervene. It is not evident Ms Goldson and Mr Goldson have done so, but even if they had, I would not grant an order for three reasons.

[12] First, it is not clear that s 19 is an appropriate vehicle for what Ms Lane seeks to achieve. Chisholm J was confronted with a similar application in *Ruocco v Wright*.⁴ There, as here, the applicant sought to use s 19 to re-open the deceased's estate, make a claim under the Property (Relationships) Act "to bring the deceased's share of property ... back into his estate", and then "pursue a claim against the estate under the Family Protection Act".⁵ Chisholm J dismissed the application, including on a jurisdictional or at least quasi-jurisdictional basis.⁶

In effect the underlying purpose of this application is to re-open administration of the estate even though it has been completed. In my view s 19(1) was not intended to permit administration of an estate to be re-opened after it has been lawfully concluded. To the contrary, the purpose of the section is to enable the Court to intervene so that administration of an estate can be completed. If the re-opening of an estate cannot be accomplished under some other statutory provision (for example, the Administration Act, Property (Relationships) Act, the Family Protection Act or the Law Reform (Testamentary Promises) Act 1949) or by virtue of some principle of law (for example, those relating to breaches of trust), s 19(1) is not available to plug the gap.

⁴ *Ruocco v Wright* HC Christchurch CIV-2008-409-311, 16 December 2008.

⁵ At [8].

⁶ At [19].

[13] As in *Ruocco v Wright*, the evidence suggests Mr Gifford’s estate has been wound up. Chisholm J’s reasoning is, therefore, applicable.

[14] Second, it is not clear that the Public Trust, if appointed, would be given leave to bring a claim under s 25(1)(a) of the Property (Relationships) Act. Leave is required under s 88(2) of that Act; and may be granted only if the Court is satisfied that “refusing leave would cause serious injustice”. Doubt attaches to whether that test would be met as consideration would presumably encompass Ms Lane’s personal circumstances, with a view to some assessment of the likelihood of a successful claim under the Family Protection Act (again, as a consideration relevant to leave in relation to the claim under s 25(1)(a) of the Property (Relationships) Act). However, Ms Lane has not offered any evidence about her personal circumstances.⁷

[15] Mr Montepara contends that the decision of the Court of Appeal in *Public Trust v Whyman* is authority for the proposition that leave is not required, or probably not required, under s 88(2) of the Property (Relationships) Act.⁸ I do not read *Public Trust v Whyman* this way.⁹ In any event, s 88(2) appears to be clear on its face that leave would be required, and in the terms identified.

[16] Third, Ms Lane has not offered any evidence about how the proposed activities by, and on behalf of the estate, would be funded. The Public Trust would need to be paid for its administration of the estate, and obviously, for prosecuting any claim under the Property (Relationships) Act. A claim of this nature is likely to be time consuming, and costly. As observed earlier, the estate appears to be insolvent. It follows that the Public Trust would need to be funded independently of the estate, or perhaps agree to some form of contingency arrangement on behalf of the estate, to do what is envisaged. The evidence is silent on this topic. When I raised this concern with Mr Montepara,

⁷ The same difficulties would confront an application under s 6(2) of the Administration Act. However, Ms Lane’s personal circumstances are presumably irrelevant to the operation of s 77 of that Act.

⁸ *Public Trust v Whyman* [2005] 2 NZLR 696.

⁹ See also *Kinniburgh v Williams* [2004] 2 NZLR 132 (also referred to as *Re Williams* [2004] 2 NZLR 132); *Kennedy v Kennedy* [2017] NZHC 168; *Trainor v Leotuku* [2020] NZHC 3121; *Morgan v Public Trust* HC Auckland CIV-2006-404-3636, 20 November 2006; and *Public Trust v Hislop* [2014] NZFC 9170.

he said that the Public Trustee was prepared to accept appointment.¹⁰ This does not address the concern: there is no evidence as to how the proposed activities would be funded, given the estate appears to be insolvent.

[17] In summary, s 19 is not an appropriate vehicle for what Ms Lane seeks to achieve; the Public Trust would not necessarily receive leave to bring a claim under s 25(1)(a) of the Property (Relationships) Act; and there is no evidence as to how the Public Trust would be funded, if appointed. So, for reasons conceptual and practical, I decline the application.

Result

[18] The application is dismissed.

[19] Ms Lane must pay Ms Goldson and Mr Goldson, as executors, 2B scale costs.

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Downs J

¹⁰ Mr Montepara did not ask for an adjournment to adduce evidence on this point, which Ms Barnes had identified as a live issue (in paragraph 37 of her written submissions) on behalf of the respondents.