TRUST LAW

Challenges to wills: the unpredictability of litigation

By Anthony Grant

Today's article concerns *O'Neill v O'Neill* [2020] NZHC 2988 (13 November 2020), a decision of Downs J.

A Hamilton solicitor died, leaving only one asset of significance – a half-interest in a house worth about $500,000.

He had three adult children. In an earlier will he gave his wife a life interest in his half-interest in the house and left the half-interest to the three children after her death. In his final will he gave his wife the half-interest outright and the three children got nothing.

The solicitor had been in a relationship with his wife for 37 years.

The three children sued, claiming lack of testamentary capacity and undue influence and sought an award under the Family Protection Act.

This was some of the evidence about O'Neill's lack of testamentary capacity: he was forgetful and repeated the same question every couple of minutes, he would forget a conversation within minutes and then ask the same question again, "whenever he was outside his normal environment... he would need complete guidance and direction on just about everything", he couldn't remember the ages of his children and he relied on his wife to write notes on a board on the dining room table to remind him when she would be home, whether someone was coming to pick him up for an outing or if a cleaner was coming etc.

Three doctors said he had sufficient mental capacity to make a will and their evidence was upheld. The claim of testamentary incapacity failed.

The children said when he made his final will, their father did so as a result of his wife's undue influence. He had poor eyesight and relied on his wife "to take him everywhere" and he was substantially dependent on her. This and other evidence was held not to be sufficient to establish a claim of undue influence.

That left the claim under the Family Protection Act and this article is primarily about this particular cause of action.

Two of the children were well off but the third appeared not to be. There is ample authority for the proposition that children who are well off but who receive nothing from a parent's will might reasonably expect to get a payment of up to 10% of an estate for 'recognition' or 'support'. But the court gave them nothing, with Downs J saying, "Every case under the Family Protection Act turns on its facts. Richardson P made the same point in [the leading case of] *Williams v Aucutt*, as did Blanchard J writing separately, "[The facts] here count against an award."

The case illustrates the uncertainty of litigation involving claims of testamentary incapacity and particularly claims under the Family Protection Act.

I suspect most counsel, advising children who received nothing under their father's will, would advise them that a claim under the Family Protection Act would be likely to succeed and there would be a reasonable prospect that they might receive about 10% of the estate – albeit after the wife had died.

The judge has not yet ruled on costs and whether the children must pay the defendant's costs for a four-day trial. If they have to pay the widow's costs, having received nothing from the estate, they will surely feel this area of law is so uncertain as not to justify the risks and expense of litigation.

In making these comments I am not criticising the decision of Downs J. The point is simply to show how fact-specific so many of these cases can be and how the outcome of cases under the Family Protection Act can be impossible for counsel – or indeed anyone – to predict.

It is hard to think of any area of the law in this country that gives judges such wide discretions and makes the outcome of such claims so unpredictable. And, being so unpredictable, so unappealable as well.

The regime can be contrasted with the 'forced heirship' regimes in continental Europe and in many Islamic countries where wealth devolves in stated proportions to family members.

By contrast, the Family Protection Act gives no bright lines for the way assets should devolve amongst family members.

The principles that New Zealand judges should apply have varied over time with the Court of Appeal having said a few years ago that the courts had been too interventionist and ought to make fewer changes than before.

This area of the law is inherently uncertain because there are no prevailing beliefs within New Zealand society as to the 'right' way assets should devolve on death. There are widely-divergent opinions. Some people believe children should be made to fend for themselves. Others think all parental wealth should devolve to a spouse and children. But how much should devolve to the spouse and how much to the children? Should there be a principle of equality? Is a court unfair in preferring inequality?

I think it likely that some judges would have found in favour of the children in the *O'Neill* case but that doesn't mean Justice Downs got it wrong. The fact that some judges would favour the children and others wouldn't reflects the divergent views in New Zealand on this subject and the unpredictability of the outcome of claims under the Family Protection Act reflects the prevailing lack of consensus on the way assets should devolve on death.

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