IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA618/2023
[2025] NZCA 36

BETWEEN	REBECCA ELIZABETH LANE Appellant
AND	ANNE VERONICA GOLDSON AND BENJAMIN JAMES GOLDSON AS EXECUTORS OF THE ESTATE OF DONALD ALGERNON GIFFORD Respondents

Hearing:	23 July 2024
Court:	Hinton, Mander and Walker JJ
Counsel:	M I S Phillipps for Appellant M L Barnes for Respondents
Judgment:	28 February 2025 at 4.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Hinton J)

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[1] On 20 September 2023 Downs J dismissed an application by the appellant, Rebecca Lane, under s 19 of the Administration Act 1969 (the Act). She appeals to this Court.

[2] Ms Lane, who may or may not be a biological daughter of Donald Gifford, seeks to enlarge his estate. She applies to have the Public Trust appointed as administrator under s 19 of the Act, and will urge the Public Trust to bring a Property (Relationships) Act 1976 (PRA) claim against Mr Gifford's de facto partner, Anne Goldson. Ms Goldson is one of the executors of the estate, and a respondent in this proceeding.

[3] In particular, Ms Lane wants the Public Trust to claim 50 per cent of the value of a property in St Mary's Bay (the Property), formerly owned by Mr Gifford but owned by Ms Goldson by the date of his death. A 50 per cent share of the Property has an indicated value range of $1,900,000 to $2,250,000.

[4] The estate is otherwise insolvent. Its debts exceed the modest assets remaining at death, being mainly artwork.

[5] Ms Lane says that once the estate is enlarged, she has an automatic entitlement under ss 77 and 79 of the Act (relating to the succession of intestate estates). This is because any proceeds of a PRA claim would fall into Mr Gifford's residuary estate, and the residual beneficiary named in Mr Gifford's will, the Aldebaran Trust, was wound up prior to his death. The residuary estate would therefore be distributed as a partial intestacy under ss 77 and 79.[1] Under a partial intestacy, $155,000 plus interest would be distributed to Ms Goldson as de facto partner, and the balance would be distributed one-third to each of Ms Goldson, Benjamin Goldson and Ms Lane. Mr B Goldson is the son of Ms Goldson and Mr Gifford, and the other executor/respondent in this proceeding.

[6] In the High Court, Ms Lane also advanced a claim under the Family Protection Act 1955 (FPA) as an alternative to what she says will be her entitlement under s 77 of the Act. Before us there was little reference to the FPA claim. That claim is now

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1 *Re Estate of Mabee* [2023] NZHC 2134 at [21].

said to be most unlikely to be necessary, given the asserted strength of Ms Lane's position under s 77.

Factual background

[7] When Ms Lane was born in 1964, her mother Ms Firth was married to a Mr Keith. Ms Firth and Mr Keith were recorded on Ms Lane's birth certificate as her parents and she was raised accordingly.

[8] Ms Firth and Mr Keith separated in late 1980 when Ms Lane was 16. Ms Firth purchased and lived in a property in Remuera. Ms Lane went with her.

[9] In 1982 Ms Firth started living with Mr Gifford in the Property. They had been in a relationship much earlier and in an unusual and traumatic twist for Ms Lane, she was then informed that although born during her mother's marriage to Mr Keith, Mr Gifford was her father.

[10] Whether Ms Lane went to live at the Property or moved in with her boyfriend is disputed. In any event, Mr Gifford referred to Ms Lane as his daughter, although later in life, according to Ms Goldson, he said he was not certain Ms Lane was his biological child. He told Ms Goldson that he "never wanted to get any paternity tests done, as he did not want to cause any trouble".

[11] In 1983 Mr Gifford transferred a half share of the Property to Ms Firth. They separated in 1992 and Ms Firth transferred her half share back to Mr Gifford, being granted a mortgage instead. It was discharged in 1997 and a new mortgage was registered to the BNZ.

[12] Mr Gifford's de facto relationship with Ms Goldson began in 1993, and their son Mr B Goldson was born in 1995. They maintained separate residences but had a committed and close relationship. Ms Goldson was the main income earner, working as a professor at the University of Auckland and as a documentary filmmaker. Mr Gifford worked as a landscape gardener.

[13] Ms Firth died in September 2011.

[14] Ms Goldson says that in 2012 Ms Lane contested her mother's will under the FPA and the litigation ran for about four years. She gives evidence of her belief that Ms Lane received (apparently including an actual bequest) about $3 to $4 million from her mother's estate. Ms Goldson says that Mr Gifford was strongly opposed to Ms Lane's FPA action. He gave evidence for Ms Firth's estate, and (again according to Ms Goldson) he and Ms Lane had nothing to do with each other from then onwards. Ms Lane makes no comment on these assertions. She says in her reply affidavit that she has been advised this evidence is not relevant for purposes of this application but she would file further evidence if called upon to do so.

[15] On 3 December 2015, Mr Gifford signed his operative will, leaving his chattels (including artwork) to Ms Goldson, $5,000 to "my daughter" Ms Lane, and the residuary estate to the Aldebaran Trust, settled by him the same day.

[16] The will specifically records that:

> **I GIVE AND BEQUEATH** the sum of $5,000.00 to my daughter **REBECCA IN RECOGNITION** of my moral obligation to her and record that in my opinion such sum is fair, reasonable and appropriate having regard to the substantial inheritance she has already received from her deceased mother.

[17] The trustees of the Aldebaran Trust were Mr Gifford, Ms Goldson and Stephen Goldson, Ms Goldson's brother. The trust deed has not been put before the Court, but Ms Goldson advises that the beneficiaries were Mr Gifford, Mr B Goldson and herself.

[18] On 27 January 2016 Mr Gifford formally transferred the Property to the trustees.

[19] By 2016 Mr Gifford started to develop symptoms of Alzheimer's disease. By 2018 he had to stop work and Ms Goldson took over managing his finances. She and Mr B Goldson moved into the Property to care for Mr Gifford and she says she paid approximately $500,000 for remedial work required on the Property. By this stage it seems Mr Gifford's liquid assets were $50,000 only. From 2018 Ms Goldson says she paid for the majority of his outgoings. In 2019 Mr Gifford's modest boat, car and some artworks were sold to help pay for his medical costs.

[20] By 2020 Mr Gifford could not be left alone. Ms Goldson engaged a live-in carer to help care for him. Her affidavit explains that on 29 September 2020, the "trustees" wound up the trust and distributed the Property to her.[2]

[21] It seems clear that the various actions regarding the trust and the Property were motivated at least in part to avoid any claim by Ms Lane against Mr Gifford's estate.

[22] From late 2020, about the same time that the Property was transferred to Ms Goldson, Mr Gifford was in full-time care in a secure dementia unit, with costs being met by Ms Goldson.

[23] Mr Gifford died on 26 February 2022.

[24] During 2022 Ms Goldson and the estate lawyers replied to queries from Ms Lane. They advised that Ms Lane had been left $5,000 but that the estate assets consisted only of artworks worth $62,000 which had passed to Ms Goldson. There was no cash, Mr Gifford's bank accounts having been closed in April 2021. The liabilities exceeded asset value. Ms Goldson offered an ex-gratia payment of $5,000 to Ms Lane. Her personal lawyer provided information about other assets in her name (which appeared relatively minor), and indicated that Ms Goldson and Mr Gifford had an unspecified agreement about the Property.

Procedural history

[25] On 6 March 2023 Ms Lane applied to the High Court without notice for an order nisi under s 19(1) of the Act calling on the executors to show cause why probate of the will should not be granted to the Public Trust. The documents filed consisted of an application in the form specified by r 27.4 of the High Court Rules 2016 and an affidavit of Ms Lane dated 24 February 2023. Rule 27.4(3) required the application to be in form PR 1AA. That form in turn required the applicant to specify why the

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[2] The specifics relating to the Aldebaran Trust do not have documentary support. We do not know whether the trustees still included Mr Gifford who by this time was severely unwell and required full-time care. If they did, both the transfer of the property and the winding up of the Trust would very likely be invalid.

application was made without notice. That section was omitted from the form filed by Ms Lane.

[26] On 15 March 2023 the Deputy Registrar made and sealed the order nisi on a without notice basis, on the following grounds:

(a) the executors had refused to prove the will; and

(b) three months had elapsed since the death of the testator.

[27] The sealed order required the executors to appear to show cause why probate of the will should not be granted to the Public Trust and stated that unless they did so the Court may make such order for the administration of the estate as appears just.

[28] The order was served on 16 March 2023. On 21 April 2023 Ms Goldson filed a notice of opposition, along with an affidavit in which she made it plain that any claim by Ms Lane was rejected. Ms Lane filed a further affidavit in reply.

[29] On 24 May 2023, at a first call of the application, Jagose J issued a minute noting that the Public Trust abided the Court's decision. The Public Trust had not and still has not taken any steps in the proceeding. The Judge's statement was apparently drawn from Ms Lane's counsel's memorandum dated 23 May 2023. Jagose J also set the application down for hearing on 2 August 2023, being the hearing which took place before Downs J.

High Court judgment

[30] The Judge made no reference to the order nisi and said it was not evident that the named executors had neglected or refused to prove the will. However, he concluded that even if they had, he would not grant an order, for three reasons.[3]

[31] First, it was not clear that s 19 was an appropriate vehicle for what Ms Lane sought to achieve. He relied on *Ruocco v Wright*, where Chisholm J dismissed a

[3] *Lane v Goldson* [2023] NZHC 2620 [judgment under appeal] at [11].

similar application under s 19 on the basis that the section did not permit administration of an estate to be reopened after it had been lawfully concluded.[4] The Judge quoted Chisholm J's finding that if the reopening of an estate cannot be accomplished under some other statutory provision (for example in the Act, PRA, FPA or the Testamentary Promises Act 1949) or by some principle of law (for example relating to breach of trust) then s 19(1) is not available to bridge the gap.[5] The Judge considered that, as in *Ruocco v Wright*, the evidence suggested that Mr Gifford's estate had been wound up and Chisholm J's reasoning was therefore applicable.[6]

[32] Second, the Judge held that, if appointed, the Public Trust required leave to bring a claim against Ms Goldson under s 25(1)(a) of the PRA, by virtue of s 88(2) of the Act. He said it was not clear the Public Trust would be granted leave. Under s 88(2) leave may be granted only if the Court is satisfied that "refusing leave would cause serious injustice". That would presumably encompass Ms Lane's personal circumstances with a view to assessment of the likelihood of her successfully claiming under the FPA. Ms Lane had offered no evidence about her personal circumstances.[7] The Judge footnoted that the same difficulties would confront an application under s 6(2) of the Act (discretion of court as to whom administration is granted), but also observed: "however Ms Lane's personal circumstances are presumably irrelevant to the operation of s 77 of the Act".[8]

[33] Third, Ms Lane had not offered any evidence about how the various actions required on behalf of the estate would be funded. The Public Trust would need to be paid, and the proceedings would likely be time-consuming and costly. The estate appeared to be insolvent. The Public Trust would need to be funded independently of the estate, or perhaps agree to some form of contingency arrangement. The Judge noted that when he expressed concern, funding having previously been identified as a live issue by the executors, counsel for Ms Lane had advised him that the Public Trust was prepared to accept appointment. The Judge said this did not address the concern that there is no evidence as to funding in circumstances where the estate appeared to

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4 At [12], citing *Ruocco v Wright* HC Christchurch CIV 2008-409-3111, 16 December 2008 at [19].
5 Judgment under appeal, above n 3, at [12].
6 At [13].
7 At [14].
8 At [14], n 7.

be insolvent.[9] The Judge also noted that counsel did not request an adjournment to adduce evidence from the Public Trust.[10]

[34] The Judge concluded, in summary:[11]

(a) that s 19 was not an appropriate vehicle for what Ms Lane sought to achieve because administration had been lawfully concluded;

(b) the Public Trust would not necessarily receive leave to bring a claim under the PRA; and

(c) there was no evidence as to how the Public Trust would be funded if appointed.

[35] The application was therefore dismissed and Ms Lane ordered to pay costs.[12]

Submissions on appeal

[36] Each of the above conclusions is challenged. In addition, Mr Phillipps, appellate counsel for Ms Lane, says as a preliminary point that the appellant had already established that the executors had neglected or refused to prove the will when the Court granted and sealed the order nisi on 15 March 2023. Therefore, before the Judge it was for the executors to show cause why probate should not be granted to the Public Trust. The implication, at least, was that the Judge had misapplied the onus.

[37] Mr Phillipps submits that s 19(1) of the Act is available in the present circumstances, and the judge was wrong to find otherwise. An order under the section is not limited to cases where the executor has failed to take any steps at all, or to cases where the executors are still in the process of winding up the estate. Executors have a duty to take steps to maximise an estate and when they are aware of potential claims available to the estate to maximise the assets, they must pursue those.

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9 At [16].
10 At [16], n 10.
11 At [17].
12 At [18]–[19].

[38] As to whether the Public Trust would obtain leave under s 88(2) of the PRA, Mr Phillipps submits that the Court just has to be satisfied that the applicant has a credible claim to enlarge the estate and, following that, against the estate. He says an application under the PRA has a very high likelihood of resulting in a substantial enlargement of the estate and, as the testator's daughter, Ms Lane has an absolute entitlement under the Act to a portion of an enlarged estate. The indication at the hearing before us was that she would not pursue a claim under the FPA, that being considered unnecessary.

[39] To the third conclusion, Mr Phillipps says it was not open to the Judge to consider how the administration of the estate might be funded. Jagose J had issued a minute saying that the Public Trust abided the Court's decision and the application therefore proceeded on that basis. How the Public Trust is to be funded is not an issue for the Court, but an issue for the Public Trust. Mr Phillipps told us his understanding was that the Public Trust had been served with the proceedings and the order nisi, and it had confirmed in writing its acceptance of the appointment, if the Court granted it. As noted, there is no such written confirmation on the court file.

[40] As a consequence, it is submitted that in terms of s 6 of the Act the Public Trust should be appointed, the primary reason being that the nature of the executors' conflict amounts to special circumstances under s 6(2) of the Act.

[41] The respondents essentially seek to uphold the judgment for the reasons given by the Judge. They submit that it is inappropriate to use s 19 to reopen a closed estate. They further submit that there is limited prospect that any PRA or FPA application brought by the Public Trust will succeed. They stress that there is no evidence before the Court from the Public Trust, and thus no evidence that it is even aware that the estate is insolvent.

Overview of the application

[42] The language of s 19 and the procedure involved are somewhat arcane:

> **19 Proceedings where executor neglects to prove will**
>
> (1) 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.
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> (2) Upon proof (whether by affidavit or otherwise) of service of the order, or upon the court dispensing with service of the order, if the executor who is so called upon does not appear or upon cause being shown, the court may make such order for the administration of the estate, and as to costs, as appears just.
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> …

[43] On the face of it, s 19 envisages two phases. First, the order nisi is granted (if appropriate) and second the named executors have an opportunity to show cause why probate should not be granted to another executor. If the court decides to appoint another executor, that will generally be assessed under s 6 of the Act which provides that the court has a discretion as to whom administration is granted and has to have regard to the rights of all persons interested in the estate. The making of any order under s 19 is discretionary.

[44] There is no prescribed procedure for applying for an order nisi as such but an application under s 19 of the Act would appear to fall under r 27 of the High Court Rules. As noted earlier, if the application is made on a without notice basis it falls under r 27.4 and must be made in form PR 1AA. Counsel's obligation to ensure full disclosure of matters relevant to the application will be in full effect.

[45] To obtain an order nisi, the applicant must show that the executors have neglected or refused to prove the will. This requires both that the executors had *an obligation* to seek probate and that they did not do so within the requisite three months.[13] The applicant must also show that the court should exercise its discretion to make the order.

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[13] *Ruocco v Wright*, above n 4, at [17].

[46] There is no well-established authority setting out the general principles to be applied on a s 19 application. However, the principles under s 21 of the Act, dealing with the discharge or removal of an administrator in general, are settled, and apply with equal force here. The standard authority is *Tod v Tod*, where this Court endorsed the principles set out by Heath J in *Farquhar v Nunns*.[14] They are as follows:[15]

> (a) The starting point is the Court's duty to see estates properly administered and trusts properly executed.
>
> (b) This jurisdiction involves a large discretion which is heavily fact-dependent.
>
> (c) The wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given consideration, but ultimately the question is as to what is expedient in the interests of the beneficiaries.
>
> (d) Expedience is a lower threshold than necessity, and imports considerations of suitability, practicality and efficiency. Misconduct, breach of trust, dishonesty, or unfitness need not be established.
>
> (e) Hostility as between administrators/trustees and beneficiaries is not of itself a reason for removal, but hostility will assume relevance if and when it risks prejudicing the interests of the beneficiaries.
>
> …

[47] This Court in *Tod* also endorsed the proposition, again from *Farquhar v Nunns*, that the courts will not readily replace an executor selected by a deceased to manage his or her estate except that where an executor has a conflict of interest that undermines the welfare of the beneficiaries or impairs their ability to act as an impartial executor, it will generally be expedient to remove them.[16]

[48] Similar principles have been established under s 6 of the Act in *Baird v Fisher*.[17] These include that the court is required to be satisfied there are special circumstances justifying the bypassing of an executor, having regard to the factors identified in s 6(4).

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14 *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145 at [22], citing *Farquhar v Nunns* [2013] NZHC 1670 at [13].

15 *Farquhar v Nunns*, above n 14, at [13] (footnotes omitted).

16 *Tod v Tod*, above n 14, at [27], citing: *Farquhar v Nunns*, above n 14; *Hinde v Cranwell* [2012] NZHC 63 at [27]; and *Crick v McIlraith* [2012] NZHC 1290 at [19].

17 *Baird v Fisher* [2014] NZHC 1347 at [6].

[49] In a case of this nature which turns on a projected proceeding under the PRA, the application of s 88 and in particular s 88(2) is key. The section provides:

> **88 Who can apply**
>
> (1) The following persons may apply for an order under section 25(1)(a) or (b) or an order or declaration under section 25(3):
>
> (a) the surviving spouse or partner:
>
> (b) any person on whom conflicting claims in respect of property are made by the surviving spouse or partner and the personal representative of the deceased spouse or partner.
>
> (2) The personal representative of the deceased spouse or partner may, with the leave of the court, apply for an order under section 25(1)(a). The court may grant leave only if it is satisfied that refusing leave would cause serious injustice.
>
> (3) The following persons may apply for an order under section 25(1)(b) or an order or declaration under section 25(3):
>
> (a) the personal representative of the deceased spouse or partner:
>
> …

Was the burden on the executors at the hearing?

[50] The appellant submits that having already obtained an order nisi, it was for the respondents to show cause why they should not, in effect, be replaced and that the Judge failed to appreciate that.

[51] Little, if anything, turns on this point. Although the Judge said that there was no evidence the executors had neglected or refused to prove the will, which on the face of it is contrary to the order nisi, he went on to consider whether in any event the application should be granted.[18] Similar to the view expressed by this Court in the leading decision of *Public Trust v Whyman*, albeit on a slightly different issue, there is no point in delving into the intricacies of arguments over shifting burdens of proof under s 19.[19] Rather, the Court's focus must be on the key issue in the case — whether there could be a credible claim by the estate against Ms Goldson under the PRA, without which there is no basis for removing the executors.

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18 Judgment under appeal, above n 3, at [11].

19 *Public Trust v Whyman* [2005] 2 NZLR 696 at [16].

[52] Further, although it was not appealed, we consider that the order nisi was improperly obtained. As noted, the application was made without notice under r 27.4 of the High Court Rules, and omitted to state the without notice ground. It is difficult to see that any applied. The application therefore should have been made in solemn form under r 27.6, with proper notice to the executors. The appropriate course in a case such as this where the application is clearly contested would then have been to set it down for hearing in full. Rather, the order appears to have been granted by the Registrar as a matter of course.

[53] Clearly no consideration had been given on the making of the order nisi to whether the executor had an obligation to seek probate. In those circumstances, it would have been appropriate for the Judge to treat the application afresh. Viewed overall, on an application under s 19 of the Act it is for the applicant to show that an order is just.

Was s 19 unavailable because the estate was wound up?

[54] As set out at [31] above, the Judge found that s 19 was not available because administration had been lawfully concluded.

[55] The executors were not under a legal obligation to obtain probate, under s 65 of the Act, as the payments to be made to specified persons were under $15,000 and therefore no formal winding up steps were required.[20] The distribution of assets in these circumstances may loosely be described as concluding the estate administration but does not preclude an order being made under s 19.

[56] The broad purpose of s 19 is to allow probate to be granted and an executor to be replaced where they ought to have sought probate and did not do so. Failure by the executors to bring a credible claim is one such situation. Contrary to the position of Chisholm J in *Ruocco*, adopted by the Judge here, in an appropriate case s 19 clearly can be used to reopen a closed estate and allow a third party to try to enlarge it.[21] It would not be appropriate to read s 19 down in the manner that the Judge's finding

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20 Administration (Prescribed Amounts) Regulations 2009, reg 4.

21 We agree with the conclusion reached by Chisholm J in *Ruocco* on the balance of his reasoning, but not on this ground. See *Ruocco v Wright,* above n 4, at [19].

envisages. If there were lengthy delay following distribution of assets before bringing a claim that might be a relevant factor in declining an application under s 19 but it is not the case here.

Does the Public Trust have a credible claim for leave under s 88(2) of the PRA?

[57] While it is counter-intuitive, an executor can bring a claim against a surviving spouse under s 88 of the PRA despite that being clearly contrary to the wishes of the deceased. In October 1988, the Working Group on Matrimonial Property and Family Protection recommended there be no right for an executor to bring such proceedings at all, reasoning that a division would only benefit beneficiaries and claimants against an estate and be at the expense of the surviving partner.[22] However the legislation ultimately provided for such a right, with leave. This enables s 88 to be used as a type of anti-avoidance provision.

[58] As Professor Peart opined in "Relationship property on death", s 88(2) appears to have been inserted "in response to submissions identifying the risk of dependent family members being rendered destitute if the estate could not seek a division".[23] Interestingly, contrary to the observations of Chisholm J in *Ruocco v Wright* and as the Supreme Court pointed out in the recent decision of *A, B and C v D and E Limited as Trustees of the Z Trust,* there is no anti-avoidance provision in the FPA although it might be thought there is a need for one.[24] If the executors had a credible claim against Ms Goldson under the PRA, there would be an obligation to seek probate and Ms Goldson and her son would be clearly conflicted. As Mr Phillipps argued, no issue would arise in invoking s 19 and s 6 of the Act in those circumstances.

[59] However, the court first has to be satisfied that the Public Trust would have a credible claim against Ms Goldson. We agree with the appellant that mere "doubt" as to the merits of the claim, as expressed by the Judge, is an insufficient ground to refuse the s 19 application. But the Court has to be satisfied that the claim at least has some merit before removing the executors selected by the deceased.

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22 Ministry of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46.

23 Nicola Peart "Relationship property on death" [2004] NZLJ 269 at 270.

24 *Ruocco v Wright*, about n 4, at [30]; and *A, B and C v D and E Limited as Trustees of the Z Trust* [2024] NZSC 161, [2024] 1 NZLR 579 at [80].

[60] There is no dispute that to bring any claim against Ms Goldson under the PRA, the Public Trust would need to persuade the Court it would be seriously unjust not to grant leave in terms of s 88(2). Mr Phillipps acknowledged leave is required, abandoning the argument that had been unsuccessfully raised in the court below, that s 88(2) may not be applicable and leave therefore not required.

[61] "Serious injustice" in this context is interpreted as serious injustice to the beneficiaries, excluding the deceased's partner and including potential claimants. As this Court said in *Public Trust v Whyman* it seems sensible to apply the serious injustice test in a way that facilitates the making of claims.[25]

[62] Whether there is serious injustice under s 88(2) turns on whether there is merit in the case the claimant would or might then have, in this instance under the FPA or s 77 of the Act.

[63] We approach the matter therefore by focusing primarily on whether there could be serious injustice to Ms Lane. It is obviously not for this Court to come to a conclusion on that. We are in no position to do so. But as we say we have to be satisfied that there is some merit in the argument — that Ms Lane's case is, in fact, credible.

[64] In our view, and consistent with those cases where leave has been granted, to establish serious injustice Ms Lane would require proof of financial need, breach of moral duty, or other special circumstances.[26] Other factors relevant to this case would

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25 *Public Trust v Whyman,* above n 19, at [48].

26 In *Public Trust v Whyman* itself the testator's infant children received nothing under his will. In *Morgan v Public Trust* HC Auckland CIV-2006–404–003636, 20 November 2006, the deceased's adult daughter had special financial vulnerability and had received nothing under the will. In both cases insurance policies that would have benefitted the applicants had been surrendered and in both cases leave was granted. In *Glass v Glass* [2022] NZHC 3233, [2022] NZFLR 674, the deceased had a very small estate because significant assets were held in a number of trusts. The deceased's adult child from a first marriage, who had received very little in her lifetime, and had challenging financial circumstances, was granted leave under s 88. So too in *Partridge v Partridge* [2024] NZHC 702, where the deceased's significant assets passed to the defendant by survivorship, and the adult children (some of whom had health and financial issues, and for whom little provision was made) were granted leave under s 88.

include whether Ms Goldson was receiving a windfall, her circumstances generally, the duration of her relationship with Mr Gifford, and the intentions of the deceased.[27]

[65] In this case Ms Lane has provided no evidence of financial need, breach of moral duty or other special circumstances. The situation is analogous to that in *Kennedy v Kennedy*, where the deceased's son's application to appoint an administrator failed because his claim under the FPA was weak.[28]

[66] Ms Lane's affidavit in support of her application stated that she was a daughter of the deceased and he had left her only $5,000. She provided no evidence, or even assertion, as to need. When Ms Goldson provided evidence of her belief that Ms Lane received $3 to 4 million from her mother's estate, strongly indicating lack of need, Ms Lane's affidavit in reply was silent. Specific evidence would be expected in reply to that allegation, and as to Ms Lane's circumstances generally.[29] Rather, as we have said, Ms Lane's position before us was that an FPA claim is most unlikely to be required.

[67] This is also not a case where need or breach of moral duty is implicit. Ms Lane is aged 60. This case is far from the facts of *Public Trust v Whyman,* where infant children of the deceased's first marriage, for whom he had been paying child support, received no provision under his will, while three jointly owned properties passed by survivorship to his second wife. The deceased had also not long before he died cancelled a life insurance policy he had taken out for the children's benefit.

[68] While Ms Lane also pointed out that her children had received no provision under the will, there is no evidence regarding those children, their age or financial position. They also can reasonably be assumed to be mature adults.

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27 *Waite v Waite* [2023] NZHC 829, [2023] NZFLR 728 at [18], quoting *Waite v Waite* [2023] NZFC 580.

28 *Kennedy v Kennedy* [2017] NZHC 168; [2017] NZFLR 149.

29 We have not overlooked Ms Lane's statement in her affidavit that she would provide further evidence if called upon. A party must establish their own case, not rely on the Court to do so. We also note that, even following the Judge's clear comment that there was no evidence of need, Ms Lane made no attempt to adduce late evidence.

[69] We have already referred to Ms Lane's primary reliance on her automatic entitlement under s 77 of the Act, assuming half of the Property is vested in the estate. But that overlooks her need to first establish serious injustice. We find it very difficult to view as seriously unjust to Ms Lane, any inability on her part to claim an automatic entitlement under s 77, in the absence of some evidence of breach of moral duty or special circumstances. The partial intestacy would be the result of sheer inadvertence on the part of either Mr Gifford, or more likely, those advising him. The winding up of the Trust would mean the residuary estate falls into an intestacy. This was clearly unintended by Mr Gifford and/or his advisers. The beneficiaries of the Trust excluded Ms Lane. For Ms Lane to automatically receive a sizeable share of the estate by default would be clearly contrary to the testator's wishes and, if anything, unjust to the estate and to Mr Gifford's intended beneficiaries.

[70] More broadly, it does not appear that Ms Goldson is receiving a windfall. It was a long relationship in which on the evidence available she was the primary earner. She has put significant funds into the Property, and spent significant time, effort, and money on Mr Gifford's care, unlike Ms Lane who had no contact with him for many years before his death. It seems Mr B Goldson has similarly cared for Mr Gifford.

[71] We also observe it is likely that Ms Firth's estate, and therefore Ms Lane, already benefitted from a half share of the Property, noting that Ms Firth held a half share in that property at the time of her separation from Mr Gifford which was then substituted by a mortgage in her favour. That mortgage was discharged a few years later.

[72] There are also two potentially significant stumbling blocks for Ms Lane. First, as Mr Phillipps acknowledged, if Ms Lane is not the biological daughter of Mr Gifford, her claims under both s 77 of the Act and the FPA fail for lack of standing. In circumstances where Mr Keith is named in her birth certificate and the issue is contested, Ms Lane would need to provide evidence of her biological parentage.

[73] Second, Mr Phillips raised the possibility that the trust transfers may be invalid. On the current evidence that would seem unlikely in relation to the transfer to the trust, but a possibility in terms of the transfer from the trust to Ms Goldson and the winding

up of the trust later. If these later transactions were invalid, then on the face of it the Property would not be relationship property and there would be no partial intestacy. Again, Ms Lane's claims would founder.

[74] As is apparent from the discussion above, proceedings such as contemplated by Ms Lane would be complex, and involve significant cost and time, the latter being illustrated by her previous FPA action which apparently took four years. Such proceedings should not be embarked upon without some demonstrated justification.

[75] For all the above reasons, we are not satisfied Ms Lane has a credible claim against the estate, and therefore concur with the Judge, albeit for somewhat different reasons, that the application under s 19 of the Act to have the Public Trust appointed as administrator should be dismissed.

Should the Public Trust have provided evidence of funding?

[76] We do not need to address the point but we do not consider it significant that no evidence has been tendered as to how the Public Trust is to be funded. As Mr Phillips says, that is a matter for the Public Trust. Section 6(5) of the Act which provides that the Court shall not require any trustee corporation granted administration to give any security would tend to reinforce that conclusion.

[77] However, we consider, and note for future reference, that in a case of this nature the position of the Public Trust should be clear on the court record, at least as to service, preparedness to act, and knowledge of insolvency. The Court should not be relying on advice from the bar. We also note that while insolvency should clearly not preclude a successful application under s 19, a corporate trustee who is fully funded by a potential claimant (as would presumably have been the case here) would have to take considerable care in maintaining independence, bearing in mind the costs and other consequences for all parties.

Result

[78] The appeal is dismissed.

[79] The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements.

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