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Relationship property on death

Nicola Peart, Associate Professor of Law, University of Otago

unravels *Re Russell*

The recent decision of the High Court in *Re Russell; Public Trust v Whyman,* 23 March 2004, France J, HC Wellington, CIV-2003-485-1434 and 1385 reveals a disturbing level of confusion about the death provisions of the Property (Relationships) Act 1976 and sets a dangerous precedent.

The deceased, Mr Russell, died intestate. He was survived by his de facto partner, Ms Whyman, the respondent, and two minor children from his former marriage. The marriage had been dissolved in 1999 and the matrimonial property had been settled by agreement. Mr Russell and Ms Whyman had entered into a relationship property agreement pursuant to which they registered their properties as joint tenants. As a result Ms Whyman took the bulk of the couple's assets by survivorship, leaving only a small estate all of which passed to Ms Whyman under the new intestacy provisions. (s 77 Administration Act 1969, as amended in 2001)

As the deceased's surviving de facto partner, Ms Whyman had a choice under s 61 of the Property (Relationships) Act (PRA) 1976 to apply for a division of the couple's relationship property (option A) or to elect option B. Under the latter option she would not apply for a division of relationship property, but retain her own assets, take the joint assets by survivorship and inherit Mr Russell's estate under the intestacy rules. As that was clearly much more advantageous to her, she elected option B.

Both Ms Whyman and the Public Trust made applications to administer Mr Russell's intestate estate. The Public Trust's application was made on behalf of Mr Russell's former wife and his two minor children. If granted, the Public Trust intended to seek leave to apply for a division of relationship property under s 88(2) of the PRA with a view to clawing back assets into the estate. If that was successful, but the children's share of the intestate estate remained inadequate for their proper maintenance and support, the Public Trust intended to make a claim under the Family Protection Act 1955 on behalf of the children for further provision from the estate.

Section 77(2) of the Public Trust Act 2001 entitles the Public Trust as of right to the grant of administration unless someone entitled to the grant applied for it and the Court grants administration to that person. Ms Whyman, as beneficiary of Mr Russell's intestate estate, was legally entitled to the grant of administration under s 6(1) of the Administration Act and R 665 of the High Court Rules unless there were "special circumstances". (s 6(2)) Accordingly, the Court held that the issue was whether there were special circumstances to warrant appointing the Public Trust in preference to the surviving de facto partner. That approach was not strictly correct. *In re Egen* [1951] NZLR 323 and *Re Brown* (1989) 2 PRNZ 216 suggest that there is no need to show special circumstances when the competition for the grant of administration is between the Public Trust and a person beneficially entitled to the estate. According to those cases, neither has priority over the other and the Court has a discretion for any sufficient reason to bypass the person beneficially entitled in favour of the Public Trust. "Any sufficient reason" sets a lower threshold than "special circumstances". Nonetheless, preference would normally be given to the person beneficially entitled to the estate.

In determining whether there were "special circumstances", the Court identified two issues:

1. whether the Public Trust could make an application under the PRA. If it could not, it was accepted that there were no special circumstances.
2. If such an application could be made, whether there were special circumstances to warrant awarding the grant of administration to the Public Trust.

Ms Whyman's arguments

Ms Whyman argued that once the surviving spouse or partner had elected option B, s 95 of the PRA prevented an administrator from making an application to divide relationship property under s 88(2). Section 95 states:

> If the surviving spouse or de facto partner chooses option B, nothing in this Act (other than sections 20 to 20F or sections 58 and 59) applies to the distribution of property under the will of the deceased spouse or de facto partner or under Part 3 of the Administration Act 1969.

As Ms Whyman had elected option B, she argued that s 88 did not apply and the Public Trust could not apply for a relationship property division. (at [24])

Ms Whyman's submission on the second issue was that there were no special circumstances that would warrant appointing the Public Trust as the administrator of the estate. She argued that it would not be right if the agreement that she and Mr Russell had made to own their properties as joint tenants was undermined in an application for division of relationship property.

Public Trust's arguments

The Public Trust counter-argued that s 95 did not preclude a personal representative from making an application under the Act. Section 95 merely meant that once a surviving spouse or partner had elected option B, he or she could not then make a further claim under the PRA, and the estate could be distributed in accordance with the terms of the will or the intestacy rules. If Ms Whyman's interpretation of s 95 was accepted, it would render s 88(2) meaningless. Furthermore, the leave application under s 88(2) should not be pre-empted in this application for a grant of administration.

THE DECISION

Without deciding the effect of s 95, the Court resolved the matter by deciding that there were no special circumstances warranting the grant of administration to someone other than Ms Whyman for the following reasons:

1. Mr Russell and his former wife had entered into a matrimonial property agreement that dealt with the issues of "their relationship property and the children". The Court held that there was nothing in the Act on which their interests could now "bite". (at [28])
2. The only matter in issue was the relationship property of Ms Whyman and the deceased. They had entered into a property agreement expressly recording that their property would be jointly owned.
3. Any application under the PRA by an administrator would require special leave of the Court which s 88(2) stipulated could be granted only if refusing leave would cause serious injustice. Relying on Heath J's decision in *Re Williams, Kinniburgh v Williams* [2004] NZFLR 467, where 'serious injustice' was held to set a high standard requiring injustice of a type that the Court can not, in conscience, countenance, the Court concluded that it was "difficult to see how the test in s 88(2) could possibly be met here". (at [30])

The Judge concluded with some brief observations on s 95, opining that Ms Whyman's interpretation of that section had merit, because it accorded with its plain meaning. Her Honour found support in s 69 which permits the surviving spouse or partner to apply to have the chosen option set aside inter alia where, since the option was elected, a person other than the surviving spouse or partner has made an application under the Family Protection Act against the estate. (s 69(2)(a)(iv)) According to Her Honour, "[t]hat implies that, otherwise, in circumstances like the present, option B prevails". (at [33])

The result was that the Court made an order awarding the grant of administration to Ms Whyman. It also ordered that costs follow the event, rather than that they be borne by the estate, even though the point raised was a novel one.

COMMENT

This decision has several major flaws. First, there appears to be some confusion about the role of the deceased's former wife. The wife's role in this dispute was only as guardian of her and Mr Russell's children. She was not a claimant in her own right. Her matrimonial property rights had been settled, and there is no suggestion that she was seeking to challenge that agreement. Nor was she an eligible claimant under the Family Protection Act 1955, because she was divorced from Mr Russell. She no longer met the requirement of being his wife, as stipulated by s 3(1) of that Act.

Second, while s 95 may create the impression that no one can make an application under the Act once the surviving spouse or partner has elected option B, that could not have been Parliament's intent when it enacted s 88(2). Section 88(2) gives the personal representative a right to apply for a division of relationship property subject to leave being granted by the Court to avoid serious injustice. Clearly, leave will only be sought if the surviving spouse or partner has elected option B, or is treated as having done so by default. (s 68) There is no point in the personal representative applying for a division of the relationship property if the surviving spouse or partner has decided to do so by electing option A. The relationship property would then be divided in accordance with the provisions of the Act and the estate would receive its share of the relationship property. Ms Whyman's interpretation of s 95 renders s 88(2) virtually meaningless. The surviving spouse or partner could elect option B immediately after death and thus prevent an application by the personal representative before he or she was even appointed.

The death provisions of the PRA strongly favour the surviving spouse and partner. Section 88(1) entitles them to apply for a division of relationship property as of right and they have a choice whether to do so. Section 88(2), giving the personal representative a limited right to apply for a division, was a late addition to the Bill, inserted on the recommendation of the Justice and Electoral Committee. (Report 109-3 *Matrimonial Property Amendment Bill and Supplementary Order Paper No 25*, p 149) Earlier versions of the Bill did not provide for applications for division by the personal representative of the deceased. Adopting the recommendations of the 1988 Working Group on Matrimonial Property and Family Protection, those Bills only made provision for the surviving spouse or partner to apply for a division of relationship property after death. The *Report of the Working Group on Matrimonial Property and Family Protection* (Wellington, 1988) at 46 considered that the estate should not be entitled to sue the surviving spouse, because when one of the parties to the relationship has died:

> the contest is no longer between two partners who take their share and then go their different ways. It is between the survivor of a marriage and the beneficiaries under a will or on an intestacy, or potential family protection claimants.

That view was a radical departure from the position under the Matrimonial Property Act 1963. That Act entitled either the surviving spouse or the personal representative of the deceased spouse to make an application as of right. Personal representatives utilised the 1963 Act quite commonly to increase the estate in the interests of beneficiaries and potential claimants against the estate. (see eg, *Re Welch* [1989] 2 NZLR 1; *Poppe v Grose* [1982] 1 NZLR 491 (CA); *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA).)

The Report of the Justice and Electoral Committee does not give any reasons for the last minute insertion of s 88(2). Nor was there any discussion about the change during the parliamentary debates. It is safe to assume, though, that s 88(2) was inserted in response to submissions identifying the risk of dependent family members being rendered destitute if the estate could not seek a division. However, it seems that the implications of this late change were not fully appreciated, because the Act provides no guidance on the consequences of granting leave to the personal representative.

Take s 75, for example. It is a key provision, because it states which sections of the Act will apply if "the surviving spouse or de facto partner chooses option A". It provides that ss 76 to 78 apply (dealing with the effect of electing option A on the estate) and that ss 2 to 53A apply subject to modifications in ss 79 to 94 (ie the inter vivos provisions apply, but are modified to take account of the fact that one of the parties has died). There is no equivalent provision directing which sections apply when a division is sought by the personal representative. The Act is silent on the effect of

leave being granted. Section 95 is the companion to s 75. It also fails to mention an application being made by the personal representative. There is therefore a gap in the law, resulting in understandable confusion. However, if s 88(2) is to have any meaning, as it surely must, then s 95 must mean that the estate will be distributed as stipulated after the division initiated by the personal representative has determined what the estate is.

Third, it is true that having settled their matrimonial property claims, there was nothing in the PRA on which the former wife's interests could "bite". That settlement ended his obligations to his wife, but it did not end his obligations to his children. He had an ongoing obligation to support his minor children after his marriage ended. Although the judgment is silent on this point, both counsel have confirmed that Mr Russell was paying statutory child support when he died. The settlement agreement that he and his former wife entered into may have included financial arrangements for the children, but those arrangements did not and could not absolve him from his duty to provide child support. No parent can contract out of the Child Support Act. (*Goldsmith v Chubb* [2003] DCR 58) Nor can anyone contract out of the Family Protection Act. (*Gardiner v Boag* [1923] NZLR 739; *Dillon v Public Trustee* [1941] NZLR 557 (PC); *Re R: M v R* [2004] NZFLR 26) Both statutes are social legislation aimed at ensuring that parents support their minor dependent children, not the state. However, by registering the bulk of his property as joint tenancies, Mr Russell deprived his estate of assets from which to provide ongoing support for his minor dependent children.

Fourth, in order to determine whether there were special circumstances warranting the appointment of someone other than Ms Whyman as administrator, the Court was entitled to consider whether an application under s 88(2) had any prospect of succeeding. If there was no prospect of leave being granted, there was no point in appointing anyone other than Ms Whyman as administrator.

The question therefore was whether there was a chance that leave would be granted to avoid serious injustice. Heath J held in *Re Williams; Kinniburgh v Williams* that serious injustice sets a tough threshold indicating that Parliament sees the granting of leave as the exception, not the rule. (at [61]) His Honour declined leave in *Re Williams*. The facts of that case have some similarities to *Re Russell*. The late Mr Williams and his second wife owned most of their assets as joint tenants. The net value of those assets was approximately $820,000 and they passed by survivorship to the surviving widow. The deceased had executed a will in which he left his estate, worth about $8000, to his widow and appointed her as his executor. His daughter from his first marriage was disinherited and wanted to make a Family Protection claim. That claim was futile unless the estate could be increased. To that end an application under s 88(2) of the PRA had to be made in an attempt to recapture Mr William's half interest in the assets that passed to his widow on survivorship.

In an earlier decision, 27 June 2003, HC Hamilton, CIV-2003-419-205, Frater J appointed the Public Trust to bring the applications under the PRA. Commenting on the widow's opposition to the appointment, the Judge said at [13]:

> In the circumstances, it seems to me that there never was any possibility that the defendant could successfully oppose the plaintiff's application for the appointment of an alternative personal representative. She would [sic] therefore have been advised to have consented to it at an early stage, thereby saving the not inconsiderable legal costs involved in arguing about it. The parties would both be better to concentrate their efforts on the next stage of the proceedings, the application under s 88 of the Property (Relationships) Act for leave, or, preferably, on the plaintiff's substantive claim under the Family Protection Act, rather than skirmishing over this preliminary procedural issue.

When the family protection and relationship property proceedings later came before Heath J, he considered the daughter's family protection claim first and made an award of $40,000 in her favour. That would have been approximately 10 per cent of the estate if the couple's relationship property had been equally divided. The Court then declined the Public Trust's leave application under s 88(2). The Court was not persuaded that the failure to grant leave would cause the kind of injustice to the daughter that the statute envisaged, because:

a. An order granting leave would interfere with the Williams' decision to own their property as joint tenants and usurp the deceased's testamentary wishes;
b. The deceased's daughter had no immediate economic needs and as her mother's only child would probably inherit all of her mother's estate;
c. Mrs Williams would not benefit from a division of relationship property, only the daughter would.
d. The change in the law requiring the personal representative to obtain leave suggests that the legislature intended to restrict the circumstances in which a claim would be brought. (at [61], [62])

While one might feel some sympathy for the daughter, she was an adult and the size of the award indicates that her claim was not based on financial need, but on the need to be recognised by her father as a member of his family. This decision suggests that claims based purely on family recognition are likely to struggle to meet the serious injustice threshold.

The circumstances of the children in *Re Russell* were quite different. Unlike the daughter in *Re Williams,* the children in *Re Russell* were aged 12 and 14 and financially dependent on their parents. Those differences alone would suggest that the leave application could not be readily dismissed. Quite the opposite! It could well have succeeded. This must be the very kind of case that the Justice and Electoral Committee had in mind when it inserted s 88(2). If the circumstances of these children did not satisfy the serious injustice test, it is difficult to imagine any case meeting that standard.

Given the very real possibility that the leave application could have succeeded in this case, there clearly were special circumstances warranting the appointment of an independent administrator to pursue the leave application. There were much stronger grounds to do so in this case than in *Re Williams*. Yet, in *Re Williams* Frater J had little hesitation in appointing an independent personal representative, because the widow had a conflict of interest. The same conflict arose in *Re Russell* and the reasons for appointing an independent personal representative were much stronger. It is submitted, therefore, that the decision in *Re Russell* was plainly wrong and ought to be overturned on appeal. ❐