

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

**CIV-2011-404-7110  
[2012] NZHC 2794**

UNDER the Family Protection Act 1955

IN THE MATTER OF the Estate of Valerie Patricia Wennink

BETWEEN DAVID MICHAEL ASHWELL  
Plaintiff

AND KENNETH NORMAN ASHWELL AND  
HOWARD ANTHONY ASHWELL  
Defendants

Hearing: 11 July 2012

Counsel: R G Espie for Plaintiff  
S L Robertson for Defendants

Judgment: 24 October 2012

*In accordance with r 11.5, I direct the Registrar to endorse this judgment  
with the delivery time of 4:00pm on the 24 October 2012.*

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**JUDGMENT OF WILLIAMS J**

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Solicitors:  
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S Robertson, Barrister, Bankside Chambers, 88 Shortland Street, Auckland

## **Introduction**

[1] Valerie Wennink died on Tuesday 15 March 2011 in her ninth decade. She was survived by three adult sons, all from her first marriage to Ken Ashwell. The boys were Ken Junior, David and Howard, born in that order. In Valerie's last will dated 13 March 2010, she left \$10,000 to each of Ken and David with the residue to Howard. This meant that the main asset of the estate – Valerie's home at 113 Tiverton Road, Avondale valued at \$415,000 and carrying no debt – went to Howard. Ken and David now challenge this division.

## **The facts**

### *Howard*

[2] Relevant background facts are as follows.

[3] Howard has lived at home with his mother for much of his life and for an uninterrupted period spanning the last 25 years. For the last 20 of those years he has lived there with his now wife, Niria – or Missy as she is known – Heke. Howard does not have a job. Indeed, he has not had one for some time. He is not on any benefit either. There is evidence that he worked for each of his brothers at some stage in the past but these are exceptions to the pattern. Missy is the official breadwinner of the house. Howard has no recorded income for any of the last 10 years.

[4] David says that over those years, Howard earned his income by growing cannabis hydroponically in the basement of his mother's home. For his part Howard denies this, but his denial is in the following rather oblique terms:

My Mum was a very strong woman. She came from a family of 12 and did not take any rubbish from anyone. Had I behaved badly around the home she would have thrown me out. Had I been cultivating cannabis in the basement I have no doubt she would have thrown me out.

[5] Howard said that if he has had cash at all in the past decade or so, it is by renovating and selling classic American cars. More about this later.

[6] Howard says he and Missy paid his mother \$250 per week board over the 20 years they have lived at 113 Tiverton Road. He says he built and paid for an annex to the main house where he and Missy have since lived. The cost of this was \$17,000 in materials and \$4,000 for his labour. He also provided in evidence a long list of other jobs he completed in and around the property. His evidence was as follows:

Although my mother paid for the direct costs involved in a lot of the work I did around the house, I contributed my time to the property in numerous jobs over the period of time I lived with my mother. Those jobs included:

- Re-piling foundations;
- Constructing retaining walls on the property;
- Building paths on the property;
- Re-cladding 50% of the house and installing aluminium windows in half of the house;
- Removing wallpaper and repairing all ceilings;
- Priming and painting the ceilings and the skirtings;
- Repairing the deck;
- Preparing, priming and painting the house (3 times over the 25 years I lived with Mum);
- Preparing, priming and painting the roof (5 times over the 25 years I lived with Mum);
- Tiling the bathroom;
- Installing a bath;
- Removing the bath and installing a shower when Mum could no longer get herself out of the bath;
- Installing new hot water cylinders (twice);
- Rewiring the house completely;
- Landscaping the grounds and doing the day to day maintenance including trimming hedges and lawn mowing on the grounds;
- Concreting the patio;
- Concreting the parking space;
- Installing gates to the driveway of the property;
- Installing a fireplace in Mum's home;
- Planting trees and shrubs;
- Replacing the guttering and drainage pipes;
- Building and concreting a garage;
- Keeping the roof clean;

- Cleaning windows.

[7] In addition, Howard said that he paid for his mother to return to her native Wales three times and took out a personal loan of \$10,000 to assist in doing so. On the last of the three occasions he said that Missy accompanied his mother.

[8] Howard said that he and Missy also took care of his mother in her declining years. Missy attended to her personal care – washing her hair and showering her, for example – cooking her meals and driving her on occasion. Apparently Valerie had bad osteoarthritis in her wrists and this considerably reduced her ability to care for herself as she got older.

[9] In addition, both Howard and Missy said that they helped to ensure that Valerie got to her medical appointments and the like and took her out on excursions, most commonly to the Avondale RSA where all three of them were members. Howard said that apart from the odd jobs he did around the house, he also maintained his mother's car.

[10] His evidence was that he and Missy were very close to Valerie and that she relied on them both for both physical and emotional support.

[11] By contrast, he described the relationship between his mother and two brothers as distant and cool. He said that once Ken and David had married they had little to do with their mother, focusing instead on their respective new families.

[12] Howard said his mother had always led him to believe that 113 Tiverton Road would be his when she died. He said she maintained that position right up until she passed away. It was partly on this basis, Howard said, that he spent so much time and money on maintaining and renovating the house. In any event, he said, his mother's view was that this was the appropriate outcome given that Howard had always lived there, had put so much effort into the house and had supported her over many years. She certainly did not at any stage advise him that this position had changed.

[13] Howard's view of matters as I have described it above is supported in affidavits from Missy; Betty Mowatt who describes herself as "Valerie's best friend" for 50 years; Iris Edmonds, Valerie's younger sister; and Louise Ockey, the manager of the Avondale RSA.

*David and Ken*

[14] David and Ken's perspectives on their respective relationships with their mother are very different. They both describe these relationships as warm and close. David accepted that he saw less of his mother during the course of her second marriage to Hennie Wennink between 1964 and 1984. Once Valerie and Ken Senior split up, Ken and David seem to have spent most of their teenage years in the care of their father. David spent a year with his mother and Hennie Wennink but this did not appear to work out. David disliked his stepfather intensely. David described him as an alcoholic and occasionally abusive to his mother.

[15] Ken also claimed to have a close relationship with his mother. He said that when his first wife Suzanne became very ill in 1988, his mother helped to nurse her and to take care of his and Suzanne's two children. Suzanne subsequently died of her illness and Ken said that Valerie was there for him and her grandchildren throughout that difficult period. He said this experience brought him and his mother very close together. Ken noted that over the years he had bought his mother a car, sent her on two trips to Australia and given her numerous other gifts. He estimated the value of this expenditure at around \$25,000.

[16] In these ways, both brothers reject Howard's allegation that their relationship with their mother was distant.

[17] A key element in this case is that not long before their mother died, both Ken and David were diagnosed with identical forms of oesophageal and stomach cancer. David was diagnosed in 2007. He has had surgery to remove parts of his stomach and oesophagus. He was off work for a year during that period of treatment and recovery. He said he had to borrow money to maintain his family.

[18] David's cancer appears to be in remission for now at least. He currently has blood tests every three months but is not undergoing any further treatment.

[19] Ken was diagnosed in 2010. He also underwent surgery, though it seems of a somewhat more radical kind. He said that most of his stomach and oesophagus were removed. He has also lost a kidney to cancer. His evidence was that he cannot work at all and that his wife is now the only breadwinner in the family. She is a real estate agent.

[20] David said that he visited his mother on 12 March 2011, three days before her unexpected death. He said that during the visit Valerie expressed concern for him and Ken. He said she told him that she would be changing her will. Instead of giving the house and residue to Howard, she now proposed to divide the estate equally between all three brothers. Ken echoed this evidence. He said that a week before her death, his mother advised him that she would be changing her will.

[21] On that point Howard, Iris Edwards and Betty Mowatt all reject any idea that Valerie changed her mind at the last minute. Iris and Betty both said they were very close to Valerie and that, if any change were to occur, they would have heard of it.

[22] I note at this point that Valerie changed her will many times. Between July 1989 and May 2011 she executed 11 wills. Most involved small cash payments to Ken and David with the house and residue to Howard. The exception was her March 2006 will in which Howard received only a life interest in the house with Ken and David taking a share of the residue.<sup>1</sup> Interestingly, this was before either brother was diagnosed with cancer.

[23] I note finally that David and Ken both say Valerie hated Missy and abhorred the idea that she or her "extended family" would get their hands on the house. They say Valerie could never have intended this outcome. This is in stark contrast to the way in which Howard, Missy and their supporting deponents describe the relationship between Valerie and her daughter-in-law. The evidence on this side of

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<sup>1</sup> Earlier wills also had a daughter, Beverley, receiving a portion of the estate but Beverley died leaving no issue.

the fence was that the relationship was close and mutually supportive, though not without the occasional speed bump. Valerie's sister Iris described matters this way:

Valerie never complained to me about Missy's presence in the home. It seemed to me everyone was comfortable with this. Certainly on occasions Valerie and Missy did have words. On occasion Valerie and I had words. Valerie and Howard had words. We were living together in close harmony for many years and naturally we had our moments.

[24] Those are the facts in broad outline.

### **The law**

[25] The applicable legal principles are well settled now. The first question is has there been a breach of (in this case) Valerie's moral duty to Ken and David? If there was, an adjustment may be made but within strictly defined limits. The basis of the moral duty between parent and child is well described by the Court of Appeal in *Flathaug v Weaver* in these terms:<sup>2</sup>

The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system and underpinned by the law. The Family Protection Act recognises that a parent's obligation to provide for both the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is, however, an obligation which is largely defined by the relationship which exists between parent and child during their joint lives.

[26] In what is, in my view at least, a most succinct crystallisation of the generally applicable principles, Randerson J provided a comprehensive list of considerations and factors in his decision in *Vincent v Lewis*, having first comprehensively reviewed the authorities.<sup>3</sup> His list was as follows:<sup>4</sup>

- (a) The test is whether, objectively considered, there has been a breach of moral duty by Mrs Allen judged by the standards of a wise and just testatrix.
- (b) Moral duty is a composite expression which is not restricted to mere financial need but includes moral and ethical considerations.
- (c) Whether there has been such a breach is to be assessed in all the circumstances of the case including changing social attitudes.

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<sup>2</sup> *Flathaug v Weaver* [2003] NZFLR 730 at [32].

<sup>3</sup> *Vincent v Lewis* [2006] NZFLR 812 (HC) at [70]–[85].

<sup>4</sup> At [81].

- (d) The size of the estate and any other moral claims on the deceased's bounty are relevant considerations.
- (e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.
- (f) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.
- (g) If a breach of moral duty is established, it is not for the court to be generous with the testator's property beyond ordering such provision as is sufficient to repair the breach.
- (h) The court's power does not extend to rewriting a will because of a perception it is unfair.
- (i) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the Family Protection Act, it is nevertheless an obligation largely defined by the relationship which actually exists between parent and child during their joint lives.

[27] Thus there is no standard measure for the extent of the moral duty owed by a parent to a child. There is no moral duty to treat children equally, or indeed all of them generously even if one is favoured. It is not that simple. Each family dynamic and each individual parent-child relationship within that dynamic is unique, and it is in the particular facts and the particular circumstance of the family in question that the metes and bounds of the moral duty are to be calculated.

### **Application**

[28] The factors for me in this case are:

- (a) Howard lived with his mother throughout her retirement years and contributed to the property in substantial ways during this period.
- (b) Howard and Missy supported Valerie in physical and emotional terms, particularly in the latter years as Valerie's health began to fail.
- (c) Howard gave gifts to his mother of considerable value.
- (d) Ken and David's respective relationships with their mother were less close and immediate, but cannot in any way be described as estranged. On David's part, I expect, the relationship was interrupted by Valerie's second marriage.

- (e) Ken in particular seems to have been a regular visitor to his mother while providing her with practical and emotional support. The death of Ken's first wife Suzanne seems to have been a key catalyst in the development of that relationship in Ken's adult years.
- (f) While, on paper at least, Ken and David have both accumulated far greater capital assets than Howard, their prospects are much reduced by their respective illnesses.

[29] There is then the question about whether Valerie expressed the desire to Ken and David to change her will or not. People describing themselves as Valerie's confidantes are adamant that if she had expressed such sentiments to Ken and David, they too would have been told. I have no way of knowing which side, if any, carries the truth in this debate, though it would not surprise me if Valerie expressed such an intention to one side, as it were, without saying anything to the other side or even, necessarily, intending to follow up on the comments. It would certainly not surprise me if Valerie felt moved to comment supportively about the circumstances Ken and David found themselves in. Nor would it be surprising that she would do so in the context of a discussion about the most significant means by which she could positively affect their lives after she was gone, that is in relation to the distribution of her estate after her death. But I do not, even with David's more specific evidence in mind, consider that the plaintiffs' case convinces me that a specific promise was made. Valerie strikes me as a woman who, once her views were settled, would make them known to those close to her. I do not think her views on the question were settled.

[30] All of that said, it is my view that Ken and David's illnesses created a significant and material additional moral obligation on Valerie. If it were not for this factor, the facts would have weighed decisively in favour of non-interference in Valerie's will. Despite the negative comments and accusations that Ken and David make against the relationship between their mother and Howard and Missy, the evidence in favour of Howard's commitment to his mother and the contributions he and his wife made to her wellbeing in the latter stages of her life I have found to be cogent and persuasive. But Valerie also knew that the future for her other two sons

was rendered potentially very grim indeed by virtue of the poor health they suffered through no fault of their own. Indeed, there appears to be a significant genetic contribution to the circumstances in which they each find themselves. I consider that this factor created an additional moral burden on Valerie as testatrix and that this burden was not discharged by Valerie's small cash bequests to Ken and David.

### **Repairing the breach**

[31] As the cases make abundantly clear, it is not for the courts to rewrite a testator's will as the particular Judge would have it written. The court's task is a limited, indeed a conservative one, once a breach is found. It is to intervene to the extent necessary to repair the breach and no more. It is not, I hasten to add, an obligation to solve Ken's and David's financial woes, even if this were possible given the modest size of this estate. It is an obligation to provide material relief in the circumstances.

[32] David lives with his family at Orewa in a home with an estimated value of \$1.2 million. This is subject to a mortgage of \$865,000 and a \$15,000 credit card debt. Household chattels are valued at between \$80,000 and \$100,000. David owns a car valued at \$10,000 and a boat at \$4,000. David said that he has also incurred liability in a leaky home case amounting to \$200,000. He works as a senior site manager for Aspec Construction. He earned \$72,000 in 2010 and \$83,000 in 2011 in that work. His wife earned around \$69,000 last year. Apart from his health issues, David can be described as comfortably off, although he says that outgoings still currently exceed income.

[33] Ken lives in Pauanui in a house with an estimated value of \$900,000 and a mortgage of \$250,000. Ken's car is valued at \$18,000 and his wife's car at \$60,000. Household chattels have an estimated value of between \$80,000 and \$100,000. Ken is unable to work. He is well placed now, but his position is deteriorating as he is having to eat into his equity position to maintain his family.

[34] Howard has very little on paper although his list of pick-up trucks awaiting restoration is impressive: a 1942 Ford truck, a 1953 Ford truck and an F100 Ford

truck. These are given low valuations but in reality, once fully restored, they are likely to fetch in excess of \$40,000 each in my experience. Although Howard lacks the accumulated capital assets of his brothers, he does not appear to lack cash flow to quite the same extent. While it is not for him to justify his entitlement under Valerie's will, this and other evidence to which I have already referred, indicates that if necessary Howard seems able to raise funds when he needs them.

[35] Ken's position is precarious it appears. He has a 35 per cent chance of a five year survival rate. His surgeon describes him as being "at serious risk of local and systemic recurrence". As to his financial status he says:

Our present income does not meet our monthly outgoings, meaning that we have to resort to savings to make ends meet. My wife is now our principal breadwinner. Our monthly expenditure is about \$4,900.00. The situation cannot go on forever.

As matters presently stand, we have no alternative but to sell our house, which will not be easy in light of current market conditions in Pauanui. In my present condition I do not relish the idea of selling and moving out.

[36] In light of Ken's more problematic health status, I consider that Valerie's moral obligation to him is proportionally greater than that to David. I consider that he should receive \$50,000 from the estate. This will not solve his financial problems, but it will help materially in the short-term at least.

[37] David's debt levels are greater but his cancer is in remission and both he and his wife are able to work. I consider that he should receive \$30,000 from the estate. Again, this is material assistance.

[38] My aim here has been to provide material assistance to Ken and David while preserving intact, so far as is possible, Valerie's consistently expressed wish that Howard have the house. Upgrading Ken's and David's collective entitlement to \$80,000 is, in my view, the minimum necessary, in that context, to repair the breach of moral duty. The \$60,000 additional payment for Howard and Missy is modest and should, on the evidence, be within their reach without risk to the house at Tiverton Road if they wish to retain it.

[39] There will be orders in those terms. Howard will need to raise the \$60,000 shortfall or the house will need to be sold. Time will be required for choices to be made and steps taken. Counsel should file submissions on appropriate timetabling orders.

[40] Costs are reserved.

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**Williams J**