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IN THE FAMILY COURT
AT GISBORNE

FAM-2014-016-00085
[2017] NZFC 2813

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	[DECLAN WIRIHANA] Applicant
AND	[CLARK WIRIHANA] Respondent

Hearing:	29 March 2017
Appearances:	A Robinson for the Applicant Respondent [C Wirihana] appears in Person [K Wirihana] appears in Person
Judgment:	13 April 2017

JUDGMENT OF JUDGE M A COURTNEY

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[1] [Kauri Wirihana] ("the deceased") died on [date deleted] April 2012. The deceased was also known as [other names deleted].

[2] The deceased was married twice. There were five children of his first marriage and four children of his second marriage.

[3] The deceased entered into a subsequent relationship, the nature of which is not clear, but it appears to have been a de facto relationship.

[4] The deceased died without having made a will. As a result, his estate falls to be divided pursuant to the provisions of Administration Act 1969.

[5] The eldest child of the deceased's second marriage, [Declan Wirihana], has made application under Family Protection Act 1955 ("the Act") for greater provision from his father's estate than he will receive under the Administration Act. In particular, he seeks to be provided with the deceased's home at [address 1] in Gisborne.

[6] The issue for determination by the Court is whether or not the present provision for the applicant from the deceased's estate pursuant to the provisions of the Administration Act is adequate provision for the proper maintenance and support of the applicant.

[7] In order to determine this issue there are a number of matters I need to address being:

(a) The deceased's relationships and his children.

(b) The deceased's estate.

(c) Division of the deceased's estate pursuant to the provisions of the Administration Act.

(d) Whether or not the Court has jurisdiction to determine the application given there are Maori land interests owned by the deceased.

(e) The background to, and the basis of, the applicant's claim.

(f) Steps taken by other parties in response to the applicant's claim.

(g) The law relating to the applicant's claim.

(h) What was the deceased's moral obligation to the applicant and has he met it?

(i) Conclusion.

(j) Costs.

(k) Orders.

The deceased's relationships and his children

[8] The five children of the deceased's first marriage, to [Abby Wirihana], are;

(a) [Clark Wirihana].

(b) [Marika Wirihana].

(c) [Kyle Wirihana].

(d) [Hana Scott].

(e) [Riley Wirihana].

[9] The deceased and [Abby] separated in [the late 1960s].

[10] The deceased met and subsequently married [Amber] (now [Fitzgerald]). The four children of that marriage are;

(a) [Declan Wirihana], the applicant.

(b) [Patrick Wirihana].

(c) [Gabriel Wirihana].

(d) [Samantha Cunningham].

[11] The deceased and [Amber] subsequently separated and were divorced in 1990.

[12] The deceased subsequently entered into a relationship with [Anika Bray] which lasted for a number of years. There were no children of that relationship.

[13] As the parties have referred to other family members by their first names, I will from time to time adopt a similar approach in this decision.

The deceased's estate

[14] The deceased's estate comprises the following:

(a) A house property at [address 1], Gisborne. This has a 2014 rating valuation of $152,000. No valuation of the property was provided for the purposes of the Court hearing.

(b) Maori land interests in at least seven blocks and undistributed income or dividends from such land of at least $2,729.25.

(c) A [make and model deleted] motor vehicle retained by [Gabriel].

(d) Personalised registration plate [registration deleted] retained by [Gabriel].

(e) Trailer, apparently retained by [Anika].

(f) Personal effects.

(g) Cash held by estate lawyers amounting to $26,550.42 as at the date of hearing. There are further expenses and adjustments which may impact on this figure. These are discussed below.

[15] The issue of payment of rates and insurance for the [address 1] property was canvassed in the course of the hearing. During an adjournment [Clark Wirihana]

visited the Gisborne District Council, as a result of which it was clarified that the following rates payments had been made since the deceased's death:

(a) For or on behalf of [Declan Wirihana], $3013.90 on 17 May 2013.

(b) $5000 by the estate on 1 August 2016.

(c) $4766.41 by the estate on 1 February 2017.

(d) Payments by the estate of $125.76 on each of 20 February 2017 and 20 March 2017. Similar payments will be made by the estate on the 20th of each month.

[16] Since the date of the deceased's death up until the date of hearing the estate has paid rates of $10,017.93 and [Declan Wirihana] has paid rates of $3013.90.

[17] The estate has paid the insurance premiums on the home since the deceased's death. As at 2 February 2017 the total paid was $3391.44. The payments continue at the rate of $109.64 per month. Accordingly, the total paid to and including April 2017 will be $3560.72

[18] In the course of the hearing on 29 March I was able to discuss with [Clark], [Kyle] and [Declan Wirihana] division of various assets of the deceased, including personal property. Agreement was reached between the three of them as set out below. Obviously, none of them could bind the other children of the deceased, but I understood they expected matters could be dealt with as follows:

Wirihana[details of arrangements for individual and personal items deleted]

(g) Unveiling costs

The deceased's unveiling has still not taken place and I understand other unveilings await the outcome of these proceedings. [Declan] and [Samantha] indicated that the four younger children would bear the costs of the unveiling. They cannot bind

[Gabriel] and [Patrick] who were not at Court. If there is no agreement then this will fall to be an estate expense.

(h) Maori land

All agreed that the Maori land interests, including any accrued funds from them, should be shared equally amongst all nine children.

Division of the deceased's estate

[19] As the deceased died without having made a will the provisions of the Administration Act 1969 determine the rights of succession to his real and personal estate. If the deceased left a surviving partner as defined in the Administration Act she receives initial provision under that Act and, depending on the size of his estate, there is then subsequent provision for his children.

[20] The applicant filed these proceedings in 2014 seeking further provision for him under the Act over and above what he will receive pursuant to the provisions of the Administration Act. An order for directions as to service of these proceedings was made in terms of the applicant's application for directions in April 2014.

[21] The hearing of this application was first scheduled for 3 November 2016. Upon perusing the affidavits filed with regard to the substantive proceedings it appeared that the relationship between the deceased and [Anika Bray] was in the nature of a de facto relationship. If that was the nature of the relationship then [Anika Bray] would have entitlements with regard to the deceased's estate pursuant to the Administration Act and the Property (Relationships) Act 1976 ("PRA"). She should also be a party directed to be served with these proceedings.

[22] [Anika Bray] was not referred to in either the application for directions as to service or the directions made by the Court.

[23] As the proceedings had not been served on [Anika Bray] the matter could not be heard in November last year. However, I still had the proceedings called to address the issue of what status [Anika Bray] had with regard to the deceased.

[24] Counsel for the applicant provided a copy of a letter dated 23 May 2012 from Ms [Bray's] lawyers regarding the deceased's estate. That letter advised that the lawyers had met with Ms [Bray] on three occasions and she would not be signing a notice of choice of option by de facto partner as to option A or option B. Whilst the PRA was not referred to, this appeared to be a reference to the option a surviving de facto partner has under s 61 of the PRA to choose between making an application under that Act for division of relationship property or taking their entitlement under the deceased's will or intestacy.

[25] The letter did not say Ms [Bray] was not signing a notice of choice of option because she was not the deceased's de facto partner. On the contrary, the letter appeared to imply Ms [Bray] was the deceased's de facto partner. This is because the letter went on to say that Ms [Bray] would not put herself forward as an applicant for appointment as administrator for a grant of letters of administration in the deceased's estate.

[26] The letter went on to record:

> The late Mr [Wirihana's] family will be aware of our client's companionship and support of their father over these many years and she requests that they bear those matters in mind when dealing with the estate and its distribution.

[27] Counsel for the applicant also filed a further memorandum enclosing a copy of an email sent from Ms [Bray's] solicitors on 2 November 2016. That email read as follows:

> I have taken instructions from my client in relation to your email today and have read to her over the phone the contents of our letter to Woodward Chrisp of 23 May 2012.
>
> Our client instructs me that the contents of the letter still stand as regards her position.
>
> Further she denies that she was in a de facto relationship with the deceased and states that she does not claim any provision from the estate.

[28] Notwithstanding the content of the email dated 2 November 2016 from Ms [Bray's] lawyers, I believed she should have been served with the proceedings having regard to the content of affidavits filed and the letter dated 23 May 2012. In

directing service I asked that if Ms [Bray] was not intending to make a claim against the estate would she please file a response advising of that.

[29] Ms [Bray] has sworn an affidavit 8 March 2017. In that she confirms she has read and considered a copy of the proceedings that have been filed including my minute of 3 November 2016. She confirmed that she had the opportunity to take further legal advice from her solicitors.

[30] The affidavit then went on to state:

> 3. I deny that I was ever in a defacto relationship with the deceased, [Kauri Wirihana].
>
> 4. Consequently, I do not wish or intend to make a claim against the estate either in terms of the Administration Act 1969, the Property (Relationships) Act 1976 and the Family Protection Act 1955.

[31] As [Anika Bray] had chosen not to apply for letters of administration of the deceased's estate, the deceased's eldest child, [Clark Wirihana], applied for and was granted letters of administration in the deceased's estate on 18 March 2013. [Clark Wirihana] filed an affidavit in his capacity as administrator of the estate dated 2 February 2017.

[32] Annexed to that affidavit was a document dated 19 December 2001 which recorded it was an agreement under the PRA with the deceased and Ms [Bray] as named parties. The document was signed by both parties and witnessed by their lawyers.

[33] Under the background recitals the agreement recorded:

> [Kauri] and [Anika] are de facto partners as defined by s 2 of Property (Relationships) Act 1976.

[34] The agreement went on to record that the parties wished to contract out of the provisions of PRA and to retain certain described property as the separate property of each of them.

[35] The Court therefore has conflicting information as to the status of Ms [Bray] in relation to the deceased. Notwithstanding the statement set out in her affidavit dated 8 March 2017 it appears the deceased and Ms [Bray] have been in a de facto relationship. The precise time period covered by that relationship is not clear, including whether or not that relationship continued to exist at the date of the deceased's death.

[36] Under the Administration Act the surviving de facto partner is to receive personnel chattels, a prescribed amount of $155,000 and one third of the remaining residue. Having regard to the size of the estate Ms [Bray] would appear to be entitled to most of it if she is indeed the surviving de facto partner of the deceased. However, Ms [Bray] is aware of these proceedings and of any potential rights she may have with regard to the estate under the Administration Act, the PRA and the Family Protection Act. I therefore take paragraph 4 of her affidavit sworn 8 March 2017 as renouncing any entitlement she may have to the estate under the Administration Act.

[37] Consequently, the estate falls to be dealt with in accordance with item 4 of the table contained in s 77 of the Administration Act. The estate therefore is to be divided equally between all of the deceased's nine children.

Does the Court have jurisdiction to determine this application?

[38] As the deceased held Maori land interests there is an issue as to the Family Courts jurisdiction to deal with the claim under the Act.

[39] Patterson[1], considers the applicability of the family protection legislation to Maori and the issue of whether the High Court or the Maori Land Court should have jurisdiction, determining that the High Court has exclusive jurisdiction. However, the commentary goes on to refer to the Family Court decision in *Riddell v Public Trust*[2] which held the Family Court has jurisdiction to make an order under Family Protection Act 1955 affecting Maori freehold land.

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[1] *Law of Family Protection and Testamentary Promises, Fourth edition, LexisNexis at chapter 1.8*.
[2] *Riddell v Public Trust [2004] NZFLR 33.*

[40] In this case, the applicant does not seek any orders with regard to Maori land owned by the deceased, leaving it to be divided equally between the deceased's nine children. Consequently, the Court is not asked to make any orders with regard to such land. I am therefore of the view that the Court has jurisdiction to determine the application, notwithstanding the estate holds interests in Maori land.

The applicant's claim

[41] At the time the deceased and his first wife, [Abby], separated they and their five children were living in a home owned by them at [address 2], Gisborne. [Clark] advised the applicant that the deceased took only his bicycle when he left the home. The home was left for [Abby's] use on the basis it would be inherited by their five children on her death. A copy of the certificate of title to the [address 2] was produced by consent. It shows that as at November 1962 it was owned by the deceased and [Abby Wirihana]. An order vested the land in [Abby Wirihana] in February 1976. On 17 January 1997 the property was transferred to the five children of the deceased and [Abby Wirihana]. The property has a current rating valuation of $180,000.00

[42] The deceased subsequently entered into a relationship with [Amber] (now [Fitzgerald]). They were married on [date deleted] May 1975. Ms [Fitzgerald] has sworn an affidavit in the proceedings advising that when she and the deceased married he had no assets. He had debt and ongoing child support payments. At that time the deceased was working [occupation deleted].

[43] In 1976 Ms [Fitzgerald] purchased the property at [address 1], Gisborne which was used as the family home. She used funds she had saved prior to her marriage to purchase the property which was registered in her name alone.

[44] Ms [Fitzgerald] says that none of the children of the deceased's first marriage came to visit, stay or attend family functions in the home apart from [Clark]. She says [Clark] only visited the house on a few occasions and never to stay.

[45] Ms [Fitzgerald] says that from the date of purchase only she, the deceased and their children lived in the home.

[46] In 1990 Ms [Fitzgerald] and the deceased were divorced. She says a division of property was discussed with the deceased. Ms [Fitzgerald] notes that even though the house was purchased in her sole name, it was the family home in terms of the PRA and the deceased was entitled to a half share in it.

[47] Ms [Fitzgerald] says the deceased was of the view that as the children from his first marriage would be receiving the [address 2] property from their mother, the [address 1] home should go to the children of the deceased and Ms [Fitzgerald]. As a consequence, the deceased remained in the [address 1] property and he and Ms [Fitzgerald] agreed that the property would be for the benefit of their four children.

[48] The applicant lived with the deceased in the [address 1] property following his parent's separation. Apart from a period of about one year when the applicant lived at [location deleted], he has lived in the [address 1] property for all of his life. The applicant's siblings [Samantha] and [Gabriel] have also lived in the house from time to time.

[49] By around 2005 or 2006 the house had become quite run down and in need of repair. Consideration was given by Ms [Fitzgerald] and the deceased as to whether they should undertake what would be quite extensive repairs or pull the home down and rebuild. It was around this time that the applicant and his partner were moving back to Gisborne to live. Ms [Fitzgerald] says there was an agreement between the deceased, herself and the applicant that the applicant would move back into the house and carry out the necessary repairs on the basis he paid the costs of repairs and improvements.

[50] Significant work was undertaken and paid for by the applicant including:

(a) [Itemised list of renovations deleted]

[51] Invoices which are said to total around $35,000 have been provided to support the claim with regard to work carried out. It is said the actual costs were greater, as not all invoices have been located.

[52] The applicant and his partner have lived in the house since returning to it and have raised their two children there. They paid the rates and insurances on the property over the years until the deceased's death. As a result of advice from [Clark Wirihana] as administrator, not all rates and insurance have been paid by the applicant since the deceased's death.

[53] Ms [Fitzgerald] refers to discussions with the deceased and the applicant around the time the applicant took on the renovation regarding what was to become of the home. She says there was an agreement between the three of them to recognise the work carried out and expenditure incurred by the applicant, but also to make provision for the applicant's three siblings. Ms [Fitzgerald] says there was a verbal agreement that the applicant should retain the [address 1] property. However, the deceased was concerned to ensure there was appropriate provision for the other three children. Ms [Fitzgerald] had purchased her parents' flat and it was agreed this would go to [Samantha Cunningham]. This has since been provided to her.

[54] It was also agreed Ms [Fitzgerald's] home at [address 3], Gisborne would go to [Patrick] and [Gabriel], but on the understanding [Patrick] would buy out [Gabriel's] half interest in the property.

[55] Ms [Fitzgerald] says the deceased was happy for their four children to be provided for in this way and for the applicant to receive the [address 1] property. However, the deceased wanted to be able to continue to stay at the [address 1] property whenever he wanted to. It appears that he has done so, spending time between that property and staying with Ms [Bray].

[56] Ms [Fitzgerald] says she and the deceased were to document this arrangement. It was never recorded in any form of relationship property agreement. Ms [Fitzgerald] says she has documented it by way of provision in her will, which has existed for many years.

[57] The applicant says that about the time this agreement was reached he spoke with the deceased about the deceased's thoughts on writing up a will to cover the

house. The applicant says the deceased's response was that if he wrote up a will it would put him in his grave before his time.

[58] The applicant says the deceased told him and his siblings on a number of occasions the applicant would inherit the [address 1] property and an arrangement had been made with their mother for the three siblings to receive property. The applicant says in doing so the deceased also referred to the fact the children by his first marriage had been provided for by inheriting the [address 2] home.

[59] The applicant says that over the years it was only [Clark] of the deceased's first children who made an occasional visit to the home. Of the remaining older siblings he had only met [Kyle], and that was on just one occasion prior to his father's death. He met the other three siblings for the first time at his father's funeral.

Steps taken in response to the application

(a) No further claims

[60] All of the deceased's children have been served with the proceedings. The deceased's grandchildren have been served by way of service on each of their respective parents.

[61] None of the applicant's siblings have made any application for provision from their father's estate pursuant to the Act. [Clark Wirihana] filed a notice of defence in his capacity as administrator advising he would assist the Court in respect to such matters as regarding the estate in accordance with s 11A of the Act. [Clark Wirihana] has filed three affidavits as to assets and liabilities in the estate. He has taken no steps in the proceedings in his personal capacity as a beneficiary in the estate.

(b) In opposition to the claim

[62] Two of the deceased's children from his first marriage, [Marika Wirihana] and [Kyle Wirihana] have filed affidavits advising they oppose the application. Those affidavits have been filed personally and neither party has had representation in the

proceedings. Neither of them filed a defence to the application. They simply advised in their affidavits that they oppose the application.

[63] Counsel for the applicant, Mr Robinson, takes the point that whilst the affidavits of [Marika Wirihana] and [Kyle Wirihana] state they oppose the application, neither of them has filed a notice of defence. He points out that the time for filing such defence expired some time ago and neither has sought to file leave to file out of time.

[64] [Kyle Wirihana] had attended a judicial conference in these proceedings and at the allocated hearing date in November 2016 when the proceedings had to be adjourned. [Kyle Wirihana] also attended the hearing on 29 March 2017. Mr Robinson raised at the outset of the hearing [Kyle Wirihana's] status and right to be heard.

[65] I believed it was important to hear what [Kyle Wirihana] had to say with regard to the proceedings notwithstanding his lack of compliance with the rules. That was for three reasons, namely:

(a) He was self-represented and would not necessarily have been aware of the procedural requirements.

(b) There were issues surrounding personal items of the deceased which I believed could be meaningfully addressed by way of discussion at the hearing. Such discussion did take place.

(c) There has been little involvement between the two families of the deceased. I believed a consensus approach in dealing with the application to be more productive than strict enforcement of procedural rules which would have resulted in [Kyle Wirihana] being "shut out" of the proceedings.

[66] In the course of the hearing [Kyle Wirihana] was able to address the Court both with regard to the applicant's claim and other matters which were raised. The Court appreciates his input to those matters.

[67] [Marika Wirihana] raised in her affidavit issues with regard to some of the deceased's personal belongings. The presence of [Declan], [Clark] and [Kyle Wirihana] at the hearing enabled a number of those items to be discussed and agreement reached between them as parties who had taken part in the hearing with regard to such items. I have recorded those items in [18] above.

[68] [Marika Wirihana] also referred to the fact that rates and insurance on the [address 1] property had not been paid by the applicant since the deceased's death. She also noted that the applicant had not paid rent for the property. [Marika Wirihana] said she had no knowledge of the claimed settlement of the [address 2] property. However, as noted above, that property was ultimately transferred to the children of the deceased's first marriage in equal shares.

[69] [Marika Wirihana] said she had a close relationship with her father. She said they would get together for meals and other catch-ups at her home. She said the deceased often bought firewood to her home.

[70] [Kyle Wirihana] filed an affidavit dated 15 April 2016. In it he stated that for the purposes of matters before the Court he represented all of the children of his father to his first wife [Abby], and the deceased's mokopuna. No signed authorities from his siblings were annexed to his affidavit nor were there any affidavits from any of those siblings to confirm that claim.

[71] On 3 November 2016 I pointed out that for the purposes of representation the Court would require [Kyle Wirihana] to file some form of authority from each of his siblings and each of the mokopuna who wished to be represented in the way stated by him. As I pointed out, the Court needed to be certain that what [Kyle Wirihana] was stating on behalf of those family members was supported by them.

[72] No authorities have been filed on behalf of any those persons. Accordingly, I take [Kyle Wirihana] affidavit as representing only his views with regard to the proceedings.

[73] [Kyle] raised the issue of rates, insurance and rent not being paid by the applicant.

[74] [Kyle] also stated that there was no documentary evidence provided to support the agreements reached with the deceased as claimed by Ms [Fitzgerald]. Given the history as detailed in her affidavit, all of the agreements were oral. Consequently, I do not expect there would be any documentary evidence. The applicant has explained why there is nothing from the deceased by way of a will to cover the claimed agreement.

[75] [Kyle] confirms that his brother [Clark] had involvement with their father. However he confirms the remaining children had very little to do with their father because they were very young when he left the home. [Kyle] says he is the second oldest of the deceased's children and was aged around five or six at the time his parents separated.

[76] [Kyle's] view is that as the [address 1] property was owned by his father and therefore part of his estate, "his children are rightfully entitled to make a claim to it".

[77] As I have noted, no claim is made against the estate apart from that made by the applicant. However, I take [Kyle Wirihana's] statement as seeking confirmation of his present entitlement in the estate pursuant to the provisions of the Administration Act.

(c) In support of the claim

[78] Only one of the applicant's siblings, [Samantha Cunningham], has taken a step in response to the application.

[79] Ms [Cunningham] says that she and her brothers [Declan], [Patrick] and [Gabriel] were very close to their father. She and her husband bought a home within

200 meters of the [address 1] property so that they and their children could be close to the deceased.

[80] Her father's home was the centre of their family life. It was the ahi kaa for their whanāu. It was the place where the fires of their whanāu kept burning. This has been the case notwithstanding the applicant, his partner and their children have lived in the home. The door of the home has always been open to the four children of the deceased and their families.

[81] Ms [Cunningham] states that, apart from [Clark], she has never seen the children of the deceased's first marriage at the home. She saw [Clark] there about twice a year. She says that the children from the deceased's first marriage have no connection to the home, saying "They have no ties to that whenua."

[82] Following the deceased's tangi Ms [Cunningham] met with the applicant, his partner, [Clark] and his wife at the [address 1] property. In the course of that meeting [Clark] advised those present that the deceased's Maori land should be divided nine ways between all nine children, but that his house, his car and other belongings (apart from the golf clubs, which [Clark] wanted) were to go the deceased's children of his second marriage.

[83] Ms [Cunningham] said [Clark] had made it clear that he saw the deceased's home and his property as belonging to the children of the second marriage, apart from the Maori land which should be divided equally. She said agreement was reached on this point.

[84] In the course of the hearing [Clark] confirmed what Ms [Cunningham] had said in her affidavit. Whilst Ms [Cunningham] believed [Clark] spoke as though he was representing the position of all of the children from the deceased's first marriage, [Clark Wirihana] made it clear at the hearing he was speaking personally and not on behalf of the other children.

[85] Ms [Cunningham] stressed the importance the [address 1] home played and continues to play in her life. She noted it was the one place which remains central and

solid even after her parent's marriage ended and after she and her siblings grew up and started their own families.

[86] Ms [Cunningham] confirms her parents wanted the house to go to [Declan]. She said she fully agrees with that. She also confirmed that arrangements have been made with her mother for [Gabriel], [Patrick] and herself to be provided for to ensure there is a fair provision for the four children by their parents.

[87] Ms [Cunningham] stated that she knew [Gabriel] and [Patrick] supported this arrangement. I note there is no evidence from them with regard to the applicant's claim. Equally, however, they have not filed in response to his claim which clearly sets out the provision he is seeking.

The Law

[88] The test under s 4 of the Act is whether adequate provision has been made for the proper maintenance and support of the claimant. The test set out over a century ago in *Allardice v Allardice* [3] is stated to be:

> It is the duty of the Court, so far as possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.

[89] The Court of Appeal in *Williams v Aucutt*[4] stated:

> The test is whether adequate provision has been made for the proper maintenance and support of the claimant. Support is an additional and wider term than maintenance. In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required. … Support is used in its wider dictionary sense of "sustaining, providing comfort". A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased. Just what provision will constitute

[3] *Allardice v Allardice* (1910) 29 NZLR 959, at 972-973.
[4] *Williams v Aucutt* [2000] 2 NZLR 479, per Richardson P at [52].

> proper support … is a matter of judgment in all the circumstances of the particular case.

[90] The Courts have made it clear their task is not to rewrite a will[5]. However in this case, the Court is not considering a will where the deceased has thoughtfully decided how his estate is to be distributed and is being asked to disturb the deceased's intention. The distribution of the estate comes about because of the deceased's failure to make a will.

[91] There is no presumption that children are to be treated equally in the division of the deceased's estate[6].

[92] A broad judicial discretion is to be exercised in the particular circumstances of each case having regard to the factors identified in the authorities[7].

[93] A claimant's contributions to the assets of the deceased, including preserving and increasing the value of an asset, may increase the deceased's moral duty to the claimant, even at the expense of other children of the deceased.[8] Contributions to the estate may take the form of services or work performed for the deceased.

What was the deceased's moral obligation to the applicant and has he met it?

[94] As far as financial need is concerned, the applicant earns approximately $700 per week net as [occupation deleted]. His partner works part-time. Her income is not stated. The applicant says he and his partner share debts of approximately $8000 to Mastercard and $6000 to GE Money Finance. No other details of assets and liabilities are given. Obviously, the applicant does not own the home in which he lives.

[95] I accept the evidence as establishing that the estate's primary asset, the [address 1] property, did not have any connection with the deceased's first marriage and the children of that marriage. The [address 1] property has come about purely as a result

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[5] Re *McIntosh (deceased)* (1990) 7 FRNZ 580 at 584; *Johnson v Johnstone*, HC Whangarei COV-2010-488-108, 15 June 2011 at [47].
[6] *Vincent v Lewis* [2006] NZFLR 812; *Paewai-Kohe v Paewai* [2014] NZHC 3137.
[7] *Fisher v Kirby* [2012] NZCA 310 at [120].
[8] Re Young [1965] NZLR 924; Re Forward HC Christchurch R398/91 11 December 1996; *Hamilton v Hamilton* [2003] NZFLR 883.

of the deceased's marriage to [Amber Fitzgerald], her purchase of the property and her subsequent agreement to leave the deceased remaining as owner of the property following separation for the benefit of their children.

[96] In addition, the value of the [address 1] has been maintained, and no doubt significantly increased, as a result of the applicant's work on it and financial contributions to it. It was in a poor state of repair prior to the applicant embarking on spending in excess of $35000 on it and carrying out work himself on the property. I also accept the evidence of [Amber Fitzgerald] that there was an agreement with the deceased that the applicant was to retain the [address 1] property on the basis of the work carried out by him, the expenses incurred by him and the fact the deceased would be able to continue to reside in the home. This was on the basis there would be provision for the remaining three children of the second marriage, which has been implemented by Ms [Fitzgerald] with provision to [Samantha] and testamentary provision for [Patrick] and [Gabriel].

[97] No claim has been made under the Law Reform (Testatmentary Promises) Act 1949. However, I treat the statements made by the deceased as being extremely relevant to what he saw to be his moral obligation to the applicant.

[98] I also accept the deceased saw his moral obligation to the children of his first marriage as having been met by provision to them of the [address 2] property during his lifetime, which subsequently occurred. This was also recognised by [Clark Wirihana] in his comments to the applicant and Ms [Cunningham] following the deceased's tangi, and confirmed by him at the hearing. That was an appropriate recognition that it would be inequitable to have received the benefit of the first house, plus claim a share of the second, when the children of the second marriage have no claim to the first house. Each family should receive the bounty of the property from the respective relationships.

[99] In the somewhat unusual circumstances of this case I accept the deceased saw his moral obligation as being:

(a) to the children of his first marriage, by providing the [address 2] property to them;

(b) to the applicant, by providing the [address 1] property to him; and

(c) to the three other children of his second marriage, by the provision being made for them by Ms [Fitzgerald] as agreed with her. This has been achieved as far as [Samantha Cunningham] is concerned. Ms [Fitzgerald] has confirmed it be achieved for [Patrick] and [Gabriel] in terms of her will.

[100] I accept that the deceased saw that provision of the [address 1] property to the applicant would continue to have benefit for all children of the second marriage in the sense that it is the akhi kaa for that whanāu.

[101] By leaving no will the deceased has failed to meet his moral obligation to the applicant.

Conclusion

[102] Having failed to make a will acknowledging that he had provided appropriately for the children of his first marriage by leaving the [address 2] property to them, the estate, apart from Maori land, should be divided to recognise his moral obligation towards his younger children. That will involve the provision of the [address 1] property to [Declan]. The balance of his estate, apart from the Maori land should also go to his younger children.

[103] Given [Declan] has been in occupation of the [address 1] property since the deceased's death, it is appropriate that he should meet the rates and insurance premiums paid by the estate since the deceased's death.

[104] Accordingly, [Declan] is to account to the estate for $10,017.93 paid by it on account of rates and $3560.72 paid by it on account of insurance, a total of $13,578.65. He should also account for any further payments by the estate between the date of this decision and the transfer of the [address 1] property to him.

[105] Included in expenses paid by the estate to date are legal fees. Woodward Chrisp, solicitors, Gisborne have been attending to the administration functions in the estate and have rendered fees from time to time.

[106] Barry MacLean, barrister, Auckland has been acting for the respondent in the proceedings in his capacity as administrator of the estate. Mr MacLean has prepared and filed documents on behalf of [Clark] including a notice of defence and three affidavits as to statement of estate finances.

[107] There has been a suggestion that Mr MacLean's involvement may not have been simply to advise [Clark] in his capacity as administrator, but also to advise him in his personal capacity. An issue has also been raised to the extent of fees charges by Mr MacLean. Those are not matters I can address in these proceedings. If, however, there are issues in that regard then they need to be addressed to determine what final fees, if any, are payable to Mr MacLean, and whether or not there is to be any adjustment to the estate for fees paid to Mr MacLean to date.

[108] As at 2 February 2017 the total fees paid to Woodward Chrisp amounted to $13,934.78. The total fees paid to Mr MacLean at that date were $3148. I was advised at the hearing there was a further fee from Mr MacLean in the sum of $6838.00

Costs

[109] The applicant has incurred legal costs of $16.171.60. Whilst I have not been provided with a copy of the fee notes the summary of fees include fees dated 8 July 2013 for $429.00. These proceedings were not commenced until 13 March 2014. A note of fees rendered on 14 March 2014 would have included preparatory work for the proceedings.

[110] Having succeeded with his application the applicant is entitled to costs. However, that should not include costs that are not related to the Court proceedings.

[111] I believe an appropriate way to deal with this matter is to make an award of costs in the sum due to the estate by way of rates and insurance premium payments to

the date of hearing. The two sums are to offset each other, so no orders are made each way. If there are any further rates or insurance payments made prior to finalisation of the estate, they are to be borne by the applicant.

Orders

[112] Having regard to the above points I make the following orders:

(a) [Declan Wirihana] is to receive the house property at [address 1], Gisborne, subject to him meeting any rates and insurance premiums relating to the property since 29 March 2017.

(b) All Maori land interests and any undistributed income and/or dividends from such land will continue to be dealt with in terms of the Administration Act, namely divided equally between the deceased's nine children, with such land interests to be dealt with by the Maori Land Court.

(c) The residue of the deceased's estate after payment of all approved expenses is to be divided equally between [Declan Wirihana], [Patrick Wirihana], [Gabriel Wirihana] and [Samantha Cunningham].

M A Courtney
Family Court Judge