

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT  
AT WHANGAREI**

**I TE KŌTI WHĀNAU  
KI WHANGĀREI-TERENGA-PARĀOA**

**FAM-2019-088-000550  
[2021] NZFC 4695**

IN THE MATTER OF	Family Protection Act 1955
BETWEEN	RACHEL HEMARA Applicant
AND	PUBLIC TRUST Respondent

Hearing: 29 March 2021

Appearances: R Harte for the Applicant  
G Cairns for the Public Trust  
J Armstrong for St John  
D Adams for L Serban

Judgment: 21 May 2021

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**RESERVED JUDGMENT OF JUDGE H ELLIS**

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[1] On 28 November 2016, the sun finally set for Stanislaus George Geracopoulos known as Stan McCloskey. He passed away leaving four adult children and a number of grandchildren and great grandchildren. In his last will, executed on 20 September 2016, only some two months before he passed, he made various bequests, but other than a specific sum for daughter Theresa McCloskey, no provision was made for the adult children. The bulk of the estate was to pass to his sister Lucretia Serban.

[2] Stan's children Rachel Hemara, Anthony McCloskey and Theresa McCloskey now bring a claim under the Family Protection Act 1955 seeking provision (or in Theresa's case, better provision) from their father's estate. Another sibling, Tremaine Heta, was adopted as a child and so cannot bring a claim as adopted children are not entitled to apply under the Act.<sup>1</sup>

[3] The overall estate has a net value of approximately \$1 million.<sup>2</sup> If distributed according to the will, and taking into account other debts, the residue of the estate is likely to sit between \$850,000 to \$860,000.<sup>3</sup>

[4] The will provides:

- (a) Two gifts of \$30,000 and \$5,000 to Michelle Westerman (Stan's brother Frank's daughter);
- (b) \$30,000 to Theresa;
- (c) \$30,000 to Amber (Theresa's daughter);
- (d) \$30,000 to St Johns Ambulance;
- (e) Stan's personal effects, jewellery and household goods to be divided between his friend Carol Roberts, Theresa and Amber; and
- (f) Residuary of the estate to Lucretia Serban.

[5] The children seek \$280,000 each and propose the current gifts to Theresa, Amber, Michelle and the Order of St Johns be reduced from \$30,000 (with an additional \$5,000 to Theresa) to \$5,000. They otherwise do not seek to alter the other provisions.

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<sup>1</sup> Family Protection Act 1955, s 3; Adoption Act 1955, s16; see *Sainsbury v Graham* [2009] NZFLR 173.

The children say however it is their intention to share any provision with her.

<sup>2</sup> Joint memorandum of counsel dated 16 April 2021.

<sup>3</sup> Ibid.

[6] It has been agreed between the executors (the Public Trust), Lucretia and the children that Stan breached his moral duty to the children to make adequate provision for their proper maintenance and support.<sup>4</sup> However, they are divided as to how this breach should be remedied. Having regard to all of the circumstances, what I must decide is how the breach of moral duty should be remedied in particular:

- (a) Should the cash legacies to the niece Michelle, Theresa, a granddaughter Amber and St Johns should remain as is; and
- (b) What provisions should be made to each child, in their particular circumstances, based on their need for proper maintenance and support.

### *Legal framework*

[7] The Family Protection Act 1955 provides that specific persons may apply to the Court for proper maintenance and support from a deceased's estate.<sup>5</sup> The power to make provision from a will is discretionary. The court may order any provision from the estate that the court thinks fit.<sup>6</sup> This can include a lump sum payment or a percentage.<sup>7</sup>

[8] The leading authorities are a trio of appellate cases – *Henry v Henry*,<sup>8</sup> *Williams v Aucutt*<sup>9</sup> and *Auckland City Mission v Brown*.<sup>10</sup> The cases highlight that a will should be disturbed no more than is necessary to make adequate provision for the maintenance and support of the claimants.<sup>11</sup> I am reminded of Justice Blanchard's wise words in *Williams v Aucutt* that the Court is not authorised to rewrite a will merely because it may be perceived as being unfair.<sup>12</sup> The issue is what would a wise and just testator provide?<sup>13</sup>

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<sup>4</sup> Family Protection Act 1955, s 4.

<sup>5</sup> Sections 3 and 4.

<sup>6</sup> Section 4.

<sup>7</sup> Section 5(2).

<sup>8</sup> *Henry v Henry* [2007] NZCA 42.

<sup>9</sup> *Williams v Aucutt* [2000] 2 NZLR 479.

<sup>10</sup> *Auckland City Mission v Brown* [2002] 2 NZLR 650.

<sup>11</sup> *Henry v Henry* at [56].

<sup>12</sup> *Williams v Aucutt* [2000] 2 NZLR 479 at [68]. See also *Vincent v Lewis* [2006] NZFLR 812 (HC) at [81], see too *Fisher v Kirby* [2012] NZCA 310 at [119] – [120].

<sup>13</sup> *Allardice v Allardice* [1911] AC 730.

- [9] The principles were summarised by Randerson J in *Vincent v Lewis*:<sup>14</sup>
- a) The test is whether, objectively considered, there has been a breach of moral duty by [the deceased] 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.
  - 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.

[10] These principles were reiterated in the Court of Appeal's subsequent decision of *Fisher v Kirby*:<sup>15</sup>

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<sup>14</sup> *Vincent v Lewis* [2006] NZFLR 812 (HC) at [81].

<sup>15</sup> *Fisher v Kirby* [2012] NZCA 310, [2013] NZFLR 463.

[119] The more recent decisions of this Court have re-emphasized what has always been understood: that mere unfairness is not sufficient to warrant disturbing a testamentary disposition and that, where a breach of moral duty is established, the award should be no more than is necessary to repair the breach by making adequate provision for the applicant's proper maintenance and support.

[120] The decisions of this Court from and including *Little v Angus* are properly viewed as a timely reminder that awards should not be unduly generous. But, in our view, neither should they be unduly niggardly, particularly where the estate is large and not necessary to endeavour to satisfy a number of deserving recipients from an inadequate estate. A broad judicial discretion is to be exercised in the particular circumstances of each case having regard to the factors identified in the authorities.

[11] The Court of Appeal authorities establish that it is not for the beneficiaries to justify the share which has been given.<sup>16</sup> Rather, it is for a claimant to establish that he or she has not received adequate provision for proper maintenance and support.

[12] I have also been referred to authorities relating to cases where there was estrangement between a claimant and the testator.<sup>17</sup> The court can, and does, take into account the nature and genesis of any estrangement. Equally, the Court has considered situations where there has been disintitling behaviour by a claimant.<sup>18</sup>

[13] The court may take into account a testator's reasons for the making dispositions (or not making dispositions) under a will and may accept that evidence whether or not it would otherwise be admissible.<sup>19</sup>

[14] Calculating how the breach translates into a specific amount (or percentage of the estate) is not a matter of mathematical precision and is highly discretionary. Relevant factors to be considered include<sup>20</sup>:

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<sup>16</sup> *Williams v Aucutt* [2000] 2 NZLR 479 at [68]; *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA) at [39].

<sup>17</sup> Including *Crosswell v Jenkins* [1985] 3 NZFLR 570 (HC) at [575]; *Carson v Lane* [2019] NZHC 3259; *Moon v Carlin* [CIV-2010-414-5486]; *Kinney v Pardington* [2019] NZHC 317, *Waine v Tigg* [2018] NZHC 1976; *Wills v Wills* [1999] NZFLR 134. See also *Flathaug v Weaver* [2003] NZFLR 730 (CA) and more recently *AP v Lucas* [2021] NZHC 1017.

<sup>18</sup> See for example *Harrison v Harrison* (2007) 26 FRNZ 532 (HC) where the claimant had assaulted his father (the testator) who had then executed a new will excluding the claimant.

<sup>19</sup> Section 11.

<sup>20</sup> I have found helpful the recurring considerations in Chapter 4 discussed in *Law of Family Protection and Testamentary Promises*, (4<sup>th</sup> ed), Patterson, P.

- Economic considerations – income and capital of the applicant;
- Applicant’s care of other dependants;
- Competing moral claims;
- Age and state of health of the applicant;
- Size of the estate; and
- The relationship between the claimant and the testator.

*Who was Stan?*

[15] I need to consider who Stan was to determine what a wise and just testator would do, who hypothetically had all of Stan’s individual traits and foibles.

[16] Stan was born in 1942 when Europe was in the grips of WWII. In 1951, when they were young children, Stan and younger brother Frank came to New Zealand with their father, leaving their mother and young sister Lucretia in Greece. Sadly, although the plan was for their mother and Lucretia to follow later, this did not happen. Their father passed away in a fire in his hostel a year after they arrived. Similarly, and tragically, the mother passed away at a young age. Lucretia was adopted and raised in Europe. Stan did not meet her again until both were adults.

[17] The boys were adopted by Mr and Mrs McCloskey and the family lived in Nelson. Lucretia says they had a hard upbringing. These sentiments are echoed by Rachel who recounts their father saying that they were not shown love and worked hard on the farm, and he and his brother left home when they were of age. Stan joined the navy, and Frank left for Australia where he passed away in 1986.

[18] I consider these early life experiences – including war, migration, loss of both parents (and by default a sister) at an early age, and a tough home life and lack of affection in his formative years had a profound impact on Stan. Independence, frugality, hard work and resilience would have been ingrained in Stan at an early age.

It is no wonder in these circumstances that he held firm to a wish to maintain his Greek heritage.

[19] Stan met Daphne Bridgman. She was 15 when they met, 16 when they married, and 17 when she had their first child – Tremaine. Stan was in prison when Tremaine was born<sup>21</sup> and he was not happy when he learned that she had been adopted.<sup>22</sup> Stan and Daphne went on to have three more children – Theresa in 1966, Anthony in 1969 and Rachel in 1972.

[20] The children were young when Stan and Daphne separated. Daphne began a relationship with Maurice Bridgman and they had a child together in 1976.<sup>23</sup> They were married and remained together until Maurice passed away in January 2019. The children considered Maurice a father figure and called him dad. According to the children, Stan had a long term friendship with a woman when he lived in Whangaroa until she passed away. Further details of this relationship are unknown.

[21] After separation, the two older children (Anthony and Theresa) stayed with Stan, while Rachel remained with their mother. Anthony and Theresa returned to live with their mother after a year or two. Daphne and Maurice then moved the children north, while it appears Stan remained in Auckland.

[22] There was intermittent contact between the children and their father during their childhood and adolescence.

[23] In 1983, when Anthony was 15, he left school and moved to Australia. He has remained there since then.

[24] When they became adults, the children's evidence is that they (rather than Stan) primarily instigated contact, often centred on key family events – weddings, funerals and unveilings, and visits when Lucretia was in New Zealand. There were other times when there were phone calls, cards and when Stan stayed with one or the other

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<sup>21</sup> It is unclear why Stan was imprisoned; the children suggest it may be linked to [deleted].

<sup>22</sup> It is unclear when and how the adoption occurred given that Stan's consent as the father would have been required: s 3(a) Adoption Act 1955.

<sup>23</sup> Daphne also had another child, born in 1974.

daughter. There were also periods when there was no contact. Both Rachel and Theresa visited the day they got the call Stan was in hospital and stayed for some days.

[25] Stan paid child support when the children were young<sup>24</sup> but other than loaning Theresa some money when she was an adult<sup>25</sup> he does not appear to have given them any additional financial support.

[26] As he got older the children say that Stan began drinking more heavily and this affected him (although not to the point where they argue he lacked capacity).

[27] Overall, my impression of Stan is that he was an independent man with a strong work ethic who had worked hard to build his capital and who freely voiced his opinions, someone who valued a sense of family having lost his own birth family at an early age.

#### *The will and its history*

[28] Stan was an active will maker and between June 2008 and September 2016 he made a number of wills.<sup>26</sup> His last will was made only some two months before he passed. He shared the contents with some of the family including Lucretia, even wills that excluded various members of the family.

[29] Stan's principal asset was a block of flats in Rotorua which has now been sold.

[30] I accept Lucretia's lawyer's submission that some of the wills were effectively Stan just "tinkering", however significant changes were made over time to reduce and then remove provision for the children:

- (a) Will 24 April 2013 – one flat gifted to Lucretia (or substitute gift of his principal residence if the flats had been sold); residuary of the estate to the children and the niece Michelle.

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<sup>24</sup> There was some uncertainty about this, but it appears because Daphne was receiving the domestic purpose benefit for some years the payment went to the Crown. He had arrears upon his death which have since been paid. BD351 and 352.

<sup>25</sup> As evidenced in the Public Trust report.

<sup>26</sup> Rachel says there are 11, but Public Trust only seem to have 8.



- (b) Will 2 August 2013 – similar to the April will except that Anthony was excluded because he had “refused to have anything to do with me.”
- (c) Will 29 September 2014 – significant change - Lucretia was to receive the residuary estate not the children; children (excluding Anthony but including Tremaine) and Amber to receive \$10,000; \$30,000 to Michelle and friend Carol. Testamentary note left with the will.
- (d) Will 19 February 2015 – significant change less than 5 months later – legacies to the children removed completely. Testamentary note identical to that left with previous will.
- (e) Will 22 December 2015 – Theresa reinstated as a beneficiary with specific provision and an interest in the household goods. Testamentary note – “I feel no moral obligation to provide for [my children] given their past conduct and uncaring attitude, apart from my daughter Theresa.”

[31] Stan’s most recent will was executed shortly before his passing. No challenge has been made as to its validity. Probate took place on 14 February 2017.

[32] Stan left statements with his later wills to explain the reasons for his dispositions. The last statement is dated 16 September 2016, some three months prior to his passing. Stan sets out in some detail why the children apart from Theresa were excluded. He refers to his wishes as “firm and considered” and that his decision to exclude the children was “not taken lightly.” He states he was aware that the children could contest the will as a result. It is a strongly worded statement that holds the children responsible for the poor relationship.

[33] The children dispute Stan’s views including that they were poisoned against him (a claim Daphne also denies), that they rebutted a relationship with him, that they do not acknowledge him as a father, reject their Greek/European heritage and that he does not have a moral duty based on their past conduct and uncaring attitude.

[34] I do not find any disentitling conduct on the part of the children. They were young when their parents separated and cannot be held accountable as such for a failure to maintain contact. The children were not poisoned, had this occurred then visits would not have eventuated.

[35] This fractured early relationship continued as each of the children became adults due to a combination of factors including Stan's personality, and a divergence as the children forged their own paths in life and had their own challenges, careers and children, and distance (in the case of Anthony). I find that Stan and the children each had their own views as to who was responsible for their limited relationship. I do not discount that Stan genuinely held the view that the children rejected him, however he may not have considered how his own particular personality may have had an impact on that.

[36] Two other matters of note – firstly, none received anything from Maurice's estate, and secondly given Daphne's evidence of her modest circumstances<sup>27</sup> it is unlikely they will receive any inheritance of note from her estate.

[37] It is against that context that the claims must be assessed.

*What does the executor say?*

[38] The Public Trust is named as executor and trustee. They adopt a neutral position as does the Order of St John.

*What does Lucretia say?*

[39] Lucretia is the residual beneficiary. She is in her late seventies. She was born in Romania in 1949 and after her mother's passing she was adopted and raised in Romania. In later years she moved to Nevada, USA.

[40] Lucretia found her brothers when she was in her 30's and stayed with Frank (who was living in Australia) and then Stan. They had ongoing contact and she described their relationship as close with calls and visits. Stan visited her in America

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<sup>27</sup> Affidavit 3 September 2020.

including in 2016 for his birthday, they travelled together to Europe, he attended her son's wedding in Japan and she came to New Zealand twice. Stan named her as a contact person at the hospital when he had his fall reflecting their connection.

[41] Lucretia was working as a technical dresser but lost her job due to Covid-19.

[42] Although Lucretia accepts that there should be provision for the children, they are divided as to the amount. She also disagrees that the gifts to Theresa, Michelle and St Johns should be reduced.

*Should the gifts remain as is?*

[43] It is accepted by the children that it is not for the beneficiaries to justify their provision under the will. However, the children argue their claims should take precedence on the basis that the child-parent relationship takes priority over claims by others.

[44] Stan made specific provision for Michelle, Theresa, Amber and St Johns Ambulance.

[45] Michelle was Stan's brother Frank's daughter. Rachel says Michelle was adopted, and although not a niece in a legal sense (the adoption severing legal ties), Michelle was looked on as part of the family. She has been provided for in the wills dating back to 2008. Michelle went to Wellington in 2006 with Stan, Lucretia and the others for Frank's unveiling, and it was Michelle who rang Rachel to tell her Stan had had a fall in October 2016.<sup>28</sup> Stan named Michelle as his executor in his 2010 will if his sister Lucretia was unwilling to act, had passed or was incapacitated. Rachel says Stan had some sympathy towards Michelle because she did not receive anything after Frank passed away, and the gift reflects his sense of moral responsibility for her. The statement accompanying the 2016 will made clear that he provided for her "*as she is the daughter of my late brother and this gift represents half of the inheritance I received from my mother.*"

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<sup>28</sup> BD12 at [32]

[46] Amber Henare is Theresa's daughter. Theresa has other children, and there are a number of other grandchildren. Stan attended Amber's wedding in 2010.<sup>29</sup> Stan says that he hopes she will "*utilise this gift in keeping with the wishes I have made known to her during my lifetime.*" Amber did not give evidence, so these reasons are unknown, but I can infer from these comments that he must have had a closer relationship with her than the other grandchildren.

[47] Stan's bequest to St Johns Ambulance was "*to purchase and supply defibrillators.*" It is unclear of his precise reasons for choosing St Johns other than they are a charity that serve the public good and he may have had assistance from them in the past.

[48] The children argue that the gifts should be reduced from \$30,000 to \$5,000. Lucretia says that the gifts should remain as they are. While I accept that there is primacy to the relationship between parent and child, it is not for the beneficiaries to give reasons for or otherwise explain their provision. The will should not be disturbed except to the extent to provide for the children and I consider that the size of the estate to be sufficient to allow for the children's claims without interfering with Stan's express wish to make provision for Michelle, Theresa, Amber and St Johns Ambulance.

[49] Accordingly, I find that the gifts should stand.

*How should the breach of moral duty to the children be remedied?*

[50] This is the key question.

*Theresa*

[51] Theresa is the oldest of Stan's children. She is 54 years and was born on 5 December 1966.

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<sup>29</sup> BD11 at [25]

[52] Unlike her siblings, she was given a specific bequest of (overall) \$35,000 and a share of the motor vehicles and personal effects.

[53] Theresa has 4 adult children who live independently, one of whom has had physical and mental health issues. She has 5 grandchildren. She does not have a partner.

[54] Theresa has had issues [with addiction, and other health issues]. These impact on her ability to find and sustain employment, at least in the short term.

[55] Her financial circumstances (as at November 2019) are very modest. She is on a sickness benefit with no assets. While in rehab she received \$25 per week, although it can be assumed this amount has increased now that she is back in the community. While her debts do not appear substantial, they are significant to her given her income.

[56] Stan appears to have given Theresa financial support as the recent report from the Public Trust refers to a debt owed of some \$2324.00. This is not referred to in Theresa's evidence and so it is unclear when and how this debt arose.

[57] Out of all the children it appears the connection between Theresa and Stan was the closest. Mr Harte referred to her as "something of a drinking buddy." Theresa says that as an adult she saw her father nearly every year other than when she was overseas or the year she was in jail. When given the opportunity to speak at the end of the hearing, it was clear that she wished to retain positive memories of her father and insisted that if time had permitted he would have changed his will so as to make provision for her and her siblings. She held fond memories of him dating back to her childhood and told the court that "*no one can ever understand how much he meant to me*"<sup>30</sup> and later "*My dad was my King*"<sup>31</sup>

[58] Stan would have been aware of Theresa's situation and the need for ongoing support. She is in modest circumstances financially with no assets and has ongoing significant health issues. I find a wise and just testator knowing her circumstances and noting the size of the estate and taking into account their relationship would have

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<sup>30</sup> BD103 at [19]

<sup>31</sup> BD104 at [23]

provided her with more than the \$30,000, the additional \$5,000 and 1/3 of the chattels etc. Weighing up Stan's moral duty with Theresa's circumstances, I find she should have an award of \$145,000 to recognise her place in Stan's life, to remedy his failure to support her better during her adult years, to allow her to improve her standard of living, support her recovery and pay her debts and noting that she will already receive \$35,000 and the chattels etc.

*Anthony*

[59] Anthony is the second eldest of the three children. He is 52 years old and was born on 2 February 1969.

[60] Anthony lives in Walwa, Australia having moved to Australia when he was 15. He is single but was previously married. He has two adult sons who live and work independently. He has two grandsons.

[61] Anthony is unemployed. In December 2019 he said that he had no other assets of significance, no debts, did not own a car, and had modest household items.

[62] Anthony says his ability to improve that situation is affected not only because of availability of work given he lives in a small town, but also because of his health issues – [health issues deleted]. He was on an unemployment benefit of \$285.00 and used the proceeds of sale of a home in Melbourne to assist with daily costs. The benefit was increased over Covid-19 so he no longer needed to use his savings. As at September 2020 he had \$57,000 in savings.<sup>32</sup> Although his evidence was that the benefit increase was only temporary and might end on 31 December I have no further evidence on the matter.

[63] Anthony remembers neither positive or negative interactions with his father growing up.<sup>33</sup> As with the other children his contact post separation was sparse. He recalls that Stan used to hit their mother, so he wasn't allowed to come to the house

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<sup>32</sup> Converting this to New Zealand dollars as at 14 May 2021 amounts to approximately \$61,500.

<sup>33</sup> BD82 at [18]

after they separated.<sup>34</sup> He does remember about 3 times waiting in vain at the end of the driveway for his father to collect him, calling him but there was no answer.<sup>35</sup>

[64] After he moved to Australia, he only saw Stan twice. The first time was when Anthony was 17. Stan visited and Anthony says that despite knowing he was living week by week, he did not offer any financial (or other) support.<sup>36</sup> The second time was when Anthony (aged 32) came to New Zealand for Rachel's wedding. It appears at first Stan did not recognise him. They had not seen each other for some 15 years (since the visit when Anthony was 17).

[65] Stan did visit Australia a second time. Stan had hoped to stay with Anthony however Anthony's girlfriend had not wanted him to. There was a mix up at the airport and he and Anthony did not see each other. Stan subsequently wrote Anthony out of the (2014) will saying that Anthony had told him that he was not welcome in his home to visit him or his family, and that Anthony did not want to be part of his life. Although Anthony disputes that, he accepts that Stan had wanted to stay and had again hinted at staying after he arrived. Anthony gave no reasons why his girlfriend did not want Stan in the home. I consider it was reasonable to assume that Stan may have been aggrieved by the refusal to have him stay at the home, particularly given the lack of previous contact, hence the decision to re-write his will.

[66] Anthony says there were also letters and calls when possible although there is no other evidence of this. Anthony did not attend Stan's funeral.

[67] I find their relationship was limited and strained. I do not accept that distance alone was not a factor as Stan enjoyed a close relationship with Lucretia who lived further away, and Anthony had the financial means to travel to New Zealand.

[68] Stan breached his moral duty to provide for Anthony. Although he may not have been as aware of his circumstances as he was of Theresa, he nonetheless had a duty towards him. Anthony is in modest circumstances and although he has savings his ability to work is hampered. Anthony says he would like to get a place to rent of

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<sup>34</sup> Ibid.

<sup>35</sup> BD83 at [19]

<sup>36</sup> Stan visited Australia a second time some years later but he missed Anthony at the airport and although there was a call later in the day they did not see each other.

his own and maybe some new furniture and a medium valued car.<sup>37</sup> Balancing the breach against Anthony's circumstances and noting his wishes to improve his situation by getting into a rental and having new furniture and a car, I consider an award of \$160,000 appropriate to recognise his place in Stan's life, to remedy his failure to support him from age 15, to allow for him to regain a better standard of living and improve his general situation as he has proposed.

*Rachel*

[69] Rachel is 47 years old and was born on 27 July 1973. She is married to Dyne Hemara. She is healthy with no major health issues. She lives in Whangarei.

[70] She and her husband both work. She is a caregiver social worker for Oranga Tamariki. Her husband is a farm assistant manager. As at October 2019 they had loans/credit card debts of approximately \$66,000, and assets including KiwiSaver, vehicles, savings and assets which they value at approximately \$79,000.

[71] Rachel and Dyne have three children – two are adults who live independently and a 13 year old who lives at home. The children are all healthy. She has two grandsons who are healthy but get asthma in winter.

[72] Rachel says she had ongoing contact with Stan during her adult years including visits, trips, calls and cards. She refers to his drinking and how this affected his behaviour, with him saying and doing things that were hurtful in later years. She visited him with Theresa after he was hospitalised due to the fall. She made the funeral arrangements and was the original applicant in the proceedings.

[73] To remedy Stan's breach of moral duty towards Rachel I take into account her circumstances, need for maintenance and support and her relationship with Stan. The cases are clear that I must not take liberties with the will and respect testamentary freedom and must only make provision sufficient to remedy the breach. Rachel is in moderately good financial circumstances with good health and one dependant. I consider a wise and just testator would have provided for her and even though she is in reasonable circumstances and with stable employment I consider an award of

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<sup>37</sup> BD 352



\$170,000.00 would recognise her place in his life, to remedy a failure to otherwise assist her during her adult years and to allow her to better her situation in a financial sense.

**The sunrise**

[74] This has been a lengthy and difficult process for each of the children who seek acknowledgement and redress. I hope a decision brings them peace.

[75] Under s 4 of the Family Protection Act 1955 the will is amended to provide for the following awards from the estate:

- (a) \$145,000 to Theresa McCloskey;
- (b) \$160,000 to be paid to Anthony McCloskey; and
- (c) \$170,000 to Rachel Hemara.

H Ellis  
Family Court Judge