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**IN THE FAMILY COURT
AT NELSON**

**I TE KŌTI WHĀNAU
KI WHAKATŪ**

**FAM-2019-042-000253
[2022] NZFC 7768**

IN THE MATTER OF THE FAMILY PROTECTION ACT 1955

AND

IN THE MATTER OF THE ESTATE OF [JANET HAYS]

BETWEEN [FREDA ROBBINS]
First Applicant

AND [JENNIFER CLEMENTS]
Second Applicant

AND [OLIVER HAYS]
DAVID ANTONY EARLE
as Trustees of the Estate of [Janet Hays]
First Respondents

AND [OLIVER HAYS]
Second Respondent

Hearing: 9 and 10 June 2022

Appearances: G Downing for the First Applicant
J S Angland and R Walsh for the Second Applicant
G C Engelbrecht for the First Respondents (attendance excused)
L C L Yong for the Second Respondent

Judgment: 31 August 2022

JUDGMENT OF JUDGE G P BARKLE

[1] These proceedings concern the Will of [Janet Hays], who died at Nelson on [date deleted] 2018. Mrs [Hays] left a Will dated 24 February 2010 that was admitted to probate on 25 August 2018. The Will provided as follows:

- (a) The sum of \$2,000 was given to her daughter, [Jennifer Robbins] (“[Jen]”), and each of her three children, [Lena Sparks], [Evelyn Sparks] and [Timothy Sparks].
- (b) The sum of \$5,000 was given to each of Mrs [Hays]’s four other grandchildren, [Lucile Robbins], [Taylor Robbins], [Brandon Robbins] and [Katelyn Hays].
- (c) Her tools were left to her son, [Oliver Hays].
- (d) The residue of the estate was divided as follows:
 - (i) A two-fifths share to her daughter, [Freda Robbins] (née [Hays]).
 - (ii) A three-fifths share to her son, [Oliver].

[2] By agreement of all parties the gifts to the seven grandchildren have been paid by the estate.

[3] The executors and trustees of the estate are [Oliver], and a Nelson solicitor, David Earle. Attached to an affidavit of Mr Earle was an earlier Will of Mrs [Hays], dated 8 May 2003. In that Will, her grandchildren were left differing amounts from those provided in her last Will, and the entire residue was to be left to her son, [Oliver]. Neither of the testatrix’s daughters, [Jen] or [Freda], were recognised in the earlier Will.

[4] Completed with the Will of May 2003 was a signed and witnessed statement of Mrs [Hays] setting out why no provision had been made for either daughter. She stated that both daughters were estranged from her. Mrs [Hays] said that she was aware that the attitude of both her daughters had been affected by the nature of the criminal charges and conviction of her husband [Toby Hays]. She stated: "I was not blind in my support of my husband and I am of the view that he served his punishment." Mrs [Hays] then went on:

I have less affection for [Jennifer ['Jen']] as a result of her style of living, her many unsavoury partners and acquaintances, and the way she has been a continual financial drain on me.

I have attempted to rebuild my relationship with [Freda], but she has rebuffed those attempts. She is also already well provided for through her marriage.

[5] A further paragraph in the statement explained why the grandchildren had been treated differently from each other.

[6] Mrs [Hays] completed a similar statement when making her Will of 24 February 2010. She said that she had not provided for her eldest daughter, [Jen], for the reasons expressed in her statement dated 8 May 2003. Mrs [Hays] then added that since that date she has had more contact with [Freda] and her children and, consequently, she has been included in the residue of the estate. Mrs [Hays] added:

I have had no contact with [Jen] or her family since 1991. When we did have contact, her and her children were always causing me trouble.

[7] On 23 May 2013, Mr Jon Tidswell, a Nelson solicitor working for the same firm where Mr Earle practised, was seeing Mrs [Hays] in [location 1] for her to sign enduring powers of attorney. Mr Tidswell took the opportunity to discuss Mrs [Hays]'s last Will with her, and completed a memorandum for his file. Mr Tidswell noted that he had gone through the Will, clause by clause, checking with Mrs [Hays] that she did not want to change any clause. She advised him that she did not.

[8] Mr Tidswell recorded that he had particularly questioned her about clause 6 of the Will, which dealt with the uneven division of the residue, asking why it was not an equal split. Mr Tidswell noted Mrs [Hays]'s advice was that her son, [Oliver], was

giving her a lot of his time, attention and help, and she wished to acknowledge this care by giving him a larger share.

[9] Mr Tidswell was comfortable that Mrs [Hays] appeared to be of sound mind, and was fully aware of the unequal distribution, but had her reasons for so doing. She also confirmed that her daughter, [Freda Hays], was married and that her name was now [Freda Robbins].

[10] Ms [Hays] survived her husband, [Toby], who died in [early] 2003. It is unclear whether he left a Will. But in any event, it seems accepted that by survivorship, and either the provisions of the Administration Act or testamentary disposition, Mr [Hays]'s entire estate passed to his wife.

[11] In a memorandum prepared for this hearing, Mr G Engelbrecht, counsel for the trustees, advised that the funds now held in the trust account of Glasgow Harley Solicitors to the benefit of the estate amounted to \$486,667.57. There was also jewellery held by the estate with a market value of \$5,814.40, together with some further unvalued jewellery and chattels. Each of the children have indicated a wish to have certain items of jewellery and chattels of the estate. Recent memoranda filed by counsel for the parties appear to have resolved how those items are to be disposed of.

[12] [Freda] has filed an application seeking further provision from the residue of the estate. She submits that her mother has failed to recognise the close support and assistance provided by [Freda] throughout her adult life, particularly in the later years when her mother was in greater need of support. As summarised by her counsel, Mr Downing, the distribution of the residue of the estate sought by [Freda] is:

- (a) ten per cent for [Jen];
- (b) forty per cent for [Oliver]; and
- (c) fifty per cent for [Freda].

[13] [Jen] has submitted that her maltreatment while a child and young person, by both her mother and stepfather (Mr [Hays] adopted [Jen] soon after marrying her

mother), was of such magnitude to justify an award to her of 80 per cent of the estate, together with costs.

[14] Ms Yong, counsel for [Oliver], acknowledged on behalf of her client that the bequest of \$2,000 to [Jen] was inadequate to discharge the moral duty of Mrs [Hays] to her daughter. She submitted an award of \$60,000 or approximately 12.5 per cent of the estate should be made in favour of [Jen]. Thereafter, the balance of the estate should be divided in accordance with the Will of the testatrix, being a three-fifths' share to [Oliver] and a two-fifths' share to [Freda].

Evidence of [Jen Clements]

[15] Mrs [Hays] was born in [Europe] on [date deleted] 1931. She married [Arnold Hood] in early 1957, and [Jen] was born in England on [date deleted] 1957. Mrs [Hays] and Mr [Hood] also had a son, [Jason], who was born on [date deleted] 1959. Mr [Hood] was killed in a [details deleted] accident in [Europe] during 1960.

[16] Mrs [Hays] married [Toby Hays], [profession deleted] from [the UK], when she was aged 29. [Jen] and [Jason] were adopted by Mr [Hays] soon after the marriage. Mr and Mrs [Hays]'s first child, [Oliver], was born later that same year.

[17] In [early] 1964 the family of five moved to New Zealand and settled in [location 2]. Mr [Hays] had a brother living in the city. Later that year [Jen] states she was abducted and raped in [location 2]. A complaint to the police was made. It is unclear whether anyone was apprehended and charged in respect of this incident. [Freda Robbins] was born late in 1964.

[18] [Jen]'s evidence is that from an early age she and [Jason] were physically and emotionally abused by their father, [Toby Hays]. She said her mother contributed to and was part of the emotional abuse. [Jen] also alleges serious neglect on the part of her mother by allowing the physical abuse, and later sexual abuse, to take place.

[19] In effect, [Jen]'s evidence was that from the earliest times Mr [Hays] was responsible for egregious and ongoing maltreatment of her and [Jason]. This

continued for her throughout the time that she remained part of the family, and at each of the locations at which they lived. On occasions her and [Jason] were left alone during the day, overnight and into the following day. They went without food. [Jen] and her brother would be excluded from family events and functions that their parents, along with their siblings, [Oliver] and [Freda], would enjoy.

[20] [Jen]'s evidence was that this maltreatment had commenced prior to her arrival in New Zealand, but matters deteriorated even further following her abduction and rape in [location 2] in 1964. There were failed attempts on the part of [Jen] and [Jason] to run away from home. When they returned home, they were subject to severe punishment.

[21] In contrast, their siblings, [Oliver] and [Freda], were well treated by their parents. They did not suffer the kind of physical and psychological abuse that was experienced by [Jen] and [Jason]. [Jen]'s evidence was that, by the time of the move to [location 1] in 1970, her parents' hatred for herself and [Jason] was quite apparent. Some of the physical abuse occurred as a consequence of incorrect advice from [Oliver] and [Freda] about the conduct of their sister and brother. Regular and protracted physical beatings were received by both her and [Jason]. These included their father using the buckle end of an army belt against bare skin. [Jen] said that Mrs [Hays] would ready the belt for her husband and often told him lies about [Jason] and herself, so that a beating would be provided.

[22] [Jen] recounted seeking out some degree of normalcy and respite from her homelife from neighbours and people in the wider community, as well as with the SPCA and other similar community organisations.

[23] The family moved to [location 1] in approximately 1970. The move was a consequence of Mr [Hays] obtaining employment at [place of employment deleted] at [location 1]. The family home was located across the road from where Mr [Hays] worked.

[24] Soon after their arrival in [location 1], [Jen]'s evidence was that Mr [Hays] began to sexually abuse her. She stated that Mrs [Hays] was aware of what was being

perpetrated by Mr [Hays], but failed to intervene, and that she enabled the conduct to take place.

[25] [Jen]'s evidence was that deliberate starving of her and [Jason] was a feature of their childhood, resulting in each of them becoming extremely underweight and unwell. [Jen] alleges Mrs [Hays] refused to take her and her brother to a doctor to be examined. In contrast, [Oliver] and [Freda] were well-fed and did not have any weight issues.

[26] Mrs [Hays] would not encourage either [Jason] or [Jen] to have friends, and would do her best to see that each of them was effectively isolated, apart from their relationship with each other. Each was very introverted, lost self-confidence and self-esteem, and talked of committing suicide. There were never any signs or statements of affection from their parents. By comparison, [Oliver] and [Freda] had a normal life with each having a number of friends and participating in extracurricular activities outside school. [Oliver] and [Freda] were paid pocket money, while [Jen] and [Jason] were not.

[27] Further, [Jen] stated from when she was about 12, and for the following four years, both her and [Jason] had to parade virtually naked, with only underwear on, in front of the other members of the family while enduring unpleasant comments. [Jen] felt, in her words, utterly destroyed, emotionally humiliated, and ashamed.

[28] Her evidence was that the sexual abuse by her father, Mr [Hays], occurred almost daily, particularly after her return from school, at either his [workplace] or in his office at home. It also became a relatively regular occurrence for him to perpetrate the abuse in the bedroom that [Jen] shared with her sister, [Freda].

[29] During 1973, [Jen] got to know the district health nurse, [name deleted]. This was because they were both members of the local [church]. [Jen] had joined the church a couple of years earlier. She would attend study groups on a Wednesday or Thursday. One evening after a Bible study meeting [the district health nurse] found [Jen] in her kitchen crying her eyes out. When asked what was wrong, [Jen] said she blurted out everything that was happening at home. She recalled feeling ashamed and

was terrified that her parents would find out. [The district health nurse] advised her that she would have to tell her mother and also the police. [Jen] stated that she had already told her mother about Mr [Hays]'s conduct towards her, but had not been believed, and was punished.

[30] When telling her mother in mid-1973 about the sexual abuse, the response of Mrs [Hays] was, [Jen] states, to have her daughter removed from school and placed in employment at [deleted] in [location 1]. [Jen] said about this time she went to the police and complained of the abuse which she was suffering. The police told her that some form of corroborating evidence was needed beyond just her allegations.

[31] [Jen] illustrated her mother's contempt for her by recounting that Mrs [Hays] suggested a party be held for [Jen]'s sixteenth birthday in [month deleted] 1973. No one arrived, and while [Jen] had prepared invitations and given them to her mother, those had not then been delivered or posted by her mother. [Jen] alleged her siblings, [Oliver] and [Freda], were involved in the façade that was perpetrated.

[32] [Jen] said that, during 1974, she once more visited the [location 1] Police Station complaining of the conduct she was enduring and asking for help. The response from the officer was that there would need to be some independent evidence of what [Jen] said was taking place before anything further could be done.

[33] [Jen] recalled that in October 1974, she was scheduled to sit her School Certificate examinations. A few days before those were to take place, she had refused Mr [Hays]'s demands for sex. That resulted in her receiving a serious beating. She said she was thrown onto the bars of a set of bunks in her bedroom, and her spine was badly injured. Her automatic response was to verbally abuse Mr [Hays], which resulted in her receiving a hiding, [Jen] stated. As a consequence of this incident, [Jen] went to the police station. Her injuries were sufficient for the police to arrange for her to be taken to live with an elderly couple in [location 1], Mr and Mrs [Mullins]. Soon after that, Mr [Hays] persuaded [Jen] to return home. The abuse continued. Serious issues arose once more in the home and [Jen] was told to leave. Arrangements were made, because of a further incident in late 1974, for [Jen] to return to the [Mullins] home in [location 1], after which she moved to [location 3].

[34] By this time [Jen] had become friends with a young man, [Kevin Sparks], whose family the [Mullins] knew. They married on [date deleted] 1975 when [Jen] was aged 17. Her parents did not attend the wedding. She had her first child, [Timothy], on [date deleted] 1976. She and [Kevin Sparks], together with their son, moved to [location 4] later that year.

[35] Her brother, [Jason], was [details of death deleted], on [date deleted] 1976. Advice of her brother's death was the only communication received by [Jen] from either of her parents while she lived in [location 4].

[36] [Jen] had daughters, [Lena], on [date deleted] 1977, and [Evelyn], on [date deleted] 1979. [Kevin Sparks] had begun to drink heavily, and also physically abused [Jen] from late 1976.

[37] The family returned to [location 1] in the early 1980s. Soon after that, [Jen] was hospitalised due to severe abdominal pain. An emergency [operation] was performed as a result of significant internal damage to [Jen]'s organs.

[38] In 1986 [Jen]'s marriage to [Kevin Sparks] ended. This followed [Jen] suffering a serious physical assault from her husband involving him shooting at her with a rifle. He was arrested and charged by the police, pleaded guilty, and received a community-based sentence.

[39] In 1986 [Jen] spent some time at [Hospital] because of depression and other mental health issues. This was a voluntary admission. During this time her two daughters stayed with her parents in [location 1].

[40] In 1988 [Jen] and the children were living [location 1]. Around this time [Jen] ran into difficulties obtaining social welfare assistance. Her evidence was that this was a consequence of her not being a New Zealand citizen, something her parents had failed to attend to after the family arrived in this country. There were continuing demands over this period by Mr [Hays] for her to have sex with him, which she rebuffed, but resulted in nightmares of her childhood being relived.

[41] [Jen]'s evidence was that her living situation was so extreme and dire that she sought to marry again. A male friend, [Glenn Conner], had been a pen pal for some time. He visited [Jen] and her children in [location 1]. The pair got on well enough and, in what [Jen] described as sheer desperation, she proposed to Mr [Conner], and he accepted. The couple were married on [date deleted] 1989 in [location 1]. All of [Jen]'s family attended this wedding with Mr [Hays] giving her away.

[42] [Evelyn] told her mother that Mr [Hays] had been sexually abusing her in [month deleted] 1991. A few days later, on [date deleted] 1991, the principal of the [Area School] told [Jen] that both daughters, [Lena] and [Evelyn], alleged they had been abused by their grandfather for some time. As a consequence of mandatory reporting being required by this time, the school advised the Department of Social Welfare who conducted interviews of the two girls, and of [Jen]. Police involvement then commenced. When interviewed, [Jen] said in her statement she had been subject to similar abuse during her childhood.

[43] In [month deleted] 1991 Mr [Hays] was charged by Nelson Police with sexual offences against [Lena] and [Evelyn]. A depositions hearing was held in the Nelson District Court in October 1991. [Jen] gave evidence about what she had been told by her daughter, together with more general evidence, that included providing some detail of sexual abuse suffered by her from Mr [Hays] while living in the family home. At the conclusion of the depositions hearing Mr [Hays] pleaded not guilty and was committed to the High Court at Nelson for trial. Prior to trial, Mr [Hays] changed his pleas.

[44] Mr [Hays] was sentenced in the High Court on [date deleted] 1992 in respect of [a number of sexual offending charges] perpetrated against [Lena] and [Evelyn]. The sentencing notes of Ellis J stated the offending took place from [month deleted] 1988 for a period of three years. The sexual conduct was varied and occurred frequently. Mr [Hays] was sentenced to four and a half years' imprisonment including a condition he complete [a programme in prison].

[45] Due to an incident at her home during 1994, it became known to [Jen] that her second husband, [Glenn Conner], was a user and dealer in drugs. She confronted

Mr [Conner], who admitted his conduct. She left the marriage and moved to [location 5] with the two girls. It seems, according to the evidence of [Jen], that [Evelyn] and [Lena] had been introduced to drugs by Mr [Conner]. They maintained contact with him. Mr [Conner] committed suicide some time in [the mid-1990s].

[46] During the 1990s, [Jen] met [Marcus Clements], who had recently separated from his wife. He had the care of his young son, and they boarded with [Jen]. Their friendship developed, but for some time there was no desire on [Jen]'s part to enter a relationship. Nevertheless, on [date deleted] 1996, the two married. They remain together.

[47] As a consequence of the conduct of her parents towards [Jen], and then of Mr [Hays] against her daughters, there was a total breakdown in [Jen]'s relationship with her mother. Mrs [Hays] did not appear to accept the offending of her husband took place against the granddaughters despite his pleas of guilty. She sided with him and regarded [Jen] as driving the allegations made by her daughters. [Jen]'s evidence was that she had written a card or similar correspondence to her mother soon after Mr [Hays] had been sentenced, proposing a reconciliation. A letter was received in reply written by her brother, [Oliver], advising that [Jen] and her daughters were not to have anything further to do with any members of the family. [Oliver]'s evidence was that he could not recall the correspondence. In his affidavit, Mr [Clements] said he had seen the letter.

[48] Ongoing difficulties with her physical health, particularly related to spinal injuries, caused much difficulty for [Jen]. She has also suffered significant mental health issues including post-traumatic stress disorder, anxiety and depression. Financial problems continued due to an inability to work, and her not being able to access social welfare assistance because, as [Jen] states, she did not have citizenship in New Zealand. She and Mr [Clements] lived in Nelson and in [location 6]. The relationships with her daughters, [Lena] and [Evelyn], were fraught. Both had children and partners. Maintaining a relationship with both was difficult for [Jen] while she lived in New Zealand. In [month deleted] 2008, [Jen] and Mr [Clements] moved to [Australia]. Since that time, she has had no contact with [Lena], and has only seen [Evelyn] once.

[49] Mr [Hays] died in [early] 2003. [Jen] received no notification of that happening. [Jen] was not aware of her mother's death until advised by [Evelyn] on 27 January 2019, almost five months after Mrs [Hays] had passed away.

Evidence of [Freda Robbins]

[50] [Freda]'s evidence is that her upbringing and that of the other three children was relatively normal, if lacking in affection. Mr and Mrs [Hays] encouraged self-resilience and independence in [Freda] and her siblings. Each of the children had left home by the time they were 16. Her parents conveyed little emotion but did their best in terms of providing for the family.

[51] She recalls Mr and Mrs [Hays] bought a bach [in location 7] soon after arriving in [location 2]. The family spent weekends and holidays there. [Freda] was around six when the family moved to [location 1]. The [location 7] property was sold, and two adjacent sections bought at [location 1]. A family home was built on one of the sections. Each family member made a contribution to building the house, but the major amount of work was carried out by Mr and Mrs [Hays], with some assistance from local trades people where necessary.

[52] Some difficulties arose for [Freda] with her primary schooling due to being a late starter, and because of no school bus being available to [school]. A move to [a different] Primary School for [Freda] solved this problem. [Freda] left school as soon as she was 15. A number of years after leaving school, she was diagnosed with dyslexia.

[53] [Freda] shared a room with [Jen] in both homes in [location 1] until her older sister left home. [Freda]'s recollection is of an uneventful family life, until heightened tensions during the teenage years of [Jen] and [Jason]. She particularly recalls her mother having difficulties coping with [Jen]. The evidence of [Freda] was that Mrs [Hays] became more and more dependent on her doctor to provide medication for various illnesses and pain-related issues. She recalls her mother maintaining a gruelling workload in the home. Her recollection of her father was that he was retiring and introverted. He seldom showed anger; she did not regard him as a violent man.

While she described Mr [Hays] as having a solid presence in the home and family, [Freda] said he was not dominant or forceful.

[54] Mr and Mrs [Hays] were much affected by the death of [Jason] according to [Freda]. [Details of Jason's death deleted] . [Freda] has few memories of [Jason], as he died just before her eleventh birthday. She described him as quiet and being interested in how things worked.

[55] [Freda] describes [Jen] as a divisive influence in the family who appeared to take pleasure in others' unhappiness. She alleged that [Jen] physically and sexually assaulted her. This was firmly denied by [Jen]. [Freda] described being paralysed in fear, and dreaded what would come next from her older sister. [Freda] cannot recall why she let the conduct take place, but assumes she accepted it as part of growing up. [Freda]'s evidence was that the cruelty she suffered at the hands of [Jen] provides distressing memories and has haunted her for years.

[56] [Jen] left home at a young age and married soon after, recalled [Freda]. She remembers her living in various locations, and said because of the age difference the two sisters had little to do with each other. [Freda] described problems getting worse as [Jen]'s children got older, especially with [Jen]'s family relationships and housing. Her recollection is that Mr and Mrs [Hays] provided as much support for [Jen] as possible, but they were frustrated with [Jen]'s lack of care of her children and instability.

[57] [Freda] described a very difficult relationship between her and her brother, [Oliver], who capitalised on the fact that she was having problems finding her way as a teenager. She says he made her life unbearable with his bullying of her, being unforgiving and unrelenting. That has continued into her adult years according to [Freda]. She describes [Oliver] as treating her as worthless, and as a failed parent with little to contribute. She described the abuse from her brother as insidious, as he was calm, quiet, steady and calculated.

[58] She describes [Oliver] as the favoured child in the family, and that he would use this role to his advantage. In her view, he always had the idea that he would

automatically achieve success and wealth. Life started off well for him with an apprenticeship, thereafter he bought [deleted]. However, work then tapered off and he invested in businesses which collapsed or did not do well.

[59] [Freda] stated that her parents did not discourage [Oliver]'s overbearing behaviour. She described them as having high hopes for [Oliver] and adoring him in the early years. Once he got his driver's licence, he had a number of car and motorbike accidents which resulted in [Oliver] becoming demanding of his parents' time during recovery. He dominated his mother's time particularly, and made the most of her being there for him hand and foot.

[60] [Freda] regards [Oliver] having a belief that his inheritance was something owed to him. She believes he does not regard [Freda] as having the same rights as him, and that he would rebuff any suggestion that she should be treated equally in her mother's Will.

[61] [Freda] had little involvement with her father's trial and imprisonment. She described this period of time as "devastatingly crushing". [Freda] stated that neither her father nor her mother made any excuses, and recollects Mr [Hays] as having quickly admitted his conduct. She recalls her parents often feuding and being paranoid about neighbours around this period especially. While [Freda] believed her mother did not condone Mr [Hays]'s actions, [Freda] described her mother as having an unbreakable bond with her husband.

[62] Her belief is that [Jen] made demands of her parents involving payment of money, and used her children to profit from Mr and Mrs [Hays] as much as she could. Her understanding was that [Jen] asked for large amounts of money from her parents on more than one occasion. While she did not condone what her father did, [Freda] recounts not liking what [Jen] did in response.

[63] Having spent some years living in [the UK], [Freda] returned to New Zealand and lived with her parents. They assisted her with a deposit to buy a home in [location 1]. That money was repaid with interest. She lived in the home in [location 1] for a few years before moving to Nelson when she married her husband, [Joe].

[64] [Freda] describes her mother as being unwell for many years and believed she would often play one person off against another. It was difficult knowing what the truth was with her mother, and who was favoured between [Oliver] and herself. Mrs [Hays] would often make complaints about each sibling to the other. The issues with her brother, [Oliver], exacerbated the difficulties she had with her mother, while the behaviour of her mother made it increasingly difficult to be supportive of her.

[65] During 2000 [Freda] describes having a falling out with her parents. She was living in Nelson with her husband and three children. Her parents were becoming increasingly more demanding of her time. They needed a greater level of support, particularly as her brother, [Oliver], was spending more time with his family. In addition, her family demands were significant, and her husband had an enormous workload in his job. The couple were also building a new home.

[66] [Freda] was concerned about the safety of her children around her father, particularly her daughters as they got older. She did not want them to be left alone with Mr [Hays]. It was difficult for her to supervise all three children. She advised her mother that she had considerable concern about whether her children would be safe around their grandfather. [Freda] believes her mother saw this as a new threat to herself and Mr [Hays]. This caused much difficulty in her relationship with both parents, and resulted in her pulling back from them.

[67] The period of estrangement between [Freda] and her parents is disputed. She places the timeframe as approximately three years or a little more. [Oliver]'s evidence is that it was for a period of six years.

[68] [Freda] describes her mother as suffering from illness, loss and sadness together with a level of paranoia and mistrust of everyone in her later years. Her father died in 2003. He had suffered a number of major health events including a heart attack, an aortic aneurysm, and cancer from the mid-1980s.

[69] Having reconciled with her mother following the death of her father, [Freda] described their relationship as much more positive from that time forward. She said

her mother seemed to enjoy her daughter's company. There was some financial assistance provided to [Freda], but this was of a minimal amount.

[70] During 2013 enduring powers of attorney were signed by Mrs [Hays]. [Joe Robbins], [Freda]'s husband, became Mrs [Hays]'s welfare attorney and, together with [Oliver], they became attorneys of her property.

[71] The next year it became apparent that Mrs [Hays] would require rest-home care. She was falling, suffering from dementia, and locking herself out of the house. She was not able to drive. High dependency care, monitoring and a secure place in which to live was required. On 16 December 2014 a medical certificate recording Mrs [Hays]'s mental incapacity was completed. From there she was placed in a rest home. Monies were advanced by [Oliver] and [Joe Robbins] from time to time to assist with rest-home fees.

[72] In summary, [Freda] describes her parents as just parents with children who were difficult. There were family issues, all of which increased in complexity over time. Each of the children had times where they fought with, disappointed their parents, and caused them worry and distress. But she did not feel unloved or unsafe with either of her parents. She states that her parents were not outwardly affectionate to each other, but they had an extremely close relationship and were inseparable.

[73] [Freda] advises that once her mother moved into the rest-home, she would visit regularly. In addition, she was in regular phone contact with the rest-home staff, and would also meet with them to discuss her mother's care. She recalls taking phone queries from the staff during both the daytime and the night. If Mrs [Hays] had a fall or fell out of bed, then it was [Freda] who was rung. If there was a medication change or medical check, then [Freda] was the one contacted. On occasion she was asked to come to the rest-home to calm Mrs [Hays].

[74] [Freda] says that by the date of her death the file note completed by Mrs [Hays] with Mr Jon Tidswell in May 2013 setting out why [Oliver] had received a larger share of the residue did not fairly reflect her relationship with her mother. [Freda] had, in

her view, provided a greater quantity and quality of care for her mother by comparison with her brother, especially during her later more dependent years when most needed.

[75] [Freda] stated that she had never been contacted by the police, doctors, or any agency in regard to [Jen]'s allegations of the conduct she suffered, particularly from her father, but also from Mrs [Hays]. In [Freda]'s view, if there was any substance to the claims of abuse, then she would have thought it would be necessary for her to be interviewed to see if it was safe for her to remain in the family environment. [Freda] said [Jen] was an avid rumour monger, and would often start rumours through the [location 1] community. That had an impact on herself at school and in the community generally. [Freda] alleges that soon after her father's sentencing, [Jen] was making enquiries with the local bank manager about wanting money. The bank manager warned both Mrs [Hays] and [Freda] about [Jen] seeking funds. In essence, [Freda] does not accept [Jen]'s account of her childhood and the alleged actions of Mr and Mrs [Hays].

Evidence of [Oliver Hays]

[76] [Oliver] said in his affidavit that he understood there was no need for him to justify his inheritance. However, he disputed a number of matters set out by his sisters in their evidence. His memory was that his parents encouraged all their children to be self-sufficient from a young age, and he noted each had left home by the time they were 16. [Oliver] stated that he and [Freda] continued to support their parents throughout their lives subject to their own family, work and travel commitments.

[77] Despite his father's guilty plea and conviction, [Oliver] stated in his affidavit that he did not know whether the allegations were true or not. He drew attention to an entry in his mother's diary dated [date deleted] 1992 in which Mrs [Hays] had recorded that his father's solicitor had advised Mr [Hays] to enter a guilty plea to avoid [Evelyn] and [Lena] giving evidence in court, and the consequent publicity. He said his mother had written: "Should not have to be charged for something that did not happen."

[78] [Oliver] had no memories of his father being a violent or angry man. He recalled the children being smacked with his belt if they were naughty, but said this was infrequent.

[79] In respect of [Jen]'s allegations of sexual abuse and being viciously beaten, and his mother encouraging such abuse, [Oliver] stated he found the allegations extremely difficult to accept. The picture that [Jen] has painted of her childhood was at total odds with the way he recalls the family growing up. [Oliver] does not have any memory of seeing any bruises or injuries, or hearing [Jen] scream and yell at his father as she claimed. He described the family home as relatively small, and is not certain how his parents could have concealed the level of alleged abuse. [Jen] and [Freda] shared a bedroom, and the latter never mentioned anything of concern to him.

[80] In effect, [Oliver] was of a view that there is little, if any, reliable and cogent evidence to support [Jen]'s position. If [Jen] suffers from psychological or mental health issues, or physical injuries, [Oliver] asserts those are not a result of any conduct on the part of his parents. He says [Jen] was a difficult teenager who had various relationships of which Mr and Mrs [Hays] did not approve. Nevertheless, Mr and Mrs [Hays] helped out once she had settled down and had children. He does recall his parents attending [Jen]'s second wedding in 1989, and his father walking [Jen] down the aisle.

[81] His evidence was that until the sexual abuse allegations were raised by [Jen]'s daughters, [Lena] and [Evelyn], in 1991, the relationship between [Jen] and her mother had been okay.

[82] Following the allegations being made, [Oliver]'s recollection is that all contact of [Jen] and her daughters with other members of the family stopped. On occasion when in the local area he would see [Jen], but largely she completely distanced herself from the family, and chose not to make contact. By the time Mrs [Hays] had passed away, [Oliver] had not seen or heard from [Jen] in over 20 years.

[83] [Oliver] describes the allegations raised in [Jen]’s affidavit against the family as extremely serious and upsetting to read, especially when he has no recollection of the alleged abuse.

[84] As is apparent from [Freda]’s evidence, the relationship between her and [Oliver] is fraught. He describes his sister as a person for whom nothing was ever good enough. If he or [Jen] had something, [Freda] wanted something better.

[85] His recollection is of the breakdown in the relationship of [Freda] and Mrs [Hays] lasting for about six years. He states that [Freda] did not attend their father’s funeral. While Mrs [Hays] attempted to mend their relationship on numerous occasions, [Freda] was not interested. His recollection is that contact resumed in [month deleted] 2006, following [Freda] sending an email wishing Mrs [Hays] a happy birthday. While he accepted that the relationship between mother and daughter improved, [Oliver] noted they only spent one Christmas with each other between 2000 and Mrs [Hays]’s death in 2018. He is unsurprised that [Freda] does not regard 40 per cent of the residue of the estate as adequate, bearing in mind her character. [Oliver] said [Freda] lives a very comfortable life.

[86] [Oliver] disputed receiving any significant financial assistance from his parents. He said his mother ran a very tight financial ship. While Mr and Mrs [Hays] helped where and when they could, it was generally in the form of babysitting, helping with home repairs and similar. Any money advanced had to be repaid with interest. For example, though Mr and Mrs [Hays] invested in the purchase of [address deleted], Nelson where [Oliver] and his wife first lived, the couple paid out their parents at market value to assist with his father’s legal fees.

[87] He recalls only having one serious vehicle accident, that being when he crashed his motorbike [details deleted] and said he did receive considerable help from his parents to recover.

[88] Contrary to [Jen]’s evidence, [Oliver] states that neither Mr [Hays] nor Mrs [Hays] were overly affectionate towards any of the children, and that he has no memory of being hugged or fussed over as a child. Neither parent had any tolerance

for any of the children complaining, and they expected all of them to find their own way in life. He did not consider they were unfair in their approach, but believes [Jen] and [Freda] resented the general parenting approach of both mother and father.

[89] [Oliver] recalls Mrs [Hays] as keeping up a relentless work ethic her entire life, which resulted in some physical stress. He noted his mother had faced a number of difficulties in her life, including her first husband dying at a young age, and her second husband being imprisoned for allegations [Oliver] regarded as untrue. He also described [Jen] and [Freda] as not being easy on Mrs [Hays], each demanding a lot and being ungrateful for the help that she provided. In contrast, while accepting that he was not the perfect son, he said he was always close with his mother, and they had a good relationship.

[90] Prior to his father passing away in 2003, [Oliver] and his wife would visit his parents in [location 1] at least once a month. After Mr [Hays] died, he said he was in regular weekly contact with his mother through phone calls, emails and regular visits.

[91] Once Mrs [Hays] had relocated to [a rest-home nearby], [Oliver] said he was a regular visitor, usually on a Sunday, and he would take his mother out for the day. That routine continued for the three and a half years she lived at the home prior to death.

The financial position of [Oliver], [Freda], and [Jen]

[Oliver]

[92] [Oliver] deposes that he and [his wife], jointly own their property at [address deleted], which is valued at approximately \$580,000. There is a flat on the property, but they do not own that home. There is a revolving credit loan against the property of approximately \$39,000. [Oliver] earned a taxable income as [details deleted] for the financial year to 26 September 2019 of \$63,692.26. His wife is retired and receives superannuation. Neither he nor [his wife] have KiwiSaver.

[Freda]

[93] The combined assets of [Freda] and her husband, [Joe], are \$2.15 million. Their total liabilities are \$306,000. The couple own their family home in Nelson, as well as a property at [address deleted]. The combined income of [Freda] and [Joe] was \$137,000 for the latest tax year, almost all earned by [Joe].

[94] Mr Downing submitted that if [Freda] and [Joe]’s marriage came to an end, then his client would be in a less secure financial position. Counsel submitted this was particularly relevant for a person approaching retirement, [Freda] now being aged 58. However, there was no evidence suggesting the marriage was under strain. Each of [Jen] and [Oliver] would face a similar situation if their respective marriages ended.

[Jen]

[95] [Jen] and [Marcus Clements] own their family home in [Australia]. They self-value the property at \$220,000. They have a motor vehicle valued at \$39,000, and furniture and other chattels self-valued at \$5,000. Their liabilities total \$339,700. Therefore, they are in a deficit position. A monthly income and expenditure statement dated 7 August 2019 shows the couple’s sole income is provided by [Marcus] of \$7,172. Their outgoings total \$7,125. They note that there will be upcoming government increases to utility costs, which will likely dissipate the small monthly surplus. Effectively their position is one of insolvency on their figures, and they depose to not having any financial security once [Marcus] retires. [Jen] also states she cannot get superannuation or Medicare in Australia.

The law

[96] Section 3(1) of the Family Protection Act 1955 (“the Act”) sets out those who are entitled to apply for provision out of the estate of a deceased person. Each of the children of Mrs [Hays] fall into that category.

[97] The basis for a claim under the Act is set out in s 4(1):¹

If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the court thinks fit be made out of the deceased's estate for all or any of those persons.

[98] The decision of a full bench of the Court of Appeal in *Williams v Aucutt* is the latest seminal decision in respect to consideration of family protection claims.² The Court took the opportunity to restate the correct approach to awards under the Act, referring to what it described as “an expansive view ... of the power of the court to refashion the will of the deceased” that had occurred in the decades preceding the decision. The Court agreed there was substance to the criticisms of the way in which the courts had been applying the law.³

[99] Richardson P, writing for the majority, outlined the general principles applying to claims under the Act. He noted that testamentary freedom remains, except to the extent there has been a failure to make proper provision for the maintenance and support of those entitled to it.⁴

[100] The Court endorsed the comments from *Little v Angus* which summarised the well settled principles applied by the courts as follows:⁵

The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is a will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events.

¹ Family Protection Act 1955, s 4.

² *Williams v Aucutt* [2000] 2 NZLR 479.

³ At [68].

⁴ At [33].

⁵ *Little v Angus* [1981] 1 NZLR 126.

[101] The test is whether, objectively considered, there has been a breach of moral duty by the deceased as assessed by the standards of a wise and just testator or testatrix. “Moral duty” is a composite expression which is not restricted to mere financial need, but includes moral and ethical considerations.

[102] It was noted that mere unfairness of treatment is not sufficient, and it must be shown in a broad sense that the applicant has a need of maintenance and support. What is “proper” is different from what is “adequate”, so the amount to be provided is not to be measured solely by the need of maintenance with which the Court would be concerned if the question were merely what was adequate. It was also stated that there can be an obligation to make provision even if the child is comfortably situated financially, as a result of moral and ethical considerations.

[103] Richardson P in *Williams v Aucutt* summarised the required analysis to be undertaken as follows:⁶

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 and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. “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 proper support in this latter respect is a matter of judgment in all the circumstances of the particular case.

[104] Justice Blanchard, in his judgment in *William v Aucutt*, agreed with the decision of Richardson P, but noted that the Court is not authorised to rewrite a will merely because of perceived unfairness, and that it is not for a beneficiary to have to justify the share that has been given. Furthermore, it is not for the court to be generous with the testator’s property beyond ordering such provision as is sufficient to repair any breach of moral duty. Testators remain at liberty to do what they like with their

⁶ *Williams v Aucutt*, above n 1, at [52].

assets once they have made such provision as is necessary to discharge their moral duty to those entitled to bring claims under the Act.⁷

[105] In the 2002 decision of *Auckland City Mission v Brown*, the Court of Appeal noted concerns that orders in recent years may have been out of line with current social attitudes to testamentary freedom relative to claims by adult children. An order made had to be limited to the amount required to repair the breach of moral duty and it was only to such extent the Will would be disturbed.⁸

[106] In the subsequent decision of *Henry v Henry*, the Court of Appeal again emphasised any award to a claimant should be no more than necessary to remedy a failure to comply with the testator's moral duty. A mere perception of unfairness was not enough. The Court must conclude that a claimant has established that he or she has not received adequate provision for proper maintenance and support. The judge must remind him or herself the Court is not to override the testamentary freedom of the testator if the test is not met, even if it appears that a fairer distribution of the estate would have been desirable. The approach is no different in the case of financial need. Again, the principle is that the Will is to be disturbed no more than necessary to make adequate provision for the proper maintenance and support of the claimant. This applies whether the case is based on financial need, the need for broader support, or both.⁹

[107] In *Fisher v Kirby*, the Court of Appeal said awards under the Act should not be unduly generous.¹⁰ However, the Court also stated that neither should they be unduly niggardly, particularly where the estate is large, and that it is 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.

⁷ At [68] and [70].

⁸ *Auckland City Mission v Brown* [2002] 2 NZLR 650.

⁹ *Henry v Henry* [2007] NZFLR 640.

¹⁰ *Fisher v Kirby* [2012] NZCA 310.

Estrangement caused by a testator

[108] Where an estrangement has been brought about by the deceased's own making, the moral duty to repair the breakdown in a relationship can be compelling. In the case of *Crosswell v Jenkins*, which involved a claim by children against the deceased's estate where paternity was disputed, Hardie Boys J said:¹¹

Each claimant must of course show in a broad sense a need of maintenance and support. But the concept of need is not a narrow one and moral and ethical considerations are to be taken into account. The claim of a child from whom the deceased has had a long estrangement cannot be as strong as that of one which whom he has a close relationship. On the other hand, where the estrangement is of the deceased's making, either because he has actively brought it about, or because he has not exercised his particular ability and responsibility to heal it, the need and the moral duty are compelling. What the deceased has failed to do in his lifetime and to accord recognition to his own family he ought to do in his will. And if he does not the Court ought to do it for him.

[109] A similar approach was taken by Gendall J in *Re Watson*, where his Honour held that the Court can look at breaches of duty or neglect to a child in the past by absence, and that lack of contact and support in an emotional and psychological sense may also be taken into account.¹²

But there can be no question that neglect of a child's needs from an early age so that estrangement arises and continues with no real relationship occurring in some circumstances heightens a moral duty or obligation to make proper testamentary provision.

The parent/child relationship

[110] In *Flathaug v Weaver*, the Court of Appeal reinforced the primacy of the relationship of parent and child and the moral obligation attaching to it saying:¹³

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.

¹¹ *Crosswell v Jenkins* (1985) 3 NZFLR 575.

¹² *Re Watson* HC Napier CP23/2000, 22 February 2002 at [26].

¹³ *Flathaug v Weaver* (2003) NZFLR 730 at [32].

[111] There are a number of cases involving testators neglecting their parental role by failing to provide for their children financially and/or morally and emotionally. Counsel for [Jen] referred to some cases illustrating the range of awards in circumstances where little or no testamentary provision was made for a child of the testator.

[112] In *Shannon v Bowering*, the deceased fathered a son who he never acknowledged.¹⁴ The deceased left his estate principally to his sister and three nieces. Justice Potter made an award of \$200,000 out of an estate valued at \$300,000, being approximately 66 per cent. Her Honour observed that the deceased denied paternity of his son, and failed to establish a relationship with him. Despite living within close proximity, the son was denied a relationship with his father which could have improved his unhappy childhood.

[113] In *Rothnie v Public Trust Office*, the claimant was a son of parents who had separated when he was eleven.¹⁵ His childhood had been marked by violence and neglect from the deceased, and there had been little or no contact after separation. Of an estate of \$312,000 that was left to the three siblings of the deceased, only one of whom survived, the Court awarded \$250,000 to the claimant (80 per cent), 10 per cent to a granddaughter and the residue to the surviving sister of the deceased.

[114] In *Re Upton*, the Court confirmed an agreement by the parties for a sum of \$85,000 (approximately 72 per cent) to be granted to the deceased's daughter from an estate of \$117,000, which had been left in its entirety to the de facto partner of the deceased.¹⁶

[115] Justice Cull, in *Kinney v Pardington*, awarded 70 per cent of an estate worth \$615,000 to the deceased's ex-nuptial daughter, Erin Kinney, with whom he had little contact over the years.¹⁷ Erin was in significant need of financial support, whereas the deceased's two sons were financially comfortable, and had been assisted by their father's trust for some years. The Court determined the deceased had breached his

¹⁴ *Shannon v Bowering* HC Rotorua CP33/97, 21 August 2000.

¹⁵ *Rothnie v Public Trust Office* HC Wellington CP203/95, 22 September 1997.

¹⁶ *Re Upton* HC Wellington CP169/94, 28 September 1995.

¹⁷ *Kinney v Pardington* [2019] NZHC 317.

moral duty to his ex-nuptial daughter during his lifetime, and failed to support her financially, morally and ethically over a significant number of years. The finding of her Honour was that the claim for maintenance and support was both one of financial need, as well as a broader need for support, emotional and filial.

Sexual and physical abuse suffered by a claimant

[116] In *AB v RT*, the Court accepted the claimant daughter's allegations that she had been severely and persistently physically abused by her father (the testatrix's late husband) and isolated during her childhood, as well as enduring a lifelong mental illness, including insomnia, an eating disorder, depression, and relational difficulties.¹⁸ The claimant had been estranged from her parents for some four decades, and was provided one per cent of her mother's estate under the Will. Justice Brown determined that an award amounting to 10 per cent of the estate was appropriate for support, and subsequently applied a modest uplift of 5 per cent to account for the abuse of the claimant.

[117] In adopting what was described as a "conservative approach", Brown J noted the following:

- (a) The main perpetrator of the abuse was not the testator, but her husband. It would be inappropriate to compensate for the father's sins entirely through the estate of the mother.
- (b) It was difficult to assess the veracity of the plaintiff's claims, given that it was virtually impossible to independently verify. An award must reflect what was necessary for proper support, not a quasi-punitive measure.
- (c) There must be due deference for testamentary autonomy as far as possible, and awards must be coloured by the nuances of a particular relationship – and the plaintiff's mother had made a Will with the express intention of limiting her daughter's legacy.

¹⁸ *AB v RT* [2015] NZHC 3174 at [96]–[98].

[118] In *J v M and C*, the plaintiff sought provision from her mother's estate.¹⁹ She had been physically and sexually abused by her father in childhood. Her mother had failed to acknowledge this, and ultimately became estranged from her. Justice Whata increased the plaintiff's 10 per cent share under the Will to 20 per cent, stating:²⁰

In my view an additional 10% better reflects the combination of need and the wider performance of the moral duty of repair in this case. While a percentage analysis can be deceiving, a 20% allocation appears to be at the upper end of the spectrum of cases.

[119] In *A v B & Anor*, the claimant daughter sought further provision from her mother's estate, alleging she had been sexually abused by her father.²¹ That was accepted by the Court. His Honour Judge Strettell acknowledged the difficulty in taking from dutiful sons who had meritorious claims, stating that no award could fully remedy the breach, and the attempt to do so reduces fulfilment of the moral duty owed to the sons. An award of \$60,000 was made to the claimant, amounting to just under 20 per cent of the estate.

Analysis – Claim of [Jen Clements]

[120] For [Jen] to achieve anywhere near the award submitted as appropriate by her counsel, it will be necessary for the Court to be satisfied on the balance of probabilities, having regard to the gravity of her allegations that the conduct of her parents towards her took place. The civil standard of proof must be flexibly applied to reflect the seriousness and consequences of the facts that must be proved. In *Z v Dental Complaints Assessment Committee*, the Supreme Court said:²²

[102] ...the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[121] Plainly, the allegations in this case are serious.

[122] Both [Oliver Hays] and [Freda Robbins] assert they had no knowledge or awareness of the sexual, physical or psychological abuse that [Jen] says took place

¹⁹ *J v M and C* [2012] NZHC 1830.

²⁰ At [23].

²¹ *A v B & Anor* FC Hamilton, FP 634/02, 23 September 2004.

²² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

throughout her childhood, which was also largely visited upon not only herself but her brother, [Jason].

[123] Counsel for Ms [Robbins] and Mr [Hays] submit strongly there is a lack of reliability and credibility about the allegations made by [Jen], and most particularly that the degree and extent of the abuse of all types [Jen] states occurred has been embellished and exaggerated.

[124] [Jen] filed her application on 13 August 2019, together with an affidavit to which she attached as exhibit A, an unvarnished description of her life history. It could not be suggested this document was amended or changed in any manner by the experienced eye of a legal advisor. Therefore, [Jen]'s account is open to criticism in terms of accuracy of dates, embellishment, and reliability due to it covering an almost 50-year period.

[125] In addition, in an affidavit completed by clinical psychologist, Ms Sandra Hartman, dated 28 September 2020, she concluded that [Jen] has suffered over a lengthy period with extremely severe symptoms of post-traumatic stress disorder, and is trying to manage significant mental, physical, social and emotional disability. My understanding is that this impacts on [Jen]'s ability to accurately remember events, and her retention of information is compromised.

[126] In attempting to corroborate her allegations [Jen], with the assistance of her counsel, sought to obtain documentation from various organisations. Following the launch of her claim, [Jen] made Official Information Act requests of the New Zealand Police, the Ministry of Justice, the Department of Corrections, the Ministry of Social Development, and [two District Health Boards]. As a result of those endeavours, some documentation was located supporting [Jen]'s description of events. It cannot be overlooked that the chronology document (exhibit A to her first affidavit) was compiled by [Jen] solely relying on her memory, and without the assistance of any of the later documentation that was obtained.

[127] Ms Yong and Mr Downing also reminded the Court that [Jen] had been subject to a number of traumatic events outside of her upbringing with her parents including:

- (a) Her abduction and rape soon after arrival in [location 2] from England when six or seven. [Jen] was critical of the lack of support she received from her parents following this event, and particularly recalled a later remark from her father, along the lines that as she was damaged by this incident then his daughter was therefore available for exploitation.
- (b) The marriage to [Kevin Sparks] which took place when [Jen] was only 17. [Jen] suffered physical abuse from her first husband, and heavy reliance on alcohol by Mr [Sparks] was a feature of their marriage. There was a serious incident of violence involving a firearm which precipitated the parties' separation. Soon after that, because of ill-health and psychological issues, [Jen] was admitted to the local psychiatric institution, [a Hospital] on a voluntary basis.
- (c) A second marriage failed as a result of [Glenn Conner] being embroiled in drug use and trafficking. He also provided drugs to [Jen]'s three children from her marriage to Mr [Sparks].
- (d) A serious [accident] in 2011 that caused [Jen] significant injuries.

[128] All of the above matters, I accept, will have had a detrimental impact on the physical and psychological health of [Jen]. The Court must be careful not to visit upon Mr and Mrs [Hays] the consequences of all of the traumatic and sad events of [Jen]'s life. In saying that I do not overlook the evidence of Dr S Blackwell as to the impact of childhood experiences on later life conduct and events.

Department of Social Welfare documentation

[129] [Jen] alleged that the physical and sexual abuse by Mr [Hays], known of, enabled and consented to by Mrs [Hays], took place from the earliest times following the family's arrival in New Zealand. However, the abusive conduct increased in frequency and intensity following the move to [location 1].

[130] Records were obtained from the Department of Social Welfare, which at the time had responsibility for issues concerning children and young people. Those confirmed the involvement of the Department with the [Hays] family, particularly [Jen] and her parents during 1973 and 1974. Over those years [Jen] was aged 14 and 15. A J Carson, who is referred to as a social worker and Assistant Director of Social Welfare for Nelson, completed some relevant documentation during those two years.

[131] On 18 June 1973, Mr Carson records having visited [location 1] on 28 May 1973, and speaking with the local constable, and a public health nurse, [the district health nurse]. He notes there had been some developments since a visit made earlier in the year, when he had suggested to [the district health nurse] that she might like to interest herself in the [Hays] family. Reference is made to [Jen] being openly hostile to Mr [Hays], and recently obtaining employment at [deleted] in [location 1]. In order to hold that position, she had to move into the township ([location 1]) from [nearby], where she had been taken in by an old foster mother, Mrs [Mullins]. Mr Carson concludes that events may take a more favourable turn for this family as a consequence of the move.

[132] This confirms the evidence of [Jen] that she obtained employment and lived with the [Mullins]s, as does her involvement with the public health nurse, [the district health nurse]. Due to the reference to Mr Carson speaking with the local constable, it is reasonable to infer the police had some awareness or involvement in matters concerning the family. Mr Carson also notes involvement earlier in 1973 than May of that year. While the document indicates concern about the situation in the [Hays] house, and hostility of [Jen] towards her stepfather is noted, there is no record of the reason for either.

[133] The next notes made by Mr Carson are dated 25 June 1974. He records having had a telephone call from the public health nurse, [the district health nurse], prior to a visit to [location 1] on Wednesday, 19 June 1974. She said to Mr Carson it was essential that [Jen] get away from the home situation for a while if she was to have any chance of passing school certificate. Mr and Mrs [Hays] arrived at [the district health nurse]'s clinic as arranged to speak with Mr Carson. He records having a clear picture of an unhappy household with a teenage daughter rebelling against parental

restraints. He offered to work with [the district health nurse] to obtain a foster home placement for [Jen], and anticipated opposition to her remaining in [location 1] without identifying who would feel that way. There appeared to be some concern about what others may think of [Jen] living away from home.

[134] The following day, [Jen] came to [the district health nurse]'s clinic, and Mr Carson recorded her as "an articulate and intelligent girl who presented favourably." In discussion with Mr Carson, it appears she accepted, at his suggestion, some responsibility for the unhappy state of affairs in the home. She did express immediate willingness to move to Mrs [Mullins]'s home, and Mr Carson, together with [the district health nurse], was to discuss her going back to the [Mullins]'s with her parents. It seems that Mr Carson did not believe resorting to statutory powers would be required, as he was of a view that the [Hays] would agree to a move to Mrs [Mullins]'s home for their daughter. It was left to [the district health nurse] to facilitate a meeting between Mr and Mrs [Mullins] with the [Hays], and [Jen]'s transfer was to be arranged as soon as the question of board was finalised.

[135] Mr Carson's next record is dated 11 September 1974, and the following is set out:

I have witnessed flaming rows which have been conducted as though I was not present, and I have wondered about the storms which must occur in this household. Mr and Mrs [Hays] have an unfortunate tendency to speak in scathing and derogatory terms about [Jason] and [Jen], and I am sure that these older children are very hostile towards their stepfather.

[136] It is unclear who provided that information to Mr Carson. One assumes that it was not his personal experience since he was located in Nelson and only visited [location 1].

[137] The final record available from the Department of Social Welfare, completed by Mr Carson, was dated 27 November 1974. That note states:

There have been violent scenes in the [Hays] home involving [Jen] and Mr [Hays] in particular. In a conversation with the new police constable, [name deleted], he informed me that he had received visits from [Jen] and her parents, each reviling the other. Mr Carson had received a message from [the district health nurse] advising that [Jen] had left home and was proposing to live with her fiancé and family in [location 3]. She was going to remain in

[location 1] with other members of her fiancé's family until having completed school certificate. Mr Carson had received a phone call from [Jen] asking for advice on the question of consent to marry.

[138] In summary, it would appear the records of Mr Carson indicate, over an almost two-year period, the [Hays] family having involvement with the Department of Social Welfare. There is reference to the public health nurse, [the district health nurse], and the local constable, having knowledge of matters of concern in the household. It would seem that Mr and Mrs [Hays] struggled with the behaviours of [Jen] and, to some extent, [Jason]. Reference is made to violent scenes in the home involving Mr [Hays] and his daughter. There is use of strong language by them in respect of their daughter, such as reviling her. This evidence, at least, confirms [Jen]'s description of an unpleasant living environment, and a particularly acrimonious relationship between her and Mr [Hays]. I note there is no specific reference to physical and/or sexual abuse.

Documentation related to police charges against Mr [Hays]

[139] The next series of documentation referred to by counsel for [Jen] concerns the sexual abuse charges and conviction of Mr [Hays] in relation to his conduct towards his granddaughters.

[140] In [Jen]'s witness statement at the depositions hearing, the initial advice of Mr [Hays]'s conduct by [Evelyn] to her mother appears to have taken place around [date deleted] 1991. That was quickly followed by disclosure to teachers at [the Area School] by both of [Jen]'s daughters, [Evelyn] and [Lena]. By that time mandatory reporting to the Department of Social Welfare was required and the principal complied on [date deleted] 1991. Initial inquiries by the Department and, more particularly, social workers Ms Margie Sue and Ms Fran Forsey, were then undertaken.

[141] In a document that is part of the social welfare records, a summary of information gained in an interview with [Jen] by Ms Forsey on [date deleted] 1991 is set out as follows:

[Jen] said that her memories of being abused by her stepfather, [Toby Hays] [*sic*], begin at about 11 years.

Sexual activity involved oral sex and masturbation. Her stepfather would force her to stimulate him orally and would also stimulate her by sucking her clitoris. If she resisted, he would hold her by her hair and force her to suck his penis. [Jen] described being shown what she called “polaroid photographs” of her stepfather in the nude, posing with an erect penis. [Toby Hays] [*sic*] would force her to “stare” at these photographs.

As [Jen] grew older her stepfather began to make more and more demands of her and began to pressure her to have full intercourse with him. She resisted this and as a result he began to beat her with an old army belt. [Jen] said the frequency of these beatings escalated until they occurred daily when she avoided taking part in sexual activity or said “no”.

At one stage she went to the local police but [Jen] said they “refused to do anything” and said there was no proof.

When she was 15 years [the district health nurse] helped her leave home and found a family with whom she could board in [location 1].

She returned home briefly but her stepfather continued to abuse her. After one severe beating she went straight to the police and they helped her leave home and found her alternative accommodation in town.

[142] In early [month deleted] 1991 [Jen] gave evidence at the depositions hearing of Mr [Hays]. The evidence was that Mrs [Hays] attended the hearing in support of her husband. He was facing [numerous] charges of sexual indecency in respect of [Jen]’s two daughters. At page 2 of her deposition [Jen] stated the following:

I suffered sexual abuse when I was growing up. It started from about 10. The sexual abuse by my stepfather went on until I was nearly 17. The abuse was almost identical as that of my daughter. When I was a teenager my stepfather, after I had had a wash on occasions, would make us come out to the lounge in our underwear and make us stand there and inspect us to see if we were clean. This inspection took place as a visual inspection.

[143] A little further on in the deposition, the following is recorded:

By this I mean he was showing his naked body to her [Evelyn]. Going back to my own youth this happened to me.

[144] At page 3, line 29, the following evidence is recorded:

My stepfather did to me many things that [Evelyn] said that he had done to her. He used to show her dirty calendar pictures, books and videos. When I was being subject to my stepfather’s abuse there were no videos at the time and he used to have some polaroid shots of himself naked which he used to show to me. They showed him side-on and front-on with a full erection. The photos, he gloated about them and shoved them in my face and say pretty aren’t they. As I got older the pattern changed of abuse. The change was that he got very aggressive, he got more intense and forceful. He got to the stage

where I didn't like what he was doing and that I had found that it was wrong, that it wasn't normal. When being aggressive towards me he would pull my hair down and put his penis in my mouth until he ejaculated.

[145] In cross-examination at the depositions hearing, the following questions and answers were recorded:

Q. Are you aware of the defendant having been violent to anybody else other than [Lena] and [Evelyn]?

A. Yes.

Q. Who may that be?

A. Myself.

Q. Anybody else?

A. My brother.

Q. And were his activities to your brother out of line for a parent?

A. I would use the word excessive.

Q. For example?

A. He used to beat us with a belt.

[146] Further on in the cross-examination:

Q. It's a lie, isn't it, the defendant tried to sexually abuse you?

A. No, it is not a lie.

Q. The defendant never showed you a photograph of himself in the nude, did he?

A. Several times he did.

Q. If he showed you a polaroid photograph did it look like the photograph he'd taken by himself?

A. No.

...

Q. The defendant never showed you sexual magazines or books.

A. No. He was more interested in the deed rather than showing it.

[147] A couple of pages on in the cross-examination, the following exchange took place:

Q. You have said that the defendant used to inspect you as part of a cleanliness parade.

A. That's right.

Q. Up to the age of 16.

A. About then.

Q. What about Mr and Mrs [Mullins]?

A. I was just getting to that, thank you. When I was about 15 I went to the police and laid a formal charge of sexual assault through that because I was so terrified of my stepfather I did not press a court hearing and as a result my mother blacklisted me, refused to accept what I had told her. I was branded a rebel and I was put temporarily into the care of an elderly couple called [Mr and Mrs Mullins].

Q. What age was that?

A. I was about 15.

Q. Did you ever go back to live with your parents?

A. Regrettably yes.

Q. Until the age of

A. I was nearly 17. In fact I left home. I was removed from home with the assistance of the police yet again with a further complaint to the police and that was just a couple of days before school certificate and I never went back home.

[148] Mr [Hays] pleaded guilty to the charges involving his granddaughters. His Honour Ellis J sentenced him in the High Court at Nelson on [date deleted] 1992 to three years' imprisonment on the charge of sexual violation, and a further 18 months in respect of the other offences. In preparation for that sentencing hearing, a pre-sentence report was prepared by [a probation officer] of Nelson. That document included the following:

While [Toby Hays] denies some aspects of the allegations, he did volunteer that he had been interviewed by the police "about 18 years ago" following a complaint of sexual abuse made by [Jen]. Seemingly that incident did not deter him from the subsequent acknowledged offending.

[149] [The probation officer] records that family relationships had been polarised. He states:

The complainant children and parents are completely alienated from the rest of the family while they in turn both blame the complainants and their mother for the present situation.

[150] The probation officer then observes that the basis of those negative and destructive behaviours lie well in the past. Both sides are well entrenched in their views.

[151] During Mr [Hays]'s time in prison, he participated, as directed by the sentencing judge, in programmes at [prison].

[152] In a letter of 10 June 1992 from Mr Bill Gordon, Clinical Director of the Forensic Psychiatric Service, to the doctor at the [Special Treatment Unit] at the prison, it was recorded that during an interview with Mr [Hays] he said that over the last two or three weeks he had found himself increasingly feeling angry and having violent thoughts about his granddaughters. While Mr [Hays] admitted the offences, he said his granddaughters had made up a lot of lies about him. He had been all set to get a gun and shoot his stepdaughter. But apparently his son [Oliver] turned up and Mr [Hays] gave the gun to him. While those feelings had settled, they had re-emerged over the two weeks prior to his interview with Mr Gordon in an intense way, such that he says when he finishes his three-year sentence he will go and kill his stepdaughter. It was noted later in the letter Mr [Hays] had increasingly hostile feelings towards [Jen], and those are of murderous intensity.

[153] On 25 January 1994, two members of the [Special Treatment Unit] completed a report to Community Corrections with respect to Mr [Hays]. Of relevance, the following is noted:

He actively sought to enlarge his understanding of the effects of his abuse on his victims, and this awareness appears to have had a significant impact on him. He does show increased empathy for the victims and although he continues to harbour some bitterness towards his stepdaughter (who facilitated the disclosures leading to his arrest), this has decreased in intensity.

... During these episodes of low mood he expressed ideas of wanting to harm others, in particular, wanting to shoot his stepdaughter.

Correspondence concerning sensitive claims to ACC

[154] Resulting from the police charges concerning her daughters and her own involvement in the prosecution, [Jen] sought assistance from the Accident Compensation Corporation. [Jen]'s counsel made enquiries on her behalf with the Corporation, but was advised that any documents for claims that have been inactive since before 2007 may either be physically archived or destroyed, in accordance with the ACC Retention and Destruction Policy. While a claim was confirmed the advice was that no physical file existed.

[155] The police provided a copy of a letter dated 4 September 1991 to Detective Inspector [name deleted] from [name deleted] on behalf of the Nelson Branch Manager of ACC. This sought information from the police as a result of [Jen] lodging a claim with ACC in relation to sexual abuse between the period 1967-1988.

[156] There were also letters dated 1 September 1995 from a client officer of the sensitive claims unit to [Jen] advising that a claim for cover and treatment expenses had been accepted, as well as to [Jen]'s counsellor, [name deleted], advising that her costs would be met.

[157] One page from a report of [the counsellor] dated 25 August 1995 was exhibited, and this recorded:

Client has experienced sexual and physical abuse throughout childhood and adolescence. She was extremely unhappy with the abuse her husband inflicted but felt unable to escape the marriage. She tried to recover from the abuse on her own after the marriage broke up. Her husband has recently returned to [location 5] and the psychological distress has returned so client has sought counselling.

[158] A copy of a functional limitations profile questionnaire, which is an assessment designed to measure the impact of an injury on a claimant's activities undertaken in everyday life, completed by [Jen] dated 5 October 1996, was produced. A considerable number of her daily activities were noted as impacted due to the abuse she had suffered.

Diary entries of Mrs [Hays]

[159] Mrs [Hays] appears to have been a conscientious diary keeper during her life. While counsel for [Jen] spent considerable time trying to have those diaries located, only a small number were found. Some of the entries were exhibited.

[160] On 25 July 1991, there is reference to [Jen] and her two daughters by her mother in the following terms: "What will them bitches hatch out next."

[161] On 4 November 1991, the following entry was made:

We went to town, paid rates bill, visited [Freda]. Told us a few comforting things we cannot make known re the witch... There will never be any peace in the family because of the three bitches.

[162] On 22 January 1992, the following is recorded by Mrs [Hays]:

[The solicitor] rang. Does not sound too good. Suggests [Toby] plead guilty to [several] charges. Hoping to drop one of [the numerous] charges. Hope to see [name deleted] on Wednesday next week, will explain better. This is to save the children getting questioned in court. Also save the publicity and trauma of High Court. Feel worse than ever. Don't know what to do for best. Should not have to be charged for something that did not happen.

[163] A week later, on 29 January 1992, Mrs [Hays] stated that a visit to the solicitor had taken place: "Not very hopeful, can't cope with things anymore, don't know what would be best. Hope the three bitches get theirs one day."

[164] On [date deleted] 1992, the diary record notes:

The newspaper from yesterday article not very nice reading. Obvious to everyone who it is as rumours have been ripe for years. Last eight months pure torture for [Freda] with [Lucile], myself, [Oliver] and [name deleted].

[165] On [date deleted] 1992, which was 10 days following Mr [Hays] being sentenced, Mrs [Hays] wrote:

It has been a miserable day, raining and I feel like crying most of the time. Worried about [Toby]. Also hurt. But the hurt from [Jen] and associates is even more so. The hurt is too powerful to feel sorry for them. They have been difficult all their lives and they have had to grow up themselves. Did not have to tell lies. But probably comes through their mother's mouth. She is so full of hate that it is beyond belief. The only one I can maybe forgive is [Lena] as

she was most honest in her statements. She was always the quiet one, not that good either as she does not answer when asked about doing something wrong. Rejected by her mother most of her life, was only useful last year and this to make life hell for us and to their mother's advantage. Will never forgive [Jen] or [Evelyn], ever. They are the way they are because the mother did not bring them up properly, did not care.

[166] On [date deleted] 1992, Mrs [Hays] wrote the following:

Got a letter from [Jen], leaves me dumbfounded after what she has done to me and Dad. I cannot talk to her after that. It was unforgiveable. She seems to blame the kids for it now. I just can't believe my eyes.

[167] On Sunday, 29 March 1992, Mrs [Hays] recorded that [Evelyn] rang, but [Freda] told her she was not there. She hoped that her granddaughter did not ring again. Then stated the following: "Could not handle her mother's letter either because it's lies."

[168] Both the later entries would appear to corroborate [Jen]'s assertion of writing to her mother following the [date deleted] 1992 sentencing of Mr [Hays], but the letter was not seen in a positive light.

Evidence of [Marcus Clements]

[169] Mr [Clements] formed a relationship with [Jen] sometime in 1994, and the couple married on [date deleted] 1996. He recounts how their relationship commenced, and then deals with evidence around the behaviour of [Evelyn] and [Lena] towards their mother. The relationship of [Jen] with both daughters is now practically non-existent.

[170] Notably, Mr [Clements] confirms the evidence of [Jen] that she had reached out to her mother after Mr [Hays] had been convicted and imprisoned. The response, he states, was a letter from her brother, [Oliver], telling [Jen] that her mother and other members of her family wanted nothing to do with her, and banning her from ever again making contact with any member of the family. This severed, it seems, any further relationship between [Jen] and her mother, sister and brother. Mr [Clements] states he has never met any member of [Jen]'s family apart from her two daughters. Mr

[Clements] refers to [Jen] becoming extremely depressed and unhappy at various times over the course of their relationship.

[171] Mr [Clements] confirms that [Jen] was not informed of Mr [Hays]'s death in [early] 2003, and some months had passed before knowledge of her mother's death was received from [Evelyn]. Neither [Oliver] nor [Freda] advised their sister of their mother's death.

[172] Mr [Clements] then goes on to detail the extreme anxiety, depression and PTSD that [Jen] has been impacted by throughout their relationship. It is apparent that her levels of anxiety have been extreme at times and her self-esteem very poor. He goes on to explain that [Jen] was extremely thin and anorexic when he first met her in the early 1990s, which he attributes to lack of food and nutrition as a child.

[173] He then details difficulties that arise for [Jen] in getting medical assistance in both New Zealand and Australia as a consequence of not having citizenship in this country. Mr [Clements] understands that [Jen]'s status had not been attended to by Mr and Mrs [Hays] on their immigration from England. Nor does it seem any steps have been taken by [Jen] to regularise matters as she got older.

[174] Mr [Clements] finally confirms the difficult financial situation of he and [Jen].

Evidence of Sandra Hartmann

[175] Ms Sandra Hartmann, registered clinical psychologist, completed an affidavit. Counsel for Mr [Hays] and Ms [Robbins] did not dispute the qualifications and experience of Ms Hartmann. Her report in respect of [Jen] dated 22 March 2020 was annexed to her affidavit.

[176] The opinion of Ms Hartmann was informed by an interview of [Jen], a number of psychological assessments completed by [Jen], and reading some of the affidavit material she had provided to the Court together with the affidavit of Mr [Clements].

[177] It was the opinion of Ms Hartmann that [Jen]'s reported symptoms reach the DSM-5 criteria for a diagnosis of post-traumatic stress disorder of extreme severity

and chronicity. There were reported ongoing problems with severe, intrusive and hyperarousal symptoms of PTSD, including ongoing memories of events from her childhood and re-experiencing of events recalled, where she feels she is actually reliving past events.

[178] Ms Hartmann stated [Jen] is struggling with a massive “trauma load” which disrupts and diminishes her capacity to engage in and fully enjoy her life on many levels. Ms Hartmann stated that:

[Jen]’s presentation, reported history, and scores on assessments completed in our sessions are [in my view] congruent, that is she presented with extremely severe symptoms of PTSD and chronic pain, and she reported a level of distress and disability consistent and typical for someone who experienced the reported life events.

The scores on the WHODAS indicate [Jen]’s day-to-day functioning is significantly impaired and she is trying to manage significant mental, physical, social and emotional disability.

Evidence of Dr Suzanne Blackwell

[179] Dr Suzanne Blackwell, clinical psychologist, also completed an affidavit to assist the Court. Dr Blackwell has been in practice as a psychologist since 1973, and in private practice since 1980. She is eminently qualified and highly experienced in giving evidence concerning the issues of child sexual abuse and the impact of that trauma, together with counterintuitive evidence in respect of a victim’s behaviour. No counsel questioned her level of expertise nor experience. Dr Blackwell was provided with all documentation filed in these proceedings up until 25 January 2021. She was careful to record that she could make no claim about the accuracy of [Jen]’s self-reporting testimony. The opinion was intended to provide information of clinical relevance, and assist the Court with information concerning the behaviour of sexually abused children and the long-term effects of child maltreatment.

[180] Dr Blackwell advised that the incidence of false sexual abuse allegations is not as common as some believe. In an appendix to her affidavit, she noted that the available research indicates that rates of false reporting in children are very low, being between three and five per cent. Those figures were derived from case files held by child protection agencies, with sample numbers ranging from 551 to 1,249.

[181] Dr Blackwell said it was relevant to state that, prior to the 1970s, society in New Zealand and throughout the western world was in a period of denial about the existence of child sexual abuse, and the physical abuse of children was normalised. In the 1970s and early 1980s, there was no mandatory reporting requiring a public health nurse, such as [the district health nurse], to inform police of any allegations she received.

[182] From her consideration of the court record, Dr Blackwell noted that [Jen] had suffered a number of other adverse events in her life which should not be overlooked. It was also considered relevant by Dr Blackwell that Mr [Hays] admitted being spoken to by the police in 1973, because of [Jen] complaining to police about sexual abuse at that time. [Jen]'s sworn evidence at the depositions hearing was also referred to by Dr Blackwell.

[183] Dr Blackwell noted that in her experience working with sexual offenders, that those who sexually offend against children do not usually begin doing this in middle age. Relevantly, the confirmed abuse of [Lena] and [Evelyn] occurred at a time when Mr [Hays] was well into that age group. Dr Blackwell advised that it was frequently the case that there has been unreported and undetected sexual offending prior to this. Surveys of convicted sexual offenders support this contention.

[184] Her proposition therefore was:

Given the high base rates of prevalence of child sexual abuse and the low reporting rates (and even lower reporting rates to police) that Mr [Hays] sexually abused Ms [Clements]'s daughters increases the likelihood that he also sexually abused Ms [Clements] as she reported.

[185] She went on to state the following:

If it is the case that Mr [Hays] did not sexually abuse his own biological daughter, this does not reduce the likelihood that he sexually abused Ms [Clements]. This is because the presence of a stepfather figure in the home increases the sexual abuse risk for female children and for both physical and sexual abuse. A New Zealand longitudinal study found that stepfathers were 10 times more likely to have been abusers than were biological fathers.

[186] Dr Blackwell then went on to consider the childhood history deposed to by [Jen] of suicidal ideation, self-harming behaviour, depression and anxiety. Those

matters were also associated with low confidence and poor self-esteem. Such factors, in Dr Blackwell's experience, would have all impacted on the choices [Jen] made in her life. For example, the decision to marry at the age of 17 years.

[187] In 1986 [Jen] was hospitalised as a result of severe depression, and subsequently she had been diagnosed with post-traumatic stress disorder. Dr Blackwell noted the assessment by clinical psychologist, Ms Hartmann, in February/March 2020. Dr Blackwell also referred to [Marcus Clements]'s documented observations of his wife's behaviour and psychological functioning over their 25-year relationship. In her opinion, [Jen] will continue to suffer psychological consequences of her childhood history for the duration of her life.

[188] Understandably, Dr Blackwell stated that it was not possible to definitively isolate the effects for all of the traumatic events experienced by [Jen], commencing with the death of her father when she was three years old. There would also have been the significant effect of her abduction and rape when aged six. The lack of maternal support and love would also have had a severe impact on [Jen], with her reported childhood experience indicating poor mother/child attachment.

[189] Dr Blackwell noted that the impact of [Jen]'s two failed marriages also cannot be underestimated. There would also have been the significant impact on [Jen] of the sexual abuse of her daughters by her stepfather.

[190] It is accepted by Dr Blackwell that it was reasonable to conclude that [Jen] has been affected by all of the traumatic events of her life. However, that stated, loving and caring parenting by [Jen]'s mother could have mitigated the impact of a number of these matters, particularly her father's death, and [Jen]'s early abduction and rape. Most damaging to [Jen] was, in Dr Blackwell's conclusion, the ongoing physical and sexual abuse by Mr [Hays] in the context of psychological/emotional abuse and neglect perpetrated by [Jen]'s mother.

[191] Dr Blackwell acknowledged that the impact of child sexual abuse on victims during childhood and subsequent adulthood are variable, and the relationship between such abuse and subsequent mental health is complex. Research has demonstrated that

sexual abuse is associated with a significantly elevated risk of negative consequences. That is particularly the case where the abuse has continued over a protracted period of time, and in combination with physical and emotional abuse. The impacts included, but are not limited to, major depression, suicide attempts, self-injurious behaviour, PTSD and anxiety disorders, eating disorders, early pregnancy, medical problems and re-victimisation, and nightmares.

[192] Dr Blackwell also advised there is no typical reporting pattern for sexually abused children and adolescents. Available research conducted over the past 30 years has been consistent in noting that delay in disclosure of child sexual abuse is most usual, and that some children may not disclose their sexual victimisation at all during childhood. Reviewers of available research literature published since 1990 reported, in summary, that only one-third of adults in a research sample who suffered childhood sexual abuse revealed the abuse to anyone during childhood, and noted that “the general consistency of these findings across these studies was noteworthy”.

[193] The doctor highlighted the evidence of [Jen] that, in approximately 1973, she told her mother, later the district nurse, and then the police about the sexual abuse she suffered. There was no obligation, of course, for the district health nurse to report the matter further. Dead end disclosure, where nothing evolves from the complaint, is a not uncommon phenomenon particularly in this time period.

[194] Dr Blackwell went on to set out reasons for delay in reporting of child sexual abuse, particularly where the perpetrator was in a position of parental authority and married to the mother of the child, as in [Jen]’s case. Delay and low reporting of childhood sexual abuse has been attributed, in part, to the fact that the alleged offender is usually someone close to the child or familiar to the child. In New Zealand, research has found that a majority of abusers were known to the child, with over a third of abuse episodes occurring with family members. Only a small minority (15 per cent) were stranger abuse episodes.

[195] If a child is to report sexual offending that is taking place, then they will require a supportive, competent adult who has the ability to stop further instances of abuse, and who will protect them from any retribution from the alleged offender. Children

with less supportive parents/caregivers are more likely to delay their reporting compared to children with parents who are more supportive. [Jen] has reported severe family violence inflicted upon her and her brother, [Jason], by Mr [Hays], and that her mother enabled and supported this. Children may comply with sexual abuse out of fear, and they may not report it out of fear of repercussions from the offender. The power imbalance makes it difficult for the child to resist the offender's sexual advances or report the sexual abuse.

[196] In addition, Dr Blackwell stated there have been other reasons for delayed reporting found by researchers in New Zealand including the expectation of being blamed, embarrassment, not wanting to upset anyone, expected disbelief, wishing to protect the abuser, and fear of the abuser.

[197] Ongoing contact between victims and offenders is also a not uncommon phenomenon, as the perpetrator and child may have become physically and/or emotionally close. American researchers reported that half of their sample of sexually abused children express love and affection towards abusers.

[198] Dr Blackwell noted the close proximity of the venue of [Jen]'s allegations of sexual abuse by Mr [Hays] including at [location deleted], across the driveway from the family home at [location 1], and in the same room as her sister, [Freda]. While sexual abuse commonly takes place in secret, it often does occur with others nearby, Dr Blackwell advised. Research over 45 years has indicated that children have been sexually abused in virtually any environmental situation. While it may seem incredible to others to risk sexually abusing a child when other people are nearby, there is the suggestion that sexual offending may be compulsive and without regard for possible detection, but also that other reasons included the increased adrenalin and excitement; next, a sense of superiority for getting away with the abuse and feeling "too compulsive to stop the offending".

[199] Noting that [Jen] has a reported history of abduction and rape by a stranger when aged six, then reported sexual and physical abuse by Mr [Hays], followed by physical abuse by her first two husbands, Dr Blackwell states that a victim being

re-victimised is not uncommon. She noted that it is a recognised phenomenon in child sexual abuse research literature.

[200] Studies conducted in New Zealand, USA and Australia indicate that a substantial proportion of child sexual abuse victims have been victimised by more than one person. Reviewers of 90 research studies on sexual re-victimisation concluded that sexual victimisation by multiple perpetrators is not uncommon. In a random sample of 2,000 children aged 10 to 16 years, researchers reported that sexually abused children were over 10 times more likely to be re-victimised and these figures did not reflect repeated victimisation by the same offender.

[201] Dr Blackwell concluded that [Jen] has a reported history of severe and ongoing childhood sexual, physical and emotional abuse and neglect. The psychological symptoms reported by her over her life to date are consistent with such a history.

[202] Accepting that this did not prove that [Jen] experienced that history, Dr Blackwell stated that such severe reported childhood symptoms and current diagnoses are seldom seen in the absence of a prolonged and traumatic childhood history, such as that which has been described by her.

Summary – Claim of [Jen]

[203] No party disputes that the moral duty of Mrs [Hays] to make adequate provision for [Jen] has been breached. Mr Downing, for [Freda], submits that an award of 10 per cent of the residue would adequately remedy the breach. Ms Yong, on behalf of [Oliver], proposes an award of 12.5 per cent. [Jen], through her counsel, submits 80 per cent of the residue should be awarded and then costs should follow. The disparate positions and evidence of the three children about their upbringings, and the reasons for the estrangement of [Jen] from Mrs [Hays], makes the assessment of both the extent of the moral duty of mother to daughter, and the degree to which it has been breached, difficult.

[204] It is most unfortunate that there was inadequate focus to the evidence provided by [Jen] in this proceeding. It was voluminous, repetitive, and lacking adequate order.

It provided the Court with a considerable challenge in being able to effectively analyse [Jen]’s claim. The criticisms of counsel for the other parties, [Oliver] and [Freda], has some merit.

[205] However, after a careful analysis of the evidence, I am satisfied, to the required standard, that [Jen] had an extremely difficult childhood, including having suffered sexual and physical abuse over some years perpetrated by her father, Mr [Hays]. I have not overlooked the evidence of [Freda] and [Oliver] that they had no knowledge of the conduct. Of course, they also did not know Mr [Hays] perpetrated the admitted conduct against his granddaughters, although neither would have been living in the household when that took place. I also accept that [Jen] has suffered a number of other traumatic events in her life.

[206] As I have commented earlier in this decision, [Jen] attached as exhibit B to her first affidavit in this proceeding, a document titled “Chronological Timeline”. That was completed from memory, and recorded events that took place many years prior. Adequate corroborating evidence was then located to give the Court a level of comfort that the general tenor of [Jen]’s evidence was able to be accepted.

[207] I particularly rely on the following evidence in coming to my determination:

- (a) The records made by A J Carson, Assistant Director of Social Welfare, Nelson. Over a two-year period, there was involvement of the Department with the [Hays] family. The documents referred to [Jen] being involved with the public health nurse, [the district health nurse] and the police at [location 1] having knowledge of the [Hays] family. The notes state Mr and Mrs [Hays] spoke of reviling [Jen], with violent arguments taking place in the home, especially between [Jen] and Mr [Hays], and a move of [Jen] to the home of Mr and Mrs [Mullins] in the [location 1] township on more than one occasion. All of those experiences were spoken of by [Jen] in her evidence.
- (b) The allegation of [Jen], that she complained to the police of the abuse by her father, is further corroborated by Mr [Hays] when speaking with

[the probation officer]. He wrote, in his pre-sentence report, that Mr [Hays] told him he had been interviewed by the police “about 18 years ago” following a sexual abuse complaint by his daughter.

- (c) Once her daughters had disclosed the sexual abuse by Mr [Hays], [Jen] then spoke of her own experiences in statements to the social worker, Ms Forsey and to the police. In giving evidence at the depositions hearing in [month deleted] 1992 under oath, [Jen] gave details of the abuse and stated that it had been the same conduct as experienced by her daughters. Mrs [Hays] attended the hearing in support of her husband so would have heard the evidence of [Jen].
- (d) [Jen] then made claims to the sensitive claim unit of ACC during the 1990s, advising that she had suffered sexual abuse at the hands of Mr [Hays].

[208] All of the above documentation was completed more closely to the conduct sustained by [Jen] than this proceeding.

[209] Mr [Hays] pleaded guilty to sexually abusing [Evelyn] and [Lena] at a similar age to when [Jen] stated the conduct occurred against her. Each of the three were closely related to Mr [Hays] because of the living circumstances. The opportunity to offend was easily available to Mr [Hays]. The type and manner of abuse was very similar to that alleged by [Jen]. [Jen]’s evidence was that he would show her polaroid photographs of himself naked and posing in an offensive manner. Technology had moved on so that the sexual abuse of the granddaughters included [Lena] and [Evelyn] being shown pornographic books, magazines and videos. In my determination Mr [Hays] had a propensity to sexually abuse young girls and teenagers.

[210] I also accept that the evidence of Dr Blackwell is helpful in assisting the Court to come to the decision that Mr [Hays] sexually abused [Jen]. I note particularly her advice that commencement of sexual abuse of children does not usually begin in middle age. Furthermore, Dr Blackwell concluded that Mr [Hays]'s sexual abuse of his granddaughters increases the likelihood he also abused his stepdaughter. The

doctor's evidence was that Mr [Hays] not abusing his biological daughter did not reduce the likelihood he sexually abused [Jen], particularly having regard to studies finding stepfathers were 10 times more likely to have been abusers than biological fathers.

[211] Nor can the conclusion of Dr Blackwell be ignored that the psychological symptoms reported by [Jen] over her life are consistent with her reported upbringing. That was of severe and ongoing childhood sexual, physical and emotional abuse and neglect. The severity of the detrimental impact on [Jen] is also confirmed in the evidence of psychologist, Ms Hartmann.

[212] It is more difficult to be confident about Mrs [Hays]'s knowledge of her husband's sexual abuse of [Jen]. I accept she was extremely loyal to her husband and supported him in terms of dealing with what I apprehend was challenging behaviour on the part of [Jen] although, in the circumstances, explicable conduct. While [Jen]'s evidence was that she told Mrs [Hays] about the abuse, I assume she, like the police, accepted her husband's denials. I also expect Mrs [Hays] could not bring herself to accept her husband would act in such a manner. Not unusually in the 1970s, Mrs [Hays], like the police, would have looked for corroborative evidence.

[213] Nevertheless, due to the accepted closeness of Mrs [Hays]'s relationship with her husband, I expect she would have been aware of the police interview of him in approximately 1973. Furthermore, she was fully involved with the DSW engagement with the family and particularly [Jen] during 1973 and 1974. An inference that Mrs [Hays] should have done more to protect her daughter is available to the Court.

[214] The position of Mrs [Hays] when her husband was confronted with the allegations of [Evelyn] and [Lena] and pleaded guilty is difficult to accept. Mrs [Hays] appears to have rationalised that decision as sparing her granddaughters having to give evidence. But it is apparent from her diary entries that Mrs [Hays] struggled to accept the culpability of her husband. Mrs [Hays] wrote in very unpleasant terms about [Jen] and her daughters. Mr [Hays] told professionals he wanted to kill his daughter. Both parents seemed to be of a view that [Jen] was driving the allegations of her daughters. There is no evidence to support that being the case. It is apparent that Mrs [Hays]

supported her husband, and I accept that must have been extremely distressing and difficult for [Jen].

[215] Mrs [Hays] made no effort to repair her relationship with [Jen]. While [Jen] wrote to her mother soon after the sentencing of Mr [Hays], that was rebuffed by her mother. There was no contact thereafter between Mrs [Hays] and her daughter. The derisory level of the gift made by Mrs [Hays] in her Will only emphasised her feelings towards [Jen]. A wise and just testator would not have acted in that manner.

[216] In determining the quantum of the award to [Jen], I remind myself of the Court of Appeal statement in *Flathaug v Weaver*:²³

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...

[217] In my view, the estrangement between [Jen] and Mrs [Hays] was the responsibility of the latter. I do not overlook the advice of Hardie Boys J in *Crosswell v Jenkins and Hall-Jones* where his Honour stated:²⁴

...On the other hand where the estrangement is of the deceased's making, either because he has actively brought it about, or because he has not exercised his particular ability and responsibility to heal it, the need and the moral duty are compelling. What the deceased has failed to do in his lifetime to accord recognition to his own family he ought to do in his Will. And if he does not the Court ought to do it for him...

[218] I am also conscious in determining the quantum of the award to [Jen], that she has suffered a number of life events that are not directly the responsibility of her parents and particularly her mother. Equally, the very difficult formative years have not contributed in allowing her the opportunity to have a fruitful life. In addition, I accept the submission of Mr Yong and Mr Downing that the extent and degree of the physical emotional and sexual abuse suffered by [Jen] cannot be confidently measured, and to some extent has been embellished in [Jen]'s evidence.

²³ *Flathaug v Weaver*, above n 12, at [32].

²⁴ *Crosswell v Jenkins*, above n 10, at 575.

[219] The gravest ill-treatment inflicted on [Jen] was from her father. While I acknowledge the comment of Brown J in *AB v RT* that it would be inappropriate to compensate for the father's sins entirely through the estate of the mother, in this case, Mrs [Hays]'s estate includes the joint efforts of herself and Mr [Hays].²⁵ Despite the unacceptable conduct of her mother towards [Jen], the purpose of an award under the Act is not to hold the deceased to account for the conduct during her lifetime, nor to punish her.

[220] The current financial position of [Jen] and her husband [Marcus] is not strong. By comparison, [Oliver] and [Freda] are comfortably off, especially [Freda]. [Jen] and her husband are in an asset deficit position and their monthly income is almost all expended on essential living costs. [Jen] is older than both of her half siblings. Her health situation is poor. I am not satisfied that she received any significant funds from her parents, despite the allegations of [Freda]. Nor do I accept the assertion of [Freda] that she attempted to exert unreasonable influence on their parents for monies once Mr [Hays]'s sexual abuse of his granddaughters was admitted. Therefore, I accept that the claim of [Jen] under s 4 of the Family Protection Act is justifiably for both maintenance and familial support and recognition.

[221] Having regard to all the matters that I have considered, together with the applicable legal principles, in my determination a wise and just testator would have made a bequest of \$125,000 to [Jen], equivalent to just over 25 per cent of the estate.

Summary – Claim of [Freda]

[222] Mr Downing's submission was that, despite the period of estrangement between [Freda] and Mrs [Hays], once reconciliation had occurred his client had provided significant and close support and assistance to her mother through the balance of her life. She was the first port of call for the rest-home from the time Mrs [Hays] required that level of care. Similarly, [Freda] had been a supportive and loyal daughter in the years preceding the estrangement and for a good part of a difficult life that Mrs [Hays] had endured.

²⁵ *AB v RT*, above n 17.

[223] Mrs [Hays] had then not had the opportunity to reconsider her testamentary dispositions due to the diagnosis of dementia in 2014. If Mrs [Hays] had the capacity to do so at the time of her death in August 2018, then being a wise and just testator, Mr Downing submitted she would have recrafted her Will to reflect the close relationship of, and support provided by, [Freda].

[224] Most particularly, [Freda] says that she has suffered during her childhood and formative years by [Oliver] being the favoured child of their parents. Not only did he receive a greater level of positive nurturing from their parents, [Freda] says he mistreated her. [Oliver] did not accept that as accurate. The evidence did indicate a high level of antipathy between the two siblings.

[225] [Freda] also alleged that [Jen] had physically and sexually abused her, but that allegation was denied and does not need in my view to be resolved in this proceeding. There was no suggestion by [Freda] her mother knew of the conduct taking place.

[226] Having lived in [the UK] for a few years after leaving school, [Freda] returned to live in [location 1]. Some financial assistance was provided by her parents, but this was repaid with interest. By this time, she was the only sibling living in [location 1]. I accept her presence would have been of much comfort to Mr and Mrs [Hays], particularly when he was charged by the police in 1991 with the abuse of his granddaughters.

[227] I acknowledge that the period when Mrs [Hays] was stricken by dementia would have made her care difficult and more demanding. There is no reason to doubt the evidence of [Freda] that she was the first port of call for the rest-home. I also accept [Oliver]'s evidence that he maintained a supportive relationship with his mother over that time period.

[228] I do not question that, apart from the period of estrangement between [Freda] and her mother, be it for a period of three or six years, the support provided to Mrs [Hays] throughout her life by [Freda] was significant. However, I am not satisfied that it should overcome Mrs [Hays]'s own assessment of how the residue of her estate should be divided as between [Freda] and [Oliver]. At best, the division through

[Freda]'s eyes reflects a level of unfairness, but it cannot be elevated to a breach of moral duty on the part of Mrs [Hays].

Result

[229] Higher courts have emphasised the importance of respecting the autonomy of a testator in the making of their Will. Therefore, subject to the payment of the award to [Jen], the balance of the residue will be divided between [Oliver] and [Freda] in the manner provided by Mrs [Hays] in her Will.

Chattels of the estate

[230] Since the hearing was concluded, counsel for the parties have exchanged memoranda, and appeared to have reached the following agreement:

- (a) [Oliver] will retain the tools and other items in his possession, being a camera, video records, a slide projector and a computer.
- (b) [Freda] will purchase the jewellery listed in Schedules B and C of the memorandum of counsel for the estate, dated 31 June 2022, for the sum of \$7,000.
- (c) [Jen] will purchase the briefcase set of cutlery for \$300, plus receive the memorabilia of her father and copies of some photos to be provided by [Oliver].

[231] The balance of chattels, and any other property in existence not wanted by any of the three parties, will be sold by the estate.

[232] If the above agreement does not correctly reflect the agreement of the parties, then that can be outlined in the memoranda of counsel dealing with costs.

Anonymisation of judgment

[233] Mr Downing asked at the conclusion of the hearing, on behalf of his client, [Freda], that the judgment be anonymised. I understood the reason advanced was because of the job position of [Freda]’s husband, [Joe]. Mr Acland advised that [Jen] opposes the judgment being anonymised.

[234] All counsel are to file submissions as to whether an anonymised version of the decision should be provided for publication beyond the parties. In the meantime, no party is to publish the judgment in any manner. To do so could well be regarded as a contempt of the Court. The same timeframes set out in respect to the submissions on costs will apply. Counsel may find the following judgments of some assistance: *Chapman v P*, *Goodfellow v Black*, and *McKinlay v Jones*.²⁶ There may well be others.

Costs

[235] Each counsel is to file a memorandum of no longer than five pages by 23 September 2022 in respect of the issue of costs. The submissions should have regard to the applicable District Court Rules and schedules. Responding memoranda of no longer than three pages may be filed by 7 October 2022.

[236] The determination in respect to anonymisation of the judgment and of costs will be made on the papers.

Judge GP Barkle

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 31/08/2022 at 2 pm

²⁶ *Chapman v P* [2010] NZFLR 855, (2009) 20 PRNZ 330; *[Fletcher] v [Read]* [2014] NZFC 1206; and *McKinlay v Jones* [2020] NZFC 6584.