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IN THE FAMILY COURT
AT NELSON

I TE KŌTI WHĀNAU
KI WHAKATŪ

FAM-2022-042-000107
[2023] NZFC 7477

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
AND	
IN THE MATTER OF	THE ESTATE OF PHILLIP JOHN EMENY
BETWEEN	MURRAY PHILLIP EMENY Applicant
AND	JEANETTE ROSALIE MATTSEN Respondent

Hearing:	11 July 2023
Appearances:	A G Stallard for the Applicant A Halloran for the Respondent No appearance by or for A C Crehan for the Estate of P J Emeny
Judgment:	21 August 2023

RESERVED JUDGMENT OF JUDGE R J RUSSELL
[as to a claim for further provision from an estate under s 4 of the Family Protection Act 1955]

Introduction

[1] Phillip Emeny ("the testator") died on 17 March 2021. His wife, Dorothy, predeceased him on 10 June 2019. He is survived by his three children Murray, Jeanette and Dianne and he has seven grandchildren aged between 13 and 48 years. Jeanette has four children, Diane has three children.

[2] This is a claim by the testator's son, Murray, for further provision from his father's estate under s 4 of the Family Protection Act 1955.

The Will

[3] The testator's last Will is dated 20 June 2014 and provides as follows:

(a) Jeanette is named as sole trustee and executor

(b) Jeanette receives as specific bequests the money held in the testator's sole name, the contents of his workshop including machinery, his musical instruments, any motor vehicle which he owns and all of his personal chattels.

(c) The residue of the estate, after payment of all expenses, is left to his wife, Dorothy, if she survives him, but if not then is left as follows:

(i) fifty per cent to Jeanette;

(ii) fifteen per cent to Murray;

(iii) fifteen per cent to Dianne;

(iv) twenty per cent to be shared equally between all of his grandchildren and great-grandchildren who survive him.

(d) There are the usual survivorship provisions contained in the Will and the children/grandchildren must reach the age of 20 years before receiving their entitlements.

[4] The testator's wife, Dorothy, died before him, on 10 June 2019.

History of Will-making

[5] The testator's first Will was made on 17 April 2007. All three children were named as trustees, Jeanette received chattels and other personal effects plus $10,000 and the residue was divided equally between the Murray, Jeanette and Dianne..

[6] The testator's second Will was made on 26 October 2012. Jeanette was appointed to be the sole trustee and had the chattels and personal effects bequeathed to her. The residue was given to the testator's wife, Dorothy, if she survived him but, if not, then was to be divided 50 per cent to Jeanette, 30 per cent to Murray and 20 per cent was to be divided between Dianne and all the grandchildren.

[7] The third and last Will was made on 20 June 2014 on the terms I have already outlined.

The estate

[8] At the outset of the hearing counsel for Jeanette, Ms Halloran, provided a summary of the updated value of the estate which as at the date of hearing the testator's estate may be set out as follows:

Property at [address A], Richmond, which had been conditionally sold for $915,000, with the net sale proceeds being estimated at $888,454	888,454
NBS bank account	16,107
ANZ Bank account with current balance (it was $108,037)	66,984
Tools and workshop machinery	8,000
Musical instruments	5,000
Household contents – estimated	3,765

Suzuki motor vehicle – sale price	13,000
Less estate expenses – estimated	- 40,663

[9] The residue of the estate under the Will is calculated as being the net sale proceeds of the home of $888,454 less estate expenses $40,663 which equals $847,791. The total value of the estate at the date of the testator's death is $1,001,700.

[10] I have been notified by memorandum after the hearing that finance by the purchaser was not able to be confirmed and the conditional sale has fallen through. The [address A] property remains on the market for sale. I propose, however, to use the values of property provided by Ms Halloran as a basis for this judgment. Mr Stallard has confirmed his agreement to Ms Halloran's calculations which I have recorded.

Implementation of Will

[11] If the testator's Will is given effect to as it is written, then the residue of the estate would be divided as follows:

(a)	Jeannette would receive 50 per cent of the residue	423,895
(b)	Murray would receive 15% of the residue (13 per cent of the total value of the estate)	127,169
(c)	Dianne would receive 15% of the residue (13 per cent of the total value of the estate)	127,169
(d)	Grandchildren would receive 20% of the residue (17 per cent of the total value of the estate)	169,558
Total		$847,791

[12] The specific bequests Jeannette is to receive have a cash value of $153,909.

The claim

[13] Murray contends there is a breach of a moral duty which his father owed to him and seeks further provision from his estate. No agreement was able to be reached and so these proceedings were commenced. Dianne and Jeanette were served with the

proceedings. Jeanette filed defences in her personal capacity and independent legal representation for her in her capacity as trustee the estate was arranged. Dianne did not take any formal steps in answer to the application but has filed an affidavit which is supportive of Murray's claim. The grandchildren's interests were to be represented by their respective parents.

[14] For Jeanette, Ms Halloran accepts Murray has a case for both maintenance and support within the meaning of s 4 of the Act. She submits that the 15 per cent left to Murray in the Will (being 13 per cent of the total value of the estate) satisfies the testator's moral duty to Murray and no further provision for him should be made.

The evidence

[15] Affidavit evidence was filed by Murray (x 3), Jeanette (x 2), Dianne (x 1) and from five support witnesses. As is the usual practice in family protection cases, no cross-examination of the deponents occurred and the hearing proceeded by way of a submissions-only hearing. Counsel helpfully provided written submissions addressing factual and legal issues in advance of the hearing.

[16] It was accepted at the outset the testator owed a moral duty to Murray, Jeanette and Dianne. It is accepted that the relationship between father and son was initially a reasonable one, which then became a civil and workable arrangement, which then deteriorated to become a poor and at times dysfunctional relationship and this existed anywhere between 15 to 20 years prior to his death, depending on whose evidence is preferred. The relationship between the testator and Dianne was not particularly good either. On the other hand, there was a positive and supportive relationship the testator had with Jeanette. It is accepted the testator's deteriorating relationship with Murray did not amount to an estrangement nor was there any disentitling conduct on the part of Murray or Dianne towards the testator.

[17] There is a considerable amount of criticism in the affidavit evidence between Murray and Jeanette as to how and why this state of affairs occurred but, as I observed at the hearing, it is not overly relevant that I analyse why this happened given the agreement about the state of the testator's relationship with them as I have recorded.

The reasons for the deteriorating relationship, which is alleged to be controlling behaviour, overt aggression, malicious dialogue and inappropriate gossiping by the testator, do not need to be the subject of any findings of fact. It is accepted that, for whatever reason, the family dynamics were poor.

[18] In the earlier years of their relationship it is accepted that Murray and his father did work together building trailer yachts and in the building industry, and occupied a workshop together. It seems all of the children lived with the testator and their mother, Dorothy, at different periods of time. There is disagreement in the affidavits about the degree of support each child received from their parents. Murray contends he was given a car and contends Jeanette received a greater degree of financial support than he did. Murray contends the testator promised to leave him his workshop tools and equipment in 1986 and this did not occur. Jeanette says the testator's wishes were for his tools to be left for her child, Johnny. In the event, no testamentary promises claim has been pursued.

[19] Murray set out his personal circumstances. He is aged 67, is in receipt of national superannuation, and lives in a Kāinga Ora house in Nelson. He was an adult student and obtained a bachelor's degree majoring in psychology which he funded by obtaining a student loan. He also commenced studying for a Masters degree in 2010 but was unable to complete this because of health reasons. His evidence is that he did not receive financial support from his parents for his education.

[20] Murray suffers from chronic fatigue, with this being first diagnosed in 1984. He contends this made it impossible for him to live and work a normal life and for the latter part of his life he has been in receipt of WINZ benefit income. His evidence is that he also suffers from reflux and from pneumonia. For age and these health-related reasons he is unable to work.

[21] In his affidavit evidence Murray said this:[1]

> ….My father in particular has failed to recognise or reflect upon any of the difficulties that I have had throughout my life and had chosen to attribute my

[1] Affidavit of Murray Phillip Emeny dated 28 April 2022 at (47).

> health conditions to bad attitudes and patterns of negative thinking rather than actual physical illness and has simply exacerbated the position by his Will.

[22] Murray contends Jeanette had a "favoured daughter" status with the testator.

[23] In his most recent affidavit Murray provides a budget showing his sole income from national superannuation, less student loan payments, is $25,373.54 per annum. His student loan balance is $32,000. His household expenses are $14,800 per annum. He owns and maintains three motor vehicles, two boats and a dog. His healthcare costs amount to $2,500 per annum, and he has personal and recreational expenses of $1,400 per annum. He calculates he has a surplus of income over expenditure of $250 per annum. He has accumulated savings of approximately $18,000.

[24] In reply, Jeanette accepts Murray:

(a) is now 67 years of age;

(b) has no children or dependants;

(c) receives government superannuation;

(d) has suffered from chronic fatigue from early adulthood;

(e) suffers from a variety of other health ailments (arthritis, gout, irritable bowel syndrome, chronic acid reflux);

(f) his limited ability to work by reason of these health conditions;

(g) lives in State housing and pays an income related rent (25 per cent of his net income); and

(h) has a student loan debt.

[25] As I have already noted, Jeanette and her supporting witnesses go to some considerable lengths in their affidavit evidence to refute Murray (and Dianne's)

allegations made about the testator and about Jeanette having status as his favoured daughter. These will be referred to in more detail shortly.

Submissions

[26] In his submissions Mr Stallard accepted the onus of proof was on Murray to prove that there was a breach of the testator's moral duty to him and from there submitted an evaluative assessment was required in accordance with the established legal principles as to what is required to remedy the breach. He submits the provision made for Murray in the Will does not properly recognise Murray's right to be recognised as the testator's only son, the role that Murray played in the testator's life and business, and fails to take into account Murray's age and health needs compared with his other siblings. Mr Stallard's submission is that the provisions made in the Will for Dianne and the grandchildren should not be disturbed, and the breach of moral duty should be remedied from Jeanette's share of the estate.

[27] Mr Stallard outlined and analysed Murray's age, health, living and working circumstances submitting that he lives an "unattractive lifestyle", essentially at "subsistence level" on a benefit which many people would be unable to cope with it. He is critical of the testator for not recognising this and making better provision for Murray in his Will and for his thinking that giving money to Murray means that the money given would have "gone to waste".

[28] In his submissions, Mr Stallard set out Murray's claim in this way:

Beneficiary	**Specific gifts**	Balance of specific gifts (cash) **($140,819.46)**	Residuary **($869,583.67)**	**Total** **$1,010,413.13**
Mrs Mattsen	Personal and household chattels, unsold musical instruments (Otherwise donated to the Nelson Centre of Musical Arts)	42.5% $59,848.27	32.5% $282,617.94	$342,466.21

Mrs Mattsen's children and grandchildren	Nil		2/3rds of 20% $115,945.82	$115,945.82
Mrs Sheaf	Nil	15% $21,122.92	15% $130,439.05	$151,561.97
Mrs Sheaf's children and grandchild	Nil		1/3rd of 20% $57,972.91	$57,972.91
Mr Murray Emeny	The contents of the workshop including machinery	42.5% $59,848.27	32.5% $282,617.94	$342,466.21

[29] It will be noted that some of the figures used in this schedule attached to Mr Stallard submissions are slightly different from the updated calculations presented to me by Ms Halloran at the hearing. I invited Mr Stallard to consider this and provide an amended schedule. As already indicated, Mr Stallard now agrees with Ms Halloran's figures, but for the sake of completeness, I have included the figures used by Mr Stallard in his submissions to illustrate the points he was making and to show the adjustments he was seeking.

[30] As can be seen from Mr Stallard's schedule, Murray sought to have the money in the testator's bank accounts at the time of his death ($108,037) taken from the specific bequest clause for Jeanette and added to the residue of the estate. Murray sought to leave Dianne's and the grandchildren's percentage share of the estate undisturbed and sought to have the balance (plus the money from the specific bequest) to Jeanette divided equally between himself and Jeanette. This would equate to each of them receiving 32.5 per cent of the residuary estate, meaning an increase for Murray of 17.5%. Mr Stallard calculated that 32.5 per cent of the estate would be worth $282,617.94 meaning Murray would get an increase of $152,178 from what was provided to him in the Will.

[31] In her written submissions Ms Halloran reviewed the facts I have summarised and relevant legal principles I will shortly outline. She accepted the testator owed a moral duty to Murray but also submitted a moral duty was also owed to Dianne,

Jeanette and the grandchildren. She described this estate has being one of moderate size. She drew my attention to Dianne's evidence:[2]

> 67. I have, as I said at the start, become involved to support Murray. I believe it is Murray who needs the greater assistance and of any entitlement I would otherwise have had, I am prepared to see go to Murray.

[32] Ms Halloran invited me to consider this evidence but did not submit I should deduct any award made to Murray from Dianne's share as Dianne had, in para 67 of her affidavit indicated she was willing to do. Ms Halloran submitted it was merely an option for me to consider.

[33] Ms Halloran submitted the greater moral duty of the testator was to his children rather than the grandchildren, the latter of whom could wait and inherit from their respective parents. She submitted the increased provision made for Jeanette was because of the testator's recognition of Jeanette's increasing contribution to her mother and father's life in their later years.

[34] Ms Halloran acknowledges the affidavit evidence paints a picture of two entirely different families. Jeanette describes a loving and close relationship with her father which grew in quality over time as his needs grew, with support being provided for grocery shopping, personal shopping, maintenance of properties and attending with him on medical appointments and on other special days. Jeanette contended she was the only family member who showed the testator any true care or compassion throughout his life. Ms Halloran drew my attention to the supporting witnesses confirming the closeness of their relationship which contrasts sharply with the evidence from Murray and Dianne which paints a picture of a controlling, dominating and aggressive father who was unsympathetic and difficult to be around.

[35] Ms Halloran drew my attention to the supporting witness evidence Jeanette had provided from Mr and Mrs Ramsey indicating the testator gave support for Murray when he went to university, the testator's workshop was made available for Murray to work in, giving Murray accommodation, the testator being verbally abused by Murray, and the testator's sadness about his distant relationship with his son. Other supports

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[2] Booklet of documents, affidavit of Dianne Sheaf dated 11 November 2022 at (125).

provided by Murray's parents included helping him set up business, getting him a puppy for company, paying debts for him, washing, cleaning and cooking for him and spending time together each Christmas. Mr and Mrs Ramsey refute the controlling, negative and domineering allegations which have been made.

[36] Ms Halloran drew my attention to the emails following the testator's death from Murray and Dianne asking not to be included in any death notice which she contends supports and demonstrates the considerable degree of animosity held towards the testator.

[37] Ms Halloran submits there has been no breach of moral duty to Murray and no award should be made. If, however, her primary submission were not accepted she submitted an award should be made which interfered with the testator's Will to the least extent possible. She favoured introducing a specific legacy to remedy the breach rather than changing the specific bequest and residuary bequest clauses in the Will as Mr Stallard had proposed.

The law

[38] Section 4 of the Act provides:

> **4 Claims against estate of deceased person for maintenance**
>
> (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.
>
> …

General principles

[39] The legal principles to be applied in this case are set out in a number of authorities. The Court of Appeal in *Little v Angus* determined:[3]

[3] *Little v Angus* [1981] 1 NZLR 126 at 127.

> 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 the will to be disturbed.

[40] The Court of Appeal revisited these principles in *Williams v Aucutt*.[4] Richardson P delivering the leading judgment determined:

> [33] Testamentary freedom remains except to the extent that there has been a failure to make proper provision for the maintenance and support of those who are seen at the date of death as entitled to such maintenance and support. The statutory scheme gives the Court a wide discretion in making that determination.

[41] He added:

> [52] … we reject the argument that the Court must expressly find a need for proper maintenance and support. 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" … "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 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 judgement in all the circumstances of the particular case.

[42] Blanchard J, in his judgment, determined:

> [70] 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. Beyond that point the testator's wishes should prevail even if the individual Judge might, sitting in the testator's armchair, have seen the matter differently. As I have said, the Court's power does not extend to rewriting a will because of a perception that it is unfair. Testators remain at liberty to do what they like with their assets and to treat their children differently or to benefit others once they have made such provisions as are necessary to discharge their moral duty to those entitled to bring claims under the Family Protection Act.

[43] In the decision of *Vincent v Lewis*, Randerson J succinctly summarised the principles to be applied as follows:[5]

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[4] *Williams v Aucutt* [2002] 2 NZLR 479.
[5] *Vincent v Lewis* (2006) 25 FRNZ 714 at 731.

(a) The test is whether, objectively considered, there has been a breach of moral duty by [the testator] judged by the standards of a wise and just testatrix.

(b) Moral duty is a composite expression which is not restricted to mere financial need but includes moral and ethical considerations.

(c) Whether there has been such a breach is to be assessed in all the circumstances of the case including changing social attitudes.

(d) The size of the estate and any other moral claims on the testator's bounty are relevant considerations.

(e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.

(f) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.

(g) If a breach of moral duty is established, it is not for the Court to be generous with the testator's property beyond ordering such provision as is sufficient to repair the breach.

(h) The Court's power does not extend to rewriting a will because of a perception it is unfair.

(i) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the Family Protection Act, it is nevertheless an obligation largely defined by the relationship which actually exists between parent and child during their joint lives.

[44] In the Court of Appeal decision, *Henry v Henry*, O'Regan J confirms the conservative principles to be applied and concludes: [6]

> [58] … In cases of financial need, the amount necessary to remedy the failure to make adequate provision in the will will be able to be determined with greater precision, and with less room for broad value judgments, than in cases where the need is more of a moral kind. The conservative approach requires that the Judge makes the assessment of what is required on a basis which focuses on what is necessary to make adequate provision, but to do no more than that. Broader questions of desirability of greater awards or the Judge's views of fairness should not come into play.

[45] In *Flathaug v Weaver* the Court of Appeal considered the moral obligations that arise from the relationship between a parent and child.[7] The Court determined:

> [32] 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

[6] *Henry v Henry* [2007] NZCA 42. See also [41]-[57].
[7] *Flathaug v Weaver* [2003] NZFLR 730.

> 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.

[46] In *Fisher v Kirby* the deceased told her son to stay away and left him a maximum of $50,000 out of her $3.7 million estate.[8] The High Court awarded him $350,000 and the Court of Appeal increased the award to $500,000. His estrangement from his mother did not detract from his need for provision. He was 60 years old, in poor health and in strained financial circumstances. The deceased also disinherited her adopted son from whom she was also estranged. The Court found that the responsibility for the estrangement did not lie entirely with her adopted son, the deceased had always been very critical of him and their relationship had been difficult from his childhood onwards. While the nature of the relationship was a factor, it was not disentitling and he was awarded $500,000.

[47] Justice Randerson, giving the decision of the Court, reiterated:

> [119] The more recent decisions of this Court have re-emphasised what has always been understood: that mere unfairness is not sufficient to warrant disturbing a testamentary disposition and that, where a breach of moral duty is established, the award should be no more than is necessary to repair the breach by making adequate provision for the applicant's proper maintenance and support.
>
> [120] The decisions of this Court from and including *Little v Angus* are properly viewed as a timely reminder that awards should not be unduly generous. But, in our view, neither should they be unduly niggardly, particularly where the estate is large and 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.

[48] Randerson J also emphasised the point made in *Williams v Aucutt* that "proper maintenance and support" is a broad inquiry that, among other things, stresses the need to recognise the child as a valued member of the family. His Honour pointed out this was reinforced by the restricted scope of the Act as it only allowed claims by close family, rather than by nieces and nephews.

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[8] *Fisher v Kirby* [2013] NZFLR 463.

Discussion/analysis

[49] To be a successful claimant Murray needs to show the testator:

(a) owed him a moral duty to make proper provision for his maintenance and support;

(b) breached his moral duty to Murray in the provision which is made for him; and

(c) where such a breach of moral duty has occurred, the Court must do no more than is required to remedy the breach.

Was a moral duty owed to Murray?

[50] In their submissions, Mr Stallard submitted and Ms Halloran conceded the testator owed Murray a moral duty to provide for his maintenance and his support. This concession by Ms Halloran is appropriately made and means the first element needing to be shown has been satisfied.

Has been a breach of the moral duty owed to Murray?

[51] It is not accepted a breach of moral duty to Murray had occurred and so an analysis of the relevant facts and legal principles as required.

[52] A summary of the evidence shows Murray is age 67 years and I accept the medical evidence shows he has not been in good health and suffers from a number of health issues many of which he seems unlikely to fully recover from. He lives in Kainga Ora supplied rental accommodation which appears to be available for him to live in for the foreseeable future at a discounted rental rate. He has no dependents. His income is limited to national superannuation and, at his age with his health issues, it is not realistic to expect him to seek employment. His budget shows he is living within his means in what could be termed a “no-frills” lifestyle.

[53] He owns the contents in his home, several motor vehicles, boats and has a bank account with savings of $18,000. He has a student loan debt of $32,000 which will need to be paid in accordance with the requirements of the Student Loan Scheme.

[54] He does not appear to have any immediate or pressing financial needs. His budget shows he does not have any health insurance in place nor does this seem likely to be able to be arranged because of his age and health issues. Although not in evidence, I accept the average life expectancy for a male in New Zealand is in the 80s.

[55] According to Ms Halloran's calculations 15 per cent of the residue of the estate will amount to $127,169, meaning Murray will have cash available to him of $145,169, ie $127,169 plus his savings of $18,000. I acknowledge the costs of and incidental to these proceedings are yet to be determined and may impact on this sum.

[56] In these circumstances, the question to be asked and answered is whether there has there been a breach of a moral duty by the testator to make proper provision for Murray's maintenance and support.

[57] As shown in the case authorities this requires an assessment of what a wise and just testator sitting in the testator's chair at the time of his death would have done in all the circumstances which were or should have been known to him at that time, but having regard to any relevant events which have since occurred. There is no assumption or presumption that the testator's children need to be treated equally and it is not sufficient to merely show unfairness to succeed in a family protection claim. An assessment of all the circumstances of the case, including any change in social attitudes since the Will was made, is required. The assessment is not restricted to financial circumstances but also includes moral and ethical considerations. The size of the estate and any other claims on the estate needs to be considered.

[58] The evidence shows that Murray's relationship with his father, while initially positive, deteriorated gradually but considerably over 15 – 20 years until his death. At the time of death, their father/son relationship seems to have been very poor, best evidenced by Murray (and his sister Dianne) not wanting to be included in his death notice. The evidence shows that for the period of 15 – 20 years prior to his death the

testator and Murray held mostly negative views of each other and had little contact. All of this means Murray did not contribute much to the life and well-being of the testator, and the testator did not provide much in the way of help, support and assistance to Murray.

[59] In the absence of estrangement or disentitling conduct, this means the testator's obligation to provide for the maintenance and support of Murray is considerably less than it otherwise would have been had there been a positive and supportive relationship between them.

[60] Under the Will, Murray will receive 15 per cent of the residue of the estate amounting to $127,169 which equates to 12.7 per cent of the total value of the estate.

[61] I have reached the view that 10 per cent of the estate can be properly attributed to the testator's obligation to support Murray, in particular to recognise Murray's place as a family member and as part of the overall life of the testator as his only son. Ten per cent of the total value of the estate amounts to $100,170. This is in line with the Court of Appeal principles outlined in *Williams v Aucutt*. The Will therefore satisfies the testator's obligation to provide for Murray's recognition and support.

[62] However, as s 4 of the Act and its supporting case law provides, the legal test is wider than this and requires consideration as to whether adequate provision has been made for the proper maintenance and support of the claimant. As I have recorded, Ms Halloran accepted there was a moral duty to provide for Murray's maintenance as well as his support.

[63] This then raises the question as to whether the additional 2.7 per cent of the total value of the estate (amounting to $27,000) which Murray receives under the Will satisfies the testator's obligation to provide for Murray's ongoing maintenance. This is a much narrower enquiry which focuses on what a wise and just testator would consider it is required to help with Murray's financial future needs which are reasonably foreseeable.

[64] As I have noted, Murray's budget shows he is living within his means. He has accommodation at a discounted rent which seems secure for him, and holds modest assets including several motor vehicles. He has accumulated savings of $18,000.

[65] In the circumstances of this case, and having regard to the moral duty the testator had to provide for his other children, his wish to provide for his grandchildren and the poor relationship which existed between Murray and the testator, and having regard to the size of the estate, I do not consider wise and just testator should have to provide money for Murray's housing and ongoing day-to-day support. This is because those needs are already being met. Murray's current income is meeting all of his day-to-day needs, and with his cash savings and on receipt of his entitlement under the Will, he will have total cash available to him of $145,169 to meet any unforeseen day-to-day needs. In addition to this he could, if he wished, sell one or more of the motor vehicles or boats to assist.

[66] The one issue, however, where a moral duty to provide for Murray's maintenance does arise is in respect of his poor health. The evidence provided clearly shows Murray has had, and will continue to have, a number of health issues. Murray's chronic fatigue syndrome condition was recognised as far back as 1984 and will have been known to the testator at the time of his death. The testator seemed unwilling to recognise the validity of Murray's poor health during his lifetime, particularly his chronic fatigue syndrome, and seemed to hold the view that Murray's should be able to "get over" this and to get on with his life. A wise and just testator armed with the medical information which is now provided would not hold that view.

[67] I have reached the view that the testator has breached his moral duty to Murray to make provision for his future maintenance to the extent that provision could and should have been made to address any future health needs that Murray may have. For example, if urgent medical or surgical treatment is required, which is not able to be immediately addressed in the public health system, or if urgent respite care is required then I consider a wise and just testator would make provision for Murray to be able to access and fund medical help and assistance and support to the extent this is required.

[68] It is in this respect only I find the testator has breached the moral duty to Murray.

What is required to remedy the breach of moral duty which has occurred?

[69] The legal principles make it clear that if a moral duty is shown, I must make further provision only to the extent necessary or sufficient to repair the breach of moral duty which has occurred.

[70] In assessing the amount of an award, I must have regard to the size of the estate and any other moral claims the testator has to his estate. I must not rewrite the Will because of any perception that it is unfair, and I must not be unduly generous or unduly niggardly about any further provision which is made. I must also have regard to the testator's wishes and views expressed in his Will. Beneficiaries in the Will do not have to justify their entitlements which they receive.

[71] I agree with Ms Halloran's assessment that this is a modest size estate. The testator held a consistent view in his pattern of Will-making that he wanted Jeanette to be his executor and trustee, and wanted her to be the primary beneficiary of his estate. I consider he was entitled to hold this view because of the physical and emotional comfort and support Jeanette provided to him in the later years of his life. His other children, Dianne and Murray, did not provide such support for him. This is recognised by Jeanette receiving at half of the residue of the estate and other specific bequests set out in his last two Wills. It has also been shown that the testator enjoyed a relationship with all his grandchildren because he has made specific provision for them in his last two Wills. His wishes in this regard need to be considered and respected.

[72] I have received no particular evidence about the likely quantum of Murray's future health needs. The New Zealand public health system should cater for most of them, but I recognise that there are waiting times and waiting lists, and that it is an option to seek and obtain private medical help and assistance as well as in-house care support. From his budget, I see that his medical expenses currently total $2,500 a year and principally relate to dental work, which has clearly been a problem for him. There has been no other medical or health expenses recorded.

[73] I have read the medical reports exhibited to Murray's affidavit, viewed his budget and, from this and the other evidence provided, intend making a global assessment of a contribution that the testator could and should have made in his Will to help with Murray's future medical, health and care needs.

[74] I have real difficulty with Mr Stallard's submissions that I should revoke the specific bequest of the cash held in the testator's bank accounts to Jeanette to allow those funds to fall into to the residue of the estate and to then adjust the percentages of the residue to be received by Murray and Jeanette to be in equal shares. I do not consider there is any basis for altering the provisions of the Will to give equality to what Murray and his siblings, along with their respective children, are to receive.

[75] To follow this submission would infringe the family protection principles I have outlined. In particular, there is no presumption that children must be treated equally, it would give effect to Murray's perception that the Will is unfair to him, it would show a little regard for the testator's wishes expressed in his last two Wills to prefer Jeanette as his primary beneficiary and it would not recognise the positive support she has provided to the testator, which Murray (and Dianne) did not. Mr Stallard's submission goes further than what is required to remedy the breach of moral duty which has occurred and is a major rewriting of the testator's will. The case authorities guard against all of these factors.

Conclusion

[76] To comply with the legal principles I have outlined and to remedy the breach of the moral duty which I found has occurred, my view is that a specific bequest can be inserted into the testator's Will for an additional sum to be paid to Murray to remedy the specific breach which I have found has occurred. All of the remaining terms of the Will can remain as the testator has written them. This means that I have interfered with his wishes to the least extent possible to remedy the breach which has occurred.

[77] I consider that the sum of $50,000 is an appropriate specific bequest which ought to be sufficient to address the limited breach of moral duty which has occurred. This means Murray will receive 17 per cent of the value of the estate, and while I

accept every case turns on its particular facts, this award is generally in line with the case authorities which I have referred to.

Outcome and orders

[78] I make the following findings and orders:

(a) The testator owed to Murray a moral duty to make provision for him from his estate.

(b) The testator has breached the moral duty to make provision for Murray's maintenance in relation to his future health needs.

(c) To remedy the breach of moral duty which has occurred I vary the terms of the testator's Will dated 20 June 2014 by introducing a new clause 3.2 as follows:

> I give to Murray the sum of $50,000.

(d) The remaining terms of the Will are confirmed.

[79] Costs are reserved. If sought, memoranda are to be filed within 21 days, with a right of reply and a further 14 days following which the memoranda are to be referred back to me in chambers for a decision on the papers. I will deal with the submissions filed by Ms Halloran seeking solicitor/client costs of $1798.60 already made relating to the late filing of evidence at that time.

_____
Judge RJ Russell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 21/08/2023 at 10 am