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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2022-070-000153
[2024] NZFC 4096

IN THE MATTER OF	THE ESTATE OF [MARK INNES]
AND	
IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	[BETH INNES] Applicant
AND	CHRISTOPHER DARLOW in his capacity as executor of the Estate of [MARK INNES] First Respondent
AND	[ISABELLE BOYLE] [LUKE INNES] [RUBY DAY] [SOPHIE HOOPER] [NICK INNES] [DOUG INNES] Second Respondents
AND	[HANNAH INNES] Third Respondent
AND	[CARLA INNES] Fourth Respondent

Hearing: 5 March 2024

Appearances:	J McDougall and S Mason for the Applicant The First Respondent abides the decision of the Court and did not appear A Cavanaugh for the Second Respondents Third and Fourth Respondents appear in Person
Judgment:	11 April 2024

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO S 4 FAMILY PROTECTION ACT 1955]

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[1] [Beth Innes][1] has applied to the Court seeking further provision from the estate of her late father, [Mark Innes] ([Mark]). [Mark] and his wife, [Lucy Innes] ([Lucy]) were married for 61 years. [Lucy] died on [date deleted] 2019, and [Mark] then died just over 18 months later on [date deleted] 2020. [Lucy] and [Mark] had nine children, all of whom survived them:

(a) [Isabelle Boyle] (nee [Innes]) was born on [date deleted] 1959.

(b) [Luke Innes] was born on [date deleted] 1960.

(c) [Ruby Day] (nee [Innes]) was born on [date deleted] 1962.

(d) [Sophie Hooper] (nee [Innes]) was born on [date deleted] 1964.

(e) [Nick Innes] was born on [date deleted] 1966.

(f) [Carla Innes] was born on [date deleted] 1969.

(g) [Beth Innes] was born on [date deleted] 1969.

(h) [Doug Innes] was born on [date deleted] 1971.

(i) [Hannah Innes] was born on [date deleted] 1975.

[2] On [Mark]'s death he left a Will dated 27 August 2015. Pursuant to that Will:

(a) [Beth] and [Hannah] were appointed as executors.

(b) [Beth] and [Hannah] were appointed as trustees of [Mark] and [Lucy]'s family trust, the [Innes] Property Trust; and

(c) Provided that [Mark]'s estate was to be divided equally between his nine children.[2]

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1 It is easier, given that a number of parties share the surname "[Innes]" to refer to the parties by their first name.

2 Given that [Lucy] had predeceased him.

[3] The [Innes] Property Trust ([IPT]) was settled on 17 July 1995. [Mark] and [Lucy], together with their children, were discretionary beneficiaries of the trust. All the children are final beneficiaries as tenants in common in equal shares. It is accepted that [Mark] and [Lucy] intended the [IPT] assets would be distributed on their deaths equally between their nine children. All the commercial properties that were previously owned by [Mark] and [Lucy] were vested in the [IPT]. Their personal assets remained outside of the [IPT], and in their names and therefore form their estate.

[4] In addition to [Beth]'s claim under s 4 of the Family Protection Act 1955 (FPA), she has filed proceedings in the High Court centred in contract and equity against the [IPT]. For the reasons set out in my decision of 12 June 2023 I declined to transfer the FPA proceedings to the High Court.[3] Because of the conflict of interest which existed for [Beth] in acting as executor of [Mark]'s estate, and as trustee of the [IPT], she agreed to her removal as executor and trustee. Mr Darlow, solicitor of Auckland, has been appointed in her place. For this hearing Mr Darlow has provided an up-to-date asset statement for the estate and the [IPT]. As at the date of hearing the estate has $1,949,352.67 for distribution, and [IPT] $2,535,914.96 for distribution.

Concerns at the Quality of [Beth]'s Evidence

[5] Much of [Beth]'s evidence is irrelevant, inflammatory, and contains a number of statements of opinion.[4] The evidence in her affidavit in reply, at times appear to not be evidence but thinly veiled legal submissions. The intermingling of the evidence about the estate and trust issues into the Family Court affidavits in relation to the FPA, when there are separate pleadings and causes of action in the High Court has, for example, been entirely unhelpful. [Beth]'s affidavits in the Family Court should only have contained evidence of relevance to the FPA.[5] That they were unnecessarily inflammatory has, unhelpfully, served to cause what may be irrevocable rifts within the [Innes] family. [Beth] appears to have no insight into the hurt and harm she has caused through the, at times, unhelpful content of her evidence.

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3 *[Innes] v [Innes]* [2023] NZFC 6755.
4 See Family Court Rules 2002, r 158.
5 As required by s 7 of the Evidence Act 2006.

[6] I am, therefore, very grateful to Mr McDougall (he, and the law firm now acting for [Beth] were not [Beth]'s original lawyers[6]) for his acceptance of the fact that [Beth]'s evidence was in parts unhelpful, poorly pleaded and irrelevant, and for his focused approach in pointing me to only the portions of [Beth]'s evidence which were directly relevant to her case. Indeed, both he and Ms Cavanaugh were truly focused in their submissions on only that evidence which was relevant to the issues I needed to determine, and I am grateful to them both.

The Basis of [Beth]'s Claim

[7] [Beth] alleges that [Mark] has breached his moral duty to her by failing to recognise:

(a) The assistance [Beth] provided to [Mark] and [Lucy] resolving the weathertightness issues of their family home in [Street A], Tauranga.

(b) The care [Beth] provided for her mother prior to her death.

(c) The care [Beth] gave to [Mark] prior to his death.

(d) The efforts of [Beth] to manage the commercial properties owned by the FPT prior to [Mark]'s death.

[8] [Beth] therefore seeks that the alleged breach of [Mark]'s moral duty to her be rectified by her receiving a greater share than her siblings. Her initial settlement offer was that the [Street A] property vest in her,[7] which would have resulted in her receiving from the estate around $1.1 million to $1.2 million, or in excess of 50 per cent of the total value of the estate.

[9] [Beth] has now modified[8] her suggested settlement on the basis that the estate is divided into tenths (not ninths as the Will stipulates), with her receiving two tenths,

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6 Consequently, none of the above criticisms about [Beth]'s evidence are levelled at Mr McDougall.
7 Bundle of Documents, vol 2, p 72, at [143].
8 Her initial settlement offer was not a realistic offer in terms of the case law and should never have been made.

and her other eight siblings receiving a tenth each. In terms of the estate, and the balance of the funds remaining for division, if divided equally between the nine siblings, each would receive $216,583.55. If [Beth]'s proposal is accepted, then a tenth share would amount to $194,935.20 each. Therefore, under [Beth]'s proposal each of the siblings would receive $21,659.46 less than that which they would receive under [Mark]'s Will. [Beth], however, would receive $389,870.40 or $173,275.74 more than she would have received pursuant to [Mark]'s Will. [Hannah] is the only sibling who supports [Beth]'s claim.

Position of the Remainder of the Beneficiaries

[10] [Beth]'s other siblings oppose her claim. They deny that there was any breach by [Mark] of a moral duty to [Beth]. They argue that [Beth] has ignored the efforts they have made during their parent's lifetime to:

(a) Help them grow their commercial businesses in the early years.

(b) The sustenance and support that the siblings provided, as and when they could, to their parents throughout their lives and into their later years.

(c) Alternatively, they argue that even if a moral duty did exist, that moral duty has been more adequately recognised through [Mark] and [Lucy]'s provision to [Beth], and an anticipated combined distribution (from the [IPT] and the estate) to [Beth] in excess of $720,000.

[11] Thus, the issues I need to determine are:

(a) Whether [Mark] breached his moral duty to [Beth]; and

(b) If so, to what extent should [Mark]'s Will be adjusted to remedy that breach.

The Law

[12] [Beth] relies on s 4 of the FPA 1955. That section provides as follows:

> **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.
>
> (1A) Subsection (1) overrides the Administration Act 1969, but is subject to section 4A.
>
> (2) Where an application has been filed on behalf of any person, it may be treated by the court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the application is served and all persons whom the court has directed shall be represented by persons on whom the application is served.
>
> (3) An application must be served on the following persons:
>
> (a) the spouse or civil union partner of the deceased:
>
> (b) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death:
>
> (c) a child of a marriage, civil union, or de facto relationship of the deceased, or a child of a marriage, civil union, or de facto relationship of any such child:
>
> (d) a person entitled to apply who the Registrar of the court considers, in his or her discretion, ought to be served because there are special circumstances rendering that desirable:
>
> (e) a person entitled to apply who the court considers, in its discretion, ought to be served because there are special circumstances rendering that desirable.
>
> (3A) Where an application has been filed, orders for representation must be made in respect of the following persons:
>
> (a) the persons referred to in subsection (3)(a) to (c); and
>
> (b) any other person entitled to apply who the court considers, in its discretion, ought to be represented because there are special circumstances rendering that desirable.

(3B) Except as provided in subsections (3) and (3A), it is not necessary to—

(a) serve an application on any person; or

(b) make provision for the representation of any person on an application.

(4) An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the court for advice or directions as to whether he ought so to apply; and, in the latter case, the court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

[13] The onus is on [Beth] to prove that [Mark] is in breach of his moral duty as at the date of his death by failing to make adequate provision for [Beth]'s proper maintenance and support. The approach to the assessment of "proper maintenance and support" is set out in a series of decisions of the Court of Appeal; namely *Williams v Aucutt,*[9] *Auckland City Mission v Brown*[10] and *Henry v Henry.*[11] Both Ms Cavanaugh and Mr McDougall accept that these three cases set out the relevant and applicable law.

[14] The case law establishes a distinction between the terms "maintenance" and "support" as appear in s 4 of the FPA.[12] "Support" is wider than maintenance, and is considered in the sense of "sustaining, providing comfort".[13] It has been recognised that "support" is not simply financial support to economic needs, but also a recognition of belonging to a family, and of having been an important part in the life of the deceased.[14]

[15] Mr McDougall in his submissions at [22] argues that these three Court of Appeal cases make it clear that the meaning of "proper maintenance and support" must be considered broadly. As the Court of Appeal in *Williams v Aucutt* stated at [52]:

> In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required and the

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9 *Williams v Aucutt* [2002] 2 NZLR 479.
10 *Auckland City Mission v Brown* [2002] 2 NZLR 650.
11 *Henry v Henry* [2007] NZCA 42.
12 Above n 4, at [52].
13 Ibid.
14 Ibid.

> authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty.

[16] But in the same paragraph the Court of Appeal goes on to state:

> Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the particular case.

[17] It is important to draw a distinction between a broad approach when considering proper maintenance and support, and the approach of the Court in rectifying a breach, if it is found. The latter assessment does not call for a broad assessment. As the Court of Appeal in *Henry v Henry* stated with reference to *Williams v Aucutt*, at [58]:

> 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, to do no more than that.

[18] As Ms Cavanaugh submits, more recently, the Courts have re-emphasised that the applicable principles have not changed, and the Courts are required to do no more than the least intervention necessary to repair the breach of moral duty. In *Fisher v Kirby* the Court of Appeal reiterated this.[15] The Court stated that at [119] and [120]:

> 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.
>
> 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 decision is to be exercised in the particular circumstances of each case having regard to the factors identified in the authorities.

[19] A useful summary of the key principles is set out in *Vincent v Lewis*; those principles are:[16]

> (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.

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15 *Fisher v Kirby* [2012] NZCA 310.
16 *Vincent v Lewis* [2006] NZFLR 812 at [81] (HC).

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

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

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

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

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

(f) 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.

[20] This summary was cited with approval by the Court of Appeal in *O'Neill v O'Neill.*[17]

[Mark]'s Will

[21] [Mark]'s Will was signed on 27 August 2015. Clause [8] of the Will states:

> I record that before I sign my Will my solicitor advised me of the provisions of the Family Protection Act 1955 that I have given careful consideration to my family responsibilities. I am of the opinion that the distribution of my estate in the terms of my Will is just, fair and equitable in all the circumstances now known to me.

[22] [Beth] essentially attacks the adequacy of that advice purported to be given. Her evidence is that her parents had been using a solicitor in Tauranga, Michael Toner, for a number of years, but for reasons that are not entirely clear, they elected to transfer their legal affairs to Burley Attwood Law. [Beth] argues that Burley Attwood Law would not have known of the full circumstances of [Mark]'s life, that they had not

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17 *O'Neill v O'Neill* [2021] NZCA 585 at [16].

discussed with [Mark] his family background, and therefore could not have provided adequate and reasonable advice as to how the provisions of the FPA may or may not have had relevance in terms of the proposed division of [Mark]'s estate pursuant to the Will.

[23] In the relationship property context, the Courts have made it clear that if criticism is to be levelled against counsel, then that counsel needs to be called so there can be evidence before the Court to enable the Court to make an informed (as opposed to a speculative) decision about the adequacy, or inadequacy, of any legal advice.[18] The same rationale is equally applicable in a case such as this. While [Beth] may suspect the advice was inadequate, it is equally plausible that the advice could have been entirely adequate. The short answer is that there is simply no evidence, as I would have expected, to enable the Court to resolve that issue. I take the words in clause 8 of [Mark]'s Will at face value. That is, I am entitled to assume that [Mark] was given advice as to the provisions of the FPA, and that having received that advice [Mark] concluded that the division of his estate pursuant to the Will was just, fair and equitable "in all the circumstances known to [[Mark]]".

[24] In leaving [Mark]'s property equally to his nine children, [Mark] had the benefit of knowing his family's relevant history, including the contributions made by all of his children to his life in the building up of the family and trust assets. I agree with Ms Cavanaugh's submission that he was the best person placed to make the assessment that he did. Importantly, [Mark] made this assessment after the efforts of [Beth] to support [Mark] and [Lucy], particularly in relation to the weathertightness issues relating to the [Street A] property.

Weathertightness Claim in Relation to [Street A]

[25] In 2003 [Mark] and [Lucy] bought the property at [Street A], Tauranga for $445,000. In 2008 it became apparent that [Street A] was a leaky home. In 2010/2011 [Street A] became the subject of a weathertightness claim with [Beth] managing that claim on [Mark] and [Lucy]'s behalf. They were awarded damages in the sum of

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[18] See for example *Wells v Wells* [2006] NZFLR 870 (HC); *Swenson v Lawton* [2022] NZHC 3544.

$299,432.44 which paid for the repairs and meant that [Mark] and [Lucy] were able to remain living in their home.

[26] There is no doubt that [Beth] assisted [Mark] and [Lucy] extensively in relation to the weathertightness dispute. In particular she:

(a) Assisted her parents to secure a mortgage to finance the repairs if the award was not successful.

(b) Arranged legal advice for her parents.

(c) She negotiated with the builder of [Street A].

(d) She initiated the proceedings.

(e) She prepared evidence of costs, briefs of evidence and affidavits.

(f) She attended meetings with her parents.

(g) She attended a mediation of the weathertightness hearing.

(h) She made the decision to de-clad the entire two stories.

(i) She remained on site to project manage and troubleshoot.

[27] [Beth] describes the stress of the weathertightness claim on her parents and it is her evidence that they required her assistance more than ever. She stated: "I would collect their mail; pay the bills and attend to emails from tenants/body corps [*sic*] etc."

[28] While recognising that [Beth] has undertaken the work, those siblings opposed to her claim argue that [Beth] was unqualified to undertake this work and should have employed someone suitably qualified, noting that [Mark] and [Lucy] certainly had the financial resources from which to do so. [Sophie] and her husband have experience in fixing leaky buildings as they owned two leaky buildings in a complex in [location deleted]. At no stage, [Sophie] asserts, did [Beth] seek any assistance from the other

family members, and it is [Sophie]'s evidence that her husband would have been in the position to know what was required, and the experts that were required. Additionally, [Sophie] states that [Beth] declined an offer to purchase [Street A] property for $1,465,000; it subsequently sold for only $1,118,000, thus they argued that there was a loss of $350,000 resulting in the decision to decline the offer.[19]

[29] I have no doubt that [Beth] and [her husband] provided substantial assistance to [Mark] and [Lucy] through the weathertightness dispute. But, as Ms Cavanaugh submits, that all occurred some four to five years before [Mark] signed his Will. [Mark] would have known that [Beth] had undertaken this work and yet he was of the view that his estate should be divided equally between all of the siblings. That is, after the weathertightness issues were resolved, [Mark] did not seek to recognise [Beth]'s contribution through a bequest over and above that of her other siblings. From [Beth]'s perspective that may seem unfair, but unfairness is not a ground for rewriting a Will.

Other Contributions

[30] The tenor of [Beth]'s evidence is that she predominantly provided support and care for her parents, throughout their lives, and particularly their latter lives. The response of the siblings who oppose [Beth]'s claim is that in doing so [Beth] has ignored the contributions that the older children have made to their parents lives and to their parents' asset base. [Beth] and her twin sister [Carla] are the third youngest children. [Beth] is 10 years younger than the oldest child, [Isabelle]. It is quite clear that the lived experience of the older children was quite different to the lived experience of [Beth]. [Sophie] gives evidence that:[20]

> The boys will be in a position to attest to the fact that they slogged their guts out helping dad physically build in [location 1] and in [location 2], or [Luke] completing a mechanical apprentice course and therefore able to subsequently work on dad's trucks. The sacrifice they made between them was significant, and directly flows into the building of the asset base that was later traded for other buildings and assets that [Beth] then had involvement with. Throughout our childhood, each of the older children were put into bedrooms with the babies to care for them, change their nappies during the night, and do chores.

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19 I note that [Beth] disputes this allegation. I place no weight on this issue in reaching my decision.
20 Bundle of documents, vol 3, p 740, at [46].

[31] [Sophie] also describes the physical and verbal abuse that [Lucy] received from [Mark].[21] [Doug] in his affidavit refers to the industrial warehouse that [Mark] and [Lucy] owned in [location 1] and states at [11]:[22]

> From the age of about 7 years, I was made, along with my brother [Nick], to spend most Saturday and Sundays with dad doing maintenance on this building. We cleared gorse, replaced gutters, painted roofs, and cleared the creek to avoid flooding (among other tasks). Mum and dad also owned a property in [location 2] where they built a small industrial warehouse. Whilst I remember doing maintenance on this building, I don't recall when it was built…On reflection I really didn't have much of a childhood, because from a young age [Nick] and I were made to work on maintaining the existing buildings and building the new ones. We would leave home at 6 o'clock in the morning and return home at around 8 or 9 o'clock at night. This went on for a number of years as we created the assets that formed the foundation of mum and dad's wealth. When I was about 15 years old, we were building the last of the industrial properties at [location 2]. I would often be taken out of school to go and work with dad on the building.

[32] He goes on to describe finishing his building apprenticeship, but then being expected to work on a new home that [Mark] and [Lucy] were building in [Wellington].[23]

[33] [Doug] similarly in his affidavit recounts the same childhood and teenage experiences as [Nick]. [Mark] owned earlier in his marriage a trucking business and [Doug] describes working on that business at the age of five. Later on, [Mark] bought an old railway house located at [location 3] at the base of [details deleted]. As a side line to [Mark]'s transport business, he would take skiers up Ruapehu during the ski season and the old railway houses were converted to hostels where the skiers would stay in the weekend. [Doug] assisted in these endeavours. He describes assisting [Nick] and his father in building a number of commercial buildings in [location 2] which were subsequently leased out. He stated:[24]

> … By the time of the last of the [location 2] property builds, I was married with a young family of my own. The weeks of work with no income was not an easy time financially for my family. Neither my siblings nor myself were ever financially recompensed for our time and input in helping to construct these buildings, which formed the base for mum and dad's asset portfolio; neither did we expect to.

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21 At p 745.
22 At p 745-746.
23 At p 746.
24 At p 784.

[34] [Nick] in his affidavit similarly recounts the work he undertook in assisting [Mark] in his early years.

[35] [Beth]'s response is to simply deny that this work was carried out, or to seek to minimise it. In doing so she invalidates and diminishes their experiences as children of [Mark] and [Lucy]. She belittles her siblings' lived experiences of their parents, and in particular their experiences of [Mark] as a difficult and, at times, a violent man.

[36] This hearing proceeded, as routinely occurs in FPA proceedings, on a submissions only basis. Thus, the disputed evidence has not been tested through cross-examination. Justice Doogue in the substantive *Cresswell v Roberts* decision set out at [71] to [79] of her Honour's decision the approach of the Court in assessing evidence, and in particular disputed evidence where there has been no cross-examination and where there is contested evidence.[25] Her Honour relied upon the approach set out by the Court of Appeal in *Basingstoke v Groot*.[26] I adopt this approach in considering the disputed evidence in this case.

[37] I find that the evidence of the older siblings, and particularly the boys, that they contributed extensively to assisting [Mark] in building the asset base which subsequently provided the commercial assets that were transferred into the [IPT] in 1995 is reliable evidence. I accept without reservation the evidence of the older siblings as it is consistent and overwhelming.

[38] I determine that [Beth] has refused to acknowledge and accept that whilst she made a substantial contribution to her parents' lives in the latter years, her older siblings made substantial contributions to their parents during their childhood, teenage and early adult years. Contributions which, as set out, establish a firm commercial business for [Mark] and [Lucy]. [Beth] clearly seeks to elevate her contributions, and to minimise, demean or deny contributions clearly made by the older siblings. While [Beth]'s lived experience may have been one in which there was not as much or little violence between her parents, I accept that the experience of the older siblings was one in which they observed their mother being a victim of their father's violence, and

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25 *Cresswell v Roberts* [2022] NZHC 1265.
26 *Basingstoke v Groot* [2007] NZFLR 363 (CA); see in particular [39].

the fact that that violence impacted on them. It is my finding that the other siblings have, throughout their lifetimes, made significant contributions to the lives of [Mark] and [Lucy], and those contributions assisted them in establishing the asset base that they enjoyed later in life.

Contributions Made to Commercial Properties

[39] [Beth] also sets out in detail the contributions she has made to [Mark] and [Lucy]'s commercial properties. I agree with Ms Cavanaugh's submission that they are irrelevant considerations in relation to estate matters under the FPA. For example, her negotiating tenancy agreements in relation to commercial properties are contributions in relation to properties owned by the [IPT]. [Beth] has a separate claim in the High Court against the [IPT] alleging damages based on contract and equity. I agree with Ms Cavanaugh's submission that [Beth] cannot seek to rely on and seek compensation from the estate for those efforts, and to then "double dip" by similarly seeking compensation and/or damages from [IPT] in the High Court. Contributions she has made to trust property cannot be a contribution that she relies on in this FPA litigation.

[40] It is my determination that [Beth]'s contributions to the weathertightness issues were just as valid to the contributions made by her siblings, and particularly her brothers, in the earlier years. At the time the brothers made the contribution the [IPT] had not been established, and thus they were contributions made to their parents' assets. These are siblings who throughout their parents' lives have made different, distinct, and significant contributions to their parents' lives and financial circumstances. Rather than accepting her older siblings' contributions, [Beth] seeks to justify her position on the basis that her contribution was more important and more valuable. I do not accept that proposition. Additionally, for the reasons set out above, the contributions made by [Beth] later in her life towards the [IPT] are irrelevant considerations for the purpose of the exercise of my discretion.

Contributions by [Beth] Towards the End of her Parents' Lives

[41] I accept that the contributions made by [Beth] towards both her mother and her father's lives were substantial. They are set out in her affidavit of 16 March 2022 and as set out in exhibit L.[27] Those contributions included the following:

(a) Taking her parents to legal appointments.

(b) Taking her parents to medical appointments, including specialist appointments at the hospital.

(c) Paying for a cleaner for six months prior to their move from [Street B] to [Street A].

(d) Assisting with the cleaning of [Street A] once the paid cleaner left, although as [Beth] acknowledges, she was not cleaning the home every week.

(e) Taking her parents grocery shopping.

(f) Purchasing new appliances for them when needed.

(g) Once [Lucy] died, doing [Mark]'s laundry.

(h) Providing companionship for her father, including cooking meals, and then when [Mark] went to the [hospital unit] full time, visiting her father daily.

(i) Purchasing clothing and other personal effects for her parents during their lifetime.

[42] I also accept that [Beth]'s contributions towards her father were significant. Particularly as [Mark] became unwell, caring and looking after him became more

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[27] Bundle of Documents, vol 2, p 186–189.

significant, and I accept [Beth] was caring for him most days. But I also accept that [Beth]'s siblings also provided support to [Mark] and [Lucy]. The tragedy is that [Beth] seeks to diminish and demean her siblings' contributions. There were those siblings, because of distance, who could not be as actively involved as [Beth] was. By virtue of the fact that [Beth] lived in the same city, it is only natural that she would spend more time and be more involved than those of her siblings who do not live in Tauranga. Those who cannot be as physically present as [Beth] should not have the tyranny of distance used to "penalise" them following [Mark]'s death.

[43] A common thread of the affidavits filed by the siblings is [Beth]'s tendency to control the other siblings' relationship with her mother and father, and negativity towards her siblings. In part that is understandable in relation to [Carla] as it appears that [Carla], and [Beth's husband] had an affair at some point in time. But it is inexplicable in relation to the other siblings.

[44] For example, [Sophie] sets out in her affidavit of 29 June 2022 that [Beth]'s claim that only [Beth] and [Hannah] were the children in contact with their parents was simply not true. [Sophie] states:[28]

> She loved talking to me, my children, and even my husband, and simply loved the communications we had.
>
> [Beth] was very possessive in her dealings with mum. I consider it very likely that mum simply did not let [Beth] know when I had been talking to her in order to avoid conflict with [Beth]. As a result, [Beth] would simply have no idea about my contact with mum. If I was ever on the phone and [Beth] turned up, mum always had to quickly go and could not let [Beth] know that she was talking to me. Even when I visited mum and dad, it was always arranged with mum that [Beth] did not know or was out at work. Mum did not like upsetting [Beth].
>
> However, [Beth] was quite controlling over the siblings' access to mum and dad.

[45] [Doug] in his affidavit of 30 June 2022 states at [41]:[29]

> From the time mum was admitted to Waikato hospital, [Beth]'s relationship with the rest of the family had completely broken down. This is because [Beth] was angry at mum because mum had asked [Carla] to come over from Australia to see her before she passed. Because of [Beth]'s abusive behaviour

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28 Bundle of Documents, vol 3, p 734 at [18]–[20].
29 At p 751.

> towards everyone while we were all in Hamilton to be with mum, we were unable to get together as a family to plan mum's funeral and give her the send-off she deserved. We did organise a family get together before mum's funeral but [Beth] and [Hannah] chose not to attend and instead sent text messages telling us what was going to happen. In the end the rest of the family felt like guests at our own mother's funeral.

[46] [Nick] in his affidavit of 30 June 2022 describes taking his mother shopping, at [54] he describes visiting his parents every day.

[47] [Isabelle] in her affidavit of 30 June 2022 sets out her health issues which she candidly acknowledges affected her ability to provide support for her parents. However, notwithstanding those health issues, she describes visiting her parents regularly once they moved to Tauranga and when they lived in [street B]. She also refutes [Beth]'s assertion at [57] of her original affidavit "that none of our siblings helped out with mum and dad over the last 10 years".[30] At [30] to [40] she points out the supports she provided to her mother, and then to her father over a number of years.

[48] [Ruby]'s affidavit of 30 June 2022 similarly sets out her view of [Beth]'s control. At [57] [Ruby] states:[31]

> [Beth] also tried to control and restrict our ability to have a relationship with our parents. [Beth] tried to control when we could visit our parents, and regularly made them unavailable when we came up to visit. This caused many of us to be unable to freely visit our parents and we were often restricted to visiting after dinner when we knew [Beth] would not be around.

[49] Then again at [60]:

> However, [Beth]'s controlling behaviour and management of our parents' affairs meant any assistance offered by available siblings was declined. Instead, we helped out in other ways by sending precooked meals, and baking etc.

[50] She similarly in her affidavit describes [Beth]'s restriction of sibling contact in relation to [Lucy]'s last days in Waikato hospital.

[51] Again, there is disputed evidence not tested through cross-examination. On the one hand, I have the affidavits of [Beth] in which she sets out that she

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30 At p 813 at [29].
31 At p 843.

singlehandedly, spurned by her siblings, provided support for her parents. On the other hand, I have affidavits from a number of other siblings which indicate that [Beth]:

(a) Was controlling;

(b) Was dismissive of their efforts to help;

(c) Singlehandedly caused such tension at [Lucy]'s funeral that most of the siblings felt like "guests at their mother's funeral"; and

(d) Attempted to control her siblings' contact with her parents.

[52] Regardless of how it came to occur, the reality is that [Beth] provided significant support for both of her parents, including [Mark] in his later years. However, in circumstances where the preponderance of evidence is overwhelming that in doing so, [Beth]:

(a) Restricted other siblings' contact;

(b) Sought to sow division between her father and the other children; and

(c) Has diminished and failed to recognise the contributions made by her siblings.

[53] It would be unjust for the Court to allow [Beth] to now rely upon a situation which she has singlehandedly created as a justification for her receiving a greater share of her father's estate.

[54] Furthermore, at a time in which [Mark] would have been well aware of the efforts that [Beth] says she made, he entered into a Will which his estate was divided equally. That was the opportunity for [Mark] to recognise, if he had felt the contributions were exceptional, or otherwise justified some recognition for [Mark] to have provided for [Beth] over and above that which the other siblings were to receive, in recognition of her duty and care. He did not do so.

Decision

[55] It is my determination that [Beth] has failed to establish that [Mark] breached his moral duty to her.

Alterative Outcome

[56] Even if I am wrong in that determination, I would nevertheless have concluded that if [Beth] had established that [Mark] did owe a moral duty to her, that he has already met that moral duty through current provisions of his Will out of his estate, and through the dispositions that she is to receive as a beneficiary of the [IPT]. For, as Ms Cavanaugh set out in her submissions, even if [Beth] is unsuccessful in the estate litigation, and in the trust litigation, she will receive a sum in excess of $720,000. I agree with Ms Cavanaugh's submission that it is a significant and sufficient amount to recognise any moral duty that is owed to [Beth]. That is evidenced by an analysis of similar cases.

[57] Mr McDougall in his submissions refers to the decision *Brosnahan v Meo* as being analogous to the present factual matrix.[32] In Mr McDougall's submission while the case concerned an only child, Cull J held that the provision of one-third of the estate did not amount to adequate provision. Her Honour increased the son's entitlement to one half of the estate. In that case there was a recognition of the son's "unswerving filial loyalty"[33] and a recognition that the son had provided "practical and personal assistance" as well as financial support.[34] However, as Ms Cavanaugh submits *Brosnahan v Meo* involved an only child which is a markedly different circumstance to the present case where [Mark] (and the Court) are required to take account of [Mark]'s moral duty to all nine of his children. In the *Brosnahan v Meo* decision Cull J also took into account the promise of financial provision made by the deceased in his lifetime,[35] the son's substantial financial contributions[36] and the deceased's erratic and inexplicable behaviour towards the son.[37] The facts of that case

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32 *Brosnahan v Meo* [2021] NZHC 79.
33 At [116].
34 At [91].
35 *Brosnahan v Meo* at [73].
36 At [72].
37 At [84].

are an entirely different factual matrix to the present case where each of the children, in different ways, over a number of years, have provided support towards [Mark] and [Lucy], and where there was no promise during [Mark] (or [Lucy]'s) lifetime to benefit [Beth] from their estate.

[58] Mr McDougall also relies on *Fisher v Kirby*.[38] In that case the Court of Appeal upheld the decision of the lower court to make a greater reward to one of the adult children from their mother's estate. In that case the Court recognised that the claimant had contributed to the family farm, and therefore the assets of the deceased's estate, throughout the deceased's lifetime.[39] The Court awarded the son $600,000 out of a total estate of $3.8 million. As Ms Cavanaugh submits, the awards to the beneficiaries in *Fisher v Kirby* were $600,000, $700,000 and $500,000 respectively. The total assets of the estate and the associated farm was $6.87 million.[40] Those figures are very similar to the total assets of [Mark]'s estate and the family trust in the present case, and the $700,000 that [Beth] already stands to receive pursuant to the Will in the distribution to her as a beneficiary of the trust. I agree with Ms Cavanaugh, *Fisher v Kirby* does not support the submission advanced that the provision for [Beth] by [Mark] represented a failure to provide for her proper maintenance and support.

[59] Finally, Mr McDougall refers to *Hamilton v Hamilton*.[41] In that case two daughters of the deceased spent much time working on the family farm, even ending their schooling early to do so. Both daughters continued working on the farm until they were married. However, their claims were limited by the fact that they made limited subsequent contributions,[42] a factor which Mr McDougall submits is not present in this case. In *Hamilton v Hamilton* the two daughters received awards of $50,000 each from an estate with an agreed value of $665,000;[43] that is, 7.5 per cent each of the estate again. In this case [Beth] is receiving just over 11 per cent of the total estate. That which she is to receive is an adequate recognition by [Mark]'s moral duty to [Beth], and her siblings.

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38 *Fisher v Kirby* [2012] NZCA 310.
39 At [128].
40 At [7] and [36] of the judgment.
41 *Hamilton v Hamilton* [2003] NZFLR 883 (HC).
42 At [68].
43 At [27].

[Beth]'s Lack of Proper Financial Disclosure

[60] Furthermore, even if I had established that [Mark] had breached his moral duty to [Beth], [Beth] has on the evidence before me failed to establish as I would expect, her financial situation such that the Court could be satisfied of her needs. As Ms Cavanaugh sets out in her submissions, the expectation is that an applicant seeking further provision from an estate will fully disclose details of their financial position. I agree with her submission that [Beth] has not done so. She has not provided details of the income she and her husband have received since April 2020 – three and a half years ago. Her affidavit discloses income of $85,159 for 2019/2020 being an income split with her husband. That income arose out of their business operated by [Beth]'s husband. No financial statements have been provided in relation to that business. Those accounts would have been relevant to ascertain, for example, whether the business has substantial assets, monies owed to either [Beth] or her husband in shareholder accounts, or whether the business was less than profitable.

[61] [Beth] also alleges that as a consequence of caring for [Mark] and [Lucy], her real estate agent licence lapsed, and thus she was unable to continue to earn substantial monies. In particular, in her affidavit sworn 16 March 2022 [Beth] deposes that prior to 2017 she worked successfully as a real estate agent earning in excess of $200,000. She goes on to state that:

> In addition, because I was so busy looking after my parents, I forgot to renew my real estate agent's licence.[44]

[62] That assertion is simply untrue. [Mark] died on [date deleted] 2020. A letter from the Real Estate Agents' Authority dated 27 May 2022 states that [Beth]'s last Real Estate Licence was for the period 24 November 2020 until 23 November 2021, and was renewed by [Beth] on 23 November 2020 (so around a month before [Mark] died), expiring on 23 November 2021. [Beth]'s assertion that she forgot to renew her Real Estate Agent's Licence because she was too busy looking after her parents in her first affidavit is clearly untrue in light of the letter from the Real Estate Agents' Authority.[45]

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44 Bundle of Documents, vol 2, p 68 at [130].
45 At Bundle of Documents, vol 3, p 742.

[63] It is also clear that while there are differences among the financial position of the siblings, two at least ([Nick] and [Carla]) have very few assets and/or income. Cases have made it clear that when assessing a claimant's financial circumstances, all existing and likely future sources are relevant. For example, in *Re Williams*,[46] the likelihood that the complainant would inherit her mother's estate reduced her father's moral duty to provide for her. I agree with Ms Cavanaugh that it is a particularly relevant point in this case as [Beth] has been provided for by her parents making additional provision for [Beth] as a beneficiary of the [IPT]. Additionally, where a deceased has treated his or her children equally, the Court is generally reluctant to intervene by awarding one child more than his or her siblings.[47]

Conclusion

[64] The Courts have made it clear that each case turns on its particular facts. The decisions make it very clear the Court's power does not extend to rewriting a Will because of a perception that it is unfair. For the reasons I have set out in this judgment, I do not determine that [Mark] breached his moral duty to [Beth]. This is a family in which the siblings made different contributions, of a differing degree, throughout their parents' lifetime. The older siblings, and in particular the boys', efforts helped significantly towards the establishment of an asset base which eventually formed part of the estate and [IPT] assets.

[65] While I acknowledge that [Beth] did provide support to her parents, and because of proximity more than some of her other siblings, that does not automatically entitle her to a greater share than her siblings. Additionally, [Mark] expressly recorded that he had been advised about the provisions of the Family Protection Act, and he made his Will after a time in which [Beth] alleges, she had made significant contributions to both his and her mother's lives. Yet [Mark], as he and [Lucy] had done throughout their lives, continued to seek the division of their estate equally between all of their nine children.

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46 *Re Williams* [2004] 2 NZLR 132.
47 *Fearon v Public Trust* HC Auckland CIV-2008-404-4465, 24 November 2008.

[66] [Beth] has failed to recognise that her experience of her life with her parents is entirely different to that experienced by her siblings, and she seeks to demean and diminish the contributions that her siblings have made. Furthermore, I accept the evidence that at times [Beth] actively hindered the other siblings being able to have a relationship with both [Lucy] and [Mark]. She should not now "profit" from her disingenuous actions during her parents' lifetime.

[67] But even if I am wrong as to the issue of [Mark] not having breached his moral duty, any duty owed by [Mark] has been adequately provided for, when considering the cases I have referred to, by the existing provisions of both the Will and the entitlements [Beth] will receive as a final beneficiary of the [IPT]. Furthermore, she has failed to provide the evidence that the Court would expect to enable the Court to conclude that she has a financial need over and above that of her siblings, which should have been recognised by her parents.

[68] Furthermore, it is my determination that [Beth] has failed to provide adequate financial disclosure, and in some respects the disclosure she provided has been simply untrue. She has not established, even if I were satisfied that moral duty had been breached by [Mark], that she has a need such that, when compared with her siblings, the remedy should be to provide her with a greater share than her siblings.

[69] In all respects therefore [Beth]'s application fails. Her application is dismissed.

Costs

[70] Mr McDougall indicated that if successful [Beth] would seek that her costs be paid from the estate. I am unclear whether Mr McDougall similarly seeks that [Beth]'s costs are paid from the estate given that she has been unsuccessful. I also apprehend that the siblings who have successfully defended [Beth]'s claim may seek costs against [Beth] themselves. To that end I make the following directions:

(a) [Beth], if she wishes to do so, is to file any application and submissions as to why her costs should be paid from the estate, especially given that she was unsuccessful.

(b) The other siblings, if they wish to seek costs against [Beth], are to similarly file submissions as to the jurisdictional basis, any relevant case law, and setting out evidence of their actual costs and what costs are sought in terms of the District Court Rules.

(c) Both those submissions are to be filed within 28 days of the release of this judgment.

(d) Any submissions in reply are to be filed 14 days thereafter.

(e) Those submissions should then be referred to me in chambers for a reserved chamber's judgment as to the issue of *inter partes* costs (if any).

S J Coyle
Family Court Judge

Signed this 11th day of April 2024 at am / pm