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**IN THE FAMILY COURT  
AT MANUKAU**

**I TE KŌTI WHĀNAU  
KI MANUKAU**

**FAM-2022-092-000204  
[2023] NZFC 13137**

UNDER THE FAMILY PROTECTION ACT 1955

IN THE MATTER OF: THE ESTATE OF [ANNA JOHNSON],  
deceased

BETWEEN [JANE JOHNSON]  
Applicant

AND [MARY O'DEA] and  
GRAHAM O'BRIEN  
Respondents – as the Executors and Trustees  
of the Estate

Hearing: 24 July 2023

Appearances: S McCarthy KC for the Applicant  
G C Jenkin for the Respondents

Judgment: 27 November 2023

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**RESERVED JUDGMENT OF JUDGE N A WALSH  
RE: Estate of [Anna Johnson]**

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## Introduction

[1] [Jane Johnson], age 60 (“[Jane]”) applies for provision from the Estate of her Mother, [Anna Johnson] (“[Anna]”).

[2] [Anna] died at [Auckland], on or about [2021].

[3] [Anna] had three children, namely:

- (a) [Mary O’Dea], born [1960];
- (b) [Michael Johnson], born [1961]; and
- (c) [Jane Johnson], born [1962].

## The Will

[4] On 14 September 2016, [Anna] completed her Will excluding [Jane] and her children as beneficiaries. This Will contained a similar paragraph, as below, setting out [Anna]’s reasons for excluding [Jane].

[5] [Anna] on 27 March 2018, completed another Will excluding [Jane]:<sup>1</sup>

... from any share of my estate on the grounds of her appalling and violent behaviour towards me and my late husband, that saw her removed from our care as a teenager and subsequent behaviour and the fact that we have had no contact with each other for several decades. I do so acknowledging that I had explained to me the provisions and the implications of the Family Protection Act 1955. I also exclude [Jane]’s children because of their gang associations and abuse of illegal drugs and the fact that there has been no appropriate family relationship with them either.

[6] Graham O’Brien, of Insight Legal, Takanini, was the solicitor who took instructions from [Anna] and completed both the 2016 and 2018 Wills.

[7] In a Will Questionnaire completed by Mr O’Brien there is the following question and notation:

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<sup>1</sup> Bundle of Documents (BOD) volume 2 page 104 at [4.4].

**FAMILY PROTECTION ACT:**

Have you excluded a member of your family from your Will, who would be entitled to make a claim against your estate on your death?

Yes / ~~No~~

[8] Mr O'Brien to this question made the following handwritten note:

Given documents related to [Jane]'s history that are to be given to [Jane] and her children if she contests my Will.

[9] Under the following heading in the Will Questionnaire there is a handwritten notation:

PLEASE SET OUT ANY OTHER RELEVANT INFORMATION YOU THINK WE MIGHT NEED TO KNOW:

*I wish to ensure my daughter [Jane Johnson] receives nothing from my estate by reason of her appalling behaviour towards me and husband when he was alive. No contact for 31 years.*

[10] The "documents related to [Jane]'s history" is comprised of correspondence from Edgewater College of 30 July 1976, Howick College of 9 November 1977, and a Court summons under the Children and Young Persons Act 1974 in December 1977.

[11] Mr O'Brien's handwritten notes in the Will Questionnaire, record as follows:

GOB added as executor. GOB – concerned at exclusion [Jane] – may claim. [Anna] adamant. Got me to get out school letters, summons (not first time seen – not persuasive?) "FP Act discussed"

[12] [Anna] in her last Will appointed [Jane]'s sister, [Mary O'Dea] ("[Mary]") and Graham O'Brien, Solicitor, as her Executor and Trustees.

[13] [Anna] made the following specific gifts:

- a) To my daughter [Mary] all my jewellery;
- b) To my grandson [Mark Johnson].... fifty thousand dollars (\$50,000) on attaining the age of Thirty (30) years;
- c) To my granddaughter [Macie Johnson].... fifty thousand dollars (\$50,000) on attaining the age of Thirty (30) years;
- d) To my grandson [Trey Johnson].... fifty thousand dollars (\$50,000);

- e) To my grandson [Waller Johnson].... fifty thousand dollars (\$50,000);
- f) To my grandson [Mikey Johnson].... fifty thousand dollars (\$50,000);
- g) To my friends [Elsie] and [Tammy Gaines] ... ten thousand Australian dollars (A\$10,000) ...

[14] The entire residuary estate was then divided equally between [Mary] and [Jane]’s brother, [Michael].

[15] [Anna] recorded in her Will that, in the year 2015 – 2016, she gave [Mary] and [Michael] \$140,000 each as inter vivos gifts to assist them.

[16] [Jane]’s children, [Evan Johnson], and [Mina Steel] filed proceedings under the Family Protection Act 1955, for provision out of [Anna]’s Estate. [Mary] and [Michael] in their beneficiary capacity opposed their claims.

[17] However, on 26 January 2023, a settlement deed was completed and it was agreed that the claims raised by [Evan] and [Mina] as grandchildren, would be settled by the payment to them from the Estate, a legacy of \$50,000 each (inclusive of their costs).

[18] It was also agreed that the gifts of Australian \$10,000 each to [Anna]’s Australian friends, [Elsie] and [Tammy Gaines], would also be paid. All of the above payments were made with [Jane]’s express consent.

[19] [Mary] and [Michael], in a notice of defence to [Jane]’s claim dated 24 May 2022, stated inter alia:<sup>2</sup>

2) The applicant has not demonstrated a need for maintenance under the Act. The estate is a modest one by modern standards and the applicant and her husband have not proved that they are in financial need;

3) The deceased and the applicant were seriously estranged such that at the date of death ([2021]) the applicant had only seen her mother once in nearly 30 years. **The applicant was largely, if not wholly, responsible for the estrangement and was unable to reconcile with her mother;** (Emphasis added)

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<sup>2</sup> BOD vol 4 page 230-231.

4) The estrangement grew from the applicant's miscreant behaviour as a teenager at home and at school. The estrangement continued beyond the applicant's teens into her adulthood and was made worse by a number of serious incidents involving the applicant's misconduct towards her mother. The misconduct came to head on 23 July 1993 when the applicant pulled a gun and pointed it at her father in the presence of her mother. The deceased was terrified and was never again able to trust the applicant, and she never wanted to see her again;

5) The deceased has set out in detail reasons why she has not included the applicant in her will and her wishes ought to be respected and the reasons given due regard by the Court;

6) **The applicant's violence towards her parents, if not disentitling behaviour in terms of s 5(1) of the Act, means that any breach of moral duty is minor and able to be remedied by a small award of between 5% and 7% of the residuary estate, which the will beneficiaries would consent to if the matter could be resolved now and without further costs being incurred.** (Emphasis added)

### **[Mary]'s evidence**

[20] [Mary] is the eldest sister, aged 63 years.

[21] She is the Mother of three children, namely:

(a) [Jude O'Dea], born [1985];

(b) [Ted O'Dea], born [1985]; and

(c) [Edwin O'Dea], born [1982].

[22] [Mary] resides in her own home in [town A]. She works as a [employment details deleted].

[23] [Anna] and her husband, [Peter Johnson], moved from Auckland permanently to the Gold Coast, Queensland, Australia in [1993]. [Peter] died there in 2008.

[24] In October 2014, [Anna] returned to Auckland and [Mary] took on the responsibility of looking after her Mother after she became unwell.

[25] [Mary] deposed:<sup>3</sup>

7) I was close to our mother, although she could be difficult. She expected a lot from me and when she fell sick it was me that looked after her. After dad died in 2008 mum fell sick while she was still living in Australia and she demanded that I drop everything and go to Australia to be with her, which I did. When she returned to New Zealand in October 2014 she made sure that I visited her every weekend, and this went on until 2019. Mum's demands upon my personal time and care took a huge toll on my health and because of that I became not so responsive to her constant demands from about 2019 onwards, at least until she fell very ill in 2021. As it happened, in early 2015 I had personal problems of my own dealing with the loss of our granddaughter and supporting her parents during that challenging time.

[26] [Mary] in emails to [Jane], chronologically, stated:

6 May 2016<sup>4</sup>

I don't intend seeing her for Mother's day she doesn't deserve it and she reaps what she has sowed. Once I have given it (a gift from the applicant) to her I will let you know her reaction but as I say don't expect anything. My advice to you is don't invest any emotions or feelings and we have all learnt to do exactly that. None of my boys see or visit her or even acknowledge her and you don't have to worry that you are missing anything.

10 October 2017<sup>5</sup>

No I didn't go for her birthday couldn't be bothered and I was in Christchurch. When up on Sunday but just more self-pity. Crying and pathetic behaviour. I wouldn't ask her for any forgiveness she may be stuffed body wise but her mind is sharpe, she is manipulating (nurses are finally seen through it all) and in her mind she believes she is still right about everything.

I won't ask her but will give you some details and you can determine if you want to take the chance and visit her but be aware there will be theatrics and she will push her buzzer for nurses and then perform. Amazing she can't talk but when she wants something it is a right show, tantrums, welling and tears. I don't show any emotion, or ask her what's wrong, just sit there and wait for her to finish and then usually go.

[27] [Mary] also deposed:<sup>6</sup>

8) Mum could be quite petulant at times. If she did not get the attention that she wanted she would misbehave. She was known to make false 111 calls and to literally scream at the top of her voice if she wanted something.

9) My job is quite demanding. I am responsible for 78 staff and over the years I have travelled internationally on a regular basis at least up until

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<sup>3</sup> BOD vol 4 pages 233-234.

<sup>4</sup> BOD vol 2 page 141.

<sup>5</sup> BOD vol 2 page 144.

<sup>6</sup> BOD vol 4 page 234.

recently. Sometimes I was forced to cancel work trips because of mum's demands. This affected our relationship and it would be wrong to say that relations between mum and I were perfect. However over the years I learned to manage the situation.

[28] [Mary] explained that at the date of [Anna]'s death on [2021], [Anna] had not seen [Jane], for over 28 years, except once when [Jane] visited her unannounced at the Auckland rest home in 2019. [Mary] recalled that [Jane] and [Anna] had been estranged since [Jane] was 17 years of age.

### Issues at School

[29] [Mary] deposed:<sup>7</sup>

11) Although I accept that mum could be difficult at times, and I experienced her bad behaviour a lot, I cannot accept that she was more to blame than [Jane] for their estrangement.

12) [Jane]'s behaviour when she was at school was appalling. However as she progressed into adulthood there was no change in her behaviour. In fact, it got worse. One could perhaps understand a disaffected schoolgirl, but not a disaffected woman in her 40s and older. I did not like the way that [Jane] treated mum and frankly I understand entirely why she was determined to exclude [Jane] from her will.

[30] It was [Mary]'s evidence that [Jane] aged 12 years, attended Edgewater College in 1975, and was:<sup>8</sup>

...totally disobedient, refusing completely to submit to her parents' discipline. She was constantly abusive and at times violent and belligerent towards both mum and dad. She refused to obey the rules at school, threw tantrums when she did not get her own way, and was constantly running away and getting into trouble.

[31] It was also [Mary]'s evidence that she believed that [Jane] would:<sup>9</sup>

... play mum off against dad. She would divide and conquer and took delight in the division between mum and dad caused by her behaviour. She would bait mum and delight in her reaction...

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<sup>7</sup> BOD vol 4 page 234.

<sup>8</sup> BOD vol 4 page 235 at [14].

<sup>9</sup> BOD vol 4 page 235 at [15].

[32] [Mary]’s evidence was that “in contrast, the relationship that mum and dad had with [Michael] and I, although not perfect, was normal”.<sup>10</sup>

[33] [Mary] recalled that “[Jane]’s behaviour was so bad at Edgewater College that she was forced to move to Howick College”.<sup>11</sup> She referred to correspondence from the principals of the two schools.

### **Department of Social Welfare involvement**

[34] On 4 January 1978, [Jane]’s parents appeared in the Otahuhu Children’s and Young Person’s Court following a complaint made by the police.

[35] The Summons to Appear dated 30 December 1977 addressed to [Jane]’s Father states that:<sup>12</sup>

A member of the Police (or a Social Worker) has stated on oath that he (or she) reasonably believes that [Jane Johnson] is a child (or a young person) who is in need of care and protection, or control in that she has consistently been running away from home and refuses to live at home with her parents and that you are a parent (or guardian or a person having the care) of that child (or young person.)

[36] The Court record reveals that [Jane]’s parents entered a plea of not guilty and [Jane] was remanded into the custody of the Department of Social Welfare until 3 March 1978 – with leave being granted to return [Jane] to her parents’ home, or for her to be placed elsewhere in the interim.

[37] On 3 March 1978 the complaint was admitted by [Jane]’s parents and [Jane] remained in the custody of Social Welfare.

[38] On 28 April 1978, [Jane], aged 15 years, 5 months, was placed under the Guardianship of the Director-General of the Department of Social Welfare by a Magistrate, P J Duncan, to live with Mr and Mrs [Jacobson] in [town B].

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<sup>10</sup> BOD vol 4 page 235 at [17].

<sup>11</sup> BOD vol 4 page 236 at [19].

<sup>12</sup> BOD vol 2 page 115.



[39] The Otahuhu Children and Young Persons Court's order dated 28 April 1978,<sup>13</sup> states that the grounds for the order was that [Jane] was "in need of care, protection, or control" under s 27(2)(c) of what was then the Children and Young Person's Act 1974.<sup>14</sup>

[40] Section 27(2)(c) provides that:

(2) A child or young person shall be in need of care, protection, or control within the meaning of this Act if-

...

(c) He is being, or is likely to be neglected or ill-treated.

[41] The independent evidence establishes that it was [Jane] who took the initiative in contacting the police. Mr T Guild, the Psychologist from the New Zealand Department of Education, on 2 March 1978 concluded that [Jane] was:<sup>15</sup>

**...admitted to the Allendale Girls Home following her reporting to the Police Station and alleging that the conditions in her home were such that she could no longer live there.** (Emphasis added)

And:<sup>16</sup>

**Was unable to cope with the conflicts and sought assistance from the police.** (Emphasis added)

[42] [Mary] deposed:<sup>17</sup>

19) ... In December 1977 my father was summoned to the Otahuhu Court when it was alleged by a social worker that [Jane] was in need of care and protection. The summons stated that [Jane] refused to live at home with her parents and was constantly running away. It was my understanding that as a result of that summons she was subsequently placed under foster care **because mum and dad just could not cope with her disruptive behaviour.** (Emphasis added)

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<sup>13</sup> The Order was prepared and issued by the Registry and signed by the Magistrate.

<sup>14</sup> BOD vol 2 page 174.

<sup>15</sup> BOD vol 2 page 182.

<sup>16</sup> BOD vol 2 page 184.

<sup>17</sup> BOD vol 4 page 236.

[43] In my opinion, the independent evidence of Mr Guild<sup>18</sup> and from the Department of Social Welfare workers viz, Ms M Sullivan, Ms F McDonald and Ms MF Collins<sup>19</sup> comprises the only reliable but compelling evidence.

[44] Mr Guild, who conducted a number of interviews with [Jane] commencing on 17 January 1978 and two interviews with her parents concluded:<sup>20</sup>

**There appeared to have been many instances of physical expressions of anger, serious division in authority and inappropriate disciplinary measures ...**

The writer has reluctantly concluded that **it is not desirable for [Jane] to be returned to her home until the parents have resolved the problems which exist between them. If the adults in a family cannot cope with the tensions which exist it would appear to be unrealistic to expect an adolescent to cope.** (Emphasis added)

[45] Ms F McDonald and Ms MF Collins on 27 May 1981, in a letter in support of their recommendation for [Jane] to be discharged from guardianship reported:<sup>21</sup>

1. [Jane] was placed under guardianship of the Director-General on 28 April 1978 on a Police complaint. [Jane] had reported to the Police that she could no longer cope with her home environment – namely her parents. Because of this and her over-reaction to situations (as reported in the psychological report) she was placed under guardianship.

[46] In the end, it was [Jane]’s Father (and, by inference, her Mother) who was the subject of the police complaint which was admitted.

[47] It must be remembered that [Jane] was an adolescent, obviously reacting badly to a situation where her parents, the adults, were in a turbulent and unhealthy relationship.

[48] Mr Guild observed:<sup>22</sup>

During this second interview **both parents agreed that no useful purpose would be served by returning [Jane] to her home as she could not be expected to cope with the emotional tension which exists.** Both stated that

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<sup>18</sup> BOD vol 2 pages 182-184.

<sup>19</sup> BOD vol 2 pages 176-180.

<sup>20</sup> BOD vol 2 pages 183-184.

<sup>21</sup> BOD vol 2 page 176.

<sup>22</sup> BOD vol 2 page 184.

they would be willing to seek assistance for their personal problems and the writer discussed with them three possible sources of help. (Emphasis added)

[49] I find it significant that, on 9 May 1978, Ms GE Brady, a Department of Social Welfare worker, wrote a letter to the Director of the Department of Social Welfare in Auckland, transferring [Jane]’s file to that office as [Jane] was now resident in Auckland. Ms Brady, in my opinion, wrote an insightful letter about what occurred in the Otahuhu Children and Young Persons Court on 28 April 1978 when [Jane] was placed under the Director-General’s guardianship. Ms Brady wrote:

3. [Jane] got quite upset at court when her parents started making negative comments about her and the job that she had. We had to sit her in another room away from them. However, she managed to cope with the situation fairly well although she was upset because her father had threatened to write to his M.P. regarding the treatment he had received from the Department. [Jane] was worried that this would cause trouble for Mrs Cobb and myself, however, we finally convinced her that she should not worry. The Magistrate was very kind to her and told her that she had her own life to lead.

4. When she came up to the office after the court hearing we had a long discussion about her future and the possibility of her going for training in horticulture. She is much more mature and sensible. Her attitude was one of relief that it was all over and she could now get on with the business of living.

5. She spoke very highly of Mr and Mrs [Jacobson] and although [Jane] is still a mixed up girl she seems to be settling down well and embarking on a career with confidence.

[50] In my opinion, an objective assessment of the independent evidence reveals that [Anna]’s statement in her Will that [Jane] was “**removed from our care as a teenager**” is misleading. It ignores the fact that [Jane]’s parents conveniently delegated their guardianship responsibilities in favour of the State, as a result of the dysfunctional relationship between the adults which had adversely impacted on [Jane] throughout her childhood.

### **[Jane]’s evidence**

[51] [Jane]’s evidence was that her parents argued a lot, often resulting in [Anna] leaving the family home for days or weeks at a time. [Jane]’s earliest recall of this happening was when she was four years old. [Jane] said that:<sup>23</sup>

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<sup>23</sup> BOD vol 1 page 11 at [43].

[she] did not like it and was frightened and simply could not cope well with mum's frequent absences throughout childhood.

[52] [Jane] said that she sleep talked and had regular nightmares. She recalled [Anna] waking her and telling her off. She slept in a bedroom with [Mary] and [Anna] would tell [Jane] to stop talking so that she would not wake up [Mary].

[53] [Jane] said that [Mary] in her eulogy at [Anna]'s funeral, talked about how their Mother never showed any of the children any affection. Apparently, [Mary] said she could not remember ever getting a hug, cuddle, or comfort from her Mother.

[54] [Jane] said that [Anna] "constantly told me I was unwanted."<sup>24</sup> When she was home alone with her Mother between the ages of four and five, she felt frightened of her Mother. She said that [Mary] and [Michael], being older, were both at school and:<sup>25</sup>

If I dared answer her back or be naughty, she would smack me hard. Mum also shut me in the hall cupboard as a punishment on a few occasions.

[55] [Jane] recalled that she started running away from home in [town D] to go to the [Johnson] Grandparents' home in [town C]. She said:<sup>26</sup>

I made it to my grandparents' place once as I recall. The other times, Mum caught up with me somewhere near the [Bridge]. I would have been five and half years old. I ran away from Mum about four times that I can recall.

[56] [Jane] recalled that [Anna] worked as a [employment details deleted] in [town D]. She said that [Anna] stole food items on many occasions while doing this work, hiding items in the bottom of the trolley, in amongst her fry pans and dirty tea towels and cleaning buckets. She would then push the trolley through the checkout without paying for it.

[57] [Anna] eventually got caught shoplifting and was charged and went to Court. [Jane] recalled that her parents never spoke of this to their children, but word got around [Jane]'s school at Pakuranga Intermediate School as one of the student's

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<sup>24</sup> BOD vol 1 page 11 at [46].

<sup>25</sup> BOD vol 1 page 11 at [47].

<sup>26</sup> BOD vol 1 page 11 at [48].

Mothers was the Store Detective who apprehended [Anna]. Years later, when they were all adults, [Mary] told [Jane] this was the reason why [Anna] changed the spelling of her first name from [Ann] to [Anna].

[58] [Jane] said her Mother also stole clothes from factory shops. She said that when she called her Mother out on this and told her Father, his reply was ‘mum had a problem’. He explained that it related to when [Anna] was a child in an orphanage and had to wear communal clothes and did not have enough food to eat.

[59] When [Jane] was 12, she tried to find her Mother’s parents. She went through her parents personal documents when home alone one day. She copied information from various documents and tried writing a letter to the orphanage where [Anna] and her brother were placed. [Anna] found a rough copy of what [Jane] had written and told [Jane]’s Father about it. Later that night, the children were told by their Father, that their Mother did not want to know her parents. He told them not to ask about them again, and not to try finding them again.

[60] [Jane] recalled that whilst attending Pakuranga Intermediate School, [Anna] started telling her that she was going to kick her out of home the day she turned 15. She said, “I lived under this threat of hers for the next few years”.<sup>27</sup>

[61] [Jane] recalled that her parents’ marriage was unhappy. She said that her parents would be:<sup>28</sup>

fighting and arguing and throwing things at each other. Even out on the street. I have a visual memory of the Police knocking on our door twice and another two occasions of Mum and Dad arguing out on the street.

[62] [Jane] recalled that during the Christmas holidays of 1975, [Anna] left her Father to care for the children. When [Jane] started the new term at Edgewater College in 1976, she had no uniform. [Mary] was tasked with the job of finding a second hand uniform for [Jane] to wear.

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<sup>27</sup> BOD vol 1 page 13 at [58].

<sup>28</sup> BOD vol 1 page 13 at [59].

[63] [Jane] said that her parents reconciled, but things did not improve. She recalled an incident on mufti day in April 1976 when [Anna] would not let her wear mufti. [Mary] and [Michael] had already walked to school in mufti. [Jane]'s Father took her to school in her school uniform and parked outside the school office. [Jane] recalled that she was angry at her Father for not standing up to [Anna]. She ran to the school nurse's office and refused to come out.

[64] [Jane] said that her Father tried his best to console her, but he had to go to work. The school called [Anna] to come and collect [Jane] as she was so upset.

[65] She said that she refused to go with her Mother and:<sup>29</sup>

At this point, the police were called to take me to the Doctors. When we got there, the Doctor approached the car with a syringe in his hand to sedate me. I refused to get out of the police car. The police handcuffed me to the rail behind the seat, so that I could be sedated and transported to Ward 12, Children's Psychiatric Ward, Auckland Hospital. I was thirteen years old and terrified.

[66] [Jane] was in Auckland Hospital between 28 April - 19 May 1976 and her Father signed a consent form. [Jane] said that while she was at Auckland Hospital she ran away several times to her Father's office at the [employment details deleted].

[67] [Jane] deposed:<sup>30</sup>

... I pleaded with him to get me out of hospital. Dad let the hospital know that I was at his office.

The Doctor sedated me to stop me from running away. The Nurses were worried that I would jump off [a Bridge]. They caught up with me on [the Bridge] a couple of times.

[68] They engaged in family counselling but [Jane] recalled that [Anna] told her 'she did not wish her to come back home.' Therefore, on the weekends [Jane] was put into Auckland Hospital's Ward 10, an adult ward. She recalled that her Father, [Mary], and [Mary]'s friend, [Lynda Connolly], visited her at Ward 10 on the weekends.

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<sup>29</sup> BOD vol 1 page 13 at [62].

<sup>30</sup> BOD vol 1 page 14 at [64]-[65].

[69] As a result of the family counselling sessions, it was agreed that [Jane] would return home. However, the arguments between the parents continued, as did the arguments between [Jane] and her Mother.

[70] [Jane] felt as though she was treated differently by the teachers at Edgewater College after she returned to school from her time in Ward 12, the Children's Psychiatric Ward. She said that it did not take long for word to get around about where she had been. Other students called her names like "[Johnson] the Looney".

[71] One of [Jane]'s teachers, Mr [Firth], yelled at [Jane] saying nasty things about her. He threw a duster, which hit her on the head. [Jane] then picked up a chair and threw it at him. She was sent to the headmaster's office and was put on a bus going into Auckland City to see her Father.

[72] On the day of [Jane]'s incident with Mr [Firth], [Mr Cummings] the Principal of Edgewater College, on 30 July 1976, wrote to [Jane]'s Father confirming that he agreed to transfer [Jane] to another school:<sup>31</sup>

...to give her the opportunity to have a fresh start and to eliminate the possibility of your two other children at Edgewater College from being affected by [Jane]'s attitude.

[73] [Jane] attended Howick College from mid-1976 aged 13 and half years. [Jane] recalled that she was very happy there. She made new friends, and nobody knew about her being in a psychiatric ward or why she left Edgewater College. She said that as well as starting to enjoy school again, her marks and grades improved.

[74] However, family life for [Jane] at home was still strained "as the pressure from Mum's threats were making me feel extremely anxious as I got closer and closer to my 15<sup>th</sup> birthday in [1977]."<sup>32</sup>

[75] Nothing happened on [Jane]'s 15<sup>th</sup> birthday, however but she remained anxious as:<sup>33</sup>

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<sup>31</sup> BOD vol 2 page 113.

<sup>32</sup> BOD vol 1 page 15 at [77].

<sup>33</sup> BOD vol 1 page 15 at [79].

Mum was still making plenty of threats about kicking me out. She would make snide remarks to me about whether or not I had saved enough money from my part-time jobs and babysitting.

[76] [Jane] deposed:<sup>34</sup>

I could not concentrate on my schoolwork and was not doing my homework. I was falling asleep in class. I got several detentions because of this and for talking back to teachers who did not believe me when I said I was having problems concentrating on my schoolwork because of what was happening at home with Mum.

[77] On 9 November 1977, [Mr Barton], the principal of Howick College wrote to [Jane]’s parents advising that [Jane] had been removed from the classroom and was working under supervision.

[78] It was [Jane]’s explanation that, “My behaviour at that time was a result of what was happening at home”.<sup>35</sup>

[79] On 25 December 1977, [Jane] had a confrontation with her Mother and explained:<sup>36</sup>

83) On Christmas Day I was extremely unhappy. I could not pretend that we were a happy family and at the table during Christmas lunch, I told Mum what I thought of her finally. Then I abruptly left the table and ran and hid in the local church (on the road behind our house) for hours. I returned later in the evening.

84) Several days later I ran away again after Mum having another go at me. I told her I was sick and tired of living under her threats of kicking me out of home. This time I hid at Pakuranga Heights Primary School. Hours later, the school caretaker was checking the school and found me. Mum and Dad were looking for me and I could hear them calling my name. I asked the caretaker to call the police for me. The police took me to Howick Police Station. Dad was called and I refused to go home.

[80] [Jane] was then taken to Bollard Girls Home. A few weeks later she was transferred to Allendale Girls Home. She was fostered by one of the teachers from Allendale Girls Home and her husband; and lived in [town B] with them and their two small children.

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<sup>34</sup> BOD vol 1 page 15 at [80].

<sup>35</sup> BOD vol 1 page 16 at [81].

<sup>36</sup> BOD vol 1 page 16.



[81] She attended Henderson High School in 1978.

[82] [Jane]'s Father's twin brother and his wife, [Perry] and [Celia Johnson], lived in [town E]. Their daughter, [Sallie] was the Head Girl at Henderson High School. Uncle [Perry] asked [Jane]'s Father and Social Welfare if [Jane] could come and live with them. They had a meeting with the principal of Henderson High School in her office. The Principal telephoned [Jane]'s parents but [Anna] refused to give permission for [Jane] to live with Uncle [Perry] and his family.

[83] [Celia Johnson], filed an affidavit in support of [Jane] and deposed:<sup>37</sup>

Yes, [Jane] was placed in foster care, [Perry] and I, and also [Perry]'s sister [Sarah], all offered to have [Jane] in our care. [Peter] and [Anna] refused to allow this to happen. I got the impression that they were insulted by our offer and no thought was given as to what was in [Jane]'s best interests.

[84] [Jane] deposed:<sup>38</sup>

89) I was abused while in foster care and talked about this with the State Institution Abuse and Enquiry and the Confidential Listening service, that I attended in 2009. I recently received an email from the Abuse and Care Royal Commission of Inquiry team, advising that the public hearings in relation to children who were placed in foster care is coming up in June and they are going to keep in touch with me and may seek my help to share my experiences and give evidence at the hearing.

90) The teacher who fostered me from Allendale Girls Home, was being transferred to Featherstone Girls Home near Wellington. I was happy as they did not want to take me with them and I certainly did not want to go with them. Which meant I had to leave school and find a job.

[85] [Jane] by April 1978 and being under the guardianship of the Director-General of Social Welfare, [employment details deleted] .

[86] She found board and lodgings with a family at [address deleted]. She also had two extra part-time cleaning jobs. One was cleaning a local motel. The other was cleaning the [a School] main offices.

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<sup>37</sup> BOD vol 1 page 45 at [19].

<sup>38</sup> BOD vol 1 page 17.

[87] By December 1978, [Jane] fell pregnant but had a miscarriage at the National Woman's Hospital. [Jane]'s Father and [Mary] visited her and asked her to come back home but she declined.

[88] In January 1979, [Jane] had a holiday in [town F] with [Sarah Rocha] , a paternal Aunt (her Father's only sister).

[89] [Jane]'s Father was asked by Aunty [Sarah] whilst [Jane] was staying, if he would consent to [Jane] moving permanently to [town F] to live with her. [Jane] recalled that her parents drove to [town F] but there was a huge argument. Apparently, [Anna] phoned the social workers to advise them that she was not allowed to live with Aunty [Sarah].

[90] [Jane]'s evidence was that Aunty [Sarah] became like a surrogate Mother to her. Aunty [Sarah] became the first person [Jane] went to for advice. She felt that Aunty [Sarah] provided emotional support for her and included her in her family. Aunty [Sarah] continued to guide and support [Jane] throughout her adult life.

[91] A death notice for Aunty [Sarah], actually refers to Aunty [Sarah] being [Jane]'s "special Mum."<sup>39</sup>

[92] [Jane] recalled that in 1979, [Mary] turned up on her doorstep and asked if she could stay with her until she found somewhere to live. [Mary] left home because of ongoing arguments between their parents. [Jane] recalled that [Mary] stayed with her for a few days until she found a flat with friends.

[93] [Jane]'s evidence was that except for her Father, she had no contact with her family until [Mary] got married in 1981. She had weekly contact with her Father, mostly phone calls and the occasional visits from her Father at her flat.

[94] A couple of months before [Mary]'s wedding, [Anna] came to [Jane]'s place of work in [town G]. [Anna] wanted to talk to [Jane] about [Mary]'s wedding. [Anna] later came to [Jane]'s [flat]. [Jane] had just been in hospital to have a growth removed

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<sup>39</sup> BOD vol 2 page 155.

from behind her left knee. [Anna] took [Jane] home to have lunch and [Jane] deposed:<sup>40</sup>

Just the two of us. I was shocked. She was quite nice to me. She asked me to come to [Mary]'s wedding and told me that Dad really wanted me to be there.

[95] [Jane] stated that [Anna] at the reception at [Mary]'s wedding, approached her and said that her Father was upset and wanted her to go home and live with them, and she agreed.

[96] On the other hand, it was [Mary]'s evidence:<sup>41</sup>

[Jane] came but for the entire event behaved appallingly. She openingly and loudly disparaged our mother to many of the other guests, causing major upset.

[97] However, [Jane] denies causing an upset at [Mary]'s wedding or that she "openingly and loudly disparaged our mother to many of the other guests". [Jane] said that her Mother would not have asked her to come back home if she had misbehaved as [Mary] claims. [Jane] said that she caught the bus to [Mary]'s wedding. She was about to leave when her Mother talked to her and asked her to come home to live with her and her Father. She said that she went home with them after the reception. The following day, her Father dropped her off at [a Church] which she had by that time joined.

[98] [Jane] did return to her parents' home and started going out with one of her brother's friends, [Paul Benson]. She fell pregnant to [Paul] but when she told her parents, [Anna] told her to leave.

[99] [Jane] found a place to live at [aHotel] in [town I] and she was living there when [Evan] was born. [Jane], before [Evan]'s birth, worked as a [employment details deleted]. She was actually working [employment details deleted] when she went into labour with [Evan]. She continued with this work after [Evan]'s birth, but it became quite difficult by the time [Evan] was three or four months old.

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<sup>40</sup> BOD vol 1 page 18 at [99].

<sup>41</sup> BOD vol 4 page 236 at [20].

[100] [Jane] recalled that her Father visited her while she was in the Maternity Hospital but no one else from her family visited.

[101] [Paul Benson]'s family proposed that [Jane] and [Evan] should move in with [Paul] and his Uncle in [town J]. [Paul]'s Mother looked after [Evan] during the day while [Jane] worked.

[102] However, [Paul] was not happy to continue their relationship, and:<sup>42</sup>

He did not want to be a father in the first place.

[103] When [Evan] was six months old, [Paul] was violent towards [Jane] a number of times. On the last occasion when [Paul] was violent to [Jane], she called a taxi and went to her parents place with [Evan], as it was late at night and they needed somewhere to stay.

[104] [Jane]'s recollection was that on arrival, only her Father and her brother [Michael] were present. [Michael] was angry with [Paul] and had to be calmed down. [Michael] wanted to go and 'sort out [Paul]' for being violent. [Jane] and [Evan] stayed the night but the next day, [Anna] returned to the home. [Anna], upon arrival, told [Jane] to leave.

[105] [Jane]'s evidence was as follows:<sup>43</sup>

She put [Evan] on the sofa and told me not to ever bring [Evan] back to the house. I cannot recall all of what she said exactly, but I have a clear recollection of her saying "**never darken our doorstep with your illegitimate black bastard again.**" (Emphasis added)

[106] [Celia Johnson], confirmed that "[Anna] would refer to [Evan] as 'That black bastard'."<sup>44</sup>

[107] [Jane] had to find another place to stay. She contacted a family by the name of [Dodd] whom she had become friendly with, whilst living at [address deleted].

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<sup>42</sup> BOD vol 1 page 19 at [107].

<sup>43</sup> BOD vol 1 page 19 at [109].

<sup>44</sup> BOD vol 1 page 45 at [21].

[108] By this time the [Dodd]’s were living in [town G], and [Jane] and [Evan] lived with them for about six months until a friend of her Father (who was a land agent) found a flat for her in [a suburb in Auckland].

### **[Jane]’s relationship with her Father**

[109] It was [Jane]’s evidence that her relationship with her Father was “very special to me.”<sup>45</sup>

[110] She said that as a child she adored her Father and he was the one she turned to for everything. She recalled that her Father:<sup>46</sup>

did most of the parenting during our childhood and was involved in all our school life, sporting and clubs, and organising our trips away. After our Saturday morning sports, Dad would take us to [a Park] where [details deleted]. We would then spend time with our [Johnson] Grandparents, staying occasionally overnight and then going to Church on Sundays. Dad took me to Church for my First Holy Communion.

[111] [Jane] said that her Father:<sup>47</sup>

tried his best to keep everyone in our family happy. Dad showed us love and affection and was genuinely interested in what we were doing at school.

[112] She also recalled that when she was in Form 1, her Father sent her to [a store] in the [town D] town centre, to be fitted for her first bra, as [Anna] was not living at home then. She also spent some school holidays going to work with her Father at the [details deleted], “because Mum was not around to look after us”.<sup>48</sup>

[113] [Jane] deposed:<sup>49</sup>

Dad could never explain to me why Mum did not care about me. When I asked him, he would say ‘your mother’s got problems.’

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<sup>45</sup> BOD vol 1 page 20 at [111].

<sup>46</sup> BOD vol 1 page 20 at [113].

<sup>47</sup> BOD vol 1 page 20 at [114].

<sup>48</sup> BOD vol 1 page 20 at [116].

<sup>49</sup> BOD vol 1 page 20 at [117].

[114] [Jane]'s evidence was that when she went to Howick College in 1977, she would meet her Father early in the morning for breakfast, and then they would walk to their bus stops on the [town D] Highway.

[115] She said that in December 1977, when she was taken to the Howick Police Station, and then to the Bollard Girls' Home, her Father was as devastated as she was, and they both cried. She explained "he did not want me to go. He said, 'I can't do anything about your mother'."<sup>50</sup>

[116] Subsequently, [Jane] discovered that her Father was having an affair with a work colleague, [Deborah Short], [employment details deleted].

[117] She said that her Father had a relationship with [Deborah] until about 2003, five years before he died.

[118] It was [Jane]'s evidence that her Father was involved with her son, [Evan], from when he was born on [1982]. She said that her Father was a great support to her whenever she needed help, and she regularly visited her Father at work and had lunch with him.

[119] She said that her Father introduced her to [Deborah] in 1984, that they had lunch together, and both visited her and [Evan] at her flat.

[120] She explained that [Deborah] looked after [Evan] when [Jane] went into Auckland Hospital for an operation, when [Evan] was two years old. She said it was about then that [Deborah] said [Jane]'s Father confided with her about his marriage and that they had become more than friends. [Deborah] said that she always hoped that [Jane]'s Father would divorce [Anna].

[121] [Jane]'s evidence was that the relationship between her Father and [Deborah] continued after her parents moved to the Gold Coast in 1994. Eventually, [Deborah] realised that [Jane]'s Father was not going to leave [Anna], and the relationship ended in 2003.

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<sup>50</sup> BOD vol 1 page 21 at [19].

[122] [Jane]’s Father and [Deborah] attended [Evan]’s fifth birthday party. Subsequently, [Jane]’s Father took [Evan] and her on a five day holiday to see [Mary] and her family who were living in [town K].

[123] At Christmas of that year, (1987) when [Evan] was 5 years old, [Jane] decided to go, unannounced to her parents’ home on Christmas Day. She said that her Father was delighted but her Mother was the opposite. She said that she recalled her Mother telling [Evan] not to call her ‘Grandma [Anna].’

[124] [Jane] had no contact with her Mother after that, until [Anna]’s 50<sup>th</sup> birthday in October 1989, but she still had regular contact with her Father. Her Father took [Anna] and [Jane] out for dinner to celebrate [Anna]’s 50<sup>th</sup> birthday [in Auckland]. At that time [Mary] was still living in [town K] and [Michael] was overseas.

[125] [Jane] met her first husband, [Michael Steel] in 1990, when [Evan] was 8 years old. They were married in [1991], and [Jane]’s parents and siblings attended the wedding.

[126] [Jane], during her pregnancy with her daughter, [Mina], had several lengthy admissions to hospital. Her Father visited her during this time. [Mina] was born on [1992].

[127] [Jane] says that she maintained regular contact with her Father and visited him and her Mother at their home in [town D]. She said that they also visited them in [town L] where they were living at that time. However, [Jane] had no contact with her Mother apart from those visits. She recalled that her Father had lots of contact with both [Evan] and [Mina], right up until he and [Anna] left New Zealand and went to live on the Gold Coast, Queensland in 1994.

### **[Jane]’s Eulogy**

[128] There is a great deal of enmity by the residuary beneficiaries and [Anna]’s brother, [Rodney Moyer], about [Jane]’s eulogy at [Anna]’s funeral.

[129] [Rodney Moyer] deposed:<sup>51</sup>

I had not seen [Jane] for over 30 years prior to [Anna]’s funeral and it was very upsetting for me to sit and listen to her speak at the funeral. **This was a speech of hatred for [Anna].** I know my sister well and whilst she was also headstrong, she did not deserve this send off. I witnessed the stress this brought on an already stressful day. **The eulogy was not one of burying the hatchet, forgiveness, or even acknowledgement of an estranged relationship, but an attack and multiple repeats for her dislike of her mother and sister.** (Emphasis added)

[130] [Mary] deposed:<sup>52</sup>

When [Jane] caused division between mum and dad she would boast about it. She even made reference to this after mum had passed away, when she spoke at mum’s funeral service last year. The eulogy that she delivered at the service was made up of a list of grievances against mum, going back to her childhood. It was not pleasant to listen to and more than three people commented to me how disrespectful [Jane] had been.

[131] I find that it is relevant to replicate the eulogy in full:<sup>53</sup>

Good Morning

Firstly I would just like to acknowledge the absence of the one link that held this family together. Our dear father, brother in law, Grandfather and Uncle to us all who sadly passed away 12 years ago on the Gold Coast. I never got to say goodbye or get closure for him so today is my chance to be heard.

We are all sinners, none of us are perfect. We’ve all made mistakes in our lives or done wrong at some point in time. Don’t think that if you live in a glass house that you can throw stones because you can’t. Lives shatter because of the choices we make – so we all need to accept our wrong doings and say sorry. I have many times.

I am a daughter, a sister, a niece, sister in law and I am your Aunty. Some of you here today I have not seen or heard from in many years. When I have reached out to you at some point in time, you’ve chosen to simply ignore me. If you don’t know me, or walked in my shoes, don’t judge me. There are always 2 sides to every story.

We can choose our friends, but not our family, so this is our family all apart from my children, [Evan] and [Mina] who were never accepted, included or loved by our Mother.

To my sister [Mary], I would just like to say thank you for all that you have done for our Mother in the past years and especially in the last few months

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<sup>51</sup> BOD vol 4 page 227 at [14].

<sup>52</sup> BOD vol 4 page 235 at [16].

<sup>53</sup> BOD vol 2 pages 185-188.



and weeks as her health declined. I understand it hasn't been very easy for you nor did you receive the support you should have had.

I have been thinking back to the last time that my brother, sister and I were all together with our Mother and realised it was at my first wedding in February 1991, some 30 years ago. How ironic that we are gathered here today not far from where we all grew up in [town M]. So we have come full circle.

Everyone has a story, with a beginning, many chapters within and an ending. It's now time to close the last sad chapter of Mums book.

Do NOT listen to me with the intent to reply,

But with the intent to understand.

Throughout my life – I've lived, I've loved, I've lost, I've missed, I've hurt and I've trusted. But most of all I've learnt that forgiveness isn't something we do for other people. Rather we do it for ourselves to get well and move on.

There comes a time in your life when you have to let go of all the pointless drama and those that create it. Afterwards you surround yourself with people who make you laugh so hard that you forget the bad and focus solely on the good.

A huge thanks then has to go to my wonderful husband [Joel], who helped me to do just that over the past 9 years. Life is far too short to be anything but happy.

There are many things I could say about my Mother today but there is no point. My Mother and I had a love/hate relationship.

She loved to hate me.

And I hated to love her but I did.

Contrary to what many of you here today believe.

I just didn't like or understand her.

So I would like to share a few memories from my childhood.

There were many great holidays for us kids especially at the holiday homes at [locations deleted]. Then when we all went off to [town N] during the school holidays as Mum always worked. Along with many great family weekends spent at our [Bach] where we even had our own mini putt golf course in the backyard.

When we were little Mum [Mary] and I would model mother and daughter clothes on the catwalk at various Fashion Shows. We then got to keep them. Mum of course thought she was Miss NZ. She was as I recall very attractive and how we laughed when she would go to bed with toilet paper wrapped around her head to keep her hairstyle in place overnight. Mum loved sending

us to school wearing the same thing and often one of us got changed behind the fence so we didn't have to be seen in the same clothes.

Our mother was our primary school dental nurse, she loved that job. If you were called to the Murder House as it was known then you would shake in your boots with fear and trepidation. My friends prayed they wouldn't get her. She was known to be cruel.

We mostly made our own fun and spent many hours exploring outdoors while growing up as Mum would always send us out to play. There was no electronic games or internet back then! So we went riding our bikes, watching all the new bridges getting built around [town D]. Once [Mary] and I pooled our pocket money with some other girls in the neighbourhood to buy a packet of cigarettes to try. Mild 10s as I remember, cost about 60 cents back then which was a lot of money back then! So off we all went to the bridge being built on [road deleted] to try them out. eew yuk I recall as I sucked it in and swallowed the smoke. I was very sick. I think I was pushed in the river, then rode home in such a state! and being told off by Mum for being all messy just after she had done her housework.

I don't remember if Mum found out or not what we'd all being up to but I never ever tried smoking again!

Mum was a very house proud woman; she loved to show and tell. She spent years renovating and decorating [town M] to her own taste. This was in the 70's, brown, orange and yellow colour scheme. It felt like we lived in a show home as everything had to be neat and tidy. The vacuuming of the shag pile carpet had to be done perfectly, more so if visitors were coming. You could never relax. No sitting on your bed in case it looked untidy and god forbid if you wanted posters on the wall. Everything had its place.

I can't ever remember Mum giving us a hug, kiss or cuddle, laugh or joke with us, nor was there any encouragement, interest, support or pride shown in any of our schoolwork or achievements.

We all enjoyed a variety of sports when we were growing up, from tennis to athletics, swimming, rugby, rugby league, netball and cricket. Mostly we took ourselves to these sports. The only thing I remember Mum taking us to was when [Mary] and I did [Ballet] classes. Most Saturday mornings were at our various sports, then we would head off with Dad to Rugby League at [a Park]. Mum never came with us, as it gave her all day to herself. We then would often stay with our Granny [Johnson] in [town C].

As little kids, we went to Church with Dad on Sundays, Mum of course never set foot in one apart from when she got married to Dad.

We all had part time jobs, from paper deliveries or collections, babysitting and milk runs.

When I started to question or rebel against Mum or was naughty by answering her back I would be told, just you wait until your father gets home. When he got home I would be sent to my room to be disciplined. Dad would take off his belt, the door would close and he would say to me when I belt the bed yell out or make a noise. So I would yell ouch and make out I was crying but in

reality we were playing Mum big time. He never smacked me, and she would think he had. Little did she know!

At 13 years old I got my ears pierced at [details deleted] after being told that I couldn't get them done until I was 16. What a bloody commotion at the dinner table that night as I couldn't wait to flick my hair back and show off. Mum was wild at me. She took [Mary] to the doctors to get hers done.

Guess who's ears got infected, - not mine.

Mum was a very good cook and we were never without a tasty meal or a nice packed lunch. Sitting at the dinner table you were expected to eat everything on your plate or no pudding. Many nights I sat at the table for what seemed like hours. I hated brussel sprouts and would try throwing them out into the cabbage tree outside the window. Trouble was from the lounge you could see everything by reflection in the windows and I was caught out often. You then had to eat more of the offending vegetables. Some nights I would refuse to eat Mums meals as I knew where they had come from. Her demonstrating days!

It was funny watching our Mother get all worked up when the house nearly burned down in [town M]. The oil flu was turned on, but no match thrown down to start it. When the fire engines arrived, Mum was yelling at us kids to get the cats and the television out. Such were her priorities. Clearly not our safety.

One thing our Mother was good at was playing games. Hide and seek was one of her favourites.

She would regularly move out and take half the furniture. Dad would come home to us kids telling him Mum had gone again. He would then spend the next few days trying to find her. A couple of times Dad was at his wits end when she couldn't be found. And I remember at age 11 he sent me down to [a store] to get my first bra fitted as Mum wasn't around. Then a couple of years later [Mary] had to find a second hand school uniform for me when I was to start 3<sup>rd</sup> form at Edgewater College as yet again Mum had done a runner.

Mum had lots of clothes; they were her most prized possessions. It was so very tempting for me to borrow them which I did often. I did it to wind her up and especially liked taking her bikinis. When wagging school to go to [a Beach] for the day I would hide them under the feijoa bushes at the Vet Clinic. Dad would be asked by Mum to check my bag as we walked together to our bus stops in the morning. I would wait until I saw Dad get on his bus before running back to retrieve the bikini I had stashed in a bag under the Bushes.

Years later, not long after [Mary] married [Kelvin], Mum wasn't home after work. None of us knew where she was until Dad learnt she was in Hospital having undergone a facelift. She looked like she'd done 10 rounds with Mike Tyson. So vain and only 43 years old.

Mum was a very complex person with many layers of hurt and anger and I never understood why she was like she was. It wasn't until years later that I learnt that she herself was never taught, nurtured or encouraged by her own Mother and Father during her sad childhood.

Dad and I had a nickname for Mum - - It was Tap Tap. She was either hot or cold. There was no in-between. Either she liked you or she didn't!

As I got older I chose names for both my parents, Mad and Bad. She was Mad for the way she carried on. And he was Bad for allowing her to behave like she did and not putting a stop to it.

Life with my Mother should never have been what it was.

At times over the years there were a few brief reconciliations between us, but only on her terms and until it no longer suited her.

I have 2 children, neither of whom were accepted, loved or included in her life.

Before Dad died in 2008, he made me promise to wait 7 or 8 years and then try and visit her to see if she had a change of heart towards me. So when I finally found out where she was, I did go and visit her a couple of years ago and took her flowers, slippers, chocolates and a card.

When shown to her room. I was shocked to see her in that state. She looked sad and lonely. Mum never spoke. She just mumbled.

I sat with her for 2 hours, hugged her and held her hand and thanked her for making me the strong woman that I am today. You see - strong women aren't simply born but made from the storms that they have walked through!

I shared with her some of our many adventures and important moments in my life. Showing her photos of my now husband, children and granddaughter. She genuinely seemed interested, more so when she saw photos of my husband in his pilot uniform. Her eyes widened and I think she got a shock when she realised my life had changed more than she would have ever expected.

As her tears flowed, I wiped them from her face and told her that I was very happy with my life and hoped she was with hers.

I know Dad would have been pleased to that I kept the promise I made to him to try to reconnect with her.

However it was Mum's choice to remain sour and bitter. Yet another opportunity for a reconciliation passed up by her. Not being a hypocrite I have never seen or spoken to my Mother since that day.

So I say to my Mother today, thank you for NOT being in my life as you should have been. It gave me the chance to have a fantastic relationship with my loved Dad who I miss dearly.

For everyone else here today - I leave you with these words.

The measure of success is not whether someone has reconciled with their family. It is whether they are healthy, peaceful and able to maintain and enjoy the relationships and connections that they do have.

Goodbye Mum or should I say Tap Tap Go in peace and be with Dad.

[132] I can empathise with [Mary] and [Rodney Moyer]'s perception that [Jane] was disrespectful. However, from an objective point of view, and with the benefit of considering all the witnesses' evidence, I find that [Jane]'s eulogy was an honest and fair description of what she described as a 'love/hate' relationship with her Mother and loving relationship with her Father.

### **Shotgun incident – July 1993**

[133] Mr Jenkin, counsel for [Mary] and [Michael], submitted that the residual beneficiaries placed significant importance on this incident in justifying [Anna]'s exclusion of [Jane] as a beneficiary under her Will.

[134] [Mary]'s evidence was that:<sup>54</sup>

... it was the incident in July 1993 which permanently put an end to what was left of Mum's relationship with [Jane].

[135] [Michael]'s evidence was that:<sup>55</sup>

The last time Mum had seen [Jane] was in July 1993 when mum witnessed her pull a gun on our father.

[136] He also said that:<sup>56</sup>

... the incident in July 1993 put the relationship between [Jane] and mum beyond repair.

[137] [Anna]'s brother, [Rodney Moyer] in an affidavit in support deposed:<sup>57</sup>

[Anna] discussed with me her intentions regarding her will. She made it clear that she did not want to see [Jane] even though she was back in New Zealand. **[Jane]'s past behaviour, and particularly the gun incident was very relevant for her still.** (Emphasis added)

[138] [Mary] explained that in 1993 her parents decided to relocate to the Gold Coast, Queensland, to start a small business, managing body corporates. She recalled that

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<sup>54</sup> BOD vol 4 page 237 at [24].

<sup>55</sup> BOD vol 4 page 220 at [10].

<sup>56</sup> BOD vol 4 page 223 at [29].

<sup>57</sup> BOD vol 4 page 226 at [8].

[Anna] gathered up all of [Jane]'s personal items that remained in the family home, such as [Jane]'s Plunket books, her personal photos, and other childhood memorabilia.

[139] [Mary] said that her Father drove to [town L] where [Jane] lived to deliver these items to her and:<sup>58</sup>

Dad had done this and had not been home 30 minutes when [Jane] arrived with a gun, which she pointed at Dad while screaming at him 'this will be another Schlaffer murder,' a reference to the terrible Schlaffer killings near [town L].

[140] [Mary] said that her Mother was terrified and hid in a wardrobe while [Jane] threw all the returned possessions across the front lawn causing a terrible commotion involving the neighbours.

[141] [Mary] arrived at her parents' home an hour or so later after the incident and found her parents in a state of shock.

[142] She said that her Mother wanted to press charges against [Jane] over this incident but her Father simply wanted to leave New Zealand. She deposed:<sup>59</sup>

Neither of them ever got over it. They were so traumatised and worried about what [Jane] would do, and they both moved into a motel and three days later flew out of the country on different flights. I think it is significant that [Jane] has not mentioned this incident in her affidavit. Mum never wanted to see or speak to [Jane] again after this incident and she never did except for the one time in 2019 when [Jane] visited Mum unannounced when Mum was in the retirement home.

[143] [Mary], in an affidavit in response to affidavits filed by [Jane]'s children, [Mina] and [Evan], deposed:<sup>60</sup>

Despite Dad's much more forgiving nature, he was still very wary when he was in the company of [Jane]. He knew very well how unpredictable [Jane]'s behaviours could be and, in particular, her behaviour in 1993 **when she drew a gun on him, as described in my earlier affidavit, which had a lasting impression on dad.** (Emphasis added)

[144] [Rodney Moyer] deposed:<sup>61</sup>

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<sup>58</sup> BOD vol 4 page 237 at [24].

<sup>59</sup> BOD vol 4 page 238 at [26].

<sup>60</sup> BOD vol 5 page 306 at [6].

<sup>61</sup> BOD vol 4 page 227 at [11].

There was a gun altercation prior to [Anna] and [Peter] leaving New Zealand. [Anna] and [Peter] were going to stay with me the night prior to flying out, but I was told that they would not be coming to stay with us or need a ride to the airport as they had organised a motel until their departure because [Jane] had arrived at the house with a gun and presented it at her father and [Anna] had heard the threats and noise and hid. [Anna] often talked about this over the years and how traumatising it was.

[145] [Mary] is correct that [Jane] made no mention of this incident in her first narrative affidavit, dated 10 March 2022.

[146] However, in [Jane]’s affidavit in reply, dated 9 August 2022, she was emphatic that:<sup>62</sup>

Mum was not involved in what [Mary] calls *the Gun Incident*. Mum was not there and I did not *pull a gun on our father*.

[147] She pointed out that her Mother did not refer to ‘*the gun incident*’ in her Will instructions to her lawyer, nor in her specific Wills.<sup>63</sup>

[148] [Jane]’s explanation was that in August 1993 she discovered that her parents were selling their home in [town D]. They were holding garage sales and she assumed that they were just downsizing to move to a smaller home.

[149] [Jane] said that, on Sunday 22 August 1993, she called into her parents’ home with [Mina], who was then 15 months’ old. She knocked on the back door, and her Mother opened it and asked what she wanted. [Jane] asked if her Father was home. [Anna] said that he was at golf and would be home later. As [Mina] needed her nappy changed, [Jane] asked if she could come in, but [Anna] had her foot at the door. She said that her Mother opened the door a little and pointed at the floor for her to change [Mina]’s nappy.

[150] [Jane], upon leaving, asked [Anna] if she could have an old set of drawers for [Mina]. [Anna] replied.<sup>64</sup>

that they had sold everything they had in a garage sale. I asked mum where they were moving to. Mum replied ‘ask your father, you’ll find out’ then she

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<sup>62</sup> BOD vol 1 page 68 at [kk].

<sup>63</sup> BOD vol 1 page 69 at [d].

<sup>64</sup> BOD vol 1 page 76 at [c].

laughed at me and told me that she was busy. I asked her to tell Dad that I had called in to see him and then I left.

[151] About a month later, [Jane]'s Father telephoned her to say that he wanted to come over to see her and he said that he had some things left over from the garage sale. The following day, her Father arrived at [Jane]'s home and he asked where [Evan] was and she told him that [Evan] was at school. Her Father then requested her to go and get [Evan] from school and to wake up [Mina] who was having her morning sleep. She said that her Father was annoyed when she declined to do what he asked.

[152] [Jane] recalled her Father went out to his car and collected a whole lot of old towels, faded sheets, some of her old childhood toys, and other things and gave them all to her. She asked her Father why he was giving her this stuff and he said that they were moving and leaving New Zealand in a few days. [Jane]'s evidence was that this was the first time she had heard that her parents were leaving New Zealand.

[153] [Jane] deposed:<sup>65</sup>

It made me sad to think that I was the last to know about it. Dad said that he thought Mum had told me. I was upset to find out from Dad that he had spent a few days with [Mary] and her family but my family and I were getting only a brief stop from him on his way home.

[154] She said that her Father gave her an envelope with \$200 cash and he said to buy the children a present each.

[155] [Jane] conceded that she was angry and felt very stressed about what was happening. She said that she got into an argument with her Father about how she was always left out of family matters. Her Father said that he thought she knew they were going overseas.

[156] She said that:<sup>66</sup>

I was very hurt and started yelling at him about my past and how he always listened to mum and now she was taking him away from me.

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<sup>65</sup> BOD vol 1 page 77 at [h].

<sup>66</sup> BOD vol 1 page 77 at [j].



[157] She said that her Father told her that he had to go and he would be in touch.

[158] She deposed:

I was so upset that I could not believe what had just happened. I picked up all of the stuff that Dad had dropped off and threw it in the back of my car. I was going to tell Mum and Dad what I thought of them. Mum probably wasn't going to listen to me so, not thinking clearly at the time, I put my husband's old broken unloaded shotgun in the boot of the car.

[159] She said that she left a note for [Evan] to tell him to go to the neighbour's house after school if she was not back home. She dropped her youngest child, [Mina], off at her Mother-in-law's home and then went to her parents' house. However, her Father's car was not there but there was a large removal truck backed up in the driveway. She walked up to the back door and saw her Father showing the people who had brought the house how the oil filled heating unit worked.

[160] [Jane] said that her Father invited her in. When [Jane] said that she wanted to talk to her Mother, he told her that her Mother was not there and that she was out with a friend. [Jane] then returned to her car and started putting all of the stuff that her Father had dropped off to her, on to the ground. She said that her Father was angry at her for doing this and asked, 'what was the matter with her'.

[161] [Jane] deposed:<sup>67</sup>

I said I just wanted Mum to hear how hurt I was by being left out again. Dad said that Mum did not want to see me. I said that I would wait for her to come home and I would make her listen to me. He asked me how I was going to do that and I said that I had a gun in the boot of the car. Dad told me to open the boot of the car and he grabbed the gun, ran up the driveway and put it into the garage and locked the garage door.

[162] [Jane] said that her Father told her to go home but she decided to sit in her car and wait. She said that her Father came outside and told her to leave but she was crying and very upset.

[163] She said that her Father told her he was concerned about how she was going to drive home given the state that she was in. She said that she waited for a while and

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<sup>67</sup> BOD vol 1 page 78 at [p].

then drove off to the top of the road. She was crying uncontrollably, so she parked up on [location deleted]. She decided to wait a bit longer to see if her Mother came home.

[164] After [Jane] calmed down and finally drove home she arrived to find a police car in the driveway with a female and male police officers waiting.

[165] She deposed:<sup>68</sup>

They asked me to go inside and have a chat with them as they had been told to check up on me. I learned that Dad had contacted Howick Police to say that he was concerned about my driving and my mental state of mind. I understand that later that day he handed in the gun.

[166] [Jane] deposed:<sup>69</sup>

The police at my house said that they had been told I had threatened my father with a gun. I told them I did no such thing and I did not touch the gun. I asked the police to ring my father and ask him. I called him and he confirmed that. Dad then spoke to me and told me he loved me. He also talked to [Evan], who had come home from the neighbour's. [Evan] was very concerned because I was still crying and the police were there.

[167] [Jane] said that the police called her husband, [Michael], at work and asked him to come home to be with her. The police assured [Michael] that [Jane] was not in any trouble and they were just there to check up on her.

[168] [Jane] makes the important point, that neither [Mary], [Michael] nor her Mother were present during the so called "*gun incident*."

[169] [Jane] disputes the claim that her parents never 'got over' the gun incident.

[170] [Jane] says that she had frequent contact with her Father after he and [Anna] moved to Australia. She exhibited a copy of a birthday card received from her Father in 1994.<sup>70</sup> She also exhibited a card received from her Father in September 1995, which contained some money.<sup>71</sup>

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<sup>68</sup> BOD vol 1 page 78 at [s].

<sup>69</sup> BOD vol 1 page 79 at [t].

<sup>70</sup> BOD vol 2 page 190.

<sup>71</sup> BOD vol 2 pages 191-192.

[171] It transpired that [Jane] came to Australia in 2008, to be with her Father who was unwell with cancer.

[172] [Mary]'s evidence was that:<sup>72</sup>

27) ... He wanted to be with his three children, but worried about [Jane] and continued to make sure that she had no contact with mum. At dad's specific request, [Jane]'s visits to the hospital in Australia were carefully managed so that she had no contact with mum even then. Mum wanted nothing to do with [Jane] and did not want to have any contact with her. She cut her completely out of her life.

28) When [Jane] came to Australia in 2008 to be with dad, rather than concentrating on his care and his needs she took the opportunity to announce, so that mum would find out, that dad had an affair that lasted 20 years with a woman in New Zealand who [Jane]'s children referred to as "Grandma". [Jane]'s judgment was very unfortunate because it just made a sad situation even worse. [Jane] did not seem to appreciate the gravity of the situation with dad and how inappropriate her comments were. At mum's request we kept the particulars of the funeral from [Jane] for fear that if she turned up she would create more havoc, which she seemed to constantly want to do.

[173] [Jane] in response does not accept what [Mary] and [Michael] say about how she told them about [Deborah Short]. She makes the point that she had no contact with [Anna] and [Anna] did not want to have any contact with [Jane] while she was in Australia. She deposed:<sup>73</sup>

... When they say that I mentioned [Deborah] to '*cause mum harm*' or to '*put pressure upon our mother*', it makes no sense to me. I do not know if they told Mum. If they did, they were the ones putting pressure on her.

[174] [Jane] recalled that [Mary] and [Michael] told her to shut up about 'that woman' and that her Father was suffering. [Jane] said that she knew that her Father's death was imminent and she knew how important [Deborah] was to her Father.

[175] She annexed a copy of a Christmas card from her father received in December 1999 as evidence. The Christmas card states:<sup>74</sup>

To [Jane], [Evan], [Mina] and [Michael]

Here's hoping that this Christmas will be a good year for you.

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<sup>72</sup> BOD vol 4 page 238.

<sup>73</sup> BOD vol 1 page 81 at [25(b)].

<sup>74</sup> BOD vol 2 page 193.

I'm very sorry that I have not been able to visit you this year as we simply have not had a holiday for almost two years.

[Deborah] called me recently when she was in Australia. I have asked her to post this card onto you with a cheque for you and the kids which I trust you will find as quite handy.

We hope to be over in NZ next April or May and if so I will make a special effort to come and see you.

Give my very best regards to [Michael] and to [Evan] and especially [Mina].

All my love and the very best wishes to them for a happy Christmas.

And for you please know that you are never far from my thoughts.

All my love Dad.

[176] [Jane] also referred to an email exchange between her Father and herself, [Mina] and [Evan] in March 2001, before they went to Australia for a holiday. The bit of [Jane]'s Father's email that is addressed to [Jane] says:<sup>75</sup>

Hi [Jane],

I have arranged with our friend to provide you with the necessaries that will help you with your trip.

I sent [Deborah] a letter today which she will no what to do with so don't worry what you and [Evan] will need will be there.

That is all for now.

Love Dad

[177] There was also direct contact between [Jane] and [Deborah] and she exhibited a Christmas card from [Deborah Short] at Christmas of 1994.<sup>76</sup>

[178] [Jane] also put into evidence a letter from her Father in October 2005, that was in an envelope that he asked [Deborah] to deliver to her.<sup>77</sup>

[179] [Jane]'s Father's note addressed to her and [Mina] states:

Surfers Paradise

19 October

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<sup>75</sup> BOD vol 2 page 195.

<sup>76</sup> BOD vol 2 page 196.

<sup>77</sup> BOD vol 2 page 198.

Dear [Jane] and [Mina]

Sorry to hear about [Mina]'s accident, I trust that her ankle will repair ok.

This cheque should be of some help to you until you are able to get back to work.

You could also say it is part of your birthday present on [date deleted]. Happy Birthday for then.

[Michael], [name deleted] and kids and [name deleted]'s mother have been here since Monday and [Michael] and the kids called in to see us today.

All the best and particular to [Mina] – get well soon [Mina]

Love from Dad and Grandad

[180] [Mary]'s position was that:<sup>78</sup>

I know that Mum and Dad's best years were from 1993 to 2008 when they lived on the Gold Coast. They both loved it there, made new friends, were active in the community and safe distance away from [Jane]. I know that their relationship greatly improved while they were there.

[181] However, [Jane]'s response was as follows:<sup>79</sup>

Mum might have been happier living in Australia and having no contact with me but I do not agree that that was the case for Dad. When Dad came back to New Zealand he visited me. While he was in Australia he called me, we emailed each other and he helped organise the holiday on the Gold Coast when [Michael] and [Mina] and I were there for [Mina]'s 9<sup>th</sup> birthday.

[182] [Jane], for a period of time actually looked after [Anna]'s Mother. In 2003, [Jane]'s Father sent her a Christmas card which stated:<sup>80</sup>

I was quite saddened to hear of the stress and pain that you have gone through following the illness and death of your Grandmother. Now that she has passed on, this should relieve you from the burden that you have borne and I feel proud of you for the compassion shown by you **and not shown by her own daughter in all the years that I have been her husband.** (Emphasis added)

[183] I find that [Mary]'s assertion that her parents by living on the Gold Coast were a "safe distance away from [Jane]" is without foundation as the unchallenged correspondence between the Father and [Jane] provides compelling evidence of a continuing warm and loving relationship between [Jane] and her Father.

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<sup>78</sup> BOD vol 4 page 241 at [42].

<sup>79</sup> BOD vol 1 page 84 at [27].

<sup>80</sup> BOD vol 2 page 201.

[184] After considering all the evidence on the shotgun incident, I find the only reliable evidence is [Jane]’s evidence, that in an upset and emotional state of mind she packed-up the items that her Father had delivered to her earlier that day, together with her husband’s “old broken unloaded shotgun” into the boot of her car. She then drove to her parents’ home and started putting the items on the ground. Clearly, it was [Jane]’s intention to confront her Mother about the lateness in being told about her parents’ plan to relocate to Australia. [Jane] candidly admits that:<sup>81</sup>

I would make her listen to me. He asked how I was going to do that and I said that I had a gun in the boot of my car. Dad told me to open the boot of the car and he grabbed the gun, ran up the driveway, and put it into the garage and locked the garage door.

[185] There is no acceptable evidence:

- (a) That [Jane] presented or pointed the shotgun at her Father;
- (b) That [Anna] was present during the incident or hiding in a wardrobe;  
or
- (c) That the shotgun was loaded.

[186] I reject [Mary]’s evidence that [Jane] pointed the gun at her Father whilst “screaming at him ‘this will be another Schlaffer murder’,” as [Mary] was not present. The evidence of [Mary], [Michael] and [Rodney] are all based on what they were told not what they personally witnessed. The person who told them ([Anna]) also did not witness the incident.

[187] I am fortified in making these findings of fact as, when the police spoke to [Jane], it was alleged that she had threatened her Father with the gun. She denied the allegation. She said she had not touched the gun.

[188] The police, at [Jane]’s request, telephoned her Father who confirmed [Jane]’s explanation. No charges were laid against [Jane]. The police wrote to [Michael Steel] (i.e. [Jane]’s first husband) on 9 June 1994 advising him to uplift the shotgun.

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<sup>81</sup> BOD vol 1 page 78 at [p].

[189] I am left with a sense that with the passage of time the so-called “gun incident” has become the genesis for an event which has taken on a life of its own in its retelling.

[190] I do not accept that [Peter] was traumatised based on [Jane]’s continuing and positive relationship with him after he left New Zealand. [Peter]’s granddaughter, [Mina Steel], in her separate proceedings deposed that:<sup>82</sup>

Nor do I agree with the claim that Grandad was ‘wary’ of Mum and myself. As far as I was concerned he had a ‘normal’ warm and loving grandparent relationship with myself. He also appeared to have a warm and loving parental relationship with Mum. Again Aunty [Mary] was not present and would have had no first-hand knowledge of either relationship after 1993.

[191] Moreover, I find it of significance that there is absolutely no reference to the gun incident in the notes made by [Anna]’s solicitor in 2016 or 2018 nor is the matter specifically referred to at paragraph [4.4] of [Anna]’s Will dated 27 March 2018. It surprises me that, if [Anna] was so traumatised by this event she omitted to expressly refer to it in her reasons for excluding [Jane] as a beneficiary.

[192] The residuary beneficiaries in their Notice of Defence asserted that [Jane]’s **“misconduct came to a head on 23 July 1993 when the applicant pulled a gun and pointed it at her father in the presence of her mother”**. (Emphasis added)

[193] The Court finds that, on the evidence their assertion is exaggerated and incorrect.

### **Other Violence allegations**

[194] [Anna] in her Will dated 27 March 2018 referred to [Jane]’s “appalling and violent behaviour towards me and my late husband that saw her removed from our care as a teenager.”<sup>83</sup>

[195] However, I find there is a complete paucity of any detail about the alleged “violent” behaviour by [Jane] towards her parents.

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<sup>82</sup> BOD vol 5 page 316 at [11].

<sup>83</sup> BOD vol page 194 at [4.4.].

[196] [Mary] alleged that “[Jane] fails to relate how she upturned the fully-laden Christmas set table and physically attacked our mother.”<sup>84</sup>

[197] [Jane], in response, explained that this incident occurred on 25 December 1977 (she would have been aged 15 years of age at that time) and:<sup>85</sup>

I did not upturn the Christmas table or physically attack Mum. I pushed my meal aside and pushed the table and ran past Mum and out of the house ... I told Mum what I thought of her finally. And then I ran out.

[198] Again, I sense that another family saga has become distorted in its retelling with the passage of time over 45 years. I prefer and accept [Jane]’s version of what occurred on 25 December 1977.

[199] The only independent evidence of violent conduct is from Mr Guild who, based on interviews with [Jane] and her parents found that:<sup>86</sup>

There appeared to have been many instances of physical expressions of anger, serious division in authority and inappropriate disciplinary measures.

[200] Mr Guild does not identify who was responsible for the “physical expressions of anger” but it is a reasonable inference that [Jane]’s parents were responsible for the “inappropriate disciplinary measures.”

### **Discussions between parties about [Anna]’s Will**

[201] [Jane] married her second husband, [Joel Byrne], on 30 October 2018, after living together from 2014. He recalled that there were two occasions before [Anna] died when [Mary] told [Jane] that her Mother’s estate would be shared equally.

[202] [Joel] recalled that in 2016, [Mary] invited both of them to her [family home]. [Mary] told [Jane] that she had some of their Father’s things to give [Jane]. [Mary] put on a DVD for [Jane] to watch some of their Father’s funeral service which had been recorded. [Jane] asked [Mary], at some stage, to turn it off after they both became emotional, and asked if she could take it home to watch it alone and [Mary] agreed.

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<sup>84</sup> BOD vol 4 page 242 at [51]

<sup>85</sup> BOD vol 1 page 64 at [z].

<sup>86</sup> BOD vol 2 page 183-184.



[203] [Jane] also confirmed [Joel]’s evidence that in 2016, she and [Joel] were invited to [Mary]’ home, and they watched a DVD. After [Anna]’s funeral, [Jane] took some photographs to [Mary] at her home, and asked [Mary] about what was going to happen to [Anna]’s estate. [Mary] informed [Jane] that because she had been left out of [Anna]’s Will, she would need to write a “letter of consideration.” She deposed:<sup>87</sup>

When we were all talking outside before we left, I asked [Mary] ‘who I should address the letter of consideration to.’ She said I did not have to write a letter because she and [Michael] had already decided to treat me equally.

[204] At that point, [Mary] told [Jane] that she had been cut out of her Mother’s Will. [Jane] says that she “did not demand anything in relation to mum’s estate...”.<sup>88</sup> She said that [Mary] told her in the presence of her husband [Kelvin], and [Jane]’s husband, [Joel], that “she and [Michael] were going to honour what they knew our Father would have wanted, and that was to treat me the same as them after mum died”.<sup>89</sup>

[205] [Jane]’s evidence is that on 5 May 2021, she and [Mary] had a 45 minute telephone conversation, which was:<sup>90</sup>

mainly one sided with [Mary] telling me that she had discussed with her lawyer that I was to get a one-third share of Mum’s 50%. She said if I accepted this I would have no further claim on anything else. If I did not accept it, I could very well end up with nothing.

[206] [Jane] took the call on speaker phone from [Mary] so that [Joel] could hear the conversation. He deposed:<sup>91</sup>

I remember very clearly, [Mary] dictated to [Nina] what was going to happen. [Mary] told [Jane] that she was offering [Jane] one third of her mother’s 50%. [Mary] said that if [Jane] accepted that there would be no further claim on anything else but if she did not accept it she would very well end up with nothing.

[207] [Jane]’s evidence was that [Mary] did not give her a copy of [Anna]’s Will and [Mary] suggested she should engage a lawyer.

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<sup>87</sup> BOD vol 1 page 85 at [35].

<sup>88</sup> BOD vol 1 page 84 at [32].

<sup>89</sup> BOD vol 1 page 85 at [33].

<sup>90</sup> BOD vol 1 page 85 at [36].

<sup>91</sup> BOD vol 1 pages 94-95 at [7].

[208] [Jane] on her own initiative obtained a copy of [Anna]’s Will through the High Court. After she engaged a lawyer to make enquires about the estate, she received an email directly from [Mary] dated 25 June 2021. [Mary] in the email referred to [Jane] engaging a lawyer and that as a result she had engaged a lawyer. [Mary] referred to a letter that [Jane]’s lawyer had sent to Insight Legal who act for the Executors and [Mary] wrote (inter alia):<sup>92</sup>

In fact Mum did her very best to empty her bank accounts after your visit and repeatedly asked me to transfer money direct to [Michael] and myself so there was only enough left for the named beneficiaries and enough to cover her expenses. [Michael] you can confirm this as you had conversations with me that Mum asked repeatedly if I had transferred the money to your account – she knew her death was near and she was adamant you would not get a cent.

### **[Jane]’s Need for Maintenance Support and Health Issues**

#### *Maintenance*

[209] Mr Jenkin, submitted that it was:<sup>93</sup>

... incumbent upon the applicant to demonstrate evidentially a need for maintenance in an economic sense. If she cannot do that then the claim if properly categorised as a support claim whereby moral and ethical matters will take centre stage. In all cases the Court must take into account the size of the estate, and the strong competing claims of her sister [Mary], and her brother [Michael].

[210] Mr Jenkin further submitted that:<sup>94</sup>

25.) ... when an applicant asserts economic need then particulars of income, assets and liabilities for both applicant and spouse must be declared.<sup>95</sup> Their main assets are not valued properly and there are absolutely no particulars of what their needs are, other than the mortgage which at the date of death was less than \$10,000. There is insufficient evidence of financial circumstances for the Court to assess whether or not [Jane] has demonstrated a need for maintenance. Nor is there sufficient information available to enable the Court to assess how any breach might be remedied.

26.) It does not appear that this is a claim for “maintenance” under the Family Protection Act 1955, because there is no detailed evidence of need. Counsel submission is, therefore, that this is a support claim under the Act by a 60 year old married adult daughter with respect to what is a small estate.

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<sup>92</sup> BOD vol 2 page 162.

<sup>93</sup> Mr Jenkin submissions dated 26 May 2023 at [7(a)].

<sup>94</sup> At page 6 at [25 & 26].

<sup>95</sup> See *Re Franich* CA 101/79, 18 June 1981.

*[Jane]’s Assets and Liabilities*

[211] [Jane] lives with her husband [Joel Byrne], in her house at [town O] which she estimates to be worth between \$803,000 and \$1,200,000 based on what ASB’s online banking estimates the property is worth.

[212] She has an outstanding mortgage to the ASB of \$76,474.31 (\$68,000 of this figure relates to legal costs) mostly as a result of engaging lawyers in relation to the claim against [Anna]’s Estate.

[213] She has the other following assets:

- (a) A Toyota Rav 4 estimated to be worth \$8,000;
- (b) A Trail Lite Motorhome estimated to be worth \$110,000; and
- (c) A Kiwisaver account estimated to be worth \$28,000.

[214] [Joel]’s assets comprise:

- (a) 1/22 share of a right to fly a warbird antique plane;
- (b) An off-road buggy, which is in the shed awaiting serious repairs after a roll-over accident in 2018;
- (c) A boat which is up for sale;
- (d) A ute brought in 2019; and
- (e) A Kiwisaver fund.

[215] Neither [Jane] nor [Joel] had a job when [Anna] died. [Jane] left her full time job as a carer in 2015. Her reasons for giving up fulltime work, was the stress that she was under with her own health issues and trying to cope with her Grandchildren’s health issues.

[216] [Jane], in 2015 started her own business called [name deleted] in which she provided organisational services. This ceased in 2020 as a result of the COVID 19 lockdowns.

[217] [Joel] has four adult children ([Sam], [Ethan], Harry] and [Matthew Byrne]) who do not live with them.

[218] [Joel]'s career, [employment details deleted], ceased on 28 September 2020 when the COVID epidemic hit. The quantum of his exit package was not disclosed, but he said that this was the only income over the last two years for [Jane] and himself, and they are also supporting [Mina] and their granddaughter [Lily], with money and personal support.

[219] [Joel] deposed that he came out of his first marriage with nothing but debt. He also had to pay spousal maintenance to his ex-wife until 2018 when he married [Jane]. He assisted [Jane] pay her ex-husband, [Michael], to acquire his share of the home where [Jane] and [Joel] now reside (which was previously [Jane]'s home with [Michael]).

[220] [Joel]'s drip-feed exit package ended in September 2022; he is selling his boat to help support them both until his health improves.

[221] On 21 January 2022, [Joel] fell and damaged his quadricep, requiring a significant operation. He suffered another fall in May 2022 and caused further damage to his quadricep's tendon. The surgeon has advised him that he will need further surgery with at least 12 months recovery.

#### *[Jane]'s Health issues*

[222] [Jane], at the date of [Anna]'s death had the following medical needs:

- (a) Ongoing stress and depression since she was put into a Girls' Home and made a State Ward when she was 15;

- (b) In September 2008 both her feet were crushed at home and as a result she has problems with her balance when she walks;
- (c) In 2009 she broke her left shoulder in several places, the first repair in 2010 was unsuccessful. She then had a total left shoulder replacement in 2012 and now (and at the date of [Anna]'s death) has only 70% use of this arm;
- (d) [Jane] in 2013 had complications from eye surgery, which was not completely effective and she continues to suffer from fluid leakage;
- (e) In December 2019 [Jane] suffered a large right shin tear through muscle on her leg which became ulcerative and still gives her ongoing issues; and
- (f) In October 2020 she broke her right ankle and had an operation on 3 May 2021 to reconstruct ligaments and tendons. At her last specialist appointment on 22 November 2021, a surgeon advised that she would need to continue with physiotherapy and strengthening exercises to get full use of her right ankle. She currently has a disability card as she cannot walk far.

[223] [Jane]'s daughter, [Mina], has for the last five years been treated at [a Hospital] and has had several surgical procedures and operations for pre-cancer. These are meant to be preventative measures. [Mina]'s last operation was 7 October 2021. [Jane] is [Mina]'s main support person and caregiver when required.

[224] [Mina]'s daughter, [Lily], was born in [2014]. She has four very rare structural brain abnormalities. She also has global developmental delays and other health issues. [Lily] will require ongoing medical help and educational support throughout her lifetime.

[225] In February 2021, both [Mina] and [Lily] were in and out of hospital with a lot of medical appointments. [Jane] was their driver and looked after [Lily] at her home when [Mina] was in hospital.

### **Submissions**

[226] Mr Jenkin strongly submitted that [Jane] had not been completely open in disclosing her assets and liabilities, in particular, her partner had never disclosed the details of his exit package as an [employment details deleted] in 2020.

[227] Mr Jenkin submitted that in these circumstances the Court should at least have the benefit of a *budget* to properly assess [Jane]’s financial situation and, if required, to craft a remedy without relying on guesswork.

[228] Mr Jenkin referred to a decision of the Court of Appeal in *Re: Franich*.<sup>96</sup> In that case the three daughters of a first marriage sought further provision from their Father’s estate. Barker J in the High Court allowed further provision for each of the three daughters. The three sons of the second marriage appealed against this judgment. Whilst the three sons accepted that there had been a breach of moral duty by the testator, challenged the amount of the further provision as being excessive.

[229] The Court of Appeal noted that:<sup>97</sup>

... at the heart of Mr Grove’s submissions (for the three sons) was his criticism of the paucity of information contained in the affidavits of the daughters as to their financial position and the needs, using that term in its wider sense – *Re Harrison (deceased), Thomson v Harrison* (1962) NZLR 6,13.

[230] The Court of Appeal held that:<sup>98</sup>

there is an onus on a claimant to adduce evidence of his means as part of his overall onus to prove his case. What evidence will discharge that onus will depend on the circumstances of each case.

[231] One of the daughters had no assets. The other two daughters owned houses, and one daughter owned a car but there were no valuations or even estimates of values.

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<sup>96</sup> *Re: Franich* CA 101/79, 18 June 1981.

<sup>97</sup> At [11].

<sup>98</sup> At [13].

[232] The Court of appeal held:<sup>99</sup>

If the claimants do not make the requisite disclosure, the Court should not assume in their favour the existence of factors which would justify an award at the high end of the scale...

### **Discussion**

[233] However, I find that although there is no budget, there has still been quite a significant disclosure of [Jane]’s assets and liabilities. For example, [Jane] has disclosed that she owns a house in [town O], as well as other assets and liabilities.

[234] The Court accepts that both [Jane] and Mr [Byrne] have serious medical issues as set out in their affidavits.

[235] In my opinion, the financial information disclosed by [Jane] and her partner sharply contrasts to the “paucity of information” facing the Court of Appeal in *Re: Franich*.

[236] In any event Mr McCarthy KC in his submissions conceded that a claim for maintenance was never regarded by [Jane] as a strong platform for claim. He submitted that the main platform for [Jane]’s claim is [Anna]’s estrangement of [Jane] and her utter failure to repair that estrangement with [Jane] when she was younger.

### **The law**

[237] The basis for [Jane]’s claim is set out in s 4 (1) of the Family Protection Act 1955, which states:

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.

[238] The Court of Appeal decision in *Little v Angus* observed:<sup>100</sup>

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<sup>99</sup> At [17].

<sup>100</sup> *Little v Angus* [1981] 1 NZLR 126 (CA).

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 the extent is the 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 of 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.

[239] I replicate Mr McCarthy KC's reference to Judge GP Barkle's decision in the Nelson Family Court summarising the current law, including estrangement caused by the will-maker:<sup>101</sup>

[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.<sup>102</sup> 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.

[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.

[100] The Court endorsed the comments from *Little v Angus* which summarised the well settled principles applied by the courts as follows:<sup>103</sup>

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.

[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.

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<sup>101</sup> *Robbins v Hays* [2022] NZFC 7768.

<sup>102</sup> *Williams v Aucutt* [2000] 2 NZLR 479 (CA).

<sup>103</sup> Above n 100 at [127].



[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:

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

[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.<sup>104</sup> 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.

[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.<sup>105</sup> 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

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<sup>104</sup> *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA).

<sup>105</sup> *Henry v Henry* [2007] NZFLR 640 (CA).

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.

[107] In *Fisher v Kirby*, the Court of Appeal said awards under the Act should not be unduly generous.<sup>106</sup> 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.

### **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:<sup>107</sup>

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.** (Emphasis added)

[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.<sup>108</sup>

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.

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<sup>106</sup> *Fisher v Kirby* [2012] NZCA 310.

<sup>107</sup> *Crosswell v Jenkins* (1985) 3 NZFLR 575 (HC).

<sup>108</sup> *Re Watson* HC Napier CP23/2000, 22 February 2002 at [26].

### 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:<sup>109</sup>

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.

[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 [J] 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.<sup>110</sup> 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.

[240] Judge Barkle went on to say:

[113] In *Rothnie v Public Trust Office*, the claimant was a son of parents who had separated when he was eleven.<sup>111</sup> 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.<sup>112</sup>

[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.<sup>113</sup> Erin was in significant need of

<sup>109</sup> *Flathaug v Weaver* (2003) NZFLR 730 (CA) at [32].

<sup>110</sup> *Shannon v Bowering* HC Rotorua CP 33/97, 21 August 2020.

<sup>111</sup> *Rothnie v Public Trust Office* HC Wellington CP 203/95, 22 September 1997.

<sup>112</sup> *Re Upton* HC Wellington CP 169/94, 28 September 1995.

<sup>113</sup> *Kinney v Pardington* [2019] NZHC 317.

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 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.

[241] Mr Jenkin emphasised that it is the Court's role to do no more than what was necessary to remedy the breach, and referred to Randerson J's decision in *Vincent v Lewis* who summarises the principles to be applied as follows:<sup>114</sup>

- (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 precision 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 amoral 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.

[242] Mr Jenkin referred to a decision of the Court of Appeal in *Henry v Henry*. In giving the decision of the Court, O'Regan J confirms the conservative principles to be applied and concluded:<sup>115</sup>

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<sup>114</sup> *Vincent v Lewis* [2006] NZFLR 812.

<sup>115</sup> Above n 105.

[58] ...in cases of financial need, the amount necessary to remedy the failure to make adequate provision in the will be able to be determined with great 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 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.

[243] Mr Jenkin also referred to the decision of Randerson J in *Fisher v Kirby* who observed:<sup>116</sup>

[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.

[244] Mr Jenkin referred to s 11 of the Act which makes it clear that the Court is empowered to have regard to the deceased's reasons for making the Will in the manner that he or she did, or not making provision or further provision in the Will for any person, whether the evidence would otherwise be inadmissible.

[245] Barraclough CJ in *Re Crewe* (deceased) observed:<sup>117</sup>

The Court is not bound by his (the testator's) intentions but will pay due regard to them; because in ordinary circumstances the testator is likely to have a valuable opinion as to what, in a particular case, is proper maintenance and support for those who are dependent on him.

[246] Mr Jenkin referred to the legal writings of Mr Patterson who opined:<sup>118</sup>

Where reasons are given for not making provision or sufficient provision for an applicant and the reasons are clearly not borne out by the evidence the

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<sup>116</sup> Above n 106.

<sup>117</sup> *Re Crewe (Deceased)* [1955] NZLR 210 (SC).

<sup>118</sup> WM Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis NZ, Wellington, 2021) at [17.13]

Court may disregard them, but if the testator's intentions are plain a Court will be loath to disregard them.

[247] Mr Jenkin referred to *Auckland City Mission v Brown* where the Court of Appeal emphasised the importance of the application of orthodox principles in respect of claims under the Family Protection Act 1955.<sup>119</sup> The Court of Appeal again emphasised that the deceased's intentions as stated were important and those intentions should only be interfered with, if it had been shown by the applicant that it was necessary to repair a proven breach of moral duty.

[248] Mr Jenkin on the issue of "estrangement" noted:

49. It seems inevitable that estrangement between the applicant and the deceased will have a serious effect upon the degree of moral duty. An estranged son cannot expect to be treated in the same way as a sibling who was very close to her mother. On the other hand, where the estrangement is of the deceased's making, then the moral duty will be more compelling.<sup>120</sup>

50. *Crosswell v Jenkins* was the case where the deceased made no provision for 5 of his 11 children of what was quite a small estate. He initially alleged that they were not his children but the Court accepted that there was enough evidence to show that they were. In the High Court at Invercargill Hardie Boys J said this:

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.<sup>121</sup> The claim of a child from whom the deceased has had a long estrangement cannot be as strong as that of one with whom he has had 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. ... I am therefore satisfied that there has been a breach of moral duty. My duty accordingly is to determine the order appropriate to remedy the breach, disturbing the will only to that extent, so as to give the fullest possible recognition to the deceased's own wishes as expressed in it. Relevant to this task are the size of the estate and the other moral claims on the deceased's bounty;

51. The onus of proof lies with the applicant.<sup>122</sup> The deceased's reasons as stated in the will are important in this context.

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<sup>119</sup> Above n 104.

<sup>120</sup> see *Crosswell v Jenkins and Haff-Jones Hall-Jones* (1985) 3 NZFLR 570 (HC).

<sup>121</sup> *Re Young (Deceased)* [1965] NZLR 294.

<sup>122</sup> see *Re Ward (Deceased)* [1964] NZLR 929 (SC), and *Re Green (Deceased)* [1951] NZLR 135 (CA).

52. In *Re Green* the deceased and his daughter were estranged. The deceased formed the view that his daughter had disowned her parents. These allegations by the deceased were found to be not proved. However it was obvious that there had been little contact between the applicant and her parents in later years and the fact that she had resided overseas for many years had led to a loosening of the bond between the two of them. The Court determined in that case that the fact of the loosening of bonds between the applicant and her parents was a matter properly to be taken into account in the assessment of the quantum of an award.

53. In *Green* the deceased failed to provide for his adopted daughter. He gave reasons for not doing so when he instructed the Public Trust to prepare his will. First of all he said that his daughter had substantially benefited under her grandmother's will. Secondly he said that she had disowned her parents, telling people that she thought they were dead. Members of the family amplified the evidence with respect to these reasons given by the deceased. The applicant denied there had been anything of the kind. Gresson J delivering the decision of the Court of Appeal said this:

In our opinion these varying ways of regarding the onus as lying one way or the other are but a part of the consideration the Court must give to all the circumstances, and a mere allegation by a testator as a reason for exclusion for a child should not be accepted as precluding the making of an order merely because the applicant fails to establish that the allegation is false. There must be, of course, a primary onus resting upon the applicant to satisfy the Court that there has been a failure of moral duty on the part of the testator. Where a testator has treated one of his children so very differently from the others as has been done in this case, the Court has necessarily to consider whether there is anything in the child's circumstances or conduct to justify complete exclusion. If reasons are given by the testator reflecting on the character or conduct of that child, the Court must, in considering the sufficiency or otherwise of the reasons, endeavour to decide upon the truth or otherwise of the allegations. But the testator should not be allowed from the grave to condemn the child and to impose upon that child the positive duty of disproving the allegations as an essential preliminary to prosecuting a claim. In our opinion, the reasons given by the testator for excluding a child (or a widow) go no further than to concentrate attention on the question whether there is or has been character or conduct operating to negative the moral obligation that otherwise have lain upon the testator. If the Court is quite unable to arrive at the truth or falsity of the allegations, so that they must be regarded as neither proved nor disproved, but merely unproven, then sub-section (2) of section 33, which authorises the Court to "*refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order*" has no application.

54. The extent of a testator's moral duty to a child will be affected by the child's conduct, especially where there has been a loosening of the bond between the two.

55. In *Re Ward* (Deceased) the applicant had nothing further to do with the deceased after she left home, did not invite him to her wedding or inform him of the birth of her children.<sup>123</sup> On the other hand, the deceased made no effort to be in touch with the applicant and she was not informed of her father's death. The applicant's conduct was described by the Court as "unfilial". Tompkins J concluded that the five years of estrangement between daughter and parents did not disentitle her to relief but limited the extent of that relief. His Honour said that the fact that the plaintiff had nothing to do with her parents for five years was a serious matter, but that the deceased also had to take responsibility because he made no move to contact his daughter either.

56. Bill Patterson's view is that the exercise of the Court's discretion will often depend upon the Court's assessment of where fault lies. He says at para. 4.17 of his book:

At one end of the scale there will be those cases where the deceased has been almost entirely responsible for the estrangement and at the other end those cases where the applicant has acted in an unfilial way. Between these two extremes there will be a wide range of circumstances and in many cases it will be found that there has simply been a loosening of the bonds caused not so much by a serious or violent disagreement but as the inevitable result of disinterest or perhaps as the unintended result of the parties making their own way in life. This would particularly be so if either applicant or deceased found it necessary to make a new life in another country.

57. In an unreported appeal from the Family Court which came before Justice Woodhouse, namely *Moon v Carlin* the deceased and the mother of his four children separated (in an acrimonious divorce) in 1970, some 36 years before his death.<sup>124</sup> At separation the children were infants aged 4, 9, 13 and 15, and from then on the contact they had with their father was minimal. The separation had a significant impact psychologically on all four children who craved the love and attention of their father, which he rejected, placing them squarely in their mother's camp.

58. The Judge in the Family Court concluded from affidavit evidence (there was no cross-examination) that the deceased was primarily responsible for estrangement between father and children. By transferring his home to a trust for the benefit of a close friend he deliberately tried to frustrate any potential claim. His statement that his children were well settled was in fact inaccurate, given the evidence of the children as to their personal circumstances.

59. In *Moon v Carlin* the responsibility for the estrangement was an issue that assumed importance in the Family Court and the High Court appeal. The children wanted a relationship with their father, but he deliberately denied

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<sup>123</sup> *Re Ward* (Deceased) above n 122.

<sup>124</sup> *Moon v Carlin* HC Auckland, CIV 2020-404-005486, 23 February 2011.



them that relationship. This affected all four of them psychologically and all this had a direct bearing upon the degree of moral duty owed and the quantum of an award.

[249] Recently, the Court of Appeal in *Barnard v Robertson* found that a testatrix did not fail in her moral duty by failing to equally apportion her estate between her three children in her Will.<sup>125</sup> The testatrix left an estate valued at approximately \$4.4 million and the only beneficiaries under her last Will were her three sons.

[250] The claimant brought proceedings under the FPA, saying that his Mother had failed in her moral duty to provide him with proper maintenance and support.

[251] The testatrix bequeathed him a life interest in his third of various investments but his two brothers were bequeathed their shares absolutely.

[252] In the High Court it was found that the testatrix's provision for her son in the Will (regardless of percentage shares) amounted to proper recognition of his moral claim on the estate and she had not breached her moral duty to him.<sup>126</sup>

[253] The Court of Appeal held (inter alia):

[48] As for “unfairness” as between Graeme and his brothers, Mr Manktelow referred us in particular to the High Court's decision in *Favel v Dorsey* where Holland J observed:<sup>127</sup>

... a testatrix is not bound to leave her estate equally to her children but in assessing a child's claim the Court will usually commence on the premise that in normal circumstances a just parent will treat each child equally. From this starting base the just parent will consider the infinite variety of circumstances which will permit or justify a departure from equality including, in addition, the right to dispose of one's property as one wishes after having met the moral claims of members of the family.

[49] To the extent these dicta can be taken to suggest that there is something akin to a “presumption” of equality as between siblings in testamentary matters, or that any departure from equal sharing must be expressly justified, we do not think they can survive decisions of this Court such as *Williams v Aucutt*, *Brown v Auckland City Mission* and *Henry v Henry*, all of which emphasise the importance of testamentary freedom. **The FPA does not authorise the courts to rewrite a testator's will merely because it**

<sup>125</sup> *Barnard v Robertson* [2023] NZCA 103.

<sup>126</sup> *Barnard v Robertson* [2022] NZHC 469.

<sup>127</sup> *Favel v Dorsey* HC Christchurch M278/87, 6 July 1988 at [9].

**might seem unfair to a family member, and a beneficiary is not required to justify the share of the estate they have been given.**<sup>128</sup> (Emphasis added)

...

**[52] In light of all the relevant circumstances, it certainly could not safely or fairly be concluded that Mrs Barnard’s treatment of Graeme in her will was capricious or could reasonably be seen as giving rise to a sense of exclusion or as a failure to recognise him as a member of the Barnard family.** (Emphasis added)

[53] The ultimate question here is whether there has been a failure by Mrs Barnard to fulfil her moral duty, judged by the standards of a wise and just testatrix. We agree with the High Court Judge that there has not. In all the circumstances we have discussed proper provision for Graeme’s maintenance and support was made.

### **Did [Anna] breach her moral duty?**

[254] Drawing all of the threads of this case together, I find, unequivocally that [Anna]’s reasons for excluding [Jane] were not valid. Earlier in this judgment I placed significant weight on the independent evidence of the psychologist, Mr Guild, and the Department of Social Welfare social workers.

[255] Mr Guild was of the opinion that [Anna] and [Peter Johnson], accepted that they needed assistance for problems in their own relationship, and that [Jane] could not be expected to cope with the emotional tension that existed.<sup>129</sup>

[256] In my opinion, [Anna]’s perception that [Jane] was “removed” from her care, is misguided. The evidence from Mr Guild, and the social workers establishes that [Jane] in fact, took the initiative of going to the police as the conflict and conditions on the home front were such that she could no longer live there.

[257] After considering the social worker’s reports and [Anna]’s consistent and unyielding instructions to Mr O’Brien, I find that [Anna] failed to acknowledge or understand that [Jane], a teenager, was reacting to the situation at home, the relationship between her parents, and [Anna]’s inflexible attitude towards her.

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<sup>128</sup> Above n 102, n 104 and n 105.

<sup>129</sup> BOD vol 2 page 184.

[258] I find that [Mary]'s email to [Jane] on 10 October 2017, is very revealing when she wrote:<sup>130</sup>

**... in her mind she believes she is still right about everything ...** (Emphasis added)

[259] I find, on the evidence, that [Anna] was neither wise nor just when it came to making no provision for [Jane] in her Will. Mr O'Brien advised [Anna] about the effects and implications of the FPA but recorded in his notes, "[Anna] adamant".

[260] Mr O'Brien at his meeting with [Anna] on 13 February 2018, took [Anna] back to her instructions concerning [Jane] and his notes conclude:

Went back to [Jane] – she to be sent the letter etc. GOB – inviting trouble.  
No change

[261] The evidence establishes that [Jane], at the age of 13, was admitted to the Children's Psychiatric Ward at Auckland Hospital following an incident on mufti day at her school. The final diagnosis on the medical records, for [Jane] was "*Behaviour Disorder*".

[262] Clearly, the intervention by the police at the request of the school, to take [Jane] to the Doctor, resulting in her being sedated with a syringe, and then handcuffed in the police car was a traumatic event for a 13 year old child. However, it appears that on home front, the relationship between [Jane]'s parents was highly volatile and [Anna] left the home for periods of time.

[263] I accept [Jane]'s evidence that she felt rejected by her Mother from when she was a child. [Celia Johnson]'s evidence was that based on her observations of [Anna]'s behaviour towards [Jane], she felt that [Jane] was unwanted and treated as such.<sup>131</sup>

[264] As a Family and Youth Court Warranted Judge, I am aware of social science about parental effectiveness at (understanding) and meeting the adolescent's emerging needs which I find is relevant and evidence based and I now replicate.

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<sup>130</sup> BOD vol 2 page 144.

<sup>131</sup> BOD vol 1 page 43 at [9].

[265] During adolescence children move through a period of rapid physical, sociocultural, psychological, and cognitive changes. Progression towards autonomy is considered of central importance during the adolescent period and helps to establish a child's identity and autonomy.<sup>132</sup> In early (12-14 years old) and middle (14-16 years old) adolescence, the adolescents' primary developmental task is to form a personal identity and separate from their nuclear family.<sup>133</sup>

[266] A young person's development of capabilities that allow for self-direction and sense of responsibility for the self are critical for successful transition into adulthood.<sup>134</sup> Parents play a key in this successful development and are the adults that we expect to support young people. Adolescents with positive family relationships are more able to cope with problems at home and school. Research shows that changes that occur throughout the adolescent's development period may lead to conflict that initiates or facilitates development tasks. When this occurs within parent-adolescent relationships that are warm and emotionally accepting it will encourage healthy autonomous development.<sup>135</sup>

[267] I find, [Jane] was deprived of the tools to help her transition from a young person into adolescence from her parents. [Anna] did not meet [Jane]'s needs or support her quest to be independent from her parents or parenting rules or develop her own values and beliefs as she grew. This meant that there was limited parental effectiveness at understanding and meeting [Jane]'s emerging needs. This was a fundamental failure.

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<sup>132</sup> Ralph DiClemente, William Hansen, Lynn Ponton "Adolescents at risk" in Ralph DiClemente, William Hansen, Lynn Ponton (ed) *Handbook of Adolescent Health Risk Behaviour* (Plenum Press: New York, 1966) 1 at 2.

<sup>133</sup> Debra Murphy and others "Early and Middle Adolescents' Autonomy Development" (2008) 13 *Clin Child Psychol Psychiatry* 253.

<sup>134</sup> Joseph Allen and others "Longitudinal assessment of autonomy and relatedness in adolescent-family interactions as predictors of adolescent ego development and self-esteem" (1994) 65 *Child Development* 179 cited in Ozlem Cakmak Tolan & Gizem Bolluk Ugur "The relationship between psychological resilience and parental attitudes in adolescents: a systematic review" (2023) 42 *Curr Psychol*.

<sup>135</sup> Laurence Steinberg "Interdependency in the family: Autonomy, conflict and harmony" in S Feldman and G Elliot (ed) *At the threshold: the developing adolescent* (Harvard University Press; Cambridge, MA, 1990) 255-276 cited in Sofie Kuppens and Eva Ceulemans "Parenting Styles: A Closer Look at a Well-Known Concept" (2019) 28 *Journal of Child and Family Studies* 168.

[268] I find that [Mary O’Dea], [Michael Johnson], and [Rodney Moyer], unfairly place the blame for the breakdown of the relationship between [Jane] and her Mother, mostly on [Jane]. They place great weight on the “gun incident” in 1993. [Mary O’Dea] said that this incident “permanently put an end to what was left of mum’s relationship with [Jane]”.<sup>136</sup>

[269] However I found, earlier in this judgment, that their evidence is based on what they were told, not what they personally witnessed. In my opinion their recollection of this incident is exaggerated and incorrect. It was my sense that this family saga has become distorted in its retelling with the passage of time.

[270] I do not accept the evidence of [Mary O’Dea], [Michael Johnson] and [Rodney Moyer], that the “gun incident” was of such importance.

[271] Although there is reference to [Jane]’s “... appalling and violent behaviour towards me and my late husband...” at [4.4] of [Anna]’s last Will, this was in reference to [Jane] being “... removed from our care as a teenager...” [Anna] makes a reference to “... subsequent behaviour...” but it surprises me that if the “shotgun incident” was such a significant event, there is no direct reference to this as a reason for excluding [Jane], or in Mr O’Brien’s notes.

[272] I accept that it appears that [Jane]’s Father, [Peter Johnson], was also critical of [Jane] at the time of the proceedings in the Children and Young Persons complaint proceeding; but I find the relationship between [Jane] and her Father was close and loving, through to his death.

[273] I find that notwithstanding the “shotgun incident” [Jane] and her Father had a warm and continuing relationship after he and [Anna] relocated from Auckland to Queensland, Australia. I find that the depth of Father’s affection for [Jane] was evidenced in a birthday card he sent to [Jane] in 1994.<sup>137</sup> Furthermore, in a card [Jane] received from her Father in September 1995,<sup>138</sup> where he enclosed \$300.

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<sup>136</sup> BOD vol 4 page 237 at [24].

<sup>137</sup> BOD vol 2 page 190.

<sup>138</sup> BOD vol 2 page 191.

[274] Furthermore, I find it is significant that [Jane]’s Father entrusted [Jane] with the existence of his long term extra-marital relationship with [Deborah Short]. In December 1999, [Deborah Short] on behalf of [Peter Johnson], posted a card to [Jane], which I earlier quoted.

[275] Therefore, I find [Anna]’s treatment of [Jane] was completely unjust and immoral by entirely excluding her as a beneficiary and failing to recognise [Jane] as a member of the [Johnson] family. In my opinion, [Anna], when judged with the standards of a wise and just testatrix failed to fulfil her moral duty to [Jane].

### **Quantum of [Jane]’s claim**

[276] Before the hearing, Mr Jenkin submitted:<sup>139</sup>

[Mary] and [Michael] have conceded early along there is a support claim but do not agree to an award of more than 10 per cent. Anything more would be unjustified.

[277] [Mary] and [Michael] in their Notice of Defence dated 24 May 2022 stated:<sup>140</sup>

6. The applicant’s violence towards her parents, if not disintitling behaviour in terms of s 5(1) of the Act, means that any breach of moral duty is minor and able to be remedied by a small award between 5% and 7% of the residuary estate, which the residual beneficiaries would consent to if the matter could be resolved now and without further costs being incurred.

[278] [Mary] deposed:<sup>141</sup>

From my point of view I agree that there has been a breach of moral duty and in that regard I put it on record that my brother and I have no objection to a small award in her favour.

[279] Mr Jenkins also submitted that the settlement with [Jane]’s children, [Evan Johnson] and [Mina Steel], means that they have received exactly the same as their cousins, namely \$50,000 each. He submitted that:<sup>142</sup>

the settlement with the grandchildren benefits [Jane] indirectly and ought to be taken into account. They have already received part of their grandmother’s estate.

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<sup>139</sup> Mr Jenkins submissions at page 22, at [78].

<sup>140</sup> BOD vol 4 pages 230-231.

<sup>141</sup> BOD vol 4 page 235 at [13].

<sup>142</sup> Mr Jenkins submissions page 23 para [79].

[280] However, I do not accept this submission as [Evan] and [Mina] were deliberately excluded as beneficiaries in their grandmother's Will, they had grounds to bring a claim under the FPA and it was settled out of Court along the same lines as their cousins in January 2023.

[281] Mr Jenkins also submitted that the Court must take into account, firstly; the competing claims by [Mary] and [Michael] and, secondly; the size of the estate which he submitted was not large.

[282] With respect to the issue of "competing claims" I accept Mr McCarthy KC's submissions that this is not relevant as provision was made for [Mary] and [Michael] in [Anna]'s Will.

[283] At the commencement of the hearing, I was advised that, after all of the gifts and [Mina] and [Evan]'s claims were paid out, as at the 17 July 2023 there was \$870,230.22 in the Estate Solicitors' Trust account. Therefore, the estate is not large.

[284] The quantum of the award must factor in the scale of [Anna]'s breach and the extent to which she was responsible for the estrangement.

[285] It is my analysis of the evidence that [Anna] in her role as an adult co-parent and joint guardian with [Peter], actively brought about the estrangement with [Jane] from [Jane]'s adolescent years without any insight or understanding about meeting [Jane]'s emerging needs.

[286] I accept [Jane]'s evidence that, between the ages of 4 and 5 years, she felt frightened of her Mother and was physically disciplined by her. I also accept that [Jane], at times, ran away from home and misbehaved at school. However, I do not find any evidence that [Jane] was physically violent to [Anna] and her Father.

[287] The independent evidence of Mr Guild in 1978 establishes that [Anna]'s relationship with [Peter] at the time of [Jane]'s admission to the psychiatric ward and the involvement of the Children and Young Persons Court, was fraught with marital

tension in their relationship. I remind myself that Mr Guild, after a number of interviews with [Jane] and two interviews with [Anna] and [Peter], concluded.<sup>143</sup>

There appeared to have been many instances of physical experiences of anger, serious division in authority and ineffective disciplinary measures.

[288] In my opinion, it was a significant judgment call on Mr Guild's part to conclude that it is not desirable for [Jane] to be returned to her home until the parents **have resolved the problems that exist between them**. If the adults in a family cannot cope with the tensions which exist it would appear to be unrealistic to expect an adolescent to cope.

[289] As I found earlier, Mr Guild did not identify who was specifically responsible for the "many instances of physical expressions of anger."

[290] Mr Jenkins, in his closing submissions, contended that if he had the opportunity to cross-examine Mr Guild, he would have put it to Mr Guild that [Jane] drove a wedge deliberately between the parents and, if there was in fact disharmony, it was [Jane] who caused it. Mr Jenkins pointed to the fact that [Michael] and [Mary] continued to live at home with their parents and Mr Guild's report does not explain why they had a good relationship with her Mother.

[291] However, Mr Guild did not interview [Michael] and [Mary] which is understandable as, clearly, they were not part of his brief.

[292] Mr Jenkins submitted that Mr Guild simply concluded that the relationship between [Jane]'s parents was "tense". However, I find that Mr Guild's findings go much further than this about the exact state of what was clearly a fragile relationship as, at the second interview, [Jane]'s parents accepted his recommendation to "seek assistance for their personal problems" and Mr Guild discussed with them "possible sources of help."<sup>144</sup>

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<sup>143</sup> BOD vol 2 pages 183-184.

<sup>144</sup> BOD vol 2 page 184.



[293] On the issue of cross-examination, both counsel earlier agreed that the hearing was to proceed without the need for cross-examination. In my opinion, that was the correct judgement call as the siblings' relationship appears to be damaged enough without the further ordeal of being cross-examined in Court.

[294] In any event, I understand Mr Guild is now deceased and I regard his conclusion to be therefore incontrovertible.

[295] I find that it was [Anna]'s personality, nature and mindset to perpetuate the estrangement with [Jane]. [Mary] described her Mother as being "quite petulant at times"<sup>145</sup> and she "could be difficult at times."<sup>146</sup> [Rodney Moyer] described his sister as "head strong."<sup>147</sup>

[296] Mr Jenkin in his closing oral submissions said that "the evidence showed that [Anna] was more of a disciplinarian whilst [Peter] was more of a forgiving person but they were still a "loving couple" who relocated to Australia together.

[297] However, there is no evidence to contradict [Jane]'s evidence that her Father continued a long-term surreptitious affair with [Deborah], a work colleague in Auckland, and their relationship even continued after he moved to Australia.

[298] There is telling evidence of [Anna]'s unbending and uncompromising position when she would not agree to [Jane] living with Uncle [Perry Johnson] and his wife [Celia] in [town E] in 1978, after [Jane] was placed at Allendale Girls' Home. Furthermore, [Anna] advised the social workers that she would not agree to [Jane] living with Aunty [Sarah], the paternal aunt (a person who became a life-long supporter of [Jane] throughout her adult life) in [town F].

[299] I find [Anna]'s judgement calls difficult to reconcile as these are critical times in [Jane]'s life. In effect, [Anna] was prepared to take the risk of her 15 year old daughter being cared for by "strangers" in foster care or in State Institutions rather

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<sup>145</sup> BOD vol 4 page 234 at [8].

<sup>146</sup> BOD vol 4 page 234 at [11].

<sup>147</sup> BOD vol 4 page 227 at [14].

than by members of the extended family. In my opinion, it reflects [Anna]'s unyielding character which was not responsibly child focused.

[300] However, the most striking illustration of [Anna]'s lack of insight or compassion towards [Jane] occurred when [Jane] (aged 20) fled to her parents' home for urgent support when [Evan] was 6 months old after being the victim of family violence. The evidence reveals that, upon arrival, [Anna] was not at home but when she did turn up she directed [Jane] to leave and not to "darken our doorstep with your illegitimate black bastard again."<sup>148</sup>

[301] In my opinion, [Jane] as a very young woman, had no option, given [Anna]'s unforgiving mindset, but to stand on her own feet which, to her credit, she did. However, it appears that [Peter] was a great support to [Jane] and [Evan] and, in 1984, he introduced her to [Deborah]. [Jane] said that she had lots of contact with her Father, [Evan] and her second child [Mina] right up until they moved to Queensland in 1994.

[302] Therefore, I find that [Anna] was primarily responsible for causing the Mother/daughter estrangement which started to unravel when [Jane] was only 5-6 years of age. I do not accept that [Jane] was primarily responsible as [Anna] was the 'adult' and Christie was the 'child.' I find that [Anna] perpetrated the estrangement right until her death. Yes, [Jane] was a rebellious and challenging child and adolescent but [Mary] and [Michael] have minimised the degree of parental dysfunction and disharmony.

[303] In my opinion, [Anna] had the grand opportunity to reach out to [Jane] in 2008 when [Jane] travelled to Australia to visit her dying Father in hospital. It was [Mary]'s evidence that, even then, [Anna] wanted nothing to do with [Jane]. [Anna] must have been aware of the ongoing relationship between Father and daughter yet she wantonly and deliberately excluded [Jane] from her Father's funeral, a significant life event in the [Johnson] family.

[304] Therefore, I find that [Anna] as the Will-maker consistently displayed a rigid and inflexible view by excluding [Jane] as a beneficiary based on her misconstrued

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<sup>148</sup> BOD vol 1 page 19 at [109].

and flawed perception of historic events. [Anna]'s decision to exclude [Jane] as a beneficiary was neither wise nor just.

[305] In determining the quantum of the award to [Jane], I remind myself of the Court of Appeal's statement in *Flathaug v Weaver* where it stated at [32]:<sup>149</sup>

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...

[306] In my opinion, [Mary] and [Michael]'s offer of 10% is woefully inadequate to remedy [Anna]'s breach of moral duty in all the circumstances of this case, bearing in mind the low size of the estate and to fairly recognise [Jane]'s position in the family.

[307] I did consider equal sharing but, on balance, this is still an unjust outcome as [Mary] and [Michael] have already receive inter vivos gifts of \$140,000 each from their Mother. Therefore, I find that Mr McCarthy's KC submission of dividing the residual estate into 1/7, with 3/7 going to [Jane], and 2/7 to each of the residuary beneficiaries, as the most just and fair outcome in the circumstances of this case.

### **Costs**

[308] The applicant has been successful. Unless counsel can agree between themselves then:

- (a) Each counsel is to file a memorandum of no longer than 5 pages by 8 December 2023 in respect of the issue of costs;
- (b) Responding memorandum of on longer than 3 pages may be filed by 18 December 2023; and
- (c) The determination in respect of costs will be made on the papers

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<sup>149</sup> Above n 109

**Orders**

[309] I order the residual estate be decided into 1/7:

- (a) With 3/7 going to [Jane], and
- (b) 2/7 to each of the residuary beneficiaries.

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Judge N.A. Walsh

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 27/11/2023