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**IN THE FAMILY COURT
AT PAKAKURA**

**FAM-2015-055-000072
[2016] NZFC 4275**

IN THE MATTER OF THE FAMILY PROTECTION ACT 1955

BETWEEN VIVIAN THOMAS
 First Applicant

 MARY JOHNSON
 Second Applicant

AND ROBERT JOHN BURTON, BARRISTER
 AND SOLICITOR, OF PAKAKURA, AS THE
 TRUSTEE AND EXECUTOR OF THE
 ESTATE OF ARTHUR JOHNSON LATE OF
 [LOCATION DELETED], RETIRED, AND
 THE NOMINATED TRUSTEE AND
 EXECUTOR OF THE ESTATE OF VIOLET
 JOHNSON LATE OF [LOCATION
 DELETED], RETIRED.
 Respondent

Hearing: 6 May 2016

Appearances: Mr NW Woods for the First and Second Applicants
 Mr A Gilchrist for the Respondent

Judgment: 25 May 2016

**RESERVED JUDGMENT OF JUDGE S J MAUDE
[Application for provision from estate - Section 4 Family Protection Act 1955]**

VIVIAN THOMAS v ROBERT JOHN BURTON, BARRISTER AND SOLICITOR, OF PAKAKURA, AS THE TRUSTEE AND EXECUTOR OF THE ESTATE OF ARTHUR JOHNSON LATE OF [LOCATION DELETED], RETIRED, AND THE NOMINATED TRUSTEE AND EXECUTOR OF THE ESTATE OF VIOLET JOHNSON LATE OF [LOCATION DELETED], RETIRED. [2016] NZFC 4275 [25 May 2016]

[1] Vivian Thomas and Mary Johnson both apply for provision from the estate of their deceased father, Arthur Johnson.

[2] Arthur Johnson died on [date deleted] 2014.

[3] Mr Johnson's will provided for division of his estate equally between his children Rod, Elsa, Malcolm and Alexander, excluding however his remaining children, the applicants.

[4] Vivian Thomas seeks provision to recognise her place in her family and, as her counsel put it, to provide restoration in respect of her place in a dysfunctional family having been physically and emotionally abused in it.

[5] Mary Johnson seeks provision to meet a need for maintenance, recognition of her place in her family and by way of restoration in respect of the effect her parents, and in particular her father's parenting, had on her.

[6] Neither applicant is critical of their siblings who benefit under their father's will.

The law

[7] Section 4 of the Family Protection Act sets out the Court's jurisdiction. It reads as follows:

4 Claims against estate of deceased person for maintenance

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

(1A) Subsection (1) overrides the Administration Act 1969, but is subject to section 4A.

- (2) Where an application has been filed on behalf of any person, it may be treated by the court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the application is served and all persons whom the court has directed shall be represented by persons on whom the application is served.
- (3) An application must be served on the following persons:
- (a) the spouse or civil union partner of the deceased:
 - (b) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death:
 - (c) a child of a marriage, civil union, or de facto relationship of the deceased, or a child of a marriage, civil union, or de facto relationship of any such child:
 - (d) a person entitled to apply who the Registrar of the court considers, in his or her discretion, ought to be served because there are special circumstances rendering that desirable:
 - (e) a person entitled to apply who the court considers, in its discretion, ought to be served because there are special circumstances rendering that desirable.
- (3A) Where an application has been filed, orders for representation must be made in respect of the following persons:
- (a) the persons referred to in subsection (3)(a) to (c); and
 - (b) any other person entitled to apply who the court considers, in its discretion, ought to be represented because there are special circumstances rendering that desirable.
- (3B) Except as provided in subsections (3) and (3A), it is not necessary to—
- (a) serve an application on any person; or
 - (b) make provision for the representation of any person on an application.
- (4) An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the court for advice or directions as to whether he ought so to apply; and, in the latter case, the court may treat

the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

Section 4(1) of the Family Protection Act establishes jurisdiction.

[8] In *Williams v Aucutt*¹ Richardson P at paragraph 52 of his judgment said:

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 the broad approach is required ... 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 ... is a matter of judgment in all the circumstances of the particular case ...

[9] The president also said at paragraph 58:

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

[10] In the same case Blanchard J said at paragraph 68 and at paragraph 70 the following:

It is to be remembered that the Court is not authorised to rewrite a will merely because it may be perceived as being unfair to a family member, and it is not for a beneficiary to have to justify the share which has been given. Rather it is for a claimant to establish that he or she has not received adequate provision for proper maintenance and support.

It is not for the Court to be generous with the testator’s property beyond ordering such provision as is sufficient to repair any breach of moral duty. Beyond that point the testator’s wishes should prevail even if the individual Judge might, sitting in the testator’s armchair, have seen the matter differently ... The Court’s power does not extend to rewriting a will because of a perception that it is unfair. Testators remain at liberty to do what they like with their assets and to treat their children differently or to benefit other once they have made such provisions as are necessary to discharge

¹ [2000] 2 NZLR at 479

their moral duty to those entitled to bring claims under the Family Protection Act.

[11] The Court of Appeal in *Fisher v Kerby*² pronounced at paragraphs 119 and 120 the following:

- (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 property, 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.

[12] The question arises as to the effect of ill treatment or neglect by a testator of a claimant and the extent to which that can extend the need for a claimant as to his or her need for restorative provision.

[13] Mr Woods referred me to three authorities relevant, he argued, to the consideration of ill treatment by a testator or testatrix, they being:

- *Lamb v Brock* 2013 NZFC 916730
- *Estate of Pauline* 2012 NZHC 1830
- *Estate of Donald Dreardon* 2014 NZFC 6590

[14] Decisions as to a testator or testatrix's moral duty and the extent that the Court intervenes in making provision for claimants must by nature involve a subjective discretionary and case by case analysis however the cases cited assist, if only to confirm, the Court's willingness to make additional provision for a claimant who establishes need resultant from mistreatment by a testator or testatrix.

² [2012] NZCA at 310

[15] In *Lamb v Brock* there existed established physical and psychological abuse toward the claimant who was one of two children of the deceased.

[16] The testator's will left \$5,000.00 or 1.38% of his estate to the claimant and the balance to her brother.

[17] The Court allowed the claimant's claim granting to her \$120,000.00 of a \$360,000.00 estate, or 33% of the estate.

[18] In the *Estate of Pauline* the claimant (one of three children) was left a 10% share of the estate, the balance divided equally between her two siblings.

[19] There had been a history of poverty, sexual abuse, neglect and estrangement.

[20] Where equal division would have allowed the claimant 33% of the estate Justice Whata observed as follows:

[22] While it might be said that a 10% allocation is generally appropriate in terms of psychological support,¹⁴ the adequacy of the allocation must be assessed on the facts of each case. When the estate is modest, it may be necessary to provide greater recognition in real terms.¹⁵ Disparate treatment might be a pointer to something having gone wrong (though not a reason by itself for intervention). But I also accept that there must be some care to acknowledge other factors that may have properly influenced an allocation, including the support provided by Christine to her mother, and Christine's apparent need. Her abuse is plainly a relevant factor also, as it is for Joan.

[23] Given the above, I consider that a 10% allocation, or \$13,652, was inadequate having regard to the size of the estate and the various competing considerations. A response by a parent to abuse must be real. Ten percent has the appearance of perfunctory recognition. More was needed to specifically achieve the purposes of recognition and support asseverated in the authorities. In my view an additional 10% better reflects the combination of need and the wider performance of the moral duty of repair in this case. While a percentage analysis can be deceiving, a 20% allocation appears to be at the upper end of the spectrum of cases.¹⁶

[24] I am conscious that the plaintiff has sought parity. I can understand why. Against a backdrop of parental abuse, it seems unfair to treat siblings so differently. But it is the responsibility of this Court to do only what is necessary to ensure that adequate provision is made for a child, in the context of a small estate, and having regard to the circumstances of that child. Beyond that, a testator is at liberty in our system of law to decide how to distribute the residue of a life's earnings in light of a complex matrix of influences.

Footnotes:

14. *Williams v Aucutt*; Family Law Service (online looseleaf ed, LexisNexis) at [7.903].

15. *Re Sutton*, above n 4.

16. *Henry v Henry*; *Re Sutton*; *A v B and Anor*; *Crosswell v Jenkins (supra)*; also *In re Harrison (deceased)* [1962] NZLR 6 (CA); *Re A (1988)* 4 FRNZ 668 (HC); *Flathaug v Weaver* [2003] NZFLR 730 (CA); *LJG v JAL FC Nelson F AM 2007-042-000500*, 18 November 2008.

Justice Whata granted to the claimant 20% of the estate.

[21] In the *Estate of Donald Dreardon* there were three surviving children and combined estates of mother and father to a value of \$6,356,193.30.

[22] The claimant's parents had left of the estate, property to a value of \$5,017,872.90 to one son.

[23] The Court considered claims made by the deceased's two other children and to grandchildren born to a deceased son of the deceased's.

[24] The Judge accepted that the deceased's children had experienced what she described as a "deprived and psychologically abusive upbringing".

[25] The Judge, dealing with a rather different factual scenario to that that this Court faces, awarded one child \$900,000.00 the other claimant child \$700,000.00 and \$100,000.00 to each of the two grandchildren.

[26] The case is not particularly helpful to me save for that it acknowledges the need to consider an abusive background.

[27] The percentages awarded to the claimants in *Lamb v Brock* and in the *Estate of Pauline* in my view offer little guidance other than to affirm provision (though falling short of parity as between siblings) by way of restoration for an abusive relationship.

[28] It is accepted that cases must not be determined on a guideline percentage basis.

[29] In the present case parity would give to each of the children of Mr Johnson 16.66% of his estate. That therefore the claimants in *Re Pauline* received 33% when one of three children is of little assistance to me in these proceedings.

[30] Notwithstanding the above I recognise that a wise and just testator who acknowledges his role in providing an abusive upbringing for a child should seek to remedy that in his will.

[31] What can be deduced from the above authorities is as follows:

- Each applicant to gain provision must show:
 - (i) A failure by Mr Johnson to exercise the moral duty of a just and wise testator.
 - (ii) The need for proper maintenance and support.
- An applicant's need to have recognition for emotional reasons as a child of a deceased's family is a need that is to be considered by the Court.
- There can be provision to an applicant for the purpose of restoration for the wrongs of parenting.
- The Court's role is not to rewrite a testator or testatrix's will as it sees fit but to if there is a failure to exercise an appropriate moral duty to provide to then make provision to the extent necessary to meet the established need.

Beneficiaries' positions

[32] The applicants' siblings who have been provided for equally by their father acknowledge that he breached his moral duty to provide for their sisters but say that the breach was only minor.

[33] Their position is that the Court should provide for the applicant's Vivian and Mary to the extent necessary to meet their need for recognition as children of their father but that no further provision should be made.

Their position is that no more than 10% of the estate should be received by either of them.

They do not accept that the relationship between Vivian and Mary and their parents and in particular their father was as made out by Vivian and Mary.

The estate

[34] At 16 January 2016 the balance held in the trust account of the estate of Mr Johnson was \$84,942.54.

[35] The 29 February 2016 valuation of the estate's house property situated at [address deleted] was \$985,000.00.

[36] The total value of the estate was therefore \$1,069,942.54.

[37] Mr Johnson's provision in respect of each of the named beneficiaries (Rod, Elsa, Malcolm and Alexander) was in round figures \$267,500.00).

[38] Rod, Elsa, Malcolm and Alexander offered to reduce their share to \$214,000.00 each by allowing the claimants 10% of the estate or in round figures \$107,000.00 each.

[39] The claimants seek \$200,000.00 each which would leave their beneficiary siblings with, in round figures, \$167,500.00 each.

The evidence

Vivian

[40] Vivian's evidence was of a wish to seek provision as a vindication for the burdens that she said she carried as the eldest child in what she described as a dysfunctional family.

[41] She described a childhood of being used as caregiver for her younger five siblings.

[42] She said that her father had made it plain to her that she was not a planned child. That she was not wanted.

[43] She also described the following:

I changed nappies. I washed and dried the clothes. I cleaned the house and helped Mum make dinners. I used to get up during the night to help Mum feed Rod and Elsa. Dad was not to be woken or disturbed.

I would bath the kids and feed them dinner before Dad got home. Mum and I tried to get the house ready so that he could have peace when he got home.

When I asked to go and play or said it was not fair that I had to do everything I could expect a slap around the head. This was not a light slap, this was a heavy hit with Dad's concrete hands.

Over the years I was hit regularly. The violence by Dad remains a feature of my childhood that can never be forgotten.

[44] Vivian described the dread she felt when informed that her mother was pregnant again [details deleted] knowing that, as she put it, she would be consigned to their further care.

[45] She described her father purchasing [business details deleted] when she was a teenager, he leaving the operation of it to his wife (Vivian's mother). She described that she would return from her own work providing then continued child care for her youngest siblings [details deleted] while her mother ran the [business details deleted].

[46] She described her mother unhappy and becoming an alcoholic.

[47] Eventually Vivian married and she and her husband went to [overseas location deleted].

[48] They acquired and ran [business details deleted] selling it to developers at good return.

[49] She described having to change her email address on many occasions due to abusive mails received by her from her father.

[50] She described suffering from depression and how her harsh upbringing had adversely affected her adult life.

[51] She and her husband, she said, returned to New Zealand regularly and maintained contact with her parents notwithstanding the conflict.

[52] She and her husband are now retired.

[53] She and her husband are now well off, being in 2013 in receipt of income of \$650,000.00 and, in 2014 and close to retirement, \$205,445.00.

[54] She and her husband's assets amounted at year end 30 June 2014 to \$2,225,419.55.

Mary

[55] Mary's evidence is of growing up in a dysfunctional family environment with a controlling, angry father.

[56] She described that from her perspective that relationship continued through adulthood.

[57] She described being shunned to a degree by her parents, orchestrated as she saw it, by her father.

[58] Her mother, she said, became an alcoholic.

[59] She described her mother's deterioration in health [details deleted] and her having cared for her for about a month while she had radiotherapy prior to her return home to [location deleted] where she and her father lived and then her eventual death.

[60] Her description was of estrangement at times from her parents and siblings but reunion and shared care during her mother's ill health and death.

[61] She purchased from her father in his lifetime a bach adjacent to her parents' [location deleted] home.

She acknowledged that the property was purchased at a discounted price but saw its sale to her as one designed to release cash to her cash-strapped father of necessity.

She described that the bach had caused her unhappiness being as it was next door to her parents and that control of her by her father eventually led her to sell it.

[62] She has described raising her daughter Chloe singlehandedly following separation from Chloe's father when she was aged 2 and having modest earnings throughout her life.

[63] She still cares for Chloe who has [details of medical condition deleted].

[64] She accepts that she is not in financial need.

[65] She earns approximately \$1,770.00 per month net of taxation against expenses of \$2,324.00 and has two residential house properties (one tenanted) and a net asset position as at 31 March 2015 of \$483,000.00.

Rod

[66] Rod deposed to his father being a hard task master.

[67] He said Vivian and Mary failed in their evidence to mention the good times.

[68] He and his siblings were, he said, shocked at their father's will not providing for Vivian and Mary and pointed out that he and his siblings had offered settlement.

[69] His description was however of his elder sisters being motivated by resentment and, unlike the younger four siblings, not respecting their parents but judging them and failing to maintain a relationship with them.

[70] He and his wife own a home with equity of approximately \$240,000.00 and other assets amounting to approximately \$52,000.00.

[71] His annual income is approximately \$65,000.00.

Alexander

[72] Alexander described a good upbringing.

[73] He described his father as a hard but fair man.

[74] He lives in a de facto relationship and has a 21 year old son.

[75] He has a home with asset value of approximately \$430,000.00 and earns income of approximately \$62,000.00 per annum.

Malcolm

[76] Malcolm described a good relationship with his parents.

[77] He described estrangement from Vivian since his parents' death and his attempt to explain his father's will.

[78] He described his parents as intelligent, perhaps strongly opinionated, but fair and reasonable people.

[79] He described his father as being angry and lashing out during the illness that led to his death.

[80] He described his sister Elsa's care for his parents through their illnesses as unconditional; she, he said, putting her life on hold for them.

[81] Whilst respecting his parents' wishes he believed that Vivian and Mary should receive recognition.

[82] He rejected what he described as a character assignation of his father.

[83] He lives in a de facto relationship with four children (three adults and one aged 17).

[84] He holds company shares, does not own real estate, and has an income of approximately \$52,000.00 per annum.

Elsa

[85] Elsa described estrangement from Vivian and Mary for most of her adult life because of the conflict, as she saw it, caused between them and her parents.

[86] She is surprised by the criticism levelled at her father and commented that it had not been mentioned in the preceding 50 years.

[87] She said:

Mum was her own person. Whilst Mum enjoyed a drink I am not qualified to determine whether she was an alcoholic. If Dad was the control freak that is alleged then Mum could not have been able to afford smoke or drink.

[88] She disagreed that Vivian had regularly visited New Zealand. Contact between Vivian and the family, she said, was virtually zero.

[89] She described her father doing silly things in part due to concern about his wife and also due to health issues and dementia.

[90] She described an outburst by Vivian the day after her father's funeral. That, if true, would not stand to her credit but it is not for this Court, without cross-examination, to determine the truth or otherwise of it. It (the allegation) perhaps does confirm the fractured relationship within the family.

[91] Her presumption (put not more strongly than that) was that Vivian and Mary's exclusion from their father's will was due to 15 to 20 years of conflict caused by them with their parents.

[92] She described Mary financially assisted purchase of the bach next door to her parents at [location deleted], sold by her parents to her beneath value and claimed that her father had always been willing to assist her with improvements.

[93] She described how her father spiralled out of control in the last two months of her mother's life. Her father did silly things including posting private things about her mother on Facebook. She accepted sending what she acknowledged was an email that now makes her disgusted and ashamed in response to her father's postings. It was critical of her father. She states that it was in retaliation, sent on impulse and not reflective of her true feelings. What the email and the Facebook postings no doubt do indicate at least is that this family had not been functioning well and that likely some history lay behind that.

[94] Elsa is married with three children, two adults and one aged 19.

[95] She earns \$26,000.00 per annum.

[96] She and her husband own a property with an equity of approximately \$460,000.00 coupled with other assets at value of approximately \$150,000.00.

Consideration

[97] The reflections of Vivian and Mary contrast significantly with those of their siblings.

[98] The Court did not have the benefit of hearing the parties examined as is customarily the case in respect of family protection cases.

[99] The picture painted by Vivian and Mary is one of significant psychological abuse and in Vivian's case, physical abuse coupled with an upbringing that when put together with their father's behaviour during their adult life and his lack of provision for them in his will, would plainly make out a case for provision.

[100] The picture painted by Elsa, Rod, Alexander and Malcolm however is of a hard but fair father who in conjunction with his wife provided a normal upbringing for all children. There is acknowledgement by them that when unwell at the end of his life Mr Johnson became angry and difficult. The picture painted by them would not be of an out of the ordinary family where older children experienced family life with parents struggling financially and all experiencing difficult times but then with younger children reaping the benefit of their parents' growth in prosperity.

[101] The picture painted by the younger children beneficiaries suggests the need for provision to restore family relationships for Vivian and Mary but not restorative provision as to mistreatment.

[102] There is a significant conflict between the evidence of Vivian and Mary on the one hand and their siblings on the other hand.

[103] I turn therefore to examine the evidence.

[104] It is difficult not to turn to the email sent by Elsa, as she put it, in anger on 21 March 2014 to her father. It read as follows:

I have thought long and hard about sending this email, I didnt want to lower myself to your standards but perhaps it is time you were told some hard facts. The only poison in this family is you.

I cannot sit by and watch you spread your venom amongst the family any longer, you really have no idea what damage you have caused over the years with your disgusting emotional blackmail...

Obviously you have too much time sitting on your own stewing about how hateful you feel against us.

One by one you have pushed us away – for what ever reason we still have to wonder! We are not bad people we are all respectable hard working human beings who have made our own way in life and have our own beautiful families – which, you could have been part of if only you had given us the chance. We have learnt such a lot from you – ‘what not to be to our own flesh and blood’. we will not despise them for what they have achieved in life – we will not be bitter and twisted because they have achieved more in life than we could afford, we will nurture them and encourage them and only hope for the absolute best for them, they are our next generation we have bought them into this world and we will give them credit for whatever they wish to do in life and whatever they achieve.

Do you ever wonder why – over all these long years, with the large family you have and the friends you have made that the only family and friends you have now is you?

How can you say all those mean nasty malicious things you say about your own family? I dont understand. I am amazed that we are of the same blood, and without my siblings consent I speak for them also, because I know them well enough to know that they would NEVER think of their own families the way you think of us.

The messages you have posted on Facebook are so malicious and hurtful, do you actually have any idea what you are saying.....? It is stuff only a crazed person would say about his own family and the fact you post it on facebook for people to see is down right embarrassing! – well at least for the sane in mind. Do you realise it makes you a laughing stock!. Your facebook ‘friends’ see you as a mean nasty evil old man who HATES his family, including his wife, who’s reputation and integrity you have depleted... is it not enough that she is terminally ill and is only on this earth for a short matter of time...

The fact that you criticize the appearance and dress of anyone, including family is laughable, have you looked in the mirror lately – YOU could be mistaken for a tramp living on the streets.!

Please do not bother to reply email to me or any of my siblings, we have all blocked you from our emails, we have had enough of your blackmail. Our lives go on..... happily!

[105] It is difficult to put the words aside as not reflective of a sense of truth at the time.

[106] The words do corroborate Mary and Vivian’s description of their lives.

[107] Mr Johnson’s email to Vivian approximate to his wife’s death also corroborates the description given by Vivian and Mary. It reads as follows:

Out of the emotional bullshit and talk facts, your mother as been a piss-head for a life time a liar and schemer, for the last four years we have been through exactly the same procedure as we went through two weeks a ago,

she ought to get an Oscar time over, now this will knock your socks off, remember when we took the kids out for dinner she went ballistic, when we gave Aaron \$200 for his wedding ditto. Give him twenty, then we went to the hospital to see Briana and I gave her a kiss she played up for months, jealous little cow, Aaron's wife above all, that's when I asked Claire not to come down to the beach, I don't know your knowledge on biology when a couple get married the mixing of blood-lines and distribution of genes, but most of the mothers go to the daughters, which we've already seen evidence of, but out of all this turmoil I'm proud to say Iv got the most beautiful grandsons one could ever wish for. but that mental cow as made sure I don't see Aaron, I know what you are going to say but she's got a tumor, half the people in N.Z. Have one but they don't keep feeding it every week, and get her pathetic family all crying around her. not one of you have come up with one constructive bit of advice just think about it if she was really sick she would'nt bounce back in two days, its identical to what she as done over the last four years, but that do not matter you are all so biased against me, honestly everywhere we go we are a joke, as Violet fallen over again she must have been on the piss the hospitals are of the same mind apart from the tumour they discovered. but as long as she as got a screwed up family like you lot come running and believe any bullshit she tells you why not she as the life of the Queen waited on hand and foot. you've hurt me so much, if I never see you again it'll be to soon...p.s. that husband of yours can he not speak for himself, I showed him the hand of friendship but his demeanour said everything, not much loss I'm sure...

[108] I have little doubt that the chronological placing of these siblings in their family affects their perception of events.

It is likely that Vivian and Mary see a factual scenario that played out for them through glasses tinted by sadness and that therefore their spin on events is seen by Elsa, Rod, Malcolm and Alexander as exaggerated and depressive.

[109] There is no doubt some merit to the view held by Elsa, Rod, Malcolm and Alexander.

[110] The reality however is that those who have experienced an abusive environment do tend to see things more negatively than those who have not.

[111] Mr Gilchrist for Rod, Elsa, Malcolm and Alexander urged upon me that the Facebook and email communications produced by Vivian and Mary which do present a very bleak picture were all produced over a period of time when Ms Johnson was dying and Mr Johnson in turn died.

[112] He urged that the relationship between siblings and parents not be judged on that window of time alone but over, as he put it, the 63 years of Vivian's life lived with her parents.

[113] Ms Johnson fell ill and began radiotherapy in February 2014.

[114] She died on [date deleted] 2014.

[115] Mr Johnson died on [date deleted] 2014.

[116] The Facebook and email communications that have been produced cover a period from [details of time period deleted].

[117] There is no doubt that they are deeply hurtful and reflective of an absolute breakdown of normal father/children relations.

[118] There is a need to refer to some of the emails:

The emails

[119] Flowing from Mr Johnson's 20 February 2014 email, Elsa in a posting to Vivian said:

Just when you think that perhaps the nutty old man is doing good and has mums interests truly at heart there is a bombshell... I got a phone call from Malcolm this morn, so I knew something was up. Dad had posted an awful message on Facebook to Diana, telling Diana that she (mum) does not deserve any kind words, that she has been a drunken cow all her life ...

[120] On 22 February from Vivian to Elsa:

Hi Elsa, Just heard from Fiona and her and Alexander have just been down to see Mum. The old man went off and called me a hooker and Tom is my pimp. He also said Alexander should have died [details deleted] and Mum was crying. ...

[121] On the same day Elsa replied to Vivian:

Hi Viv, it is just so awful – how could he say those things about Alexander, and where is he coming from to say those absolutely ludicrous things about you! WTF!

It makes us more determined than ever to go down there – he is trying to overpower all of us – to keep us away, god knows what would happen tomorrow but we are there for Mum NOT him

[122] Elsa on 5 March posted:

Hey sisters,

Yip – it was just a matter of time before he went off on another rage... Here's the latest that he posted earlier today.....

“Big helping of reality, to the disbelievers. Breakfast menu rice bubbles-banana, 1 rasher of bacon, 1 egg, 1 slice of bully beef. Does this sound Like a meal for someone on her last breath, should She get run over by a charging elephant well of Course that's my fault, so any of you just coming down To make trouble fuk-off and leave us alone We have managed without you for sixty odd yrs, im Sure we can manage the rest of our time...”

[123] On 20 March 2014 Mr Johnson emailed Vivian:

I'm not sure if you have enough intelligence to know the meaning, prior to you coming over we corresponded pretty well, but your shallowness soon surfaced when you met the family the poison soon got to you, not one intelligent question did you put to me, you know full well you had no intention of coming down here to see us, twelve months ago we ran out of time to come down, this time it was the turn of events that we met over the hospital, and there you are dressed up like a tart off [Kings Cross] have you no shame or no brains, even Mom was ashamed, you did not go over there to see mom it was a ego trip, no wonder your daughter does not take any advice off you what a pair of fuking idiots.... PS. I suppose its so easy to forget if you have no brain to start with...

[124] On 20 March after being informed by Vivian of Mr Johnson's email Elsa said:

... He is pathetic! We all know that. Our bond is stronger than his ridiculous shallow words.

[125] On 28 February 2014 Elsa to her sisters:

... I hate to be the bearer of negativity, but there was another fb message today.....

“Food for thought. Met an old mate of mine. Arthur you look rough, I know I've been looking after a (sick cow for years) I said what

would you do. Shoot the fuking thing other wise the herd will be contaminated...”

Might need to read it a few times to make sense of it, but again very nasty...

He is just so awful, feel like we need to do something but treading on eggshells around mum right now just to keep her happy – as he knows it. Feel so powerless....

[126] On 1 March 2014 from Elsa to Mary:

Yeah, I told her in hospital that if she went back home it would be harder for us to visit her, but – I guess it is the only place she knows – it is her home. (as much as we HATE it) she wants to be there, with all her familiar tings. Sad! Just missing the people that care for her the most.... Being kept away from evil scary man...! (not funny...!) ...

[127] From Elsa to Vivian and Mary on 6 March 2014:

... He is the one that has all the time in the world but doesnt give a shit! It is an inconvenience to him to be driving his sick wife to the hospital....., different story when [details deleted]..... God I hate that man, I get so wound up whenever I start on him, I must stop that because it is wasting precious energy, and I feel myself getting very negative. Wish he would just fall over in his garden – preferably over his newly planted spring onions.....the end!

[128] On 17 March 2014 Elsa to Mary and Vivian:

Anyway – I hate that FOB, and how dare he go on about his wonderful day crawling the pubs when mum is going through hell trying so hard to be so brave!..... arghh! So while she was trying to call him – all afternoon, he was out socialising – bastard!

[129] A common thread in the emails between siblings that I have not recorded is description of him, particularly by Elsa, as “FOB”. I sought clarification from counsel who advised that their instructions were that FOB was short for Fucking Old Bastard.

[130] The issue that arises as I consider the evidence given of a long and abusive relationship between Vivian and Mary and their father and then the 2014 emails and Facebook entries is:

- Does Mr Johnson’s behaviour in 2014 and his children’s perception of it reflect only his growing ill health and inability to cope with his wife’s

illness and death followed by his own or does it reflect and indeed corroborate the evidence of Vivian and Mary?

[131] If it corroborates the evidence of Vivian and Mary then in my view not only has Mr Johnson failed in his moral duty to provide for Mary and Vivian (something that Elsa, Rod, Alexander and Malcolm acknowledge) but it also strongly indicates lives of emotional deprivation reinforced by Mr Johnson's failure to provide for them such justifying provision not simply for reasons of confirming Vivian and Mary's place in the family but also by way of restoration.

[132] The sequence of emails and Facebook communications centre on a period of time when siblings pulled together after their mother's diagnosis of cancer and spending approximately a month living with Mary while receiving radiotherapy.

[133] There can be no doubt that this period was a stressful time for all concerned, including both parents.

[134] What I do observe from the emails and Facebook entries is:

- (a) Vitriolic comments by Mr Johnson.
- (b) Comments by Vivian which describe not the moment but a more general view of her father.
- (c) Frequent observations by Elsa that her father is a Fucking Old Bastard.
- (d) No contradiction by Elsa of the adverse comments made by Vivian, rather affirmation of them.

[135] The will executed by Mr Johnson that excluded Vivian and Mary was executed in November 2004 some nine years prior to the email and Facebook entries that I have referred to indicating a fractious relationship and determination by Mr Johnson to exclude Vivian and Mary well prior to the onset of his ill health.

[136] The will was executed against legal advice given that it would lead to Family Protection claims.

[137] Mr Johnson's Facebook entries are similar in context to Vivian's description of a father who:

- (a) Beat his mother's father in England (described in the evidence).
- (b) Made it plain to Vivian that she was not a planned child.
- (c) Hit Vivian regularly.
- (d) On the evening of his wife's death, as described by Vivian, began an argument with Malcolm and attempted to punch him.

[138] While it is perhaps not unexpected that Mary might support her sister's evidence (they were both left out of their father's will) she did not take the opportunity to embellish her affidavit evidence with a suggestion that she too had been physically abused rather stating that she had not been.

[139] It may well be that the experience of Elsa, Rod, Malcolm, and Alexander was somewhat different to that of Vivian and Mary growing up.

[140] They grew up in a family's chronology not in the initial cash strapped years in [location 2 deleted] but for the large part were raised in the years the family spent on a house property in [location 3 deleted] when their family had a tennis court and a swimming pool (age details deleted).

[141] Vivian was largely, she and Mary describe, their caregiver.

[142] While I accept that with Vivian and Mary both describing depression that it is likely that their perception or recall is a different one than of their younger siblings, the critical reality is that the 2014 email and Facebook records do not stand alone but sit in context with Vivian and Mary's evidence and even more critically the reality

that Mr Johnson felt so strongly with no apparent recorded justification in 2004 that he did not include Vivian and Mary in his will.

[143] Further, I note that in Elsa's 21 March 2014 email to her father she specifically referred to his damage to the family "over the years".

[144] There is no evidence of estrangement by Vivian and Mary rather continued contact, albeit at a lesser level than their siblings, with their parents.

[145] Indeed in the 1990's Mary allowed her home to be used as security and guaranteed at \$60,000.00 a loan to her father when he was in financial difficulty.

[146] Further, in 2002 Mary acquired the [address 2 deleted] property next to her parents' house to release cash to her father.

[147] It was put to me that she received a cash gift of \$30,000.00 to assist in the purchase and that is borne out in the evidence.

[148] Mr Woods for Mary urged that that be seen in the context of a concession to achieve the sale due to financial pressures. I cannot reach that conclusion because of a settlement statement produced showing that the \$30,000.00 concession was made by way of formal gift, but what the transaction shows is that there was no estrangement and indeed in so far as the \$60,000.00 loan guaranteed by Mary is concerned, a willingness to help her father.

[149] I reach the clear conclusion that the evidence of Vivian and Mary as to physical abuse (Vivian) and psychological abuse (Vivian and Mary) is true.

[150] Without assessment I cannot lay the blame of Vivian and Mary's asserted depressions on their father, though I can conclude that the result of the abuse reinforced in 2014, and confirmed when knowledge of the 2004 will was announced, would have had a profound effect upon them.

[151] I am satisfied that in the context the precedent authorities that I have been referred to, that both Mary and Vivian are entitled to provision from their father's estate in respect of:

- (a) Recognition of their place in the family.
- (b) Restoration as a result of their emotional deprivation.

[152] Vivian has no need for financial provision. Her financial wellbeing is significantly greater than her siblings.

[153] I am not satisfied that Mary's financial circumstances are markedly different to her other siblings (Vivian excepted).

[154] The question for me is what should the provision for Vivian and Mary be?

[155] I must remind myself that provision is not to achieve parity, it is to meet a displayed need.

[156] Both Vivian and Mary have been marked out, without reason, for exclusion.

[157] Both have suffered at the hands of their father.

[158] I do not view a 10% award or in round figures \$107,000.00 as sufficient in the context of their younger siblings each receiving \$214,000.00.

[159] In *Williams v Aucutt* the outcome was a 10% award for a claimant in recognition of place in family, however as I have already indicated it is not for the Court to reach conclusions based on precedent percentages.

[160] Nor can I extrapolate from the decisions in *Lamb v Brock* and *The Estate of Pauline* that I have referred to, that a 20% award is appropriate where an abusive background existed.

[161] As I had already indicated the 20% award for one of three children is quite a different position than a 20% award for one of six children.

[162] I find it difficult where no justification is observable from the evidence or the will of Mr Johnson to not consider that parity achieves justice, however I observe the words of Justice Whata that I have referred to above and note that parity is not the objective of the Court, rather the making of provision for a claimant that meets a displayed need.

[163] It is not for the Court to deny a testator or testatrix the right to differentiate between his or her children within the boundaries of what a morally wise and just will writer would write.

[164] In my view, the discriminatory hands of inequality dealt to Vivian and Mary would justify a higher award than their siblings but for the need for me to recognise the right of Mr Johnson to divide his estate unequally.

[165] The appropriate balancing of the greater need that Vivian and Mary display than their siblings against the right of a testator to provide unequally for his children leads me to the conclusion that equal division between these siblings is appropriate.

[166] I am mindful that in youth Mary was treated less unfairly than Vivian.

[167] In adulthood, however, Mary suffered the ignominy of receiving an invoice for seven days spent staying with her parents after surgery to remove a tumour and being invoiced by them for board and flowers. It is difficult to weigh the effect of that treatment with the role that Vivian played as an older child physically hit by her father and deprived by circumstances of a normal childhood and normal out of school activities.

[168] Mary received what appears to have been a \$30,000.00 gift helping her to acquire the [location deleted] property that she purchased next door to her parents; however, it was acknowledged that that was a purchase designed to assist in getting

cash to her father. She herself said that she found the experience of having a neighbourhood property unpleasant leading to her sale of the property.

[169] Weighing all of Mary and Vivian's evidence I determine that they should be treated equally.

[170] The result is that all six children are to share equally in their father's estate, the share that I otherwise would have allowed Mary and Vivian reduced to recognise their father's right to provide for them to have a lesser share.

[171] In the above circumstances there is not a need for me to order that interest accrue on the provisions made for Vivian and Mary.

[172] I reserve leave for counsel to file submissions as to costs, Mr Wood within 21 days of the date of this judgment and Mr Gilchrist in reply within 14 days thereafter.

S J Maude
Family Court Judge

Signed 25 May 2016 at pm