EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2021-070-000651
[2024] NZFC 7308

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
AND	
IN THE MATTER OF	THE ESTATE OF [GERALD HAYNES]
BETWEEN	[ALICIA NASH] Applicant
AND	HENRY JOHN BRANDTS-GIESEN as Executor in the Estate of [GERALD HAYNES] First Respondent
AND	[ANDREA HAYNES] Second Respondent
AND	[VINCENT HAYNES] [HEATHER JOYCE] Third Respondents

Hearing: 11 June 2024

Appearances: G Angus for the Applicant
D Durovich for the First Respondent
G Brant for the Second Respondent
L Dixon for the Third Respondents

Judgment: 5 July 2024

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO A CLAIM UNDER THE FAMILY PROTECTION ACT]

[1] Mr and Mrs [Haynes] married in May 1967. They have four children:

(a) [Alicia Nash], born [date deleted] 1968.

(b) [Caroline Haynes], born [date deleted] 1970.

(c) [Vincent Haynes], born [date deleted] 1974.

(d) [Heather Joyce], born [date deleted] 1975.

[2] On [date deleted] August 2020 Mr [Haynes] passed away. He was survived by his wife and his four children. Mr [Haynes] left a Will dated 19 June 2019; probate of the Will was granted to Mrs [Haynes], [Vincent], [Heather], [Caroline] and the former family accountant Barrie Wayne Price on 23 November 2020.[1]

[3] Pursuant to his Will, Mr [Haynes]:

(a) Gave Mrs [Haynes] his personal effects and his share of the contents of their home and motor vehicles and any boat and associated equipment (save some nominated chattels that were bequeathed to [Vincent]).

(b) Gave his interest in his and Mrs [Haynes]' principal place of residence[2] to his trustees to hold in trust and to permit Mrs [Haynes] to have the free use and residence of the property for the rest of her life (with the power to sell and acquire a replacement property and/or invest any surplus proceeds, paying the net annual income arising to Mrs [Haynes] at the trustees' discretion).

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1 For ease of reference, given the shared surname of some of the children, I will refer to them by their first name in the judgment. Mr and Mrs [Haynes], however, will be referred to more formally out of respect for them.

2 Their principal place of residence was a property at [address 1]. The property was owned severally, with both Mr and Mrs [Haynes] owning a half share each.

(c) Upon Mrs [Haynes]' death, his half of their principal place of residence was to form part of the residuary estate.

(d) The residuary of Mr [Haynes]' estate was held on trust to:

(i) Pay his debts, funeral expenses and administration expenses.

(ii) To hold the net annual income arising to be applied:

1. Towards ongoing administration and taxation.

2. For the benefit of Mrs [Haynes] of such sum or sums as the trustees may in each year determine.

3. Any unexpended income was to form part of the residuary estate.

(e) On Mrs [Haynes]' death pursuant to his Will specific requests were made as follows:

(i) To pay [Alicia] a legacy of $100,000 and to her three children $25,000.

(ii) To pay the surrender proceeds of Mr [Haynes]' bonus bonds to [Caroline] and [Heather] in equal shares.

(iii) To pay [Caroline] and [Heather] legacies of $200,000 each.

(iv) To divide the residue then remaining equally between [Caroline], [Vincent] and [Heather].

(v) Finally, pursuant to the Will he forgave any loans or financial assistance provided to his daughters.

[4] At the time of his death Mr [Haynes]' estate comprised of the following:

(a) One half share in their principal place of residence at [address 1]. The CV for the property at the date of Mr [Haynes]' death was $800,000; the current CV is $1,008,000.

(b) One half share in a property at [address 2]. The CV for this property at the date of Mr [Haynes]' death was $2,000,090. The current CV is $3,180,000.

(c) One half share in the [location A] properties. These are a series of properties on the [road A] which, at the time of Mr [Haynes]' death, was in the process of being subdivided with the intention of selling the subdivided properties. The [location A] properties consisted of:

(i) A property at [address 3]. The CV for the property at the date of Mr [Haynes]' death was $395,000. The current CV is $550,000.

(ii) A property at [address 4]. The CV at the date of Mr [Haynes]' death was $395,000. The current CV is $550,000.

(iii) A property at [address 5]. The CV at the date of Mr [Haynes]' death was $390,000. The current CV is $550,000.

(iv) A property at [address 6]. The CV at the date of Mr [Haynes]' death was $672,000. The current CV is $910,000.

[5] The total value of those properties (using the CV value) as at Mr [Haynes]' death was $4,652,000 and currently is $6,820,000. Mr [Haynes]' half share is $2,326,045 as at the date of his death, and $3,410,000 currently.

[6] A company owned by [Vincent] and his wife, [company 1], owed to Mr and Mrs [Haynes] $2,011,066.64. [Company 1] has subsequently repaid that debt, and half of that debt, namely $1,005,533.32 forms Mr [Haynes]' half share, and is currently held on an interest-bearing trust account.

[7] The current value of the [location A] properties amount to $2,560,000. [Caroline] has obtained a valuation from Seagars of the [location A] properties on the basis that [road A] properties are subdivided, in accordance with the proposed subdivision, into 12 lots; Seagars' estimate is that the total value of the subdivided sections would range between $5,850,000 to $6,350,000. The mean value is $6.1 million, and potentially the estate's half share is $3,540,000. If the subdivision proceeds, then the value of Mr [Haynes]' estate would increase by an additional $1,770,000.

[8] Thus, Mr [Haynes]' estate, on the basis of the current CV values of the properties, together with the monies held by the independent executor in his trust account totals $4,415,533.32. If the Seagars' valuation is accurate, then that estate will potentially increase by Mr [Haynes]' half share of that increase of $1,770,000 bringing a total estate to $6,185,533.32.

[9] From that will need to be deducted Mr Brandts-Giesen's firm's legal costs, outstanding tax liabilities, and the costs of completing the subdivision. [Vincent] sets out the anticipated future costs (at least $200,000 plus GST) in relation to the subdivision at [26] of his 21 April 2022 affidavit.[3] There is also a refund owed to Mrs [Haynes]' for monies she has paid personally relating to expenses which should have been paid by the estate; those costs owed to Mrs [Haynes] are estimated to be around $160,000.

Independent Executor

[10] There had been ongoing disputes between [Caroline] and the other former executors almost since the date of Mr [Haynes]' death. On 10 April 2024 the High Court made orders removing Mrs [Haynes], [Vincent], [Heather], [Caroline] and Mr Price as executors of Mr [Haynes]' estate, and appointed Mr Brandts-Giesen as the independent executor in their stead. He is a partner at Dentons Kensington Swan, a law firm in Auckland. Ms Durovich, who appeared for Mr Brandts-Giesen at the hearing, advised that he is currently undertaking a cost benefit analysis to ascertain whether, taking into account the competing interests under Mr [Haynes]' estate and

[3] Bundle of Documents, vol 3-007.

resultant trusts, the subdivision should proceed or not. Thus, until Mr Brandts-Giesen makes that decision, the exact value of Mr [Haynes]' estate is unable to be ascertained. The ultimate value will depend on whether the subdivision proceeds, and the consequent sale price realised for the 12 lots of land, or for the unsubdivided parcel of land. [Alicia] has twice sought an adjournment of the hearing on the basis that the exact value of the estate could not be ascertained. For the reasons set out by both myself and Judge Blair the request for an adjournment was declined.

History of Proceedings

[11] Both [Alicia] and [Caroline] initially filed a joint application for further provision from Mr [Haynes]' estate on 22 November 2021. However, on 28 April 2023 [Caroline] discontinued her substantive claim. She has been subsequently ordered to pay costs of $33,800.00 following a decision of his Honour Judge de Jong in relation to her discontinued application.[4] Thus, [Alicia]'s claim for further provision from her father's estate is the only application before this Court and is the subject of the present hearing.

Breach of Moral Duty

[12] [Vincent], [Heather] and Mrs [Haynes] all agree that Mr [Haynes] breached his moral duty to [Alicia]. [Caroline] has taken no steps of late in the proceedings and did not participate in the hearing. It can be inferred from her earlier application and affidavit that she similarly agrees that Mr [Haynes] breached his moral duty to [Alicia].

[13] The sole issue in this case, therefore, is how that moral breach is to be rectified, if at all. In resolving that issue all counsel are now agreed that it is not necessary to know the exact value of Mr [Haynes]' estate. There is agreement that it is a relatively large estate, and that any variation to Mr [Haynes]' Will to reflect the Court's decision on the quantum necessary (if any) payable to [Alicia] to rectify the breach of moral duty can be easily met out of the existing assets of the estate.

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4 *[Nash] & [Haynes] v [Haynes] et al* [2024] NZFC 570.

[14] [Alicia]'s position, as set out by Ms Angus, is that [Alicia] should receive a percentage of the estate. On that basis, it could be argued that [Alicia] should not be finally paid out until a decision is made as to whether the subdivision is to proceed or not, and if it is to proceed, until the realisation of the sale of all of the subdivided sections. [Alicia] however seeks an immediate payment, arguing monies are available from the term deposit held by the independent executor in his firm's trust account. Presumably this is on the basis that the value of the estate should be calculated using a value assuming that the subdivision is to proceed, and the sale price realised will be that estimated by Seagars.

[15] Mrs [Haynes], through Mr Brant, and [Vincent] and [Heather], through Mr Dixon, submit that it would be wrong to rectify the moral breach by fixing a percentage payable to [Alicia]. Rather they submit that the Court must come to a determination of a figure which would be sufficient to rectify the breach, and that that can then be paid to [Alicia]. Additionally, they submit that in order to give effect to Mr [Haynes]' Will, any further amount due to [Alicia] should be paid, in accordance with Mr [Haynes]' Will, upon Mrs [Haynes]' death.

Issue for Determination

[16] Therefore, the issues that require determination are as follows:

(a) How to rectify the accepted moral breach by Mr [Haynes] and in particular:

(i) Is that to be rectified by the payment of a percentage of Mr [Haynes]' estate to [Alicia]; or

(ii) Is it to be rectified by the payment of a lump sum?

(b) Should the monies that [Alicia] receives be payable now, or upon Mrs [Haynes]' death?[5]

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5 In accordance with Mr [Haynes]' Will.

Factual Background

[17] During their lives, Mr and Mrs [Haynes] farmed in the Waikato on a property at [road B]. [Alicia] left school in the sixth form, initially working on the farm, but then training as a [profession deleted], with costs of her [professional] training met by Mr and Mrs [Haynes].

[18] [Alicia] met her husband [Derek Nash] in 1986. She fell pregnant when 18, and their daughter [Jill] was born in 1987, and their son [Danny] in 1990. The evidence is that [Alicia]'s marriage to [Derek] was not always a happy one. They first separated for a brief period in 1994 and [Alicia] returned to live with her parents at the family farm. The evidence is clear that Mr and Mrs [Haynes] supported [Alicia]'s decision to leave [Derek], [Alicia] said he had been having affairs.[6] However, in 1995 [Alicia] and [Derek] reconciled, moving to Australia where they lived until the year 2000 when they returned to New Zealand and lived in [location B]. Unfortunately, from around this time, [Alicia] and [Derek] made a series of financial and business decisions which ultimately resulted in significant financial loss.

[19] Firstly, they sold their home in [location B] and purchased machinery to produce [details deleted]. [Alicia] and [Derek] went into business with [Derek]'s brother [Jeremy]. Then a few years later [Derek] and [Jeremy] bought into another business with a Mr [Turner], [company 2]. That venture was not successful, and [Alicia], [Derek] and [Jeremy] bought out Mr [Turner]'s share of the business.

[20] In 2004 [Alicia], [Derek] and [Jeremy] purchased a rental property in [location B]. However, [Derek] and [Jeremy]'s relationship deteriorated, and [Derek] walked away from the property to keep the peace. Around the same time [Alicia] borrowed $60,000 from her parents to buy out [Jeremy]'s interest in the business; However, [company 2] did not prosper and was eventually put into liquidation. Mr [Haynes] agreed that [Alicia] did not need to make payment on the $60,000 loan until she and [Derek] were more financially secure. The evidence is that the loan balance had been reduced to approximately $45,000 by this time, and the balance outstanding was forgiven by Mr [Haynes] pursuant to his Will.

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6 Mrs [Haynes]' affidavit sworn 28 June 2022 at [29], Bundle of Documents 3-076.

[21] [Alicia] and [Derek]'s relationship subsequently deteriorated and they again separated; [Alicia] temporarily moved to Wellington in 2009 while [Derek] moved "up north" for work. Mrs [Haynes]' uncontradicted evidence is that [Alicia] told her parents that she wanted to leave [Derek] and that they were effectively living apart at that time. Mrs [Haynes]' evidence is that both she and her husband were happy for [Alicia] as they thought it was the best thing for her. They had seen her improve following this recent separation. This was communicated to [Alicia] by Mr [Haynes].[7] However, the following day [Alicia] phoned Mr [Haynes] back and told him that there was too much narcissism in the family and that they needed to simply let her get on with her own life.

[22] From August 2010 it seems that [Alicia]'s relationship with her parents deteriorated further. Essentially, [Alicia]'s evidence is that she would remonstrate with her father about what she perceived as her mother's shortcomings as a mother.[8] Mr [Haynes]' response was to defend his wife against what he perceived to be unfair criticisms from [Alicia].

[23] There is a difference of opinion as between [Alicia] and her siblings about whether their childhood was a happy one or not. [Alicia] describes her relationship with Mr [Haynes] as a child as being "very close" and "very happy, fun-loving".[9] [Alicia] however does not believe she had a good relationship with her mother.[10] She describes her mother as being physically cruel and as trying to drive a wedge between her and her father.

[24] [Vincent] and [Heather] deny that either of their parents were physically or emotionally abusive. [Heather]'s evidence is that they had a conventional rural upbringing[11] characterised by hard work, long days at times, but overall a carefree rural upbringing. [Vincent] and [Heather] described their mother as strict, but not unusually so, consistent with the style of parenting of their generation.

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7 Affidavit of Mrs [Haynes] dated 28 June 2022 at [53], Bundle of Documents 3-078.
8 [Alicia]'s affidavit sworn 19 November 2021 at [52], [55], [56], [57] and [64], Bundle of Documents 2-008–011.
9 [Alicia]'s affidavit sworn 19 November 2021 at [17] and [18], Bundle of Documents 2-003.
10 Ibid at [18].
11 Affidavit of [Heather] sworn 28 April 2022 at [17], Bundle of Documents 3-052.

[25] It appears on the evidence that [Alicia] did not see her parents, but her father in particular, between Father's Day 2010 and Mr [Haynes] being hospitalised in late 2013, early 2014. There were periods of telephone contact, but inter-dispersed with periods of no contact at all.

[26] Mrs [Haynes]' unconflicted evidence is that she and her husband saw [Alicia] twice during the last 10 years of Mr [Haynes]' life. Those occasions were while Mr [Haynes] was in hospital and there was a risk of him dying.[12] It appears that there was virtually no contact between [Alicia] and her father between 2015 and late 2019. In 2019 there was a limited amount of contact by phone and texts, but there does not appear to be any evidence that in-person contact resumed. That is significant as [Alicia] and [Derek], who by this stage had again reconciled, moved to [location C] in early July 2020. However, [Alicia] did not inform her parents of the move, and there is no evidence that [Alicia] made any effort to visit her parents in [location A]. Mr [Haynes] suffered a brain bleed on 8 August 2020, and [Alicia] saw him at the hospital on the day he died.

The Law

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

> **4 Claims against estate of deceased person for maintenance**
>
> (1) If any person (referred to in this Act as the **deceased**) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the court may, at its discretion on application so made, order that any provision the court thinks fit be made out of the deceased's estate for all or any of those persons.
>
> (1A) Subsection (1) overrides the Administration Act 1969, but is subject to section 4A.
>
> (2) Where an application has been filed on behalf of any person, it may be treated by the court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the

[12] Mrs [Haynes]' affidavit sworn 28 June 2022 at [58] and [84], Bundle of Documents 3-079 and 3-081.

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.

[28] The onus is on [Alicia] to prove that Mr [Haynes] is in breach of his moral duty as at the date of his death by failing to make adequate provision for [Alicia]'s proper maintenance and support. The approach to the assessment of "proper maintenance and support" is set out in a series of decisions of the Court of Appeal; namely *Williams*

v Aucutt,[13] *Auckland City Mission v Brown*[14] and *Henry v Henry.*[15] All counsel accept that these three cases set out the relevant and applicable law.

[29] The case law establishes a distinction between the terms "maintenance" and "support" as appear in s 4 of the FPA.[16] "Support" is wider than maintenance, and is considered in the sense of "sustaining, providing comfort".[17] It has been recognised that "support" is not simply financial support relating to economic needs, but also a recognition of belonging to a family, and of having been an important part in the life of the deceased.[18]

[30] In discussing the meaning of "proper maintenance and support" the Court of Appeal in *Williams v Aucutt* stated at [52]:

> In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty.

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

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

[32] It is important to draw a distinction between a broad approach when considering proper maintenance and support, and the approach of the Court in rectifying a breach, if it is found. The Court of Appeal in *Henry v Henry* with reference to *Williams v Aucutt*, stated at [58]:

> The conservative approach requires that the Judge makes the assessment of what is required on a basis which focuses on what is necessary to make adequate provision, but to do no more than that.

[33] More recently, the Courts have re-emphasised that the applicable principles have not changed, and the Courts are required to do no more than the least intervention

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13 *Williams v Aucutt* [2000] 2 NZLR 479.
14 *Auckland City Mission v Brown* [2002] 2 NZLR 650.
15 *Henry v Henry* [2007] NZCA 42.
16 Above n 4 at [52].
17 Ibid.
18 Ibid.

necessary to repair the breach of moral duty. In *Fisher v Kirby* the Court of Appeal reiterated this.[19] The Court stated that at [119] and [120]:

> The more recent decisions of this Court have re-emphasised what has always been understood: that mere unfairness is not sufficient to warrant disturbing a testamentary disposition and that, where a breach of moral duty is established, the award should be no more than is necessary to repair the breach by making adequate provision for the applicant's proper maintenance and support.
>
> The decisions of this Court from and including *Little v Angus* are properly viewed as a timely reminder that awards should not be unduly generous. But, in our view, neither should they be unduly niggardly, particularly where the estate is large and it is not necessary to endeavour to satisfy a number of deserving recipients from an inadequate estate. A broad judicial decision is to be exercised in the particular circumstances of each case having regard to the factors identified in the authorities.

[34] A useful summary of the key principles is set out in *Vincent v Lewis*; those principles are:[20]

> (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 deceased's bounty are relevant considerations.
>
> (e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.
>
> (f) Mere disparity in the treatment of beneficiaries not sufficient to establish a claim.
>
> (f) If a breach of moral duty is established, it is not for the court to be generous with the testator's property beyond ordering such provision as is sufficient to repair the breach.
>
> (h) The court's power does not extend to rewriting a will because of a perception it is unfair.
>
> (i) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the Family Protection Act, it is

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

> nevertheless an obligation largely defined by the relationship which actually exists between parent and child during their joint lives.

[35] This summary was cited with approval by the Court of Appeal in *O'Neill v O'Neill.*[21]

The Position of [Alicia]

[36] [Alicia]'s position is that a proper recognition of her father's duty to provide proper maintenance and support would be a payment to her of 25 per cent of the estate. In short, she is seeking that the Court rewrite the Will to provide for an equal distribution of the residue between all four children upon Mrs [Haynes]' death. Ms Angus was unable to point to any cases in which this has occurred. In *Brosnahan v Meo* Cull J held that the provision of one-third of the estate did not amount to adequate provision.[22] Her Honour increased the son's entitlement to one-half of the estate. However, *Brosnahan v Meo* involved an only child, and Cull J also took into account the promise of financial provision made by the deceased in his lifetime, the son's substantial financial contributions in the deceased's erratic and inexplicable behaviour towards the son. The facts of that case are an entirely different factual matrix to the present case. Ms Angus also references *Fisher v Kirby*.[23] I note that in that case the Court awarded the son $600,000, which amounted to 15 per cent of an estate of a similar value to Mr [Haynes]' estate.

[37] Ms Angus also urges me to take into consideration that [Vincent] and [Heather] had previously offered settlement on the basis of [Alicia] receiving 25 per cent. That offer was made on a "without prejudice basis save as to costs" but has become admissible evidence in these proceedings as it was referred to in the cost application in relation to [Caroline]'s discontinued applications.[24] The settlement offer was made early in the proceedings at a time when [Vincent] and [Heather] were attempting to avoid the necessity of a hearing. [Alicia] and [Caroline] rejected the offer at the time. Resolution of the quantum to rectify the breach of moral duty on the basis of equal sharing between [Alicia], [Caroline], [Vincent] and [Heather] is simply inconsistent

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21 *O'Neill v O'Neill* [2021] NZCA 585 at [16].
22 *Brosnahan v Meo* [2021] NZHC 79.
23 *Fisher v Kirby* [2012] NZCA 310.
24 Referred to at [11] above.

with the case law unless I determine that such a division is the only way to rectify the breach of moral duty. I am not bound to follow an earlier settlement offer proffered by [Vincent] and [Heather].

[38] It is also inconsistent with the views of Mr and Mrs [Haynes]. Their reasons for treating [Alicia] differently to the other siblings are set out in a letter dated 4 August 2013.[25] Those reasons were as follows:

> In giving instructions to our solicitor for new wills and reviewing the terms of our previous wills made in 2008, we have had to explain the situation that has arisen in relation to our eldest daughter [Alicia], and have been advised that we should document our reasons for treating [Alicia] differently in our wills from her two sister.
>
> She is married to [Derek Nash] who has never liked or got on with me ([Mrs Haynes]) and who has been an unfaithful husband to [Alicia] and who we also suspect of being a gambler. In short, he has been a difficult son-in-law to warm to.
>
> So, when [Alicia] told us she was leaving [Derek], we praised her for having the strength to do so and let her know that we thought she would be better off without him. However, when [Alicia] decided to stay in the marriage, she must have resented our expressions of encouragement and support for her to end the marriage and became very verbally abusive on the telephone to both of us on more than one occasion. That was in August 2010. She told us that she didn't need us or our money and has had nothing to do with us since.
>
> After that, when we posted off a birthday present to our grandson [Emmett] and no acknowledgement was received, our daughter [Heather] enquired of [Alicia] whether [Emmett] had got his present. [Alicia] confirmed that he had and that he had even written a thank you letter but that she had burnt it. We still keep in touch with [Alicia]'s older two children [Jill] and [Danny] who are now living independent lives but are no longer in touch with [Alicia] or [Emmett] (who presumably still lives with his parents).
>
> It is because of this estrangement and verbal abuse by [Alicia] that we wish to leave a greater share of our estate to our dutiful daughters. We do not wish to cut [Alicia] out of our wills altogether but also want to see some money go directly to [Alicia]'s children who should not suffer because of their mother's upsetting behaviour.

[39] [Alicia] in her evidence confirms that she burnt the thank you letter that her son [Emmett] had written to Mr and Mrs [Haynes].

[40] In exercising the discretion under the FPA, *Henry v Henry* is a reminder that:

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[25] Bundle of Documents, vol 3-178.

> …the Judge must remind him or herself that there is no basis for the Court to override the testamentary freedom of the testator or testatrix if that test [the claimant establishing that he or she has not received adequate provision for proper maintenance and support] is not met, even if it appears to the Judge that a fairer distribution of the estate would have been desirable.[26]

[41] Testamentary freedom is a significant matter that I need to consider. In *Williams v Aucutt* Blanchard J said at [70]:

> Testators remain at liberty to do what they like with their assets and to treat their children differently or to benefit others once they have made such provisions as are necessary to discharge their moral duty to those entitled to bring such claims under the Family Protection Act.

[42] Mr [Haynes] had very clear reasons, which he has set out in his 4 August 2013 letter, for treating [Alicia] differently to her siblings. It is significant that Mr [Haynes]' Will was signed in June 2019, just over a year before he died. By that time, Mr [Haynes] had experienced around four years of no contact from [Alicia], and a highly conflicted previous relationship in which [Alicia] waxed and waned around contact with her father. His reasons for treating [Alicia] differently from her other siblings were due to his recent and cogent experiences of [Alicia] immediately prior to the signing of his June 2019 Will.

[43] It is not for the Court to now determine that an unequal division is simply unfair,[27] and to rectify that unfairness by amending the Will to provide for an equal division as between the four siblings. To do so would fly in the face of all of the leading appellate authorities and is not rectifying the breach only to the extent necessary to rectify the breach and would require the Court to ignore Mr [Haynes]' testamentary freedom.

[Alicia]'s Explanation for the Inequality in the Will

[44] [Alicia] places the blame squarely at the feet of her mother for the breakdown in the relationship with her father. She describes a childhood in which she was singled out and treated differently from her siblings. It is clear that Mr and Mrs [Haynes] never approved of her relationship with her husband [Derek], but [Alicia] places the

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26 *Henry v Henry* at [55].
27 Note 24 above at (h) of the quote from *Vincent v Lewis*.

blame for this also at the feet of her mother, and accuses her mother of fuelling that antagonism, even when her father did not want the conflict to continue.

[45] While I have no doubt that there was a conflict of relationship between [Alicia] and her parents, I determine that the evidence before me establishes that Mr and Mrs [Haynes]' style of parenting would appear to have been no more than that which was normal in the 1970s, and in which physical discipline occurred with regularity. [Vincent] and [Heather] paint an entirely different picture of their parents, and while I accept that there is an age difference between [Alicia] and [Heather], [Vincent] himself does not describe the type of abusive style of parenting that [Alicia] does.

[46] This was a hearing conducted, as routinely occurs in FPA proceedings, on a submissions only basis. Justice Doogue in the substantive *Cresswell v Roberts* decision set out at [71] to [79] the approach of the Court in assessing disputed evidence when there is no cross-examination and where there is contested evidence.[28] Her Honour relied upon the approach set out by the Court of Appeal in *Basingstoke v Groot*.[29] I adopt this approach in considering this disputed evidence.

[47] In recognition of that fact that the evidence has not been tested through cross-examination, Ms Angus urged me to look at the totality of the evidence, including Mrs [Haynes]' affidavit which she acknowledges the pain and hurt that was caused. However, nowhere in the evidence does Mrs [Haynes] admit to the level of denigration and abuse that she is accused of, and in fact she denies it. What she does admit to is being a disciplinarian and a hard parent, and, as so often, I suggest, occurs with the first-born children, harder on [Alicia] as the oldest than the rest of the children. Mrs [Haynes] describes [Alicia] as "…a challenging teenager and she would get into trouble with [her father and I] but we loved her dearly."[30] Mrs [Haynes]' behaviour is certainly not at the high level of abuse that was present in *Black v Black*.[31]

[48] It is also clear to me that [Alicia] at times contributed to the conflict. There was a lengthy period where there was no face-to-face contact with her parents,

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28 *Cresswell v Roberts* [2022] NZHC 1265.
29 *Basingstoke v Groot* [2007] NZFLR 363 (CA); see in particular [39].
30 Bundle of Documents, vol 3-075.
31 *Black v Black* [2014] NZHC 1478 (HC).

including with Mr [Haynes], at [Alicia]'s insistence. When [Vincent] tried to broker a reconciliation so that the family could be together for Christmas, [Alicia] declined to do so. It is accepted on the evidence that her relationship with her father was fraught, and they would go through brief periods where they would communicate, but rapidly there would be a disintegration in their relationship and lengthy periods of no communication at all. [Alicia] and her family shifted to live in [location C], an easy drive to [location A]. Yet on the evidence it appears [Alicia] did not advise her parents that they now lived closer. This would have been an opportunity to try and repair the relationship.

[49] This is a case in which there is estrangement between [Alicia] and her parents. In relation to estrangement, Hardie Boys J stated in *Crosswell v Jenkins*:[32]

> 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…the need and the moral duty are compelling.

[50] On the facts before me it is my determination that while both [Alicia] and Mr [Haynes] were at fault, Mrs [Haynes] cannot be blamed for the breakdown to the extent asserted by [Alicia]. Additionally, it is my determination that in the later years of Mr [Haynes]' life, it was principally [Alicia] who contributed and sustained the breakdown through a combination of the factors I have referred to above. In particular, her failure to attend the family Christmas in 2019 when [Vincent] tried to bring the family together,[33] and her unwillingness to visit her father when she and [Derek] moved to [location C] are particularly significant contributing factors. These factors are examples of disentitling conduct by [Alicia], and are matters that I take into account, recognising that such behaviours do not justify the exclusion of [Alicia] from remedy for breach of moral duty.[34] However, as the Court of Appeal commented in *Flathaug v Weaver*:[35]

> That inquiry must, however, take full account of the limited nature of the relationship between the testator and the claimant…It was fundamentally different from the lifelong relationships which underpin claims in more conventional circumstances…it serves to emphasise that the duty owed to

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32 *Crosswell v Jenkins and Hall-Jones* (1985) 3 NZFLR 570 at 575.
33 Bundle of Documents, vol 3-002.
34 Thompson Reuters Family Law, Family Property, vol 2, (2008), FP4.04, p 4-292 (4/9/23).
35 *Flathaug v Weaver* (2003) 22 FRNZ 1035, [2003] NZFLR 730 at [41]

> provide both maintenance and support in present circumstances is of a materially lesser order than would arise between a parent and child who had shared a lifetime relationship.

Should the breach of moral duty be assessed by way of a lump sum or by way of a percentage?

[51] Ms Angus urges me to redress the breach by way of fixing a percentage of the estate that [Alicia] is to receive. In part, Ms Angus makes the submission because of the uncertainty around the value of the estate. This was certainly the situation faced at first instance in *Black v Black*, and on appeal the full bench of the High Court referenced their inability to make definitive findings about the net worth of the estate.[36] The High Court, in varying the first instance decision, divided the estate 50 per cent to the wife, and 50 per cent divided amongst the children, but in unequal shares as between the children. The facts of that case were different to this case in that *Black v Black* was a case in which Mr Black left everything to his wife, and the children challenged that finding.

[52] Ms Angus also referred to *Ormsby v Van Selm* where at [41] Katz J commented:[37]

> In *McKenzie v Thomas* the Court of Appeal said that it was preferable to repair a breach of moral duty by means of a specific legacy rather than a percentage of the estate that would fluctuate in value depending on the estate's value, leading to a non-principled rewriting of the will by requiring equal sharing.[38] Nevertheless it is apparent from previous cases that it is fairly common to make awards under the Act on a percentage basis.

[53] In that case Katz J overturned the Family Court decision and awarded the two daughters 30 per cent and 25 per cent respectively, which left the son 45 per cent of the value of the farm. It is significant as Katz J did not divide the farm equally between the three siblings; [Alicia] is of course asking the Court to do exactly that and divide the estate equally between the four siblings.

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36 *Black v Black* at [68].
37 *Ormsby v Van Selm* [2015] NZHC 2822.
38 Justice Katz then referenced *McKenzie v Thomas* CA120/02, 14 November 2002 at [16].

[54] Of significance, in relation to fairness and equal sharing as between siblings, Katz J stated at [39]:

> Given the very sad facts of this case, the temptation to re-write the will along "fairness" lines is inevitably a strong one which, in my view, the Judge likely succumbed to. The authorities are clear, however, that it is not for courts to re-write wills on fairness grounds. Further, there is no "presumption" of equal sharing amongst children. People are at liberty to do what they like with their assets and to treat their children differently, provided that they make such provisions as are necessary to discharge their moral duty to those entitled to bring claims under the Act.[39] The focus must be not on what the Judge thinks would be "fair", but rather on what provision is necessary for a claimant's proper maintenance and support, taking into account both their financial position and their entitlement to be recognised as a member of the family. Further, the court is required to do no more than the minimum to redress the breach of moral duty that has occurred.

[55] Therefore, Mr Dixon and Mr Brant urge me to simply fix a sum which is sufficient to remedy the breach of moral duty and to provide for [Alicia]'s maintenance and support. In Mr Dixon's submission it is irrelevant whether [Alicia] should receive a percentage of the estate as it is now or a percentage of the estate if it increases in value as a consequence of the subdivision. Rather Mr Dixon urges me to stand back and fix a sum which is sufficient to discharge Mr [Haynes]' moral duty to [Alicia].

[Alicia]'s Needs

[56] [Alicia] and [Derek] are not financially secure. Given their updated evidence I accept, as Mr Dixon submits, that their total household income is well above the average household income. However, they have significant debts outstanding, and no savings apart from [Alicia]'s modest KiwiSaver account. That can be contrasted with the position of Mrs [Haynes], [Vincent], [Caroline] and [Heather], all of whom are financially secure.

[57] Throughout their lives [Alicia] and [Derek] had been financially successful. However, as set out above following a series of decisions that they made together, they have in essence lost everything. The thrust of Mr Brant's submission was that [Alicia] and her husband have made a series of bad financial decisions, and they simply need to take the consequences of those decisions. The question I am faced with is what a

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[39] And in relation to the latter sentence Katz J referenced *Williams v Aucutt* at [70].

wise and just testator would do in circumstances in which three of the children are financially successfully and one is not. Inextricably linked to that issue is Mr and Mrs [Haynes]' distain for [Derek], his extra-marital affairs (which they have judged him on), and the troubles he has caused their daughter throughout her life.

[58] Mr and Mrs [Haynes] clearly struggled to comprehend why [Alicia] kept reconciling with [Derek] given these matters. In saying that, Mr and Mrs [Haynes] have been willing to help [Alicia] and [Derek] out when in a difficult financial situation. For example, they leant [Derek] and [Alicia] $65,000 to buy out [Derek]'s brother's interest in a business. Then upon Mr [Haynes]' death he forgave the balance of that debt.[40]

[59] I am in no doubt that [Alicia] has a greater need than her siblings. It is clear from Ms Angus' submission that [Alicia] is wanting monies sufficient to enable her to buy or all but buy a home. However, the cases, including *Ormsby*, make it clear that that is not a relevant consideration for the Court. Rather, the Court is simply required to interfere to the least extent possible, without being overly niggardly, to rectify any breach.

[60] An issue with fixing a lump sum payable now would mean that it would affect the sum of money held by Mr Brandts-Giesen from out of which he, as the independent executor, has a discretion to decide how to benefit Mrs [Haynes] out of the income of those monies. However, Mrs [Haynes] is, on the evidence, financially independent herself. She has her half share of the [company 1] loan repayment in excess of $1 million. The estate owes her roughly $160,000 for reimbursement of monies she has paid on behalf of the estate. She has a half share in the [location A] property, which she could sell and downsize. I suspect she will have no need to have recourse to the income from the monies held in the trust account of Dentons.

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[40] Although it is unclear whether this was a debt owned severely between he and Mrs [Haynes], and if so, then Mr [Haynes] could only have forgiven a half share of that debt, being the half share owed to his estate. However, if the debt was held jointly with Mrs [Haynes], then he of course could forgive the entire debt.

Should monies be payable to [Alicia] now or upon Mrs [Haynes]' death in accordance with Mr [Haynes]' Will?

[61] Mr Dixon and Mr Brant submit that the monies should be paid in accordance with Mr [Haynes]' Will. That is, any adjusted amount to recognise the breach of moral duty should be payable to [Alicia] upon her mother's death. In Mr Brant's submission to do otherwise would be an unjustifiable alteration to Mr [Haynes]' Will and would not amount to the least restrictive intervention. In submitting that an appropriate way to redress the difference is to fix a sum, Mr Dixon similarly submits it should remain payable upon Mrs [Haynes]' death.

[62] It is Ms Angus' submission that there are sufficient monies in the Dentons' trust account to pay out [Alicia] now without any harm to the estate assets, and, for the reasons set out above, without any detrimental harm to Mrs [Haynes]' independent wealth and means. [Alicia], she submits, has a need now. I suspect the true extent of that need was not known to Mr [Haynes] because of the breakdown in their relationship. He would have been aware however that she was in a difficult financial situation given their suspension of repayment of the loan from Mr and Mrs [Haynes].

[63] But a wise and just testator, in Mr [Haynes]' shoes, would have recognised the immediate greater need for proper maintenance and support of [Alicia] than that of her siblings. That recognition needs to be considered against the reasons of Mr [Haynes] for treating [Alicia] differently to her siblings, and a recognition of testamentary freedom. My determination is that a wise and just testator in Mr [Haynes]' shoes would have treated the siblings differently for the reasons advanced by Mr [Haynes]. But that should not extend to excluding [Alicia] entirely from the residuary of the estate. A wise and just testator in Mr [Haynes]' shoes, knowing of her immediate and greater need (compared to her siblings) for maintenance and support, would not have required [Alicia] to wait until Mrs [Haynes] dies before receiving her share. Just as Mr [Haynes] recognised the breakdown in the relationship through his unequal provision of the specific bequests ([Alicia] to receive $100,000, [Caroline] and [Heather] $200,000 each, and [Vincent] none), that should have also been recognised through an unequal share of the residuary payable upon Mrs [Haynes]' death, to the four siblings.

Discussion

[64] I have decided to fix a percentage that [Alicia] should receive. In this case the uncertainty as to what the estate will be worth, consequent upon Mr Brandts-Giesen's decision to proceed or not with the subdivision, is an important issue. Whilst my preference would be to fix a sum, the Court, in stepping into the shoes of a wise and just testator in Mr [Haynes]' situation, would be influenced by the size of the estate. That is, the estate is worth, in broad terms, around $4 million at present. The "risks" in fixing a sum now is that it may be that the Court might have decided to increase that sum if the estate in fact transpired to be worth in excess of $6.5 million. Given the uncertainty around the actual value of the estate the fairest way to remedy the breach is to fix a percentage.

[65] However, I determine that of the $1 million sitting in Dentons' trust account a payment to [Alicia] now of a sum is the least restrictive and reasonable intervention, and the alteration of Mr [Haynes]' Will to give effect to this is similarly reasonable. [Alicia] has immediate needs and debts that need repaying. She is clearly in a much more financially difficult situation than her siblings and she has a clearly greater present need.

[66] Pursuant to Mr [Haynes]' Will [Alicia] is to receive $100,000 upon her mother's death. [Vincent] and [Heather] suggest that be increased by $300,000, equating to a total payment to [Alicia] of $400,000 or around 10 per cent of the estate. They suggest that remaining 90 per cent will then fall for equal division between the remaining three siblings as per Mr [Haynes]' Will upon Mrs [Haynes]' death.

[67] Mr and Mrs [Haynes] set out their reasons for an unequal division as between the siblings, and why [Alicia] was to receive less. Their testamentary intention must be given effect to and deserves recognition. I also take into account the evidence that [Alicia] has contributed and at times furthered the lack of relationship between her and her father. Involving [Emmett], by destroying his thank you card to his grandparents was particularly egregious.

The Result

[68] My decision is that [Alicia] should receive, in recognition of Mr [Haynes]' breach of moral duty, his testamentary freedom and [Alicia]'s need for proper maintenance and support, 13 per cent of Mr [Haynes]' estate. That percentage is sufficient to repair the breach of moral duty. That is to occur by way of an immediate payment to her of $400,000, with the balance to be paid to her upon Mrs [Haynes]' death.

[69] Accordingly, I order that Mr [Haynes]' Will is to be varied as follows:

(a) Clause [5](b) of Mr [Haynes]' Will is to be varied to insert as follows:

> "…and apply the same, first …, secondly in the sum of $400,000 payable immediately to [Alicia], and then thirdly for the benefit of my wife…."

(b) Clause [5](c)(i) of Mr [Haynes]' Will is to be varied as follows:

> To pay to my daughter [ALICIA NASH] 13% of my residuary estate less the $400,000 she has received in accordance with [5](b) above, and to each…

Costs

[70] Counsel have foreshadowed there may be issues as to costs. Whilst [Alicia] has been partially successful, her rejection of the settlement offer of 25 per cent has required this matter to proceed to a hearing and I apprehend that [Vincent], [Heather] and Mrs [Haynes] might argue unnecessarily so. To that end I make the following directions:

(a) If [Vincent], [Heather] and/or Mrs [Haynes] wish to seek costs they are to file appropriate submissions with reference to the scale costs within 28 days of the date of this judgment.

(b) [Alicia] is to then have 21 days to file a response.

(c) Thereafter the registrar should refer the matter to me for a reserved chamber's decision as to the issue of *inter partes* costs (if any).

S J Coyle
Family Court Judge

Signed this 5th day of July 2024 at am / pm