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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2020-090-000498
[2024] NZFC 2717

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	KAREN CHRISTIANSEN Applicant
AND	JAMES RICHARD JACKSON as the executor of the estate of the late Christopher John Dodd Respondent
AND	MITCHELL RAY DODD Interested party

Hearing:	25 October and 2 November 2023 (with further documents filed to 21 November 2023)
Appearances:	M Keall for the Applicant S Judd for the Respondent (appearance excused) C McLean & W Prior for the Interested Party
Judgment:	1 March 2024

RESERVED DECISION OF JUDGE A M MANUEL

Introduction

[1] Chris Dodd died unexpectedly on 12 October 2019. The cause of death was an undiagnosed perforated ulcer. He was 55 years old.

[2] He left behind a de facto partner, Karen Christiansen, and his only child from a previous marriage, Mitch Dodd.

[3] In his last will dated 10 June 2010 Chris left his all estate to Mitch (the last will).

[4] Chris and Karen had made a property agreement under s 21 of the Property (Relationships) Act 1976 (the PRA) on 25 May 2017 (the property agreement). The property agreement set out what was to happen if their relationship ended on separation or death.

[5] Karen is not challenging the property agreement, but she is making a claim under the Family Protection Act 1955 (the FPA) against Chris's estate on the grounds that Chris breached his duty to make adequate provision for her in his last will.

[6] Although the terms of the property agreement prevent Karen from making a claim against Chris's estate, it is an established rule of law that parties cannot contract out of the provisions of the FPA.[1]

[7] The net value of Chris's estate is approximately $2 million.[2] Karen's net worth is approximately $2 million[3]. The issue is whether approximately $2 million is adequate provision for Karen and if not, how much Chris should have left her.

Chris and Karen

[8] When they met Chris and Karen were in their late 40's. They were a mature couple who had led full lives. They were both working full time and had built up assets over the years.

[9] Chris was an electrician who had worked for the same company for many years. His father, Raymond Dodd, had died and his mother, Doreen Dodd, was living

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[1] *Matthews v Phochai* [2020] NZHC 3455 at [38] citing *Gardiner v Boag* [1923] NZLR 739 (SC); *Parish v Parish* [1924] NZLR 307 (SC); *Re Julso* [1975] 2 NZLR 536 (SC); *Public Trustee v Dillon* ([1940] 874 (SC).
[2] See schedule1. It is not possible to be precise about the figures in either schedule 1 or 2 because no formal valuations were obtained for any assets and the schedules had some possible omissions.
[3] See schedule 2.

independently in her own home at New Lynn. His relationships with his mother and his son Mitch were close.

[10] Chris had been married twice before and also been in a long term de facto relationship. His first marriage, to Amanda Dodd, was brief and lasted about 7 months to June 1987. His second marriage, to Annette Dodd, lasted about 10 years to December 1998 and produced Mitch, who was born on [date deleted] 1994. After that Chris was in several relationships, including a de facto relationship which lasted for about six years, before he met Karen in 2012. At the time Chris was living in a property he owned at Titirangi. He also had other assets, such as a Kiwisaver fund and a collection of vehicles which included several classic cars. A mortgage over the Titirangi property had been paid off in full.

[11] On 10 June 2010 Chris made his last will appointing his lawyer, James Jackson, as executor and directing that after debts, funeral and testamentary expenses and any duties had been paid the residue of his estate was to be given to Mitch. There was also a charging clause. The last will was simple but effective.[4]

[12] Karen was working as an accountant. She had qualified as a chartered accountant in her twenties but never worked at an accountancy firm, preferring to work in businesses and change jobs every three or four years. For about five years from her late twenties to mid-thirties she had worked as a flight attendant and travelled the world. After an unhappy relationship ended in her late twenties, she had not re-partnered nor had any children.

[13] Over the years she earned the equivalent of about $120,000 a year in today's terms and built up assets, starting with a property in Massey which she purchased in her 20s with her brother Adrian. Later on she bought Adrian out. By the time she met Chris she had purchased a second property at Sandringham where she was living. The properties were held via a look through company named Pendragon Estates Limited which Karen had set up in 2006 for tax reasons. Karen also owned a Kiwisaver fund,

[4] Although it is described in this decision as a "last will" it is in fact the only will Chris is known to have made.

life insurance, bonus bonds and vehicles including a classic car collection of her own. Both Karen and Chris were car enthusiasts.

[14] In evidence Karen described herself as an independent person with a wide range of interests and activities, many of which she enjoyed with Chris after they became a couple. She said she was "in vibrant good health" and had been a life long runner. Her family members – father, mother, two brothers and their families – were all close and enjoyed good health too.

De facto relationship

[15] Karen moved into Chris' Titirangi property in September 2012. They set up a joint account to which they both contributed but otherwise kept their finances separate. Karen sold the Sandringham property and Pendragon received net sale proceeds of about $255,000. The Massey property was rented with the rent used to cover the mortgage and other outgoings.[5]

[16] In March 2015 Chris and Karen signed an agreement to buy a section at Mangawhai for $278,500. The purchase was funded with cash and a mortgage of $180,000. Karen says she contributed cash sums of $71,528 and $28,750. Mitch claims that Chris also contributed, and that the cash contributions were not only from Karen.

[17] The Mangawhai property was registered in both names. Both parties contributed to the mortgage payments. Karen says that by the end of 2016 the mortgage had been largely repaid, with lump sum payments of $95,000 on 12 December 2016 and $55,000 on 28 November 2016, both made by her.

[18] The parties then purchased a property at Kaiwaka for about $300,000, in the name of Pendragon, using the Massey property as collateral. Karen says that Chris did not contribute. A mortgage was raised to complete the purchase with both parties liable. The Kaiwaka property was rented out with the rent used to pay the mortgage and outgoings.

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[5] Details of the amount secured by the mortgage when the de facto relationship began are not available, but as at the date of the property agreement the amount secured was $212,000.

[19] Karen says that she and Chris intended to:[6]

> 28. …eventually pool our assets in retirement… to build our dream retirement home on my Mangawhai section complete with a veggie garden and fruit trees, with room for a pony for me and a large shed for Chris…
>
> …
>
> 30. … Because our retirement plans necessitated pooling all our assets our plans included our explicit agreement to leave the bulk of our estates to each other. We did not have any immediate plans to retire but decided to go ahead and make the necessary wills to facilitate the process in the long run rather than waiting until we actually retired.
>
> 31. …We periodically talked over and re-affirmed our commitment to our retirement plans including making wills, before and after the [property] agreement [was made]…

[20] Chris initiated the property agreement in 2017. By then the parties had been living together for more than three years.

[21] Karen says that although she and Chris "had their share of disagreements from time to time" they "enjoyed a comfortable loving relationship." Mitch was less positive and says his father wanted the property agreement made after "trust issues" arose over money matters. It is neither possible nor necessary for any finding about this to be made.

[22] Chris contacted his lawyer James Jackson in about April 2017 and Mr Jackson took instructions and prepared a draft. Chris discussed the draft with Karen. Some amendments were made. Karen instructed Michael Richardson to act for her and he provided the standard certificate confirming that before he witnessed her signature on the document, he had given her independent advice, and explained the effect and implications to her.

[23] Mr Jackson, whose firm Paddy Orr & Co had acted for Chris for many years, gave evidence in the proceedings. Mr Jackson produced two s 21 agreements from the firm's deeds department which had been made when Chris separated from Amanda and Annette. He gave evidence about the last will and the property agreement, both of which he had prepared. The full file for the property agreement was produced in evidence.

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[6] BOD pp 028-031.

[24] Mr Richardson did not give evidence. His file for the property agreement was not produced.[7]

[25] Karen says she had no input into the property agreement, although there are alterations and notes in her handwriting in Mr Jackson's file. There are handwritten notes made by Karen recording the details of her research about the PRA on the internet.

[26] Karen also says she was advised not to sign the property agreement by Mr Richardson, but there is no evidence from him to that effect. Mr Jackson says that if she was unhappy with any aspect of the property agreement no mention of it was made to him by Chris, Karen or Mr Richardson.

[27] Karen claims she signed the property agreement only to assuage concerns held by Chris after a difficult separation from Annette and because of Chris's verbal assurances that their retirement plans (including making wills providing for each other) were still in place. However, Mr Jackson says that he:

> … advised Chris that he could change his will but he wanted to leave it as he was. He said he wanted to leave his estate to Mitch, being his only child. I have no records and no recollection of Chris wanting to change his will at any time. Karen has given evidence that Chris intended to provide for her in his will. Chris did not convey that to me.

[28] Karen did not have a will of her own. She says that after the property agreement was made Chris prompted her to make one every so often, but she did not do so. When he died she still did not have a will.

[29] She says she did not see Chris' last will until after he died and when she did she:[8]

> 32. …was surprised and felt let down it had not been updated to make me the main beneficiary because Chris had been so clear about doing that. On further reflection I remembered I had similarly committed to making Chris the main beneficiary of my estate but despite his periodic reminders about sorting out a will, that job was still languishing on my to do list.

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[7] Correspondence was produced showing efforts to obtain the file, which seemingly came to naught.
[8] BOD p 029.

Terms of the property agreement

[30] The property agreement was in a standard form and used clauses derived from the precedents included in the Fisher text which would be familiar to any relationship property lawyer.[9] It included a pre-amble which recorded the date when the de facto agreement began, the property each party owned at the time, the fact that they were living in Chris' Titirangi property and details of relevant financial events over the course of the relationship. The stated intention was to resolve all questions about their rights and property under the PRA, including classifying both assets and income as their separate property.

[31] Chris' separate property was set out in schedule "A" to the property agreement as including any interest in any trust, the Titirangi property, bank accounts in his sole name, his Kiwisaver funds, his income (except for income paid into the joint bank account) and his vehicles, tools, household chattels and personal effects.

[32] Karen's separate property was set out in schedule "B" as including any interest in a trust, the Mangawhai property, her shares in Pendragon (Pendragon held the Massey and Kaiwaka properties) bank accounts, Kiwisaver funds, income (except for income paid to the joint account), vehicles, household chattels and tools, personal effects, life insurance and bonus bonds (the last two items were handwritten additions included by Karen).

[33] The property agreement had clauses providing for the replacement and intermingling of the separate property. No registered valuations were available, with the parties acknowledging that they had been advised to obtain them, but had declined to do so.

[34] Both parties acknowledged they had received independent legal advice and that the property agreement would be binding on them in all circumstances including:

> …the bankruptcy, taking of property in execution by creditors, separation (whether on one or more occasion), marriage reconciliation **or death of one or both parties.** (emphasis added)

[9] Fisher on Matrimonial and Relationship Property (2022).

[35] The parties acknowledged that they had "legal capacity", were of "sound mind" and signing the property agreement "voluntarily" with neither "under duress or undue influence." They acknowledged that the property agreement was "fair, just and equitable to them." They agreed to each pay their own legal costs.

[36] There were specific clauses providing for death, as follows:

> **Death**
>
> 14. Chris acknowledges and records that if after the date of this Agreement and before separation or the dissolution of the Relationship he dies, Karen shall have the right to occupy Chris's Home for a period of one year on the proviso that Karen continues to meet all out-goings for Chris's Home and permits the remainder to pass to the executors or administrators of Chris's estate.
>
> 15. Subject to the above clause:
>
> 15.1 Chris and Karen acknowledge and expressly agree that the provisions of this Agreement shall bind them and their respective executors and administrators, and that neither of them shall make any claims against the estate of the other pursuant to the provisions of Part 8 of the Act or any amendments thereto or Acts to be passed after the date of this Agreement or any other enactment, common law or equitable claim.
>
> 15.2 Chris acknowledges that it is Karen's wish that upon her death Karen's estates will pass in its entirety to the beneficiaries under her last Will and Testament and unless Chris is specifically provided for under the last Will and Testament, he will have no claim against her estate. Chris agrees not to lodge any claims against Karen's estate in respect of her property if he is not provided for under the last Will and Testament.
>
> 15.3 Karen acknowledges that it is Chris's wish that upon his death Chris's estate will pass in its entirety to the beneficiaries under his last Will and Testament and unless Karen is specifically provided for under the last Will and Testament, she will have no claim against his estate. Karen agrees not to lodge any claims against Chris's estate in respect of his property if she is not provided for under the last Will and Testament.

Aftermath

[37] Chris died when the parties had been in a de facto relationship for about seven years and about two years and five months after the property agreement was made. Karen continued to occupy the Titirangi property for a year after his death in terms of clause 14 of the property agreement. She then moved back to her Massey property,

where she is living to this day. She is now 61 years old. She has continued on in the paid workforce. There was no mention of retirement in her evidence.

[38] In August 2022 Karen sold the Mangawhai property and Pendragon received net sale proceeds of $727,392. The sale price of $756,000 was a significant increase on the $278,000 Chris and Karen had paid back in March 2015. Karen spent some of this on repaying a revolving credit facility and a loan from her father, vet bills, car repairs, house repairs and maintenance, legal fees and lump sum repayments of credit card and mortgage debts. By late 2023 the net proceeds of sale had been reduced to about $393,159.

[39] Mitch had been living and working in Northland with his partner Cherie Phillips. They relocated to Auckland after Chris died, partly to be closer to Mitch's grandmother Doreen, who is now 92 years old. When Karen moved out of the Titirangi property Mitch and Cherie moved in. Mitch is currently working as a fencing contractor. Other than his inheritance his means are slender. He is now 29 years old.

[40] It will come as no surprise to learn that the relationship between Karen and Mitch broke down in the aftermath of Chris's death. These proceedings were commenced in about September 2020.

Parties' intentions

[41] Karen's application under the FPA was premised on her claim that the terms of the property agreement did not reflect the parties' intentions if their relationship ended on death. Nor did Chris's last will. There are a number of difficulties with this narrative.

[42] First, Karen claimed that she signed and paid for her share of the costs of a legally binding agreement which included terms expressly contrary to her understanding of the parties' intentions if their relationship ended on death. Her evidence was that:[10]

> 41. Clause 15 of the property agreement seemed to say neither party would have a claim on the estate unless wills were executed to that effect. I was a

[10] BOD p 032.

> little concerned by that as we had agreed to make wills giving the whole of our estates to each other as part of our retirement plans and I wanted to be sure that Chris was still committed to that before proceeding with the property agreement.
>
> 42. Chris specifically addressed my concerns by making a point of reassuring me and mutual friends on several occasions I would be provided for when he died. At the same time, he was also telling me more specifically in private he was still committed to giving me the bulk of his estate and the balance ot Mitch.
>
> 43. I was happy with those reassurances and signed the property agreement. I was comforted when Chris continued to say he was leaving me the bulk of his estate and was checking in on my will making efforts every two or three months from the time of property agreement as I have mentioned.

[43] However it is unlikely that Karen would have signed the property agreement on this basis.

[44] Karen made six detailed affidavits in the proceeding.[11] It is apparent from her evidence that she is not only a qualified and experienced professional but an assertive, capable and confident person. She had worked in roles focused on money and finance and managed to navigate her way successfully in the world as a single, independent person. She had built up a property portfolio which would have involved her signing legal documents over the years. If Karen had been presented with a property agreement which was contrary to her understanding of the parties' intentions, and to the assurances which Chris was making to her, it is likely she would have negotiated different terms.

[45] Second, it is unlikely that Karen had little or no input into the terms of the property agreement. There are the alterations and notes in her handwriting in Mr Jackson's file. And the terms of the agreement represent a compromise on the part of both parties, with Karen giving up a claim to the Titirangi property and Chris giving up claims to the Mangawhai, Kaiwaka and Massey properties.

[46] Third, it is unclear why Karen would be given legal advice not to sign the property agreement. When it was implemented after Chris's death the property agreement effected a broad 50/50 division with both Karen and the estate ultimately

[11] Dated September 2020, June 2021, February 2022, September 2023 and November 2023.

retaining assets and liabilities worth approximately $2 million. This was a reasonable outcome in terms of the PRA, which in principle tends towards equal sharing.

[47] Fourth, while it is possible that Karen did not see the last will, it is likely that she knew about the terms and the implications under Clauses 14 and 15 of the property agreement. Karen's evidence is that she and Chris were very open with each other and she said this about their level of intimacy:[12]

> 7. Chris and I also spent a great detail of time talking especially when we went away on holiday as we tended to go away on our own. From those discussions Chris knew many things I did not discuss with anyone else …
>
> 8. Chris knew my life story. I knew his.
>
> 9. These were not stories that we shared in any detail with other people. We were both quite private in that way and I'm only revealing a tiny part of our conversations to show the kind of details we shared in private.

[48] If Karen knew what the last will provided and maintained that it needed to be updated to accord with the parties' intentions, it is surprising that she was not prompting Chris to update his last will, rather than Chris prompting her to make a will.

[49] Fifth, if Chris specifically considered updating his last will and decided against it, as Mr Jackson claims, and at the same time encouraged Karen in the belief that he was updating it "to make [her] the main beneficiary because Chris had been so clear about doing that", then he acted deceptively. The descriptions of Chris in the various affidavits suggest that this would have been quite out of character. None of the deponents had a bad word to say about Chris. He was remembered as a decent and dependable person who was loving and loved in return. He had long standing, positive relationships with his mother, his son, his employer, his friends and even his law firm. It seems unlikely that he would deceive Karen in this way, by saying one thing to her and doing another behind her back.

[50] Sixth, if Chris had deceived Karen, it is surprising that she does not express greater disillusionment with Chris or the relationship in her evidence. Instead Karen described Chris as "my kindred spirit and the only man I have truly loved" and

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[12] BOD p 107.

produced a series of 20-odd photographs to illustrate how happy she and Chris had been together.

[51] Seven, while Karen provided affidavits from three deponents (Katrina Donovan, Craig Stanley and Leo Tinsley) in support of her claim, their evidence did little, if anything, to assist her. Ms Donovan was a friend of Karen's who met Chris after the relationship began in 2012. Ms Donovan referred to a dinner in January 2019 with a discussion about wills. She said that when her own partner:[13]

> 6 …made a comment about leaving the whole of the estate to [his son] Jake …Chris said but hang on you have to make sure that Katrina is looked after. He then talked about his own situation and said that Mitch wasn't going to miss out but he had to make sure that Karen was looked after and would have a roof over her head if he died. It was not a particularly long conversation and the discussion quickly moved on to lighter subject matters.

[52] It does not follow from this comment that Chris intended to change his last will. He may have considered that in terms of the property agreement Karen would be looked after and would have a roof over her head if he died.

[53] Mr Stacey said that Chris had been a "good friend of mine for about 20 years: and that:[14]

> 13. My understanding is Chris and Karen had a "mine is mine and yours is yours, type property agreement." I can understand that because I know Chris was anxious to avoid another property separation no matter how small the actual risk of that occurring. He had a very difficult and expensive time of it when he was separated from Mitch's mother Annette.
>
> …
>
> 14. Chris spoke to me several times about pooling resources with Karen in retirement so they could have the house and lifestyle they wanted up at Mangawhai, but I do not recall any specific discussions about wills or estates.

[54] Mr Tinsley worked with Chris and they became friendly over the last five or six years of Chris' life. Mrs Tinsley said that Chris and Karen had:[15]

> 11 … their ups and downs like any couple but they were obviously committed to each other. They first told me about their retirement plans several years before Chris died … Their plan was to put their resources together and build their retirement home on a plot of land they had at Mangawhai.

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[13] BOD, p 185.
[14] BOD, p 315 – 316.
[15] BOD, p 319-320.

…

> 16. Chris and Karen both had their own assets when they got together but ended up living in Chris' s house in Titirangi. I know Chris felt like he lost out in the property division with his previous partner Annette and wanted to be 100% sure he wouldn't lose half his house if he and Karen ever split. I remember they did a property agreement a few years before Chris died but it didn't change the way they talked about their plans for Mangawhai …
>
> 17. The only discussion I recall having with Chris about wills happened a short while after my wife and I separated. I mentioned I was going to update my will to remove my wife and make sure my son was well provided for. Chris had been through a similar experience and mentioned that Mitch was well looked after
>
> …

[55] Neither Mr Stacey's nor Mr Tinsley's evidence confirm Karen's claim that Chris intended or promised to update his last will but failed or neglected to do so.

[56] In summary, Karen may have conflated the parties' intentions for money, finance and wills after they retired and begun to implement their retirement plans and pool their resources with their intentions for money, finances and wills before that happened. When Chris died the parties had not retired. They had not begun to implement their retirement plans. Nor pool their resources.

[57] Karen claimed that Chris's last will was to be updated before they retired and put their plans into action and suggests that the fact that it was not was possibly due to simple procrastination. I am unable to accept this.

[58] Karen's narrative is insufficiently coherent or cohesive. I find that the parties' intentions if their relationship ended on death were, as at the date of Chris' death, as recorded in the property agreement.

Relevant law

[59] The parties' intentions about their property is just one factor to be considered under the FPA. There are also other factors. Having made findings about the parties' intentions in this case, I need to return to the FPA more generally, and two relevant cases in particular.

[60] Section 4 (1) of the FPA provides:

> **S 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.

[61] The people entitled to claim include a de facto partner of the deceased living in a de facto relationship with the deceased at the date of his death and the deceased's child.[16]

[62] The words "proper maintenance and support" used in s 4(1) FPA were addressed by the Court of Appeal in *Williams v Aucott*, *Auckland City Mission v Brown* and *Henry v Henry*.[17] In each case the overriding principle at all stages of the Court's inquiry was held to be conservatism and respect for testamentary freedom. It was insufficient if "the individual Judge might, sitting in the testator's armchair, have seen the matter differently."[18] The Court is not to be generous with the testator's property.[19] Before disturbing the will the Court must be satisfied that there has been a manifest breach of moral duty by the testator.[20] If so, the adjustment must be no more than the minimum necessary to remedy the testator's failings.[21]

[63] *Williams*, *Auckland City Mission* and *Henry* involved claims by adult children but in *Wylie v Wylie* the Court of Appeal held that the same approach should apply to claims by widows and it follows that this also applies to a surviving de facto partner, such as Karen.[22]

[64] With regard to competing claims between a child of an earlier relationship and a surviving partner, the High Court in *Matthews v Phochai* stated that:[23]

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[16] Sections 3(1) (aa)-(b) FPA.
[17] *Williams v Aucott* [2000] 2 NZLR 249 (CA); *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA); *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.
[18] *Williams v Aucott* at [70].
[19] *Williams v Aucott* at [68].
[20] *Williams v Aucott* at [52].
[21] *Henry v Henry* at [54].
[22] *Wylie v Wylie* [2003] 23 FRNZ 156 (CA).
[23] *Matthews v Phochai* [2020] NZHC 3455 at [43]-[47].

> … claims by the partner have tended to be described as "paramount." That however has in each instance been an evaluation in the circumstances of the particular case.
>
> The approach has differed in cases where the testator married once only, compared to cases where the widow's claim has been in competition with that of children of an earlier marriage. In the former category (so not that found here), the testator's moral duty has been found in cases of a larger estate to take the form of an obligation to secure the widow in an anxiety-free standard of living by providing ownership of the fee simple in the matrimonial home, an annuity out of the estate, a capital award to cover expenditure, and a capital reserve.
>
> Where the beneficiaries are children of an earlier relationship however, the Courts have been slower to depart from older authority that the widow should not receive a capital award, preferring to make an award of an annuity and a life estate in suitable accommodation together, where necessary, with a smaller capital sum in the nature of a "nest egg". This is so that, as Beattie J put it in this Court in 1976, "the capital ultimately is preserved for the child and is not unfairly passed on to strangers in blood." Similar comments can be found in more recent decisions of the Family Court.
>
> Ultimately, the balance to be struck depends on the circumstances of each case. With both first and subsequent marriages and relationships, the extent of the testator's moral duty to the widow or surviving de facto partner will depend on factual circumstances such as, for example, the duration of the marriage, its nature in terms of the widow's role in bringing up the testator's family, managing the household, and acting as his partner in life, and their expectations as to how they would share their resources during their lifetime together. Those points, obviously, will need to be considered alongside the circumstances underpinning the children's "claim" to maintenance and support.
>
> Applying the above principles, where the parties agree at the outset they will maintain financial independence and each have their own families from prior relationships to support, this will be relevant in determining the quantum of an award and also relevant in deciding whether to take account of a claimant's support of other members of their own family.
>
> [footnotes omitted]

[65] The 2020 High Court appeal decision *Matthews v Phochai*, from which the above passages are cited, shares similarities with the present case. Ms Phochai was the de facto wife of the deceased, Mr Matthews. The relationship lasted about 11 years before he died in 2016, aged 71. Ms Phochai was nearly 60 years of age at the time of the hearing. Mr Matthews made no provision for her under his last will, leaving his estate to his children. He had been married twice before and had two children from his first marriage and one from his second. The children were all adults. The couple had made a property agreement under s 21 of the PRA in mid-2005 soon after their

relationship began. The property agreement provided essentially that the property and income which Mr Matthews brought to the de facto relationship would remain his separate property. Ms Phochai was working four days a week earning about $30,000 a year. She was living in the former family home with her two adult daughters and son-in-law.

[66] In the Family Court Ms Phochai's challenge to the property agreement had failed. She did not seek to revisit that decision on appeal. It was conceded there had been a breach of moral duty under the FPA by Mr Matthews. The question was whether the $1 million awarded to Ms Phochai in the Family Court was too much. The estate was worth approximately $3 million. Ms Phochai had a net worth of approximately $200,000, plus a car and household chattels. On appeal the award was reduced to $750,000 which was held to be sufficient for her to buy a cheaper property than the one where she was living, with enough cash, including her own income, and potential income from her family members, to support herself. Or, in the alternative, she could choose to retain the former family home with her family members paying rent.

[67] The result was informed by the existence of the property agreement and the fact that Mr Matthews had children from previous relationships with the High Court accepting a submission that:[24]

> … the [property agreement] must be relevant to an assessment of the amount required to remedy the moral breach. The parties had each agreed that they would be financially independent and would leave the relationship with only the assets they came in with, plus anything more they had acquired themselves.
>
> [The Family Court Judge] found the agreement became unfair with the passing of time, but not seriously unjust and therefore upheld it. It would seem wrong then to simply ignore the clear intent of the agreement in the context of fixing an award under the [FPA]. At the least, the award should be at the lowest end of any potential range.
>
> It also has to be noted that this was the third relationship for each of the parties and more relevantly, they each had children from their two previous relationships. As the Judge said, it is very common for older couples who have previous families to want their assets to go to their children and not (ultimately) to the children of a later partner …In cases such as this, provision of housing and trusts for life or even by way of rental may be more appropriate than a house being provided as a capital sum. It seems the case was not argued that way by either party, but those options should be reflected in a discounted capital sum.

[24] At [61]-[64].

> It is important to note that the agreement records the parties' joint intention. The intention of the testator alone (even if made clear at an early stage) would be of little relevance.

[68] In the 2021 High Court decision *Zhang v Guo & Anor* Mr Zhang was the de facto husband of the deceased, Ms Chai.[25] The relationship lasted about six years before Ms Chai died. Mr Zhang was in his mid-50s at the time of the hearing. The deceased made no provision for him. Ms Chai left $80,000 and her remaining estate to her son, Mr Guo. This included a residential property on the basis that Ms Chai's elderly mother would live with Mr Guo and be cared for. The deceased's half share in another property passed by survivorship to Mr Zhang along with $43,950 from their joint accounts. Ms Chai considered this to provide sufficiently for his interest.

[69] The High Court agreed, finding there was no breach of moral duty under the FPA. Ms Chai had not provided for Mr Zhang in her last will knowing that he would obtain sole ownership of the jointly-held property, which the Court took into account. There was no property agreement under s 21 of the PRA and Mr Zhang elected not to pursue a relationship property claim. He benefited to the extent of approximately $300,000 compared with an estate of around $1.1 million. He also retained a property held in his sole name. The High Court held that:[26]

> Mr Zhang undoubtedly played an important part in the last six years of Ms Chai's life. But her mother and son could reasonably be considered to have played a more important part in her life overall. With a six figure salary and additional unmortgaged property providing rental income, in addition to the property which passed to him by survivorship, Mr Zhang is not badly off. I consider it reasonable for Ms Chai to believe that passage of that property, subject to the mortgage, would sufficiently provide for him.

Result of application of law to the facts

[70] I find there was no breach of moral duty under the FPA by Chris towards Karen in his last will for the following reasons:

(a) the parties' de facto relationship was a third or fourth qualifying relationship for Chris and a second for Karen, and Chris had a child from a previous relationship;

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[25] *Zhang v Guo* [2021] NZHC 714.
[26] At [2].

(b) the parties' intentions were as recorded in the property agreement, which had been made less than two and a half years before Chris died;

(c) the provisions of the last will, which had been made about nine years before Chris died, had been reconsidered by him subsequently at the prompting of his lawyer, with no changes made;

(d) at 61, in good health, with no dependents, a net worth of approximately $2 million and a good income, Karen, like the de facto husband in *Zhang v Guo*, "is not badly off." She has a home and a rental property. She had sufficient from the sale proceeds of Mangawhai to repay the borrowings secured over both properties and still have a "nest egg", had she chosen to adopt that course. Since Chris died her resources have been sufficient to pay approximately $57,000 in legal fees, approximately $21,600 to repair one of her cars and approximately $107,000 to repair her Massey property.

[71] Karen's application under the FP A is dismissed. All things being equal costs are to follow the event. The parties are invited to reach agreement, failing which Mitch is to file a memorandum within 14 days, after which Karen is to have 14 days to reply.

Dated at Auckland this day of

A M Manuel
Family Court Judge

Schedule 1

Items		**Approximate values**
Titirangi property (one roof valuation)		$990,000
Buccaneer 4.8 boat (sold)		$18,000
Motor vehicles	- Ford Mustang	$45,000
	- Ford Galaxie	$40,000
	- Packard (sold)	$18,000
	- Toyota Corolla	$2,000
	- Holden HT	$3,000
	- Triumph Tiger motorbike	$11,000
Trailer		$2,750
Milford Investment		$252,507
Kiwisaver		$512,428
Tools		$50,000
Steel Sands Credit Union		$3,432
Kiwibank		$120
Payment from employer		$77,500
Contents		$50,000
Bonus bonds redemption		$2,508
Bonus bonds internet		$56
Steel Sands Credit Union		$3,432
Interest earned to 13 November 2023		$4,871
Liabilities		
Funeral expenses, estate admin costs, estate litigation costs, RWT on interest earned etc (distributions to Mitch of $215,197 excluded)		($112,536)
		$1,974,068

Schedule 2

Items		**Approximate values**
Massey Property (one roof valuation)		$840,000
Kaiwaka Property (one roof valuation)		$585,000
Mangawhai property (sold)		$727,319
Caravan (given to Karen by estate)		$0-$15,000
Kiwisaver		$200,000
Motor vehicles	- Triumph	$20,000
	- Sunbeam	$15,000
	- Jensen Healy	$15,000
	- Ford Falcon XR8 (given to Karen by estate)	$10,000
	- Tractor (given to Karen by estate)	unknown
Household chattels		unknown
Liabilities		
	Mortgage Massey	($164,000)
	Mortgage Kaiwaka	($247,000)
	Credit cards	($3,000)
		$1,998,319 - $2,013,319

* Proceeds of sale of Mangawhai reduced to $393,159 as at late 2023.

* Savings of $23,500 made ‘from other sources’ as at late 2023.