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

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IN THE FAMILY COURT
AT HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2022-019-000401
[2024] NZFC 7107

IN THE MATTER OF	THE ESTATE OF [WILMA DRUMMOND]
BETWEEN	[SAM DRUMMOND] Applicant
AND	[MIRIAM ROWAN] Applicant
AND	[HARVEY DRUMMOND] Respondent
AND	[BOYCE DRUMMOND] Respondent

Hearing: 27 May 2024

Appearances: Mr D Fraundorfer for [Sam Drummond]
Mr M Branch for [Miriam Rowan]
Mr W Patterson for the Beneficiaries

Judgment: 7 June 2024

RESERVED JUDGMENT OF JUDGE D A BLAIR

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[1] The applicants [Sam Drummond] and [Miriam Rowan] are two of eight children of the late [Wilma Drummond] ("[Mrs Drummond]") and the late [Cohen Drummond].

[2] [Mrs Drummond] died on [date deleted] 2021, leaving a last Will dated 23 November 2020. The applicants say the Will of [Mrs Drummond] did not provide for their proper maintenance and support and the Court should provide for their provision, pursuant to s 4 Family Protection Act 1955 ("the Act").

[3] The hearing proceeded by way of submissions only. There was not cross-examination of any party. Inevitably, the case reflects very different perceptions of [Mrs Drummond]'s adult children and different recollections or experiences of family history. I need to acknowledge those different perspectives from the outset.

[4] The executors will abide the decision of the court. There was no need for representation of the executors at the hearing.

The family and the scheme of the Will

[5] The eight children of [Cohen] and [Wilma Drummond] are all still alive. They are [Bud Drummond] (referred to within family as "[Bud]"), [Miriam Rowan], [Sam Drummond], [Harvey Drummond], [Rodger Drummond], [Janet Logan], [Lee Drummond] and [Boyce Drummond].

[6] [Cohen Drummond] died in 2002 and left a life interest in his half share of the family home on an acreage at [address 1] Hamilton to [Wilma Drummond]. When that property was subsequently sold, the half share owned by [Cohen]'s estate went to the eight children. [Mrs Drummond]'s half share was then available to her.

[7] [Mrs Drummond]'s Will dated 23 November 2020 ("the Will") provides:

(a) Personal chattels to [Harvey] to distribute.

(b) $10,000.00 to [Harvey Drummond] and his wife [Rosalin] in recognition of the care they have provided to their son.

(c) That the residual estate is paid equally to "the following of my sons namely" [Bud Drummond], [Harvey Drummond], [Rodger Drummond], [Lee Drummond] and [Boyce Drummond]. If one of those beneficiaries predeceased [Mrs Drummond] their share went to their children.

[8] The Will contains a clause reflecting [Mrs Drummond] having received legal advice on the provisions of the Family Protection Act 1955, "in particular with regard to my having made no provision for my children and understand the meaning of the provisions contained in that Act". [Mrs Drummond] states having given careful consideration to this and stated her belief that the Will is a proper distribution of the assets accumulated by her.

[9] The Will therefore contains no provision for either applicant or for [Mrs Drummond]'s other daughter [Janet Logan].

[10] [Janet Logan] is not an applicant and has filed nothing to engage with these proceedings.

[11] The five sons named as beneficiaries to the Will oppose any finding that the Will breaches [Mrs Drummond]'s duty to provide for maintenance and support of the applicants.

[12] Neither applicant asserts a case that they are in need of "maintenance". Instead, they focus on the Will not providing for their "support" by way of recognition as children of the deceased.

The Law

[13] Section 4(1) and (2) of the Act provides:

> **Claims against estate of deceased person for maintenance**
>
> 4 (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.

(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.

[14] Section 5 of the Act provides:

5 Terms of order

(1) The court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the court to disentitle him to the benefit of such an order.

(2) In making any such order the court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

[15] In *Little v Angus*[1] the Court of Appeal summarised the approach for a claim under the Act as follows:

> The inquiry is to be whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events.

[16] As noted in *Ormsby v Van Selm*[2]*:*

> Although the phrase "moral duty" does not appear in the statute itself, it has, in effect, been grafted onto the statutory wording and is now recognised as being too deeply imbedded in the administration of the Act to be open to judicial reconsideration (noting re *Z* [1979] 2 NZLR 495 at 506).

[1] *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.
[2] *Ormsby v Van Selm* [2015] NZHC 2822 Katz J at para 29.

[17] In *Ormsby v Van Selm*, Her Honour gave the following summary at paragraph 30. The footnote numbering set out in the extract are modified to correlate to the foot numbering used within this current decision.

> A number of cases, including the decisions of the Court of Appeal in *Williams v Aucutt;*[3] *Auckland City Mission v Brown*[4]*; and Henry v Henry*[5] have informed the modern approach to claims under the Act. The key principles for present purposes (focussing in particular on quantum issues) are as follows:
>
> (a) "Proper maintenance and support" requires a broad approach that includes the need to recognise the child as a valued member of the family and other social and ethical factors. "Support" is a wider term than "maintenance" and 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.[6]
>
> (b) "Proper" denotes something different from "adequate" and the amount of an award is accordingly not to be measured solely by the need of maintenance which would be so if the court were concerned merely with adequacy.[7]
>
> (c) Assessing what provision will constitute proper support is a matter of judgment in all the circumstances of the particular case. Where there is no economic need it may be met by a legacy of a moderate amount. On the other hand where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.[8]
>
> (d) 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 than in cases where the need is more of a moral kind.[9]
>
> (e) The size of the estate and any other moral claims on the deceased's bounty are relevant factors.[10]
>
> (f) In assessing whether the deceased has made appropriate provision for the claimant's proper maintenance and support, and what would be

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[3] *Williams v Aucutt* [2000] 2 NZLR 650.
[4] *Auckland City Mission v Brown* [2000] 2 NZLR 650
[5] *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.
[6] *Williams v Aucutt* at [52].
[7] *Fisher v Kirby* [2012] NZCA 310 at [111], citing *Williams v Aucutt* at [38] and *Bosch v Perpetual Trustees Company Limited* [1938] AC 463 (PC) at 479.
[8] *Williams v Aucutt* at [52].
[9] *Henry v Henry* at [58].
[10] *Little v Angus* at 127.

required to remedy a failure, the court should do no more than the minimum to redress a testator's 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.[11] Testators are 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 claims under the Act.[12]

(g) The Court's power does not extend to rewriting a will because of a perception that it is unfair. Nor is disparity in the treatment of beneficiaries sufficient, in itself, to establish a claim.[13]

(h) Although awards should not be unduly generous, nor 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.[14]

[18] The applicant refers to the Court of Appeal in *Flathaug v Weaver*[15]:

> The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system and underpinned by the law. The Family Protection Act recognises that a parent's obligation to provide both for the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is, however, an obligation which is largely defined by the relationship which exists between parent and child during their joint lives.

[19] Counsel for the second applicant adds to the *Ormsby v Van Selm* reference above, with reference to paragraphs [44] and [45] of the decision:

> [44] In *Williams v Aucutt*, the Court discussed the issue of awards to children whose entitlement under s 4 of the Act is on a family recognition basis, as distinct from economic need. They discussed the Court of Appeal case *Re Shirley,* in which a bequest of less than 10 per cent of the estate was a "relatively modest provision" but was "adequate provision" to recognise the child's moral claim.
>
> [45] In a number of other cases awards to children on a family recognition basis alone, as distinct from economic need have tended to be in the range of 10 per cent to 20 per cent of an estate, depending on the particular factors involved. Where the estate is small, and there are many competing moral claims, then obviously an award is likely to be at the lower end. If an estate is large, there are few competing claims, and the breach of moral duty is particularly egregious, larger awards are often made. …

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[11] *Williams v Aucutt* at [70]. see also *Auckland City Mission v Brown* at [36]; *Henry v Henry* at [55] and [58].
[12] *Williams v Aucutt* at [70];.
[13] *Re Leonard* [1985] 2 NZLR 88 (CA) at 92; *Williams v Aucutt*, *Henry v Henry* at [55].
[14] *Fisher v Kirby* at [120].
[15] *Flathaug v Weaver* [2003] NZFLR 730 (CA) at [32].

[20] Counsel for the beneficiaries asks the Court to note paragraph [39] of the *Ormsby* decision:

> 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. 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.

[21] Counsel notes Blanchard J in the concurring judgment in *Williams v Aucutt*:

> We are not concerned in this appeal with a claimant's need for proper maintenance. It is conceded that there is none. The claim is for proper support in the form of recognition both of membership of the family of the deceased and of contributions by way of assistance to and support of the deceased. Such a claim is one capable of being brought under the Act. In part is seeks support from the estate in return for support which has been rendered, albeit without any promise of return such as would fall within the Law Reform (Testamentary Promises) Act 1949. The question remains, however, whether a need for proper support is made out in the particular circumstances. It is not to be assumed that merely because a claimant, no matter what his or her personal substance, has been a dutiful child of the deceased, it will necessarily be appropriate to order some provision or further provision. In some cases a mere acknowledgement of the relationship may be the most that can be expected. And in others the competing claims on the testator of a surviving spouse or of less fortunately placed siblings may negate any moral duty towards a wealthy claimant.[16]

[22] Counsel for the second applicant also refers the Court to the decision of Cooke J in *Scott v Garnham*[17]:

> It is also important to focus on why there was a breach of moral duty by the deceased in this case even though this was not in dispute. That is because the remedy should correspond to what is required to make adequate provision. I agree with the Family Court Judge that there was a breach in this case. It arises not because of a particular financial need that Jazz has, but because of the irrational way in which the deceased managed her affairs, including the changing bequests in her wills in a way that involved undue favouritism and corresponding disentitlement in relation to the three siblings. The various wills that she executed over the years, and the volatility involved in her

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[16] *Williams v Aucutt* at [69].
[17] *Scott v Garnham* [2021] NZHC 592 at para [32].

> intentions, involve a failure to make provision in a general sense … but the exclusion of Jazz in that will can be seen as a continued manifestation of an inability to make proper provision for the maintenance of her children. As the Judge held there was no disentitling conduct by Jazz. Jazz was simply out of favour at the time the last of the wills were made.

[23] On the issue of disentitling behaviour, counsel for the beneficiaries refers to the Court of Appeal in *Re Worms v Campbell*[18] with reference to the New South Wales decision in *Re the Will of F B Gilbert*[19] in describing disentitling conduct:

> I think that this means character or conduct relevant to the purposes which the Act is intended to serve, for example, misconduct towards the testator, or character or conduct which shows that any need which an applicant may have for maintenance is due to his or her default.

[24] In *Vincent v Lewis*[20] the Court concluded it was unnecessary to reach any firm conclusion about the issue of disentitling conduct. The Court accepted a submission that the first task of the Court is determine if there has been a breach of moral duty. If there has been no breach then the disentitling behaviour inquiry is unnecessary:

> In most cases, including the present, it will be sufficient if the conduct of the plaintiff is taken into account when assessing the extent of moral duty and in particular the impact of any such conduct on the relationship between the plaintiff and her mother.

[25] In the case of the second applicant [Miriam Rowan], the respondents submit that a child who has been estranged from their parent for a long time cannot expect the parent to then make provision for them in a Will. As per *Re Gretton*[21] the Court noted whilst it could not be said the onus about disentitling conduct had been satisfied:

> … this nevertheless, it seems to me that I must consider the plaintiff in the character of a daughter who has been estranged from her parents for a very long period, and who seems to have preferred to make her own associations and has taken no interest in the other members of the family.

[26] The conclusion in that case was there was no reduction in the modest amount available to the beneficiary:

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[18] *Re Worms v Campbell* [1953] NZLR 924.
[19] *Re the Will of F B Gilbert* [1946] 46 NZWSR 318.
[20] *Vincent v Lewis* [2006] NZFLR 812.
[21] *Re Gretton* [1957] NZLJ 34.

> …to make provision for a daughter who has been of no assistance to the testator or the other members of the family, and has elected over a long period of years to be entirely independent and virtually estranged from her parents.[22]

[Mrs Drummond]'s known previous Wills

[27] The executors have placed into evidence an affidavit by Lesley Wolstenholme, a legal executive at Cambridge law firm, Lewis Lawyers. Ms Wolstenholme took instructions on various Wills for [Mrs Drummond]. In summary:

(a) During meetings with [Mrs Drummond], Ms Wolstenholme ensured it was just the client without any family present and as a general remark, [Mrs Drummond] was always adamant about what she wanted.

(b) At a meeting on 10 February 2010 [Mrs Drummond] instructed a bequest of $10,000.00 to [Harvey] and his wife [Rosalin] (regarding their son), dealt with chattels to her son [Harvey] and for the balance of the estate - "the rest to children". The residuary clause in the resulting 19 February 2010 Will names [Bud], [Harvey], [Rodger], [Lee], and [Boyce]. Ms Wolstenholme says that [Mrs Drummond] did not tell her she had more children other than those named in the Will.

(c) A further Will dated 3 July 2012 changed [Mrs Drummond]'s executors - from [Lee] and [Boyce] to [Bud] and [Harvey].

(d) Ms Wolstenholme met with [Mrs Drummond] on 9 May 2015. Ms Wolstenholme (only knowing that [Mrs Drummond] had the five sons mentioned in the earlier Will) was told during the meeting about two daughters, [Mrs Drummond] advising she did not get on with her daughters and they had not talked for years. Advice followed about the Family Protection Act 1955 in relation to not making provision for those two children (the daughters). The legal executive had been provided a letter from a doctor to say [Mrs Drummond] was capable of making rational and informed decisions, [Mrs Drummond] having

[22] At 34 – 35.

experienced a stroke previously. The Will of 20 May 2015 appoints [Harvey] and [Boyce] as the executors, dealt with chattels to her son [Harvey], gives $10,000.00 to [Harvey] and his wife in relation to their son and divides the residue amongst the same five sons. A clause identifying having received legal advice about the Family Protection Act 1955 says "…in particular with regard to my having made no provision for my children [MIRIAM ROWAN] and [JANET LOGAN]."

It is noted [Janet]'s name is recorded in the proceedings and in an attachment showing her email address as [a misspelled version of Logan], not [Logan]. It is not known whether Ms Wolstenholme mis-recorded the name when receiving instructions, or [Mrs Drummond] gave her the wrong name.

(e) In 2016 [Mrs Drummond] wanted to amend her Will so that the residuary beneficiaries would be her grandchildren. Ms Wolstenholme recalls [Mrs Drummond] wanting to do this to stop the fighting. The Will dated 4 August 2016 specifically names various grandchildren, two of whom being [Rowan] grandchildren and one being [Rachel Drummond] who is the first applicant's daughter.

(f) Ms Wolstenholme received a letter from [Mrs Drummond] dated 10 June 2020 asking for a change to her Will. Following payment of a bank loan, [Mrs Drummond] sought that the remaining proceeds of her house sale should be divided equally between three charities. This being her main asset, those instructions therefore excluded all of her children, other than the request that sale proceeds from house contents be divided equally between [Bud], [Harvey], [Rodger], [Lee], and [Boyce]. Ms Wolstenholme obtained a letter from Dr Vaughan regarding capacity which is dated 16 November 2020, giving the opinion [Mrs Drummond] had capacity to execute changes to her Will. On about 20 November 2020 [Mrs Drummond] telephoned Ms Wolstenholme wanting to change her Will without delay, making

> reference to medical treatment. [Mrs Drummond] instructed that her residual beneficiaries were no longer the grandchildren but rather her same five sons. The Will dated 23 November 2020 resulted. This is the Will under question in these proceedings.

[28] Throughout the scheme of these Wills, and [Mrs Drummond]'s instructions, there was no reference to the first applicant [Sam Drummond]. The fact of Ms Wolstenholme being told in 2015 there are two more children (the daughters) still kept a silence about [Sam]. The 2016 Will contains reference to [Rachel Drummond] but there is nothing in the information to reveal Ms Wolstenholme had become aware of [Sam] as the eighth child.

The first applicant's case

[29] [Sam Drummond] is in his early 70s, resides in rural Hamilton with his wife and has the one biological child, [Rachel], now in her mid-30s. [Sam] has two adult stepchildren to his wife.

[30] There is no claim that the first applicant's circumstances warrant financially an argument about need for financial maintenance.

[31] [Sam] and his siblings grew up with their parents on a farm in [town redacted]. He describes a fairly blunt upbringing, including the requirement for his contribution to work around the farm, and parental tensions.

[32] The first applicant describes financial complications within this family group causing tensions, including in relation to the Will and estate management pertaining to the father of the children, [Cohen Drummond]. [Mrs Drummond] was said to have been dissatisfied with receiving only a life interest to her late husband's half share in the [address 1] property and [Sam] describes being actively involved to assist his mother during that period. He says [Mrs Drummond] gave [Sam] and [Harvey] enduring power of attorney authorisation in relation to property. On behalf of his mother, [Sam] says there were concerns about debt by [Janet] and her husband to [Cohen Drummond]'s estate and the fact of the life interest to [Mrs Drummond].

[33] With his involvement, the first applicant describes [Mrs Drummond] 'suing' [Janet] and her husband for repayment of money and a "bitter three year legal dispute ensued". A payment of $100,000.00 by [Janet] and her husband apparently then settled those proceedings. [Sam] says he had incurred on his mother's behalf about $41,000.00 in legal fees which she repaid to him upon subsequent receipt of the $100,000.00.

[34] [Mrs Drummond] and her late husband's executors (as owners of a half share each in [address 1]) agreed to sell [address 1] in 2004 for $850,000.00. This meant, when the sale settled in 2005, [Mrs Drummond]'s half of the net proceeds became available to her and [Cohen Drummond]'s net half share could be distributed to the children pursuant to his Will.

[35] A registered valuation for the property dated 19 July 2004 advises a value of $600,000, and makes reference to subdivision potential for this 4.4111 ha property.

[36] In the lead up to the sale of [address 1], [Mrs Drummond] wanted to build a new home for herself. A family trust which was related to the applicant and for which he was a trustee had purchase rights for three bare sections in a development at [address 2], Hamilton, the purchase prices being set as at August 2003. It was resolved [Mrs Drummond] would take over ownership of one of the sections and build on it. [Sam Drummond] says whilst estimated value of the section at the point of the discussion had become $137,000.00, there was an agreed deemed, and discounted, sale price to [Mrs Drummond] of $120,000.00 - structured on the basis of a $40,000.00 interest free loan by the trust to [Mrs Drummond] for the rest of her life and a $80,000.00 debt for the balance. When securing the section the Trust had apparently contracted to pay $88,000.00 for it.

[37] [Mrs Drummond] moved into the completed home on the section ("[address 2]") in mid-2005. The first applicant says on 1 July 2005 [Mrs Drummond] paid $80,000.00 and had signed an acknowledgement of debt dated 20 June 2005 for the other $40,000.00 (although this refers to another $13,065.75 in relation to other amounts owing).

[38] The first applicant describes issues arising with his mother in 2006 and 2007. His mother wanted to "split the difference" between the initial purchase price for the section of $88,000.00 and the amount agreed at $120,000.00.

[39] On 30 June 2006, [Mrs Drummond] made payments to the Trust of $8,000.00 and $13,065.41 in reduction of debt. Possibly the $8,000 reflected for her the difference between $80,000 and the $88,000 the Trust had secured the section for.

[40] In 2007, Antony says [Mrs Drummond] wanted him to upgrade her pending international holiday flights to business class, which he declined to do. In December 2007 issues arose around the applicant's possession of his father's shotgun and then followed an alleged complaint by sibling [Rodger] to police about [Sam] having the item.

[41] Dispute Tribunal proceedings followed in 2008 about the gun, with which [Mrs Drummond] is said to have involved herself as a witness in support of [Rodger]. [Sam] received a letter from his mother of May or June 2008. She referred to [Sam]'s "veiled nastiness" with reference to the Disputes Tribunal hearing issue and the gun, and offered that as far as she was concerned the disputes hearing was [Rodger]'s idea. [Mrs Drummond] reflected resenting having been used for "point scoring" and in reference to [Sam], "that you have the audacity and lack of intelligence to lay it at my door".

[42] [Mrs Drummond] was notified that a caveat had been registered over [address 2] on 9 May 2008 in relation to the residual debt owing to the vendor trust for the section. Why the trustees (the first applicant being one of the trustees) took that step is subsequently described in a letter from the trustees' lawyer dated 19 May 2009 - by which point the request was being made to withdraw the caveat.

[43] A letter dated 23 December 2008 written by lawyers Willis Toomey Robinson who were acting for [Mrs Drummond] asserted she had been induced into the contract in relation to the section at [address 2] by "Land Transfer fraud" and misrepresentation.

[44] A complaint by [Rodger Drummond] to the New Zealand Law Society Standards Committee in relation to the solicitor acting on the transactional aspects of the section going to [Mrs Drummond] (and being a trustee of the vendor trust), whereby conflict of issue and conduct issues were alleged, was dismissed in a decision dated 13 May 2009. This went to review and a decision dated 19 August 2009 declines the review, confirming the decision of the Standards Committee.

[45] The letter from the trustees' lawyer dated 19 May 2009 describes the caveat being placed on the property following [Mrs Drummond]'s direct and active involvement in a campaign in which [Sam Drummond] as a trustee of the trust was implicated in the criminal theft of a shotgun and fraud over the sale of the section to [Mrs Drummond]. The letter records [Sam] remaining sceptical of any actions taken by [Mrs Drummond] and notes [Mrs Drummond] was not being asked to repay the balance of the debt in any event. [Mrs Drummond] was wanting to obtain finance to repay it, but saw the caveat as a block and wanted it released.

[46] [Sam] says with reference to the above factors, he was feeling "betrayed and used" and in October 2009 he wrote to his mother to express his frustrations. The letter is in evidence and refers to [Sam]'s perspective of having spent a lifetime in the midst of sick and soulless family members who are capable of mindless denigration of others, dishonesty, deceit and even engaging in criminal acts in order to achieve whatever end, no matter how perverse. The letter raises [Sam]'s belief that his mother had been in an "adulteress relationship with a milk man" in [town deleted] and that his late father must have suffered trying to keep the family together dealing with [Mrs Drummond]'s "deception and lies". The letter refers to [Mrs Drummond]'s alleged wretched behaviour causing the family unit to be so dysfunctional. It says the truth about [Wilma Drummond] is that she "has no integrity, cannot be trusted and, most critically, does not know how to give or receive love. [Sam]'s letter reflects that his mother needs to ensure she does nothing further to widen the almost insurmountable rifts she has created between her offspring and notes she still had some time to rectify some of the damage she had caused.

[47] [Sam] describes only limited contact from the point of the letter until 2015, involving occasional visits with his daughter [Rachel] to see her grandmother. In 2015

[Mrs Drummond] had self discharged from hospital following an apparent stroke, and perhaps in a confused state, she contacted the first applicant - neither [Bud] or [Harvey] being of assistance. [Sam] says having assisted at hospital that day he saw his mother again about a week later and he then started to visit on a monthly basis. The applicant describes some ongoing involvement, and the deterioration in his mother's health in 2020. He says [Bud] and his wife effectively become [Mrs Drummond]'s full time caregivers. The applicant describes [Mrs Drummond]'s capacity to engage in visits lessening in late 2020. The deterioration in her health led to [Mrs Drummond]'s death on [date deleted] 2021.

[48] The first applicant submits this was not a family shy of conflict and therefore [Sam]'s issues with his mother should be considered in that way. [Sam] says by the time his mother died they were back on good terms.

[49] The first applicant has placed into evidence examples of fallouts between [Mrs Drummond] and other children. A handwritten letter written in 2004 to son [Rodger] by [Mrs Drummond] (and transcribed by the first applicant) described an issue with [Rodger] about horses and estate issues pertaining to [Cohen Drummond]. The latter part of the letter reads:

> Your rather foolishly seem to rate your knowledge of Dad's ways rather than mine when we were married 54 years! You also haven't learnt that I will not tolerate words put in my mouth nor actions attributed to me which did not occur. Insults and threats I ignore; be clear that my remaining time is not going to be spent governed by what it might suit some of my children to claim Dad would or would not like. Whatever you think appropriate to do, direct any communication to estate trustees or executors.
>
> [Rodger] you can take no pride in your disgraceful contribution to the shattering of our family's relationships Mum.

[50] Another letter written by [Mrs Drummond] to [Rodger] dated 31 December 2004 refers to a Christmas letter [Rodger] had written his mother:

> I read that yuletide letter and thought – is that tiresome little creature really [Rodger]?

[51] [Mrs Drummond] in the letter refers to estate related issues and advises:

> the lies and insults have been beyond belief – I could never have imagined being so ashamed of three of my children …. [Lee] got his own way with his settlement of what Dad told me should have been $30,000.00 as shown in his black book but continued his insults. Greed has transformed him as well. His behaviour towards [name deleted], roguery over his house – you know it all and you – I paid the bloody lot. I wonder why Dad once said you were as tight as bulls bum at fly time. Have a happy new year Mum.

[52] A letter the first applicant says [Mrs Drummond] sent to [Lee] dated 29 April 2004 refers to his disgraceful behaviour having "brought great hurt and shame to the family". The letter describes estate related issues in relation to the late [Cohen Drummond] and refers to debt issues for [Lee] as described by [Mrs Drummond]'s late husband. The letter refers to [Lee]'s alleged "blackmail accusations" that he relayed to other family members and casts doubt over the circumstances in which the late Mr [Drummond]'s 'black book' recording debt had been destroyed in. [Mrs Drummond] refers to there being "connivance I could never have predicted". The letter was copied out to [Mrs Drummond]'s seven other children.

[53] Another undated letter from [Mrs Drummond] "to my family" was written at a time she was in the process of selling [address 1] and making plans for the new house. The letter describes the issue about the horses with [Rodger] and references:

> We have in this family the unsavoury situation whereby [Janet] made the judgment on [Rodger]'s claim resulting in the blackmail which occurred before she would give the signature necessary for me to accept the offer of $850,000.00 for this property. Nevertheless I shall count my blessings and trust you will all wish me well when I move on from this house Dad and I built together.

[54] The first applicant submits that having regard to his background with his mother he should receive up to 20% of the estate, but would be accepting of one eighth which is 12.5%.

Summary of the case of [Miriam Rowan]

[55] [Miriam Rowan] describes her memory of an upbringing by her mother without any form of affection. She says [Mrs Drummond] was vicious both verbally and physically. Childhood responsibilities working on the farm are described. [Miriam] went to boarding school, saying she dreaded the holidays back at home. There was alleged physical abuse of her by her mother.

[56] [Miriam] says she was told when she was about 11 years old by her father that her mother had been having an affair during their marriage and she was asked to report on telephone calls and her mother's movements. [Ann] regards that her mother despised her for siding with her father [Cohen Drummond], and that [Mrs Drummond] did so for the rest of her life.

[57] [Miriam] went overseas in 1970. Back in New Zealand, she married in 1975 to her now late husband.

[58] Over the period her parents had moved to the lifestyle block in [address 1] Hamilton (which I apprehend from the title to the property may have been in the late 1980's) [Miriam] describes input around the property and working hard on the relationship with her mother for the sake of her children. [Miriam] says she chose to limit contact when it became increasingly uncomfortable and [Mrs Drummond] was becoming more and more jealous of [Miriam]'s relationship with [Cohen Drummond].

[59] [Miriam] says it is not correct she became estranged from her mother after her father [Cohen] died - because this would imply they were close in the first place – which was not the case. [Miriam] describes being devastated by the way her mother had treated her when her father was dying, when she was forbidden from seeing her father [Cohen Drummond] in the lead up to his death and she did not get to say goodbye.

[60] Following [Cohen]'s death, [Mrs Drummond] is said to have become fixated on selling [address 1] and [Miriam] and one of her sister in laws spent weeks packing and cleaning a filthy house. [Miriam] tried to assist with her mother's investigations to build. [Miriam] describes being generous with gifts for the new house and assisting with domestic travel.

[61] [Miriam] describes ceasing contact with her mother when she chose to treat [Sam] "in the most despicable manner" and her false accusations about him and the lawyer. [Miriam] says she lost what little respect she had for her mother. She did not attend [Mrs Drummond]'s funeral as to do so would have been hypocritical.

[62] [Miriam] describes her mother as being a central figure in family fallouts and disagreements and she says no family member including spouses escaped being badmouthed and/or being a recipient of her vengeful behaviour. She describes her mother as adept at taking a "divide and rule" approach.

Position taken by the respondent beneficiaries

[63] The respondent beneficiaries are [Bud], [Harvey], [Rodger], [Lee], and [Boyce].

[64] The current estate sits at about $866,000.00 which would, if the Will is undisturbed, leave them with a bequest of about $160,000.00 to $170,000 each.

[65] None of the beneficiaries are claiming a financial or personal circumstance necessitating *maintenance*. The beneficiaries submit the applicants have not made out a case based upon the *support/recognition* principle. They submit the actions of [Sam] meet the threshold of disentitling behaviour and those of [Miriam] come very close, but are better characterised as a conscious and determined decision to have little or nothing to do with [Mrs Drummond] during the latter years of her life, such as to remove entirely any moral obligation of her mother to provide for [Miriam] by way of recognition.

[66] There was or is a perspective held by some of the beneficiaries that the [address 1] sale was done by [Sam] at an undervalue and it disregarded subdivisional potential. The beneficiaries take the view that the relationship between [Mrs Drummond] and [Sam] was poor from as early as 2005 in relation to the emerging dispute over the section purchase and there is compelling evidence of a total breakdown in [Mrs Drummond]'s relationship with [Sam] as a result of the October 2009 letter.

[67] Prior to the letter, the beneficiaries emphasise a worsening in matters with the May 2008 caveat against [Mrs Drummond]'s home and according to [Bud], [Mrs Drummond] started to fear she could be evicted from the house and despite his reassurances, she borrowed under a reverse mortgage to clear the debt on 22 May

2009. [Rodger] and [Lee] refer in their evidence to their mother holding a concern about the caveat, to the point of obsession.

[68] The beneficiaries reject [Sam]'s assertion that he resumed a normal relationship with his mother from 2015 and despite [Sam]'s daughter [Rachel] having a child in 2017 (about whom [Mrs Drummond] was interested), there was virtually no more significant contact.

[69] The beneficiaries emphasise that the Wills from 2015 onwards continued to make no reference to, or provision for [Sam] despite the supposed reconciliation with his mother in the years following the 2009 letter.

[70] In relation to [Miriam]'s case, the beneficiaries say [Miriam] displays virtually no love or affection towards her mother at all and they emphasise [Miriam]'s decision to cease all contact with her mother over matters relating to [Sam] - which in my assessment was the period of the Disputes Tribunal/Law Society case/allegations of Land Transfer fraud.

[71] The beneficiaries say [Miriam]'s statement that she lost "what little respect I had for her" confirms that her relationship prior to this was poor. They say the estrangement lasted until [Mrs Drummond]'s death and there was no reconciliation, [Miriam] not even attending the funeral.

[72] The respondent brothers refute [Miriam]'s allegations about her childhood.

[73] It is said in the period of about 2006 onwards [Mrs Drummond] was hurt about being "dumped" by her daughter.

[74] The beneficiaries say there is no evidence to support [Miriam]'s claim there was a breach of duty by [Mrs Drummond] to her in failing to recognise her as a member of family. The fact is, [Miriam] had excluded herself.

Analysis of whether [Mrs Drummond] breached a duty to provide support the first applicant [Sam Drummond]

[75] In performing this assessment, I take into account any conduct by [Sam] when assessing the extent of moral duty and in particular the impact of any such conduct on the relationship between he and [Mrs Drummond].

[76] There is a background of this family group falling in and out of favour, including [Mrs Drummond]'s position taken with respect to some of her children from time to time. Examples from the evidence are:

(a) The 2004 position taken by [Mrs Drummond] about [Rodger]'s perceived behaviour and the impact of it.

(b) Estate/debt issues arising regarding [Janet] and her husband pertaining to [Cohen Drummond]'s estate, and proceedings about this.

(c) The 31 December 2004 position reflected in [Mrs Drummond]'s letter, critical of [Rodger], [Lee] ("greed has transformed him as well"), and [Janet] – but apparently positive about [Bud] and [Sam].

(d) The highly critical letter regarding [Lee] of 29 April 2004 over financial issues.

(e) [Mrs Drummond] being prepared to work with [Sam] over the sale of [address 1] for which a sale price of $850,000.00 was received, notwithstanding a registered valuation of $600,000.00, which then enabled her to liquidate and obtain the [address 2] home following her husband's death - yet then in about 2006 starting to develop issues about [Sam], initially over the deemed acquisition price for the section and then the 2007 issues around [Cohen Drummond]'s shotgun held by [Sam].

(f) Despite the 2004 issues [Mrs Drummond] had expressed to, and about [Rodger], [Mrs Drummond] appeared to have taken [Rodger] back into

her confidence by 2008, as shown by the shotgun issue. The type of negative or critical position [Mrs Drummond] had taken against [Rodger] was then being taken about [Sam]. By December 2008 [Mrs Drummond] was alleging [Sam] had been involved in "Land Transfer fraud" in relation to [address 2].

(g) By 2010 [Mrs Drummond]'s sons [Bud], [Harvey], [Rodger], [Lee], and [Boyce] were named as the beneficiaries to her Will, notwithstanding the concerns previously communicated about [Rodger] and [Lee]. Ms Wostenholme had not been told about any other children.

(h) By 2015 [Mrs Drummond] was acknowledging the existence of her daughters to the legal executive preparing the Will, but excluded them.

(i) The 2016 Will completely excluded all of [Mrs Drummond]'s children, which is notable given that [Bud], [Harvey] and [Boyce] had not particularly fallen out of favour on the information available. The Will by-passed [Mrs Drummond]'s children to the various grandchildren.

(j) The 10 June 2020 letter then wanted to preclude all family members, the asset base excluding any chattel sale proceeds, going to charity.

[77] It is noteworthy that according to the scheme of family fallouts and changed Wills, some of [Mrs Drummond]'s children were able to bring their way back into their mother's favour over time. It is noteworthy [Mrs Drummond] had been prepared to bypass *all of her children* (and thus not recognise or support any of them) regardless of their behaviours, and in the 10 June 2020 letter she had been prepared to fail to recognise any family at all, other than what would have been a miniscule division amongst five sons of chattel sale proceeds.

[78] [Sam]'s actions on behalf of his mother in 2004/2005 in relation to the sale of achieved a price well over a registered valuation. He guided his mother into

ownership and occupation of the new home, during a period in which she was expressing strong dissatisfaction with other children.

[79] [Sam] was not the initiator of the Law Society complaint issues in 2008/2009 but those pertained to the arrangement he had organised for his mother in the acquisition of the section. The fact of those Law Society proceedings was not something initiated by the first applicant.

[80] The 9 May 2008 caveat over [Mrs Drummond]'s new home appears likely to have caused her stress and confusion. [Sam] and the other trustees have set out their position in the 19 May 2009 letter. It seems very likely the fact of the caveat put [Mrs Drummond] into a state of unease, although there was a lack of logic in her response that she needed to have the caveat removed so as to borrow funds to repay the residual debt to the trustees – in circumstances where the trustees communicated there was still no demand for repayment and nor was one intended.

[81] [Sam] describes what he attempted to do subsequent to the 2009 letter. The letter by any interpretation brought about a serious assault on his mother in his expressed views about her, and their relationship. Particularly from 2015, the evidence is there was some level of attempt to revive the relationship. That his mother saw fit to call upon him in 2015 at the hospital is relevant.

[82] The assessment about [Sam] should reflect the apparently good relationship between he and his mother until the unravelling started in about 2006/2007, and I place into question whether overall and changeable family dynamics may have played a part directly or indirectly in [Mrs Drummond] then assuming her position against [Sam].

[83] I cannot conclude that anything until 2009 was particularly disentitling in relation to [Sam], but then, it is unavoidable that the letter sent in 2009 must be taken into account. In my assessment raising with an elderly parent a historic allegation about an affair (regardless of whether there *might* be any truth to it) and saying what was said served no useful purpose whatsoever and was unnecessarily damaging.

[84] In [Sam]'s circumstances with his mother, it is appropriate to take into account his efforts post 2015 to rekindle even a luke-warm relationship, even if I view those cautiously. Other sons appear to have made their way back into [Mrs Drummond]'s confidence through passage of time.

[85] I reflect *Flathaug v Weaver,* whereby a parent's obligation to provide for the emotional and material needs of his or her children is an ongoing one and "though founded on natural or assumed parentage, it is, however, an obligation which is largely defined by the relationship which exists between parent and child during their joint lives."

[86] I conclude that overall [Mrs Drummond] did owe [Sam] a moral duty to provide for his support (recognition) in her final Will, and as at the date of her death. In reaching that conclusion I take into account the somewhat changeable family dynamic. I take into account there had not always been a rationality about [Mrs Drummond]'s expressed wishes. I take into account the quite extreme ways at times she voiced opinions about her children. I take into account the changing bequests in [Mrs Drummond]'s Wills, including the changeability in the appointment of executors.

[87] In measuring the moral duty, I take into account as a positive, [Sam]'s assistance with the sale of [address 1] and the positioning of his mother into her new home at [town deleted]. It placed him into a precarious position however, having chosen to entwine himself with his mother in direct financial arrangements, which in hindsight and given the family background he might now conclude was unwise. This family had already shown an ability to seriously argue about financial and property issues.

[88] Even if only a modest relationship with [Sam] had been restored and despite the 2009 letter, there was a moral duty to recognise him.

[89] The fact of the letter and damage caused, however, tempers the extent of a finding of moral duty and the consequent provision in this decision.

[90] In deciding upon quantum, I reflect that testators are at liberty to do what they want with their assets and to treat their children differently or to benefit others once they have made such provision necessary to discharge their moral duty. I reflect that awards should not be unduly generous and this is not a case about financial need. I take into account there is no argument by any of the competing beneficiaries about the financial need of maintenance, and overall, the case is about the children of [Mrs Drummond] being recognised and supported. A percentage provision to [Sam] will not unduly impact the five named beneficiaries to the Will.

[91] I go no further than remedying breach. I take into account it is not the role of the Court pursuant to cases under this Act to rewrite Wills.

[92] Overall, I conclude [Sam] should receive 10% of the net estate. In accordance with the *Williams v Aucutt* analysis, this puts the support/recognition amount at the lower end of the scale. I continue to acknowledge that [Mrs Drummond] had testamentary freedom to favour other children, and that [Sam] through his actions in writing and setting out his position in the 2009 letter (which undeniably impacted the relationship) was then owed a lessened moral duty by way of recognition and consequent award.

Analysis of whether [Mrs Drummond] breached a duty to provide support for [Miriam Rowan]

[93] The beneficiaries take the position that whilst there may not have been express disentitling behaviour by [Miriam] towards her mother, her long estrangement has the same result whereby there was not a breach of moral duty and so no justification for an award.

[94] The respondent beneficiaries have different memories of their childhood to [Miriam]. It is not possible for them to speak to what she says *she* experienced. Her siblings would have only snapshot memories and will have seen things through the lens of their own experience.

[95] The beneficiaries emphasise that [Miriam] in her proceedings displays virtually no love or affection towards [Mrs Drummond] and that on [Miriam]'s own account, she made a decision to cease all contact with her mother over matters pertaining to [Sam]. This appears to relate to the approximate period of 2008. [Miriam]'s comment about having "lost what little respect I had for her" confirms, in the submission of the beneficiaries, that her relationship with [Mrs Drummond] was poor before this. [Miriam] gives her own clarification that she and her mother were not close before the death of her father.

[96] The beneficiaries regard that [Mrs Drummond] felt dumped by [Miriam]. They say the fact is [Miriam] had excluded herself.

[97] In the case of [Miriam] and her mother, I conclude that overall, [Miriam] had a strained relationship with her mother. This matches [Miriam]'s own description, and her viewpoint about how she was treated when she was young. [Miriam] describes some level of assistance by her at the time the [address 1] property was acquired. Perhaps at best, a relationship which was not close, continued on until the family conflict [Sam] found himself in the middle of in about 2008. At that point [Miriam] says she decided to finish contact.

[98] It is noteworthy that during the period in about 2004 when [Mrs Drummond] held or expressed very negative views about some of her male children, [Miriam] did not feature in that criticism or fallout. Perhaps the remote nature of her relationship with [Mrs Drummond] meant this was not a practical risk. [Miriam] had received the blow she had (on her evidence) about being excluded from seeing her father in the lead up to his death in 2002. [Miriam] places a lot of relevance on that incident.

[99] It is noteworthy [Miriam] did not go to her mother's funeral in 2021 and I conclude this in part helps show the relationship which had existed between she and [Mrs Drummond] during their joint lives. I reach this conclusion regardless of [Miriam]'s strong displeasure at how she perceives [Mrs Drummond] was treating [Sam] in about 2008.

[100] [Mrs Drummond] has helped to show her viewpoint regarding [Miriam] by having completely omitted to provide any bequest for her pursuant to the scheme of the Wills since 2010. That said, [Mrs Drummond] acknowledged [Rowan] grandchildren in the 2016 Will.

[101] In assessing whether there was breach of a moral duty to [Miriam], I do take into account the background of conflict and fallouts in the [Drummond] family, and the ability of [Mrs Drummond] from time to time to maintain quite damming positions about her adult children and to voice this. However, the disconnected status between [Miriam] and her mother was quite longitudinal and not only a part of hot and cold cycles.

[102] I conclude there is no basis to find [Miriam] engaged in disentitling conduct as anticipated by s 5 and nor am I invited to do so. I do however measure any moral duty [Mrs Drummond] had to [Miriam] when she wrote her Will and at the time of death against what was overall, a dislocated and strained relationship.

[103] I conclude that all things considered, the wise and just testatrix would have regarded they had some level of moral duty to their daughter [Miriam], taking into account overall family challenges experienced, and that for whatever reason, the landscape of [Miriam]'s upbringing and transition into adulthood and onwards, did not enable the sustenance of a closer relationship. This situation cannot solely be laid for blame at [Miriam]'s feet, and nor at [Mrs Drummond]'s. Further, it is possible some of the other challenges [Mrs Drummond] experienced with family dynamics provided a difficult setting for [Miriam] and her mother.

[104] [Mrs Drummond] should have provided for [Miriam] in her Will to provide recognition of her daughter, and their struggles. One perspective is that a bequest could have reflected a sadness about what could have been a better relationship.

[105] I take all of the above into account when assessing quantum, as well as the general factors identified when assessing [Sam]'s quantum.

[106] I assess the appropriate provision for [Miriam] is 7.5% of the net estate. This places her at the low end of the recognition spectrum and reflects that [Mrs Drummond] had the right to favour other children. The exact percentage award for [Miriam] may be of lesser relevance for her – in comparison to now receiving acknowledgement by way of this decision that overall I find that [Mrs Drummond] held that duty of support and recognition to [Miriam].

[Janet]

[107] [Janet] has not filed proceedings to seek provision and whilst it cannot be said that she has advised she does not want to benefit from the estate (at least via these proceedings) there is a consequent lack of information from her which could enable the Court to conclude in the absence of her involvement that there has been a breach of moral duty by way of recognition.

[108] The High Court noted in *Hita v Hita*[23]:

> Section 4(2) of the Act enables this Court to treat (the applicant's) application as an application from anyone entitled to claim under that Act. That is, the Court could treat (the applicant's) application as also being an application made by (three other family claimants). However, given that they took no part in the proceeding and I have limited evidence of their circumstances, it is appropriate to treat (the applicant's) application as solely her own.

Conclusion

[109] Orders are made pursuant to s 4 of the Act, that provision of:

(a) 10% (ten per cent) is to made for the first applicant [Sam Drummond] out of the deceased's estate.

(b) 7.5% (seven and a half percent) is to be made to the second applicant [Miriam Rowan] out of the deceased's estate.

[110] In relation to costs, my preliminary view is I would not be inclined to award that costs for any party be met from the estate. Costs if sought would be an inter party

[23] *Hita v Hita* [2023] NZHC 2171 at paragraph 90.

issue, which would be a regrettable final chapter in matters pertaining to their late mother. However, the applicants have 21 days from today to file any submission on the issue of costs; then 14 days thereafter for the beneficiaries. The executor's legal costs relating to these proceedings will of course be met out of the estate and no submission is necessary.

D A Blair
Family Court Judge