IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2023-442-038
[2024] NZHC 291

UNDER	The Family Protection Act 1955
IN THE MATTER	of the Estate of PHILLIP JOHN EMENY
BETWEEN	MURRAY PHILLIP EMENY Appellant
AND	JEANETTE ROSALIE MATTSEN First Respondent
AND	JEANETTE ROSALIE MATTSEN Second Respondent

Hearing:	21 February 2024
Appearances:	P J Bellamy for Appellant A M Halloran for Respondents
Judgment:	23 February 2024

JUDGMENT OF GRICE J
(Appeal)

Introduction

[1] This is an appeal against a decision of the Family Court regarding a claim made under the Family Protection Act 1955 (the Act) in relation to the estate of Phillip Emeny (the testator). The testator's son, Murray Emeny (the appellant) contends that the specific bequest of $50,000 awarded to him by Judge Russell in the Family Court ought to be increased to $75,000. The appellant also submits that the Judge erred in decreasing the provision made to Murray in the residue of the estate to 10 per cent, from 15 per cent.

Background

[2] Phillip Emeny died on 17 March 2021. He was predeceased by his wife Dorothy, and is survived by his three children Murray, Jeanette and Dianne, as well as seven grandchildren aged between 13 and 48 years.

[3] The claim in question was brought by Murray, who sought further provision from his father's estate under s 4 of the Act.

[4] Murray has been in poor health for a number of years and has been unable to work. His relationship with his father had also deteriorated in the years prior to the testator's death. Murray's claim in the Family Court was successful in that the Judge found that the testator had not recognised his moral obligation to provide support for his son, given Murray's medical needs. The Judge therefore directed a specific bequest of $50,000 to Murray before division of the residue. Therefore, the amount available to the residuary beneficiaries was reduced by $50,000.

[5] In the course of argument, counsel agreed that this was the effect of the orders of the Family Court. The effect on Murray's share of the estate was that he received approximately (depending on the final amount of the residue following sale of the house and costs) $42,500 extra than he had taken under the will, that being the $50,000 bequest and the 15% residuary share. The other residuary beneficiaries bore the total deduction of $42,500 approximately based on the figures adopted by the Family Court.

The will

[6] The testator's last will is dated 20 June 2014. It provides:[1]

(a) Jeanette is named as sole trustee and executor.

(b) Jeanette receives as specific bequests the money held in the testator's sole name, the contents of his workshop including machinery, his musical instruments, any motor vehicle which he owns and all of his personal chattels.

[1] Summary adopted from *Emeny v Mattsen* [2023] NZFC 7477 [Family Court decision].

(c) The residue of the estate, after payment of all expenses, is left to his wife, Dorothy, if she survives him, but if not then is left as follows:

   (i) fifty per cent to Jeanette;

   (ii) fifteen per cent to Murray;

   (iii) fifteen per cent to Dianne; and

   (iv) twenty per cent to be shared equally between all of his grandchildren and great-grandchildren who survive him.

(d) There are the usual survivorship provisions contained in the will and the children/grandchildren must reach the age of 20 years before receiving their entitlements.

[7] The testator's first will, dated 17 April 2007, named all three children as executors and trustees, and left Jeanette various chattels and other personal effects plus $10,000, with the residue to be divided equally among Murray, Jeanette and Dianne.

[8] The testator's second will, dated 26 October 2012, was very similar to his last will as set out above, with the exceptions that 50 per cent of the residue was to be given to Jeanette, 30 per cent was to be given to Murray, and 20 per cent was to be divided between Dianne and all the grandchildren.

The estate

[9] In the Family Court, the total value of the estate at the date of the testator's death was estimated at $1,001,700.

[10] Under the current will, Jeannette would receive specific bequests to the monetary value of $153,909, with the residue of the estate to be divided as follows:[2]

(a) Jeannette would receive 50 per cent of the residue: $423,895.

(b) Murray would receive 15 per cent of the residue: $127,169.

[2] *Emeny v Mattsen*, above n 1, at [11].

(c) Dianne would receive 15 per cent of the residue: $127,169.

(d) The grandchildren would receive 20 per cent of the residue: $169,558.

Murray's personal circumstances

[11] Murray is now aged 68, receives superannuation, and lives in a Kāinga Ora house in Nelson. He undertook tertiary education as an adult, which he says was funded through a student loan and his own savings, without the support of his parents. In 1984, Murray was diagnosed with chronic fatigue, which he claims made it impossible for him to work and live a normal life. His evidence is also that he suffers from reflux and pneumonia. It is Murray's view that the testator failed to appreciate the difficulties he suffered, attributing them to a negative attitude rather than physical illness. He also contends that Jeannette was the "favoured daughter" of the testator, a claim which Jeanette refutes.[3]

The Family Court decision

[12] In the Family Court, the parties accepted at the outset that the testator owed a moral duty to Murray, Jeanette and Dianne. It was also accepted that the relationship between Murray and the testator was initially reasonable, and then gradually deteriorated from a "civil and workable arrangement" to "a poor and at times dysfunctional" one.[4] The relationship between the testator and Dianne was also not particularly good, whereas his relationship with Jeanette was described "positive and supportive".[5] However it was accepted that the testator's relationship with Murray did not amount to estrangement, nor was there any disentitling conduct on the part of Murray.

[13] The Judge considered that the reasons for the deteriorating relationship were not relevant given the accepted state of the family dynamics. However, the Judge noted that the affidavit evidence "paint[ed] a picture of two entirely different families".

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3 Family Court decision, above n 1, at [22] and [25].
4 Family Court decision, above n 1, at [16].
5 At [16].

Jeanette described a close and loving relationship with her father, while Murray and Dianne depicted the testator as controlling, aggressive and unsympathetic.[6]

[14] The Judge observed that to make out a successful claim, Murray needed to demonstrate that the testator owed him a moral duty to make proper provision for his maintenance and support, and breached that moral duty in the provision made for him.[7] The Judge also noted that where such as breach of moral duty has occurred, the Court must do no more than is required to remedy the breach.

[15] All parties agreed that a moral duty was owed to Murray, therefore the first element was satisfied.

Breach of moral duty

[16] In determining whether the moral duty had been breached, the Judge considered Murray's medical and financial circumstances. The Judge noted that if he received the 15 per cent of the residue allocated to him in the will, Murray would have a total of $145,169 available to him – that being $127,169 from the testator's estate plus $18,000 of savings from his personal bank account.

[17] The Judge noted that examining whether there is a breach of moral duty:[8]

> "…requires an assessment of what a wise and just testator sitting in the testator's chair at the time of his death would have done in all the circumstances which were or should have been known to him at that time, but having regard to any relevant events which have since occurred. There is no assumption or presumption that the testator's children need to be treated equally and it is not sufficient to merely show unfairness to succeed in a family protection claim. An assessment of all the circumstances of the case, including any change in social attitudes since the Will was made, is required. The assessment is not restricted to financial circumstances but also includes moral and ethical considerations. The size of the estate and any other claims on the estate needs to be considered."

[18] The Family Court decision noted that the relationship between Murray and the testator had gradually deteriorated, and at the time of the testator's death was very poor. The Judge found that the evidence showed that in the last 15–20 years of the

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6 At [34].
7 At [49].
8 At [57].

testator's life, he and Murray held mostly negative views of one another, had little contact, and therefore provided minimal support for the other's wellbeing.[9] The Judge considered that this meant the obligation on the testator to provide for the maintenance and support of Murray was "considerably less".[10]

[19] It was noted that under the will, Murray would receive 15 per cent of the residue of the estate, which equated to 12.7 per cent of the total value of the estate. The Judge considered that 10 per cent of the total estate could properly be attributed to the testator's obligation to support Murray, in recognition of his place as a family member and the testator's only son.[11] The Judge then assessed whether the additional 2.7 per cent (of the total value of the estate left to Murray in the will) was sufficient to provide for Murray's "ongoing maintenance", in satisfaction of the testator's obligations to provide "proper maintenance and support" under s 4 of the Act.

[20] The Judge noted that Murray was "living within his means". He considered that in the circumstances the testator should not be required to provide money for Murray's housing and ongoing day-to-day support, as those needs were already being met by his regular income.[12]

[21] However, the Judge found that testator did breach his moral duty to make provision for Murray's future maintenance with respect to his health needs and ability to seek urgent care if required.[13] The Judge noted that the testator had seemed unwilling to recognise the validity of Murray's poor health, particularly his chronic fatigue syndrome, and that a wise and just testator in the circumstances would not hold that view.[14]

Remedy

[22] The Judge considered that the testator was entitled to make Jeanette the primary beneficiary of his estate in recognition of the support that she had provided

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9 At [58].
10 At [59].
11 At [61].
12 At [65].
13 At [67].
14 At [66].

him in his later years of life, as opposed to Dianne and Murray. He also acknowledged the need to respect the wishes of the testator to provide for his grandchildren.

[23] The Judge did not consider there was any basis for altering the provisions of the will to provide equally for the testator's three children, noting that this would infringe family protection principles.

[24] The Judge concluded that a specific bequest was to be inserted into the testator's will for an additional sum to be paid to Murray to remedy the specific breach found. The sum of $50,000 was considered an appropriate amount to address the limited breach of moral duty. This meant Murray was awarded a total of 17 per cent of the overall estate.

Approach on appeal and relevant law

[25] Section 15 of the Act provides a general right of appeal for decisions of the Family Court or the District Court made under the Act. This is confirmed by s 15(1A), which provides that the High Court Rules 2016 and ss 126–130 of the District Court Act 2016, with all necessary modifications, apply to an appeal under subs (1) as if it were an appeal under s 124 of that Act.

[26] Therefore, in general, the principles in *Austin, Nichols & Co Inc v Stichting Lodestar* apply, and the appellant bears the onus of satisfying the appellate court that it should differ from the Family Court's decision, and in doing so must identify the respects in which the judgment under appeal is said to be in error.[15]

[27] However, in this case the focus of the appeal relates to the quantum of the award, which is an exercise of discretion. The appellant therefore must persuade this Court that the Judge made an error of law or principle, took into account an irrelevant consideration, failed to take into account a relevant consideration, or demonstrate that the decision of the lower court was "plainly wrong".[16] This approach is supported by *Talbot v Talbot*, which highlights that for Family Protection Act claims, if a breach of

[15] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].
[16] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

moral duty is found, the remedy to be granted is an exercise of discretion.[17] Thus, this is an appeal against the exercise of a discretion. That there was a breach of duty is uncontested.

[28] Ms Halloran emphasised that the error was required to be material before the appellate court would interfere. She also referred to the adoption of that approach in *O'Neill v O'Neill*,[18] and more recently in *Brown v Brown* where the Court of Appeal said:[19]

> [65] We have noted that the statutory jurisdiction is expressly discretionary, which has implications for the standard of appellate review. In the passage from *Little v Angus* which we have quoted at [61] above, this Court stated that experience has taught that an appellate court should not substitute its discretion for that of the trial judge unless there be made out some "reasonably plain ground" on which the order should be varied. This Court has recently held in *Talbot v Talbot* that whether or not there has been a breach of duty is an evaluative question, while the decision to grant a remedy is discretionary and will only be reviewed on *May v May* grounds. We doubt that this effected any substantive change to the traditional, flexible standard of appellate review. In many cases the existence and extent of the moral duty will be the decisive consideration, but an appellate court will not intervene in an evaluative decision unless persuaded that the court below was wrong and that onus is frequently difficult to discharge in this jurisdiction.

[29] The Judge summarised the law relevant to Family Protection Act claims.[20] He referred to s 4 of the Act, which allows claims to be made for further provision from the estate where inadequate provision is made for the proper maintenance and support of the persons entitled to claim under the Act.

[30] The Judge referred to relevant decisions including the principles articulated by the Court of Appeal in *Williams v Aucutt.*[21] The Judge also noted the summary of those principles stated by Randerson J in *Vincent v Lewis:*[22]

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17 *Talbot v Talbot* [2017] NZCA 50 at [37].
18 *O'Neill v O'Neill* [2021] NZCA 585 at [34].
19 *Brown v Brown* [2022] NZCA 476 (footnotes omitted).
20 Family Court decision, above n 1, at [38]–[42].
21 *Williams v Aucutt* [2000] 2 NZLR 479.
22 Family Court decision, above n 1, at [43], citing *Vincent and Lewis* (2006) FRNZ 714 at [81].

> (a) The test is whether, objectively considered, there has been a breach of moral duty by [the testator] judged by the standards of a wise and just testatrix.
>
> (b) Moral duty is a composite expression which is not restricted to mere financial need but includes moral and ethical considerations.
>
> (c) Whether there has been such a breach is to be assessed in all the circumstances of the case including changing social attitudes.
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> (d) The size of the estate and any other moral claims on the testator's bounty are relevant considerations.
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> (e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.
>
> (f) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.
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> (g) If a breach of moral duty is established, it is not for the Court to be generous with the testator's property beyond ordering such provision as is sufficient to repair the breach.
>
> (h) The Court's power does not extend to rewriting a will because of a perception it is unfair.
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> (i) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the Family Protection Act, it is nevertheless an obligation largely defined by the relationship which actually exists between parent and child during their joint lives.

[31] Judge Russell also noted further comments of the Court of Appeal in *Henry v Henry* as follows: [23]

> [58] … In cases of financial need, the amount necessary to remedy the failure to make adequate provision in the will will be able to be determined with greater precision, and with less room for broad value judgments, than in cases where the need is more of a moral kind. The conservative approach requires that the Judge makes the assessment of what is required on a basis which focuses on what is necessary to make adequate provision, but to do no more than that. Broader questions of desirability of greater awards or the Judge's views of fairness should not come into play. …

Appellant's submissions

[32] Mr Bellamy, counsel for the appellant, initially submitted that there are essentially three elements to the appeal, namely:

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[23] Family Court decision, above n 1, at [44], citing *Henry v Henry* [2007] NZCA 42.

(a) that an award of $50,000 was insufficient to address Murray's poor health, resulting economic difficulties, and reduced circumstances in life which he would continue to face;

(b) that the figure of 10 per cent attributed to the testator's obligation to support is insufficient; and

(c) there was a failure by the Judge to reflect the fact that the will of the testator's wife, Mrs Emeny, which dealt with a significant amount of separate property as well as relationship property, would have apportioned the residue of the estate in equal shares to the three children.

[33] In his oral submissions Mr Bellamy indicated that he focussed on the amount of the bequest and the fact that the effect of the bequest made to Murray meant that the amount of the residue of the estate would reduce by $50,000. The residuary estate (to be divided) had reduced from the amount that the Judge had referred to in his judgment of $847,791,[24] to $797,791.00 following deduction of all bequests. Therefore, Murray's residuary share on those figures of 15 per cent amounted to $119,668.65. The Judge had calculated Murray's share of the residue (before ordering the bequest to Murray of $50,000) at $127,169.[25] Therefore Murray's share of the residue dropped by approximately $7,500, but taking into account the bequest of $50,000, his net gain (based on the estimates in the judgment for the value of the residuary estate) was $42,500. The balance of his bequest of $42,500 came off the shares of the other residuary beneficiaries.

[34] Mr Bellamy said this amounted to the Judge reducing Murray's share of the estate in a way which was outside the Judge's ambit, by adjusting the distribution for recognition of Murray's entitlement as a child as assessed by the testator. Mr Bellamy also argued that there was confusion in the judgment as the Judge had taken Murray's share as a total of the estate (not just the residue), assessing that at 12.7 per cent.[26]

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24 Family Court decision, above n 1 at [11].
25 At [55].
26 Family Court decision, above n 1, at [61].

[35] First, the Judge made no error in using 10 per cent as a guide as to an appropriate recognition of the testator's general obligations to his son Murray in this case. This was in line with the principles in *Williams v Aucutt.* The Judge concluded that 10 per cent was in line with that decision and appropriate for the general obligation to a child, as follows:[27]

> [59] In the absence of estrangement or disentitling conduct, this means the testator's obligation to provide for the maintenance and support of Murray is considerably less than it otherwise would have been had there been a positive and supportive relationship between them.
>
> [60] Under the Will, Murray will receive 15 per cent of the residue of the estate amounting to $127,169 which equates to 12.7 per cent of the total value of the estate.
>
> [61] I have reached the view that 10 per cent of the estate can be properly attributed to the testator's obligation to support Murray, in particular to recognise Murray's place as a family member and as part of the overall life of the testator as his only son. Ten per cent of the total value of the estate amounts to $100,170. This is in line with the Court of Appeal principles outlined in *Williams v Aucutt*. The Will therefore satisfies the testator's obligation to provide for Murray's recognition and support.

[36] The Judge then went on to assess whether the remaining 2.7 per cent (of the 12.7 per cent of the total estate) was sufficient to recognise the ongoing maintenance obligations given Murray's health issues, in particular. He said:[28]

> [63] This then raises the question as to whether the additional 2.7 per cent of the total value of the estate (amounting to $27,000) which Murray receives under the Will satisfies the testator's obligation to provide for Murray's ongoing maintenance. This is a much narrower enquiry which focuses on what a wise and just testator would consider it is required to help with Murray's financial future needs which are reasonably foreseeable.

[37] He concluded this did not meet the ongoing maintenance obligations in the circumstances. The Judge went on to award the $50,000 bequest without altering the residue allocation of 15 per cent.

The testator's obligations and the relationship between the testator and Murray

[38] Mr Bellamy submits that 10 per cent (of the residue) did not recognise the testator's obligations to Murray. In support of this submission, Mr Bellamy largely

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[27] Family Court decision, above n 1.
[28] Family Court decision, above n 1.

reiterated the factual context of the relationship between Murray and the testator, which the Judge already considered in the Family Court. Mr Bellamy submits that the Judge focused on the latter years of the relationship between Murray and the testator, when the testator formed a negative view of his son based on the opinion that Murray used his illnesses as an excuse not to work. He submits that the Court should view the background to this relationship as "essentially neutral with each of them failing in their duty to each other", rather than as one unilaterally ignoring the other, noting that "the fact that they were very different people is unfortunate but is nobody's fault".

[39] Mr Bellamy also submits that it was illogical for the Judge to reduce Murray's award compared to that of Dianne's given the nature of their respective relationships with the testator. Mr Bellamy made further submissions contending that although the testator seemed to have considered support for Murray to be a waste, this could not be because Murray was frivolous, as he was in fact very frugal.

The relevance of Mrs Emeny's estate

[40] This particular aspect of the appeal was not a focus of oral argument.

[41] Mr Bellamy submits that the Judge did not address the fact that in her will Mrs Emeny treated Murray and his siblings equally on her death. Further, had her husband pre-deceased her, all of the children would have received an equal share of both their mother and the testator's estate, as each had left their entire estates to the other.

[42] Mrs Emeny received a number of inheritances from family members in her lifetime, so her estate was comprised of both separate and relationship property. Mr Bellamy submits that she had different attitudes towards her children than her husband. He says that Mrs Emeny expressed an intention to support Murray through university, and that given his $32,000 of student debt, any adjustment should have been made "upward rather than downward". However, in oral submissions Mr Bellamy accepted that Murray's share in the estate, when converted to monetary terms based on the assumed value of the residuary estate, increased by $42,500.

The specific bequest of $50,000

[43] Mr Bellamy states that given the evidence before the Judge, reaching the figure for the specific bequest of $50,000 was "not unreasonable". However, he submits that there should be some uplift to account for inflation and the length of time that the maintenance covers.

[44] It is submitted that Murray will need medical care for the rest of his life, which will increase in scope and expense over time. Mr Bellamy contends that while Murray's medical expenses currently amount to $2,500 per annum, there should be a 50 per cent uplift to reflect these expected increases in cost, and that the Court should therefore substitute an award of $75,000.

Respondent's submissions

[45] Counsel for the respondent, Ms Halloran, submits that the appellant's analysis of the Family Court's decision is misconceived. She says that the assertion that the Family Court reduced the provision of 15 per cent of the residue of the estate for the appellant to 10 per cent is incorrect. Rather, the reasoning at paragraph [67] of the judgment and the final orders made at paragraph [78] make clear that the provision of 15 per cent was not interfered with.

[46] Ms Halloran submits that the only evidence put forward of the appellant's income and expenditure, assets, and liabilities was detailed in an affidavit provided by him sworn on 26 June 2023. The appellant in that affidavit detailed a "budget" which itemised medical costs of $2,500 per annum. Ms Halloran submitted that having regard to the likely "one-off" costs identified in the appellant's budget, the award of $50,000 was appropriate. She also noted that Mr Bellamy's reference to the appellant's student loan of $32,000 had been considered in the Court's overall assessment and is not relevant to the award the Court made for the appellant's medical needs.

[47] The respondent submits that the bequest ordered by the Judge of $50,000 was not "plainly wrong" and should not be disturbed.

[48] Mr Halloran also submits that the contention that 10 per cent was not sufficient recognition and support for Murray has no merit, given the modest nature of the estate and having regard to the poor relationship between Murray and the testator. Regardless, the appellant's submission in that regard was based on the misconception that the award of 15 per cent was disturbed.

[49] Ms Halloran further says that the ground of failing to give weight to Mrs Emeny's will has no merit, as there was no evidence of mutual wills before the Court such the Court could make any finding that the deceased was obliged to leave his will on the same terms as his wife.

[50] In oral argument following discussion with counsel, it became clear that there had been some confusion about the net effect of the judgment – that is, that the Court had not reduced Murray's share but had awarded a bequest of $50,000 and not interfered with the residue division of 15% to Murray. Ms Halloran submitted that even though the residue shares would decrease in Murray's case, this was only by $7,500, and the other residuary shares bore the brunt of the reduction in residue, while Murray made an overall gain of $42,500. Thus, the Judge did not make an error. He had been using assessed figures for the residuary amount, but it was the proportions that were important and Murray's share of 15% was appropriate in the circumstances. Even if the Judge had overlooked the reduction of $7,500, Ms Halloran said this was not a material error.

Analysis

[51] First, Mr Bellamy appeared to accept that he had misunderstood the effect of the of the Family Court decision. Mr Bellamy in his notice of appeal and written submissions had focussed on the intermediary finding that 10 per cent of the *overall* estate would be sufficient to meet the testator's moral duty to support his son, which the Judge reached before taking into account the testator's obligation to provide for Murray's future needs (which he went on to consider). The appellants written submissions did not recognise that the Family Court awarded an additional bequest of $50,000, while preserving Murray's entitlement to 15 per cent of the residue as set out under the will.

[52] Furthermore, the support provided for the appellant's submissions is largely factually based and does not raise any clear error in the Judge's reasoning. I am not persuaded by the submission that the Court should view their relationship as "essentially neutral" because no one was "at fault" for its deterioration, as the 7 did not place blame on either party in his decision. The Judge merely noted that the fact that Murray and the testator did not have a close and supportive relationship meant it was understandable that Murray was not provided for in the testator's will to the extent that Jeanette was.

[53] Furthermore, the submission that Murray was not frivolous does not add anything to the appellant's argument, as the Judge clearly recognised that Murray lived a "no frills" life within his own means. Nor do I consider that the submission made in argument that Murray's circumstances have been constrained for some years adds any weight to the appeal. The Judge considered the whole relationship and recognised the years of tension between Murray and his father. The basis of the submission that the Murray's percentage of the residue should not be less than Dianne's 15 per cent of the residue is not correct as the award for Murray was not decreased from the 15 per cent set out in the will. Mr Bellamy noted that the appeal argument had also clarified some confusion as to the effect of the will for his client.

[54] The Judge would have been well aware that the value of the residuary estate could not be estimated with precision. He pointed out that the house property had only been conditionally sold and that the sale had fallen through before the delivery of the decision.[29] In addition, as Ms Halloran pointed out costs needed to come out of the estate for these proceedings — at least for the executors. There is no error in the Judge using those figures — he appropriately was attempting to assess Murray's financial position in order to consider whether a further award should be made. The Judge determined that this was appropriate, as the testator had breached his moral duty in relation to Murray's likely health needs, but not in relation to his share in the residuary estate.

[29] Family Court decision, above n 1, at [8] and [10].

[55] The Judge was satisfied on settled principles that the sum of 15 per cent was sufficient to recognise Murray's place as a family member and part of the overall life of the testator — he correctly based this conclusion on settled law.[30] Furthermore, the Judge did not make a mistake in not expressly referring to the fact that the residuary estate would reduce taking out the $50,000 bequest to Murray. It was an obvious consequence of the bequest and he expressly preserved the 15% allocation of the residuary to Murray.

[56] The appeal must fail under that head.

Should the specific bequest be increased to $75,000?

[57] The reasoning put forward by the appellant for increasing the specific bequest to Murray from $50,000 to $75,000 was not developed in detail. Mr Bellamy relied on inflation and increased cost care and reduction in public health care in general terms under this head.

[58] In my view, the Judge was entitled to reach the sum of $50,000 based on the evidence before him. He carefully reviewed Murray's circumstances and concluded that the $50,000 bequest was sufficient to meet the obligation on the testator. That gives Murray a fixed sum which will be taken out of the estate first rather than relying on a percentage of the residuary estate, and the Judge did not err in making an order as such.

Conclusion

[59] For the reasons set out above the appeal is dismissed.

Costs

[60] Mr Bellamy suggests costs lie where they fall. However, Ms Halloran seeks costs on a 2B basis. Therefore, any application for costs should be made by memorandum (with submissions and authorities) on or before seven days from the

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30 Family Court decision, above n 1, at [61].

date of this judgment. Any response within a further seven days and any reply within a further three days.

Grice J

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