IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA636/2024
CA24/2025
[2026] NZCA 58

BETWEEN	TAKOTO HIWI MACKAY Appellant
AND	MERE DOROTHY HANA BLAIR Respondent

Hearing:	5 November 2025
Court:	Collins, Fitzgerald and Robinson JJ
Counsel:	A S Butler KC, A J Douglass and S Gaskell for Appellant P A Cowey and A J Summerlee for Respondent M A Choppin as litigation guardian for Appellant
Judgment:	5 March 2026 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside. The case is remitted back to the High Court for rehearing in light of the matters set out in this judgment.

C The costs orders made in the High Court are quashed.

D Costs in this Court are reserved for further consideration.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mrs Mackay, by her litigation guardian, Ms Choppin, appeals a judgment of Osborne J in which the Judge determined that a payment of $336,000 made by Mrs MacKay to her daughter Ms Blair, in November 2017, was an unconditional gift to assist Ms Blair to purchase a property in Kaiapoi (the property).[1]

[2] The Judge rejected Mrs MacKay's claim that she had an equitable interest in the property by way of a resulting trust.[2] The Judge also rejected Mrs MacKay's claims that:

(a) she did not have the requisite capacity to make the advance in issue to Ms Blair;[3]

(b) she was unduly influenced by Ms Blair when she made the advance;[4] and

(c) the advance was an unconscionable bargain.[5]

[3] The Judge also awarded Ms Blair increased costs pursuant to r 14.6(3)(b) of the High Court Rules 2016 because, in the Judge's assessment, the claim lacked merit and because of Mrs Mackay's failure to act reasonably which in turn contributed to the time and expense of the proceeding.[6] The litigation guardian's application to be exempt from liability for costs was dismissed in relation to costs incurred following Ms Choppin's appointment.[7]

Grounds of appeal

[4] Dr Butler KC (who was not trial counsel) succinctly summarised the essence of Mrs MacKay's case. He submitted that Osborne J erred when he concluded that

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1 *Mackay v Blair* [2024] NZHC 2459 [High Court judgment] at [128] and [367].
2 At [371].
3 At [357].
4 At [394]–[397].
5 At [414]–[428].
6 *Mackay v Blair* [2024] NZHC 3735 [costs judgment] at [36]–[42] and [44]–[45].
7 At [67]–[68].

Mrs MacKay was not the beneficiary of a resulting trust in relation to the property, because:

(a) the presumption of a resulting trust was not displaced in this case;

(b) Mrs MacKay would not have advanced funds to her daughter if they were not buying a property together;

(c) the payment was anchored to an expectation Mrs MacKay would have a legal right to live in the property and in due course, be looked after by Ms Blair; and

(d) the payment Mrs MacKay made to her daughter lacked the gratuitous quality required for a gift.

[5] Mrs MacKay also contends the Judge erred:

(a) when he declined to appoint a communications assistant for Mrs MacKay;

(b) when he concluded Mrs MacKay had the requisite capacity to make a significant gift to Ms Blair;

(c) when he concluded that payment by Mrs MacKay to Ms Blair was not the product of undue influence; and

(d) when he found there was no unconscionable bargain.

Background

[6] By any analysis the circumstances of this case are laced with personal tragedy, from the perspective of both Mrs MacKay and also Ms Blair.

[7] Mrs MacKay was born in 1948. During her childhood, Mrs MacKay suffered abuse. She left school at the age of 14 having not learned to read and write properly.

Throughout her life she suffered from poor literacy and numeracy. As a consequence, Mrs MacKay had a weak understanding of financial matters and was dependent on others, particularly her second husband (Mr MacKay) who managed her financial affairs.

[8] Mrs MacKay's first husband was abusive towards her. They had three children, the youngest of whom was Ms Blair. Mrs MacKay's first marriage came to an end when Mrs MacKay was in her thirties. The abuse which Mrs MacKay suffered in her first marriage led to her receiving treatment through the Accident Compensation Corporation for post-traumatic stress disorder (PTSD).

[9] Mrs MacKay met Mr MacKay in 1990. They married in 2004 and remained together until he died from cancer in April 2017.

[10] Mr MacKay had a printing business and the couple lived in his home in Spreydon, Christchurch. Ms Blair was close to Mr MacKay, he having entered into her life when she was about 10 years old.

[11] Towards the end of Mr MacKay's life his printing business, including the premises were sold. His estate was administered by the Public Trust. The Spreydon property was left to Mrs MacKay as were most of the couple's other assets. Following Mr MacKay's death, Mrs MacKay's assets were worth about $940,000.

[12] Ms Blair, who was born in 1977, lived overseas for a period before returning to New Zealand in 2005. She has two daughters.

[13] On her return to New Zealand, Ms Blair continued to maintain a close relationship with Mrs and Mr MacKay.

[14] By 2015, Ms Blair was living in a rented property with her children in Halswell. At that time Mr and Mrs MacKay had preliminary discussions with Ms Blair about helping her buy her first property. On 10 February 2016, Ms Blair wrote to Ms Olds, a mortgage broker, saying that she wanted to buy her first home and that Mr and Mrs MacKay would offer support by way of guarantees.

[15] Soon after Mr MacKay sold his printing business in 2016, Ms Blair and her children moved to a property in Tai Tapu. Mr and Mrs MacKay subsidised her rent.

[16] Following Mr MacKay's death in April 2017, Mrs MacKay suffered significant grief reactions. A psychiatrist later said "[s]he was clinically depressed and emotionally vulnerable. There was re-triggering of her PTSD. She became emotionally dependent on her daughter for support".

[17] Not long after Mr MacKay's death, Ms Blair raised the idea of buying a property to enable Mrs MacKay to live with Ms Blair and her children.

[18] Mrs MacKay's son, Nathan, who at this time lived in Australia, discussed family living arrangements with Ms Blair, soon after Mr MacKay's funeral.

[19] In May 2017, Ms Blair and her children moved into the Spreydon property occupied by Mrs MacKay. Mrs MacKay accommodated this by moving to a sleepout on the property.

[20] It was at about this time that Mrs MacKay gave Ms Blair access to her bank accounts so that Ms Blair could help Mrs MacKay manage her finances and to ensure Mrs MacKay was able to pay her bills on time.

[21] In June 2017, Ms Blair made contact with Ms Olds, saying that she was looking for a larger house in which to accommodate her family including her mother.

[22] On 7 June 2017, Ms Blair and Mrs MacKay met with Ms Olds to discuss the idea of Ms Blair purchasing a property. Soon thereafter, Nathan emailed Ms Blair expressing his concerns about the arrangements which were being contemplated.

[23] Between June and October 2017, Mrs MacKay discussed gifting arrangements to Ms Blair with her friend, Ms Baars.

[24] In August 2017, Mrs MacKay and Ms Blair visited properties including the property which was ultimately purchased in Kaiapoi. This led to Ms Blair seeking advice from Ms Olds about lending arrangements and how to characterise the financial

assistance from Mrs MacKay. Ms Blair also sought legal advice which led to her preparing a letter stating that Mrs MacKay would gift Ms Blair $300,000. Mrs MacKay signed that letter and attached her term deposit statement.

[25] On 24 August 2017, Mrs MacKay, Ms Blair and Ms Olds met. Loan application documents were completed. Mrs MacKay's name was originally included in that documentation alongside Ms Blair's, but was crossed out.

[26] The following day, Mrs MacKay visited her long-term general practitioner Dr White and asked for a letter to confirm to the bank that she was making a gift and that she had the capacity to do so. Dr White obliged by writing a letter saying Mrs MacKay was "of sound mind and able to make decisions with respect to legal matters".

[27] At some stage between August and early October 2017, Mrs MacKay and Ms Blair met with Mr Corcoran, a solicitor. He discussed the gift with Mrs MacKay and advised her to get independent legal advice. Ms Blair offered to assist Mrs MacKay in getting legal advice and to make an appointment with the same law firm that Mr MacKay had used. Mrs MacKay declined this offer.

[28] In early October 2017, Nathan visited Christchurch. This coincided with him emailing Ms Blair putting forward a proposal that Mrs MacKay would make advances on inheritances to both himself and to Ms Blair. He stated that Mrs MacKay had decided to give a $200,000 "advance" on Ms Blair's inheritance to purchase a house.

[29] In October 2017, Mrs MacKay advanced Ms Blair $346,000. Ms Blair stated that initially Mrs MacKay offered $336,000 of this amount as a gift and the remaining $10,000 as a loan.

[30] On 10 October 2017, Nathan emailed Ms Blair suggesting that Mrs MacKay was not in the right frame of mind to deal with these issues and that they pause their house plans.

[31] On 31 October 2017, Ms Blair signed a conditional sale and purchase agreement for the property with a purchase price of $636,000 and a deposit of $31,800. That offer was accepted on 6 November 2017. The following day, Ms Blair engaged D'Arcy Thomson Law and advised them Mrs MacKay was gifting her $326,000. Later that day, Ms Blair prepared a new gifting letter stating that Mrs MacKay would gift Ms Blair $346,000, a slightly higher sum than had previously been mentioned, namely $336,000, plus a loan of $10,000. Mrs MacKay signed that "gifting statement" later on 7 November 2017.

[32] On 13 November 2017, Mrs MacKay went to her bank and transferred funds from her term investment account to her cheque account and authorised Ms Blair to transfer $346,000 from Mrs MacKay's cheque account to Ms Blair's ANZ bank account.

[33] Settlement occurred on 27 November 2017. On the same day, Mrs MacKay, Ms Blair and her children moved into the property. Mrs MacKay did not move out of the Spreydon property and lived between that property and the Kaiapoi property.

[34] In November 2018, Nathan took Mrs MacKay on a road trip. It was during this trip that Nathan learned that Mrs MacKay's name was not on the title to the property.

[35] The relationship between Mrs MacKay and Ms Blair started to break down in January 2019. Mrs MacKay decided not to stay in the property and requested that Ms Blair "pay [her] back the money [she] had put towards the purchase". Ms Blair started to make weekly payments, but only managed to repay Mrs MacKay $750. Ms Blair took the view that these payments were intended to go towards the repayment of the $10,000 loan that had previously been discussed.

[36] In August 2019, the relationship between mother and daughter deteriorated. According to Ms Blair, it was about this time that Mrs MacKay requested Ms Blair sell the property and repay the full amount that Mrs MacKay had contributed towards the property (namely the $346,000).

[37] On 18 September 2019, Mrs MacKay visited the property to recover some of her belongings. An argument appears to have broken out. Ms Blair called the police. Later in September 2019, Mrs MacKay received independent legal advice from Ms Jenkins at Cameron and Co.

[38] Matters continued to deteriorate. Mrs MacKay moved to Taupō in 2020 where she lived with Nathan who had, by that time, returned to New Zealand. Around December 2020, Mrs MacKay engaged lawyers to sell the Spreydon property. The following year, on 24 June 2021, she lodged a caveat over the Kaiapoi property.

[39] In her statement of claim, Mrs MacKay sought an order for sale and division of the proceeds of the property in proportion to the contributions made to the purchase price; namely 54.4 per cent for Mrs MacKay and 45.6 per cent for Ms Blair. The proceedings were commenced on 22 September 2021 and Ms Choppin was appointed as Mrs MacKay's litigation guardian on 12 August 2022.

[40] By August 2023, Mrs MacKay's financial position had declined quite considerably. By then her assets were worth $346,665.[8]

Mrs MacKay's capacity

[41] The High Court had the advantage of expert evidence which included:

(a) An affidavit from Dr Lim, who is a consultant psychiatrist and psychogeriatrician specialising in "adult and old-age psychiatry". In his affidavit he annexed his report dated 3 March 2022.

(b) An affidavit from Dr Casey, who is also a psychiatrist and psychogeriatrician. Her affidavit annexed a report dated 6 July 2023.

(c) A reply affidavit from Dr Lim dated 13 December 2023.

(d) A joint experts' report dated 18 December 2023.

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8 High Court judgment, above n 1, at [47].

(e) Oral evidence given concurrently at the hearing by both psychiatrists.

[42] The Judge also assessed evidence from witnesses (including Mrs MacKay) about Mrs MacKay's apparent understanding in November 2017 of matters relevant to the payment she made to her daughter.

[43] The Court ruled inadmissible a neurophysiological assessment dated 11 May 2022 conducted by Ms Andrews, a registered clinical psychologist and neuropsychologist.[9]

[44] We will first summarise the medical reports before turning to the admissibility of Ms Andrews' report and how the Judge applied the evidence when reaching his conclusion that Mrs MacKay had the capacity to understand in November 2017 that she was gifting Ms Blair $336,000.

Dr Lim

[45] Dr Lim reviewed Mrs MacKay's medical records and conducted a face-to-face examination of her on 5 October 2021. He administered cognitive and functional tests to gain an understanding of Mrs MacKay's numeracy and literacy abilities and whether she suffered from a cognitive disorder.

[46] Dr Lim administered a full ACE-3 test. Mrs MacKay scored 57 out of 100 in that test which is widely used to screen for dementia and allows for an assessment of different cognitive deficits. Although Mrs MacKay's score was well below the score which would normally indicate dementia, Dr Lim attributed her low score to her difficulty with language, vocabulary and numeracy. Dr Lim also administered the Rowlands Universal Dementia Assessment Scale which confirmed to Dr Lim that Mrs MacKay was unlikely to have dementia.

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9 At [205].

[47] In Dr Lim's clinical assessment, Mrs MacKay was suffering from:

(a) chronic residual PTSD symptoms; and

(b) residual grief following the death of Mr MacKay.

[48] Dr Lim assessed Mrs MacKay's poor numeracy and literacy and her understanding of the transactions in issue. He noted her understanding of the events leading to the purchase of the property were that she "entered into a shared financial contribution towards the house, with some expectation that she would get care from [Ms Blair] in the long run".

[49] Dr Lim concluded that even if Mrs MacKay had the benefit of independent advice she:

> … would have had a great deal of difficulty understanding the implications of a significant financial transaction, including the legal concepts of gifting, legal ownership arrangements and complex financial arrangements.

Ms Andrews' report

[50] Ms Andrews conducted a neuropsychological assessment of Mrs MacKay which included interviewing Mrs MacKay for one and a half hours (30 minutes of which was with her son Nathan) and performed psychometric tests on Mrs MacKay over a six and a half hour period. The interviews and tests were conducted in March and April 2022.

[51] The key neurological findings made by Ms Andrews were as follows:

(a) Mrs MacKay has a reading age equivalent to a person of seven years of age.

(b) Her functional academics were very poor:

(i) She was able to perform single digit addition but struggled to perform double digit addition.

(ii) She was unable to multiply higher order single digit numbers.

(iii) She was unable to divide sums.

(iv) She was able to name a square, triangle and circle but not a rectangle.

(v) She made five spelling errors when writing the sentence "the quick brown fox jumped over the lazy dog".

(vi) She was unable to spell her formal Christian name.

(vii) She struggled to understand the concept of time and responded with "12" to questions asking how many days and months in a year, and many hours in a day.

(viii) She was unable to name any seasons.

(ix) Her reading, spelling, mathematics computation and sentence comprehension were in the impaired range.

[52] Ms Andrews assessed Mrs MacKay's general intellectual functioning on the Wechsler Adult Intelligence Scale – Fourth Edition. The results of that assessment were:

(a) Mrs MacKay's overall intelligence was within the impaired range (first percentile). That is to say, her overall intelligence was in the lowest one per cent of the population.

(b) Her verbal comprehension was also in the impaired range (first percentile).

(c) Her perceptual reasoning skills were in the low average range compared to similarly aged adults.

(d) Her working memory was in the impaired range (0.4 percentile).

(e) Her mental processing speed fell within the borderline range (fifth percentile), meaning she had difficulties with "speed of mental operation".

[53] Ms Andrews also concluded that Mrs MacKay's immediate verbal memory and learning, perceptual and visuospatial functions, attention and memory were all within the impaired range.

[54] Mrs MacKay's adaptive skill results showed that she was in the "extremely low" range in relation to leisure skills, communication, functional academics, social skills, community use and health and safety skills and "below average" in home living skills.

Dr Casey's report

[55] Dr Casey was not asked to see Mrs MacKay. Instead, her brief was "to provide an Independent Expert Opinion on the report of Dr Dominic Lim and to address the issues as to whether Mrs Mackay had the capacity to make a gift in 2017".

[56] After reviewing Mrs MacKay's medical records and Dr Lim's report, Dr Casey was satisfied that:

> There is no doubt that Mrs Mackay is a vulnerable elder due to the nature of the mild Intellectual Disability, her psychosocial circumstances, educational status and social and psychological background. Indeed, she is as vulnerable now, (possibly more so given ageing and loss of social support), as she was at the time of the gifting in 2017.

[57] After reviewing the material presented to her, Dr Casey concluded that, "on the balance of probability, Mrs Mackay would have had the capacity to decide to make the gift to her daughter [Ms] Blair, and to understand the nature and effect of the document that she signed on 7 November 2017".

Joint report

[58] Dr Lim and Dr Casey agreed on how Dr Casey had set out the general concept of capacity domains in her report:

> 11. The accepted medical and legal principles of the capacity to decide are; the patient or client needs to know the context of the decision at hand, be able to understand and manipulate relevant information, know the choices available and appreciate the consequences of the situation, and, be able to communicate a choice.
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> 12. Capacity is not only task-specific, it is also situation-specific. A person may weigh up and make a decision in a new circumstance that may be a different decision from one they would have made in previous circumstances. The capacity to decide may also be time-specific. In the consent to treatment, the ability to retain relevant essential information may only be necessary just for the time required to make the clinical decision. In the case of capacity to revoke and revise an Enduring Power of Attorney, the inability to recall previous appointments, or demonstrate a rationale for change, or appreciate the impact of the revision, may be signs of loss of capacity. In the capacity to revise a will, the more complicated the estate and the situation, the higher the threshold for determination of capacity.
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> 13. The recall, consistency, situation, and timeframe require a different level of exploration in the assessment of capacity to decide in different decision-specific circumstances. Domain-specific capacity recognises that people may lack capacity in one or more domains yet retain capacity in others.

[59] They also agreed that as at November 2017, Mrs MacKay suffered from:

(a) a depressive disorder;

(b) PTSD; and

(c) an intellectual disability.

[60] They were also in agreement that Mrs MacKay "did not have the diagnosis of dementia" at that time.

High Court findings

[61] Osborne J concluded Ms Andrews' report was inadmissible because it was not in the form of an affidavit and she was not called as a witness.[10] As a consequence of this finding the Judge said he would disregard the contents of Ms Andrews' report and those parts of Dr Lim's evidence that drew support from Ms Andrews' report.[11]

[62] The Judge also found that Dr Casey's evidence was preferrable to that of Dr Lim's concluding, "by a significant margin that the opinions reached and provided by Dr Casey are far more reliable than those reached and provided by Dr Lim".[12]

[63] Three central reasons underpinned the Judge's conclusions:

(a) his view that Dr Lim was at a disadvantage as a result of not having available to him the relevant evidence about Mrs MacKay's conduct during the periods at issue;[13]

(b) his concerns that Dr Lim's opinions "were informed to an unreliable extent by [Mrs MacKay's] self-reporting to him";[14] and

(c) the evidence of witnesses (including Mrs MacKay) which undercut Dr Lim's factual assumptions.[15]

[64] The erroneous factual assumptions made by Dr Lim included the following matters referred to by the Judge:[16]

(a) [Mrs MacKay] had no recollection of signing the November 2017 gift letter;

(b) [Mrs MacKay] relied on [Ms Blair] to organise independent legal advice;

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10 At [203] and [205].
11 At [205].
12 At [331].
13 At [332].
14 At [333].
15 At [228], [333(g)] and [334].
16 At [333].

(c) [Mrs MacKay] was brought (implicitly by [Ms Blair]) to see her GP for a capacity assessment;

(d) [Ms Blair] had effected the transfer of funds from [Mrs MacKay's] bank deposit;

(e) [Mrs MacKay] was unaware that [Ms Blair] became the owner of the Kaiapoi property on completion of the purchase;

(f) [Mrs MacKay] said (in discussions between herself and [Ms Blair]) there had been no mention of gifting at all; and

(g) Dr Lim placed no weight on the evidence considered by Dr Casey such as that of [Ms Blair], Mrs Baars and Ms Olds, as [Mrs MacKay] contested their evidence including in relation to such matters as the closeness of her relationships.

[65] Dr Butler challenged the finding that Ms Andrews' report was inadmissible particularly as the report was relied upon by both Dr Lim and Dr Casey as the source of their evidence about Mrs MacKay's previously undiagnosed intellectual disability. It was also submitted on behalf of Mrs MacKay that Ms Andrews' report was highly relevant, cogent and substantially helpful and had been prepared by an acknowledged expert.[17]

[66] We do not know why Ms Andrews' report was not presented as an affidavit or why she was not called as a witness. Nevertheless, Ms Andrews' expert opinion that Mrs MacKay suffered from a previously undiagnosed intellectual disability was accepted by Dr Lim and Dr Casey who are both highly qualified experts. In these circumstances, we think the Judge erred in ruling a line through those parts of Dr Lim's evidence which relied upon the uncontested elements of Ms Andrews' report. Those parts of Ms Andrews' report, which were accepted by both Dr Lim and Dr Casey, should not have been excluded from consideration.

[67] We will return to the consequences which flow from this finding later in this judgment.

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[17] Referring to Evidence Act 2006, s 25.

The test for capacity to make an inter vivos gift

[68] Dr Butler accepted the Judge correctly identified:

(a) there is a presumption of capacity;

(b) the burden of proving lack of capacity lies on the person alleging incapacity;

(c) the burden may shift if a tenable issue of lack of capacity is raised; and

(d) these principles apply to inter vivos gifts

[69] In *Re Beaney* the Chancery Division of the High Court of England and Wales (Chancery Division) explained the test for capacity to make an inter vivos gift.[18] That case concerned the capacity of Mrs Beaney, an elderly woman, to transfer to one of her three children a house which was Mrs Beaney's only significant asset. The transfer was signed when Mrs Beaney was in hospital following the deterioration of her mental condition during the preceding three years. At the time she executed the transfer, Mrs Beaney was told by a solicitor that the transfer would have the effect of giving her house to her older daughter. Mrs Beaney signed her name and witnesses thought she knew what she was doing.[19]

[70] The Court explained:[20]

> The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.

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18 *Re Beaney* [1978] 1WLR 770 (Ch).
19 At 770 and 772.
20 At 774.

[71] The Court concluded that as the claims of Mrs Beaney's other children and the extent of the property involved in the transfer were not explained to Mrs Beaney, the transfer was void.[21] The Court was not satisfied Mrs Beaney knew she was making an absolute gift of her house to her eldest daughter.[22]

[72] *Re Beaney* was cited by Winkelmann J in *Green v Green*.[23] That case was appealed to this Court.[24] *Re Beaney* was not referred to in the judgment of this Court, as the "Beaney" test for capacity to make an inter vivos gift was not relevant to the issues on appeal.[25] *Re Beaney* was however subsequently applied by the Chancery Division in *Sutton v Sutton* in which a gift of the family home of a father to his son was set aside because the father lacked the requisite capacity to make the gift.[26] After citing the passage from *Re Beaney* we have set at [70], the Court said:[27]

(a) the family home was unlikely to have been Mr Sutton's only asset of value when he transferred it to his son;

(b) it was nevertheless likely to have been his principal asset; and

(c) accordingly "the degree of understanding that he had to have for the gift to be valid was a high one and that he had to be capable of understanding not only the general nature of the transaction but also the claims of other potential donees [including his wife]".

[73] In this case, Osborne J said:[28]

> [347] If the approach in *Re Beaney* were to be applied in this case, where [Mrs MacKay] at 69 years of age was disposing of approximately one-third of her estate, the subject transaction sits between the two *Beaney* extremes — the fact the gift amounted to as much as one-third of [Mrs MacKay's] estate would indicate the required level of understanding should be close to but not as strict as that required for a testamentary gift.

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21 At 773–774.
22 At 777.
23 *Green v Green* [2015] NZHC 1218 at [95] n 43.
24 *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321.
25 See at [13]–[15].
26 *Sutton v Sutton* [2009] EWHC 2576 (Ch), 12 ITELR 627 at [1] and [27]–[28].
27 At [11].
28 High Court judgment, above n 1.

[74] Dr Butler submitted the approach taken by the Judge failed to consider Mrs MacKay's understanding of the consequences of the transaction namely that the payment meant she had no legal right to occupy the property or be cared for later in life by Ms Blair. These points were made by Dr Butler in the following way:

> [59] The Judge's assessment of the level of understanding should have taken into account the decision-specific nature of the total transaction of which the "gift" was but one (albeit important) part. Put another way, while a gift can be thought of as one of the simplest forms of transaction that a person can enter into (ie it is not necessarily an intrinsically difficult concept to grasp), difficulty and complexity can arise when its role within an overall transaction and the consequences of making a gift (as opposed to the use of some other form of property transfer / transaction) are not properly understood by the donor. This is the point well illustrated by *Sutton*.
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> [60] Here, [Mrs MacKay's] advance was intended to be part of mutually beneficial financial and living arrangements between [Mrs MacKay] and [Ms Blair]. [Mrs MacKay's] submission before the Judge (and again on appeal) is that she did not understand the consequences of making the advance via a gift as contrasted with other modes of making an advance that would have facilitated mutually beneficial financial and living arrangements equally well.

[75] Mr Cowey, senior counsel for Ms Blair, vigorously challenged Dr Butler's assessment of the approach taken by the High Court Judge. He did so by making the following two points:

(a) It was Mrs MacKay's testamentary intention to divide her estate into equal thirds with Ms Blair receiving one of those shares of Mrs MacKay's estate.

(b) The Court found that Mrs MacKay had capacity to distinguish between the consequences of making a gift and a loan and concluded that Mrs MacKay "understood the various legal and conveyancing concepts, including the nature of gifts and of loans and of not taking any title interest in the Kaiapoi property".[29]

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[29] At [352].

[76] The Judge also said:

> [353] Legal advice was not required for [Mrs MacKay] to understand the legal concepts involved or the impact the transaction was having on her financial position — the evidence establishes that [Mrs MacKay] understood all those matters.
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> [354] It is equally clear [Mrs MacKay] understood the claims [two of her other children] had on her estate and the way in which those claims would be affected by the gift to [Ms Blair].

[77] Notwithstanding Mr Cowey's arguments to the contrary, we are not persuaded that the issue is as stark as he suggests, that being whether Mrs MacKay had the capacity to understand the distinction between an outright gift and a loan. Rather, we accept Dr Butler's characterisation of Mrs MacKay's intentions in relation to the overall transaction, namely an advance of funds — not by way of a loan — but as part of mutually beneficial financial and living arrangements between her and her daughter.

[78] There are several pieces of evidence available to support this conclusion about the nature of the intended transaction from Mrs MacKay's perspective. First, Ms Olds confirmed Mrs MacKay's evidence that it was Mrs MacKay's intention to assist her daughter to buy a home large enough for Mrs MacKay to live in with Ms Blair and her children. Ms Blair also confirmed the intention was for Mrs MacKay to live with Ms Blair so that Ms Blair could support her mother. She said the arrangements were not made for Ms Blair's benefit but rather, for the benefit of her mother:

> I did it because I love my mum and … the best place for her to be … was with me and my girls …

Mrs MacKay was, understandably, delighted at the prospect of living under the same roof as her daughter and grandchildren.

[79] Secondly, Ms Blair appeared to accept in cross-examination that Mrs MacKay intended to rent out the Spreydon home after she moved into the property with Ms Blair. This evidence undercuts Ms Blair's contention that the property was just for her and that Mrs MacKay could come and go as she pleased.

[80] Thirdly, there was evidence, confirmed by Ms Olds, that Ms Blair and her advisors considered various legal structures including a trust, co-ownership and a loan.

It was Ms Blair who conveyed to her advisors that Mrs MacKay had decided to gift Ms Blair $336,000.

[81] Fourthly, as Dr Butler submitted:[30]

> There is no evidence that [Mrs MacKay] and [Ms Blair] even discussed, let alone agreed, critically important factors relevant to [Mrs MacKay's] intention, such as the possibility of joint home ownership, a trust, a property sharing agreement, the implications for a future Residential Care Subsidy application, the implications for [Mrs MacKay's] other children, the terms of the Family Protection Act 1955, and what would occur if either [Ms Blair] wanted to sell the property or [Mrs MacKay] wanted to move out or fell ill.

[82] Finally, there is no evidence of discussion with, or understanding by, Mrs MacKay of the suggestion that if the relationship between her and Ms Blair broke down, Mrs MacKay would not get any of her money back. We therefore do not agree that Mrs MacKay intended the advance to Ms Blair to be by way of an outright gift, unaccompanied by the important expectations that in exchange for financial support, Mrs MacKay would be entitled to live in the property for the rest of her life and to be cared for by her daughter.

[83] Looking at the matter through this lens, we agree with the submissions advanced on behalf of Mrs MacKay that the Judge erred when he found that Mrs MacKay had a relatively detailed level of understanding of the nature of the transaction.[31] We have reached this conclusion because our assessment of the evidence reveals that there was nothing to support the finding that "[Mrs MacKay] had a high level of capacity to understand *all* the key aspects of the transaction she entered into. And furthermore, she in fact understood them".[32]

[84] In particular, there appears to be no evidence to support the conclusion that Mrs MacKay had the capacity to protect her interests and to make an informed choice regarding the arrangements or to evaluate the various options available for legal ownership of the property. Furthermore, there was no evidence that Mrs MacKay understood or accepted that if the relationship between herself and Ms Blair failed then Mrs MacKay would not be able to:

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30 Footnote omitted.
31 See High Court judgment, above n 1, at [351]–[352].
32 At [352] (emphasis added).

(a) live in the house;

(b) require Ms Blair to refund the money paid to her by Mrs MacKay; or

(c) require Ms Blair to look after her later in life.

[85] This concern is reinforced by the fact there was no discussion with Mrs MacKay as to what the legal implications for the transaction would be in relation to her succession planning or what would happen if the relationship with Ms Blair broke down, with the result that Mrs MacKay would no longer live at the property.

[86] Applying the functional and decision-specific test articulated in *Re Beaney* leads us to conclude that there was a tenable evidential foundation for the argument that Mrs MacKay lacked the capacity to make the payment to Ms Blair because she did not fully understand the implications of the payment upon her ability to live in the house and/or receive care and support from Ms Blair later in her life.

[87] This was a case in which, had the Beaney test been fully applied by the Judge he would have appreciated that the onus of proving Mrs MacKay's capacity to make the payment switched to Ms Blair. Instead, the Judge considered the onus rested upon Mrs MacKay and never shifted to Ms Blair. This oversight, and the failure to give any weight to Ms Andrews' uncontested evidence leads us to conclude that the appeal should be allowed and the case remitted back to the High Court for rehearing in light of the matters we have explained.

Resulting trust

[88] We also are satisfied that the Judge erred when applying the legal tests relevant to the application of a resulting trust.

[89] Equity presumes that a person who pays for property intends to retain beneficial ownership of that property. This fundamental proposition was articulated almost 240 years ago by Eyre CB when he said in *Dyer v Dyer*:[33]

> The clear result of all the cases, without a single exception, is, that the trust of a legal estate … whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it … It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence.

[90] In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson expressed the principle that the presumption of a resulting trust "is easily rebutted either by the counter-presumption of advancement or by direct evidence of [an] intention to make an outright transfer".[34] This principle has been emphasised in many recent cases of this Court.[35]

[91] In this case the evidential inquiry as to whether the presumption of a resulting trust was displaced required the High Court to focus solely upon Mrs MacKay's intentions.[36]

[92] In his judgment, dealing with the resulting trust issue, Osborne J said:[37]

> [371] As I am satisfied the presumption of resulting trust is rebutted in this case (save in relation to the "extra $10,000") by direct evidence of [Mrs MacKay's] intention to make an outright transfer I determine the question of resulting trust by reference to that evidence. Had my decision turned on the application of the presumption of advancement, I would have found the presumption does apply to [Ms Blair] as a child of [Mrs MacKay] who had modest means. The evidence relied on by [Mrs MacKay] does not show she did not intend to benefit [Ms Blair] by way of [a] gift.

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33 *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 30 ER 42 (Exch) at 43 (emphasis in original).

34 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 708.

35 See for example *Chang v Lee* [2017] NZCA 308, [2017] NZAR 1223 at [18]; *Reid v Castleton-Reid* [2019] NZCA 372, [2019] NZAR 1655 at [38]; *Li v 110 Formosa (NZ) Ltd* [2020] NZCA 492 at [120]; and *Lendich v Codilla* [2023] NZCA 222, (2023) 24 NZCPR 374 at [12]–[13].

36 See *Chang v Lee*, above n 35, at [21]. In that case, this Court held that in the absence of an agreement on the terms of Mr Chang's advance, the Court's inquiry must focus on his intention.

37 High Court judgment, above n 1.

[93] Mr Cowey urged us to accept the Judge's findings saying:

(a) Even if the presumption of a resulting trust had arisen, the presumption was easily rebutted either by the counter-presumption of advancement or by direct evidence of an intention to make a gift.[38]

(b) None of Mrs MacKay's statements about the advance being a loan rather than a gift were contemporaneous. The only contemporaneous acts of Mrs MacKay involved her signing the gifting statements in 2017. In these circumstances, the counter-presumption of advancement prevails.[39]

[94] We shall analyse the presumptive trust issue by:

(a) considering the evidence pertaining to Mrs MacKay's intentions including the gifting statements which she signed; and

(b) considering the counter-presumption of advancement.

Evidence of Mrs MacKay's intentions

[95] We have set out the relevant evidence relating to Mrs MacKay's intentions at [78]–[81] and do not repeat it here. Importantly, that evidence was not specifically referred to by the Judge when deciding whether or not the presumption of a resulting trust had been rebutted.

The gifting documents

[96] The only contemporaneous records which contradicted Mrs MacKay's evidence that she never intended to gift Ms Blair the $336,000 were the two gifting documents signed by Mrs MacKay in 2017. The critical gifting document was the one dated 7 November 2017 as that specified the sum that was paid and was critical to the

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38 Referring to *Westdeutsche Landesbank Girozentrale v Islington London Burrough Council*, above n 34, at 708.

39 Citing *Woolf v Kaye* [2018] NZHC 2191, [2019] 3 NZLR 93; and *Klimenko v Kilmenko* [2021] NZHC 2592.

purchase of the property. However, as Ms Olds confirmed in her evidence, that letter was drafted to satisfy the bank's lending requirements. It was Ms Olds who provided Ms Blair with the words that were used in the 7 November letter.

[97] In normal circumstances, a letter signed by a donor gifting money to an adult child to purchase a house might rebut the presumption of a resulting trust. This case is however far from normal:

(a) There is no evidence that the letter of 7 November was explained to Mrs MacKay or that she fully appreciated the legal ramifications of gifting $336,000 to Ms Blair.

(b) This concern is compounded by our apprehension that the implications of Mrs MacKay's cognitive limitations were not fully appreciated by the Judge or those dealing with her at the time the transaction was entered into.

(c) There was no analysis as to how the "gifting" letter of 7 November fitted into the wider arrangements that were of concern to Mrs MacKay, principally, her desire that she would have a legal right to live in the property and in due course be cared for by Ms Blair.

(d) There was no consideration of the fact that if the parties were not purchasing a property then, Mrs MacKay was unlikely to have made the payment to Ms Blair.

Counter-presumption of advancement

[98] The counter-presumption of advancement presumes that where a parent transfers money to a child, they intend to do so as a gift.[40] This presumption stems from the "natural obligation [of the transferor] to provide for the transferee".[41] In the paragraph of the High Court judgment we have set out at [92], Osborne J concluded that having found the presumption of a resulting trust was rebutted by way of "direct

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40 *Woolf v Kaye*, above n 39, at [157], citing *Woodcock v Woodcock* [2018] NZHC 470 at [111].
41 *Woolf v Kaye*, above n 39, at [157].

evidence of [Mrs MacKay's] intention to make an outright transfer", it was unnecessary for him to consider the application of the counter-presumption of advancement. Regardless, the Judge noted that if his decision had turned on that counter-presumption, he would have found that it applied.[42] We observe, however, that the counter-presumption of advancement may not be so significant where the advance is from a parent to an adult child.

[99] As Fitzgerald J said in *TN v AK*:[43]

> [68] … there is some doubt whether the presumption of advancement carries much weight in transfers between parents and adult children; the Supreme Court of Canada, for example, has held the presumption of advancement is not applicable to adult children.[44]
>
> [69] … I see merit in the approach adopted by the Canadian Supreme Court.

[100] We share the reservations expressed by Fitzgerald J particularly in a case such as the present where there is a sound basis for questioning Mrs MacKay's capacity to properly understand that the "gifting" letter may not have reflected her real intentions.

[101] Our analysis of the resulting trust issue leads to the conclusion that had the Judge fully appreciated the apparent limitations to Mrs MacKay's cognitive abilities he is unlikely to have concluded that the presumption of resulting trust was rebutted. This conclusion is however dependent on the extent to which Mrs MacKay lacked the capacity to properly understand the legal implications of her gifting $336,000 to Ms Blair. As we have previously noted, that inquiry requires further assessment of the medical evidence, including any evidence from Ms Andrews. Unfortunately, that task can only be performed in the High Court.

Other grounds of appeal

[102] Our conclusions render it unnecessary to consider the remaining three grounds of appeal. We will however briefly touch upon the Judge's decision not to appoint a communications assistant for Mrs MacKay.

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42 High Court judgment, above n 1, at [371].
43 *TN v AK* [2019] NZHC 2466 at [68] and [69].
44 *Pecore v Pecore* 2007 SCC 17, [2007] 1 SCR 795.

[103] There is an application before us to adduce further evidence, namely a report from Ms Maguire, a communications assistant. Her review of the High Court transcript and audio recording of Mrs MacKay's evidence shows Mrs MacKay "appears [to have] faced notable communication challenges in understanding and responding to questions".

[104] In light of the conclusions we have reached, it is not necessary to determine the application to adduce Ms Maguire's evidence. That will be a matter for the High Court if a rehearing proceeds.

Costs

[105] We set aside the costs orders made in the High Court. We reserve costs in this Court until the parties have had an opportunity to decide whether or not a rehearing is necessary. Once that decision is made, the parties may file memoranda concerning costs in this Court.

Results

[106] The appeal is allowed.

[107] The judgment of the High Court is set aside. The case is remitted back to the High Court for rehearing in light of the matters set out in this judgment.

[108] The costs orders made in the High Court are quashed.

[109] Costs in this Court are reserved for further consideration.

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