IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA180/2022
[2023] NZCA 230

BETWEEN	GRAEME WHATMAN BARNARD Appellant
AND	CHRISTOPHER MARK ROBERTSON, ROGER THOMAS BARNARD AND GRAEME WHATMAN BARNARD AS THE TRUSTEES AND EXECUTORS OF THE ESTATE OF THE LATE MARGARET ISABEL BARNARD Respondents

Hearing:	13 February 2023
Court:	Cooper P, Ellis and Churchman JJ
Counsel:	T G A Manktelow and H K Clow for Appellant G A Paine for Respondents W L Aldred and L E Kenner for the beneficiaries
Judgment:	13 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the beneficiaries costs for a standard appeal on a band A basis with usual disbursements. We do not certify for two counsel.

C The respondents' costs are payable from the estate.

REASONS OF THE COURT

(Given by Ellis J)

[1] Margaret Barnard died on 27 June 2019, leaving three adult sons: the appellant Graeme Barnard, and his brothers Roger and Timothy.[1] Mrs Barnard left an estate valued at approximately $4.4 million; the only beneficiaries under her last will were her three sons. Her estate was not, however, divided equally between them.

[2] Graeme—who received less than Roger and Timothy under their mother's will—brought proceedings under the Family Protection Act 1955 (the FPA) saying that his mother had failed in her moral duty to provide him with proper maintenance and support.

[3] Graeme's claim was dismissed by Simon France J in the High Court.[2] Graeme now appeals that decision.

[4] Graeme's claim was resisted in the High Court, as it continues to be resisted on appeal in this Court, by Roger's estate and Timothy as the other beneficiaries of Mrs Barnard's estate. For ease of reference, we refer to Roger's estate and Timothy together as the beneficiaries. The respondents abide the decision of the Court, as they did before the High Court.

Background

[5] The following overview narrative is not disputed.

[6] In their younger years, Mrs Barnard and her husband, Mr James Barnard, owned and lived on a 100-acre sheep farm in Kairanga. Their three sons grew up on the farm. From the early to mid-1980s onwards all but approximately 10 acres of the farm was leased to a third party.

[7] In 2002, well after the boys had all left, Mr and Mrs Barnard sold the farm and moved to Palmerston North, where they built a new home. Mr Barnard died in 2007. Apart from a short time spent in a rest home in 2018 shortly before her death,

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1 The three brothers will be referred to by their Christian names in this judgment, to avoid confusion. Roger died just before the case was heard in the High Court.

2 *Barnard v Robertson* [2022] NZHC 469 [High Court judgment].

Mrs Barnard lived at the Palmerston North house for the rest of her life. The house has since been sold, and the proceeds form part of Mrs Barnard's estate.

[8] Graeme married in 1985 and had two sons. He and his wife separated in 2006, and relationship property matters were settled by consent in December 2007. Mrs Barnard provided Graeme with $150,000 in order to buy out his wife's interest in his family home so that he could remain living there. In return, a one quarter share in that property was vested in Mrs Barnard in February 2008. To fund the remainder of the buy-out, Graeme took out a mortgage of $47,000, which Mrs Barnard first guaranteed and then paid off later that same year. At that point, her ownership interest in Graeme's property increased to one third.

[9] A month or so later, Mrs Barnard updated her will. That will (dated 14 March 2008) is in materially the same terms as her final will, which was executed on 13 June 2013.

[10] The 2013 will provides that:

(a) Mrs Barnard's interest in Graeme's property was gifted to him;

(b) her investments (in the form of a share portfolio) were gifted as follows;

(i) Roger and Timothy were to receive $250,000 each;[3] and

(ii) the remainder of the investments was to be divided into three equal shares, with Roger and Timothy receiving their shares outright as capital sums, but with Graeme receiving only a life interest in his share;[4] and

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3 There is no dispute that these sums were intended to be equivalent in value to what had been gifted to Graeme, although by the time of the hearing before Simon France J, a one third share of Graeme's property was worth $386,000.

4 On Graeme's death his share is to revert to his two brothers or, in the event of their prior death, their children.

(c) the residue of the estate—comprising Mrs Barnard's house (now sold) and some jewellery—was to be divided equally between her three sons, giving each of them $290,000.

[11] Uncontested calculations presented by the beneficiaries' counsel in the High Court were to the effect that Graeme's life interest had a value of $374,353 and could be expected to yield him annual (after tax) income of $26,000. By contrast, the capital value of his brothers' shares in the investments was a little under $900,000 each.

The hearing in the High Court and the decision under appeal

The evidence

[12] In the judgment under appeal Simon France J noted that Graeme "relied significantly" on the proposition that he had a special claim on his mother's estate because of his contributions to it and to his care of his mother in her latter years.[5] Much of the evidence therefore focused on the nature and extent of these alleged contributions, which were disputed by Graeme's brothers.

[13] Evidence in the High Court was given by affidavit and there was no cross-examination. The Judge observed that the affidavits disclosed "a deep antipathy between the brothers which has manifested itself in claim and counterclaim that have descended to pettiness".[6] He said that without cross-examination it was impossible to resolve many of the factual contests but that, in any event, "most do not merit resolution".[7]

[14] The Judge was also not prepared to give much weight to affidavits sworn by Mr John Bird (a close friend of Graeme's) and Ms Joanne Machin (Margaret's caregiver) filed in support of Graeme's claim. He explained:[8]

> There are affidavits filed on Graeme's behalf from Mrs Barnard's caregiver and by a friend of Graeme's, both deposing in favour of his version. It is not

5 High Court judgment, above n 2, at [20].
6 At [10].
7 At [10].
8 At [12].

> possible to give them much weight. As for the friend, it is difficult to discern how much is personal knowledge and observation. As for the caregiver, there is fulsome support but a somewhat surprising error in recalling the length of time she worked with Mrs Barnard. A statement of "in the years I worked for her" cannot be so as it seems to have been employment limited to part of the last year of Mrs Barnard's life. I do not suggest anything more than a misremembering.

[15] The Judge nonetheless went on to articulate a general narrative, reflected in our overview of the background above, based on the relevant evidence before him. As well, he:

(a) noted that while all three sons had left home in either their late teens or early 20s, Graeme remained living closer to his parents than his two siblings;[9]

(b) recorded that in her later years it was Graeme who held a power of attorney for his mother;[10]

(c) observed that, by dint of geography, "[c]ommon sense says [Graeme] would have assisted his mother more";[11] and

(d) noted that Mrs Barnard's will treated Graeme's children differently from the children of his brothers as there was no provision for Graeme's life interest to pass to his children if he predeceased Mrs Barnard.[12]

[16] The Judge referred to a February 2008 lawyer's letter addressed to both Mrs Barnard and Graeme. The letter addressed the agreed arrangements around the refinancing of Graeme's house and, in that context, referred to the question of new wills. The Judge set out the relevant part of that letter, which recorded:[13]

> … we note you have both expressed the intention to make new Wills. We invite your instructions. We believe that in Graeme's will [he] ought to bequeath his 75% interest in the property to [Mrs Barnard]. *It needs to be pondered how you choose to treat Graeme's sons in your Wills. You have both*

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9 At [11].
10 At [12].
11 At [12].
12 At [14]. By contrast, the will provided that if either Timothy or Roger predeceased their mother, their share was to pass to their children.
13 At [15] (emphasis added by Simon France J).

> *exhibited reluctance to bequeath any of your estates to the boys*. The presence of the Family Protection Act does impact on that choice, but we can discuss that aspect when you next visit.

[17] The Judge noted that although Mrs Barnard herself had not formally explained why Graeme received only a life interest in his third of the remainder of the investments when his brothers were bequeathed their shares absolutely, it was the approach she had adopted in both the 2008 will, and again in 2013.[14] The Judge noted that two reasons for drafting the will in this way had been referred to by Graeme's brothers:

> [17] Roger and Timothy Barnard identify two related reasons – a desire on their mother's part to protect Graeme from his own business failings, and from his former wife. On this latter aspect, while the couple separated in 2007, they never divorced until shortly after the testator's death and seemingly Mrs Barnard was concerned to exclude the former wife from any possibility of access to her money.

[18] By contrast, Graeme had deposed he did not know why he was given only a life-interest, and his children were excluded. He disputed that his companies were failing and says they were wound up as part of the settlement with his former wife. He acknowledged, however, that his mother may have had concerns about his former wife having claims on his property (although the couple separated in 2007, they did not divorce until shortly after Mrs Barnard's death). The Judge noted that Graeme's evidence did not directly address the 2008 solicitor's letter we have set out above that suggests Graeme and his mother were, at that time, in agreement that his sons should be excluded from their respective wills.[15]

[19] For these reasons the Judge concluded that "[t]he evidence does not allow me to draw conclusions as to the testator's reasoning".[16] He reiterated his earlier view that much of the evidence lacked objectivity and was speculative, unnecessarily accusatory, undisciplined and irrelevant, saying "I am reinforced in a view formed on the first reading that it is not possible for the Court fairly to resolve these on the papers, or form firm conclusions".[17]

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14 At [16].
15 At [18]. Although Graeme did dispute at trial that he was ever party to an agreement to exclude his children from taking his estate.
16 At [16].
17 At [19].

Special claim based on contributions

[20] As noted earlier, the Judge considered Graeme's claim "relied significantly" on the proposition that he had a special claim on his mother's estate because of his contributions to it. On that issue, the Judge's assessment was as follows:

> [21] The first phase of this claim is contributions by [Graeme] to the farm. These are said to be while living at home, then by doing shearing with his father to avoid the need to hire shearers, working on weekends once he had left home and assisting his father once the farm was reduced to a 10 acre plot. His brothers dispute this on several fronts. First, it is said all the sons, as is usually the case with farms, worked on the farm when living at home. Second, the subsequent contribution by Graeme is contested, although the extent to which the brothers could have personal knowledge is limited. That said, Timothy says he was living on the farm for four years after Graeme left and he denies the claimed weekend assistance by Graeme over that period.
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> [22] The evidence does not satisfy me that Graeme has contributed to the estate through this endeavour in a way that merits special recognition. His parents owned the farm when the children were born and during the period when the full farm was still run by their father, it is probable all sons contributed. The level of contribution will have varied depending on circumstances, but to the extent his is a claim of building up the asset or doing something significant, I am far from satisfied that is the case. Such assistance as was given once the farm reduced to 10 acres is more easily seen as a contribution to his parents' life than any building up of the estate.

Breach of moral duty

[21] After referring to the relevant authorities, the Judge observed there could be no dispute that Mrs Barnard owed Graeme a moral duty, or that the will recognised that duty. Rather, the question was "whether that duty has been discharged by a proper provision in all the circumstances pertaining at the time of her death".[18] The Judge then:

(a) reiterated the details of the provision made for Graeme in the will (a one third share in his home, which was valued at around $1.1 million, a share of the residue of Mrs Barnard's estate worth around $300,000 and a life interest in a portion of Mrs Barnard's investments, which presently provided an annual after-tax income of $26,000);[19] and

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18 At [29].
19 At [29].

(b) noted that Graeme already "has national superannuation and a share portfolio worth $160,000 and yielding an income of around $5,000 per annum".[20]

[22] The Judge's analysis of the circumstances relevant to the question of "proper provision" was as follows:

> [31] Focusing solely on financial need at the time of her death, I consider it can be said there was a need. This is, of course, a case-specific assessment. While [Graeme] has assets worth around $1 million, he is a not uncommon asset sound but cash poor applicant. His income to meet all outgoings on a house, and his living expenses, was national superannuation plus $5,000.
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> [32] Looking at other circumstances that feed into what would be proper, Mr Barnard had been a dutiful son who had provided comfort and assistance to his mother since she was widowed, and probably to an increasing extent as she became frail. There were competing claims on the testator's estate, namely two sons each with family and one who was suffering from cancer which led to his death last year. And Mrs Barnard had assisted Graeme in his lifetime in a way not provided to the other sons. This assistance was offset by the testator taking a share in Mr Barnard's house but it enabled him at around the age of 54 to have a mortgage-free home.
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> [33] These were all matters a wise and just testator would need to have regard to in making proper provision.

[23] The Judge concluded:[21]

(a) the will was "unfair" to Graeme, in terms of its differential treatment of him and his brothers in relation to the investments; but

(b) proper provision for him had nonetheless been made.

[24] The Judge elaborated on both conclusions. As to the question of unfairness, he said:[22]

> [35] To explain the unfairness conclusion, the assistance given to Graeme at the time of his separation has been offset by the specific $250,000 gifts to the other two sons. At any point in time since the will was structured this way, this mechanism might have favoured one side or the other. Mrs Barnard lived to a good age, *and so the figures presently favour Graeme* but the mechanism deals with the topic of help during Graeme's life. As for the other dispositions,

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20 At [30].
21 At [34].
22 Emphasis added.

it is, as always, a matter for the testator, subject to discharging moral duties, but objectively it seems to me unfair to have given one-third of the share portfolio to each of the other sons, currently valued at approximately $900,000 each, plus half each of Graeme's share on his death. Conversely Graeme receives only the income from his third. There is nothing in the evidence that explains this mechanism or suggests it is fair. Hence my conclusion.

[25] And as to the question of proper provision:

> [36] The question, however, is whether proper provision has been made. Looking at the matter from the viewpoint of the size of the estate, and accepting Mr Day's assessment of the capital value of the life interest, [Graeme] receives somewhere around 20–25 per cent of the estate at today's value. It is far from not giving proper recognition to his membership of the family.
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> [37] Looking at his circumstances, I accept the one-third share in the house makes little difference on a day-to-day basis. It does, however, give him full ownership of a valuable asset should he wish to downsize. Further, concerning his lack of income situation, there is now both the annual income from the share portfolio and a capital sum which can provide income, or be used as extra money to assist living. Taken with his own shares and other assets, it means [Graeme] has around half a million dollars available to him in addition to superannuation and the share portfolio income. He also now fully owns a substantial property. It cannot be said, in my view, that the testator has failed to meet his needs in either a narrow financial sense or the wider sense required of a wise and just testator. His brothers have been more favoured without, as I read the evidence, any real basis to support that approach; but he has been properly provided for in the sense of the testator meeting her moral duties.

The appeal

[26] On appeal, Graeme challenges the High Court's findings that:

(a) it was not possible to give weight to the evidence of the third parties, Mr Bird and Ms Machin;

(b) Graeme's contribution to his mother's estate did not merit special recognition;

(c) the provision made for Graeme in the will amounted to between 20 and 25 per cent of the estate;

(d) the provision made for Graeme in the will (regardless of percentage shares) amounted to proper recognition of his moral claim on the estate; and

(e) Graeme's mother had not breached her moral duty to him.

[27] He seeks an order quashing the finding that there was no breach of moral duty and an order making such further provision for him from the estate as is necessary for his proper maintenance and support.

Applicable principles and authorities

[28] The Court's jurisdiction to order further provision out of a deceased's estate or on an intestacy is derived from s 4(1) of the FPA, which provides:

> (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.

[29] The broad principles applying to FPA claims are well settled and were recently summarised and confirmed by this Court in *Brown v Brown*:[23]

> [60] … The starting position, as recognised in this Court's decision in *Williams v Aucutt*, is that testamentary freedom remains except to the extent that there has been a failure to make proper provision for the maintenance and support of those entitled to it.
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> [61] In summarising the consideration of whether a testator has breached his or her moral duty, the Court in *Williams* adopted the observations from an earlier decision of this Court as follows:
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> > The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to 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

[23] *Brown v Brown* [2022] NZCA 476 (citations omitted and emphasis added).

> 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. *Experience in administering this legislation has established the approach in this Court that on an appeal the Court will not substitute its discretion for that of the Judge at first instance unless there be made out some reasonably plain ground upon which the order should be varied.* All this is so familiar that authorities need not be cited.
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> [62] The Judge also acknowledged further observations from *Williams* on what is covered by the concepts of maintenance for and support of a claimant. The notion of support is wider than that of maintenance, and supporting a child's path through life is not simply a matter of financial provision, but also requires the recognition of a sense of belonging to a family. Where the size of the estate is more than sufficient to meet other needs, then a provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for the family member.
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> [63] A further point made in *Williams* was that *perceived unfairness arising from disparity of treatment between potential beneficiaries is not of itself sufficient to override the testator's wishes. A claimant must instead make out that a testator or testatrix has not acknowledged a need for maintenance and support*.

[30] The Court in *Brown* also noted that while *Williams* had proceeded on the basis that FPA appeals were appeals against the exercise of discretion, it was unlikely to make a difference if the relevant decision was regarded as an evaluative one. The Court said:[24]

> [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*.

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[24] Citations omitted and emphasis added.

This case: our assessment

[31] We propose to address the appeal by reference to the first three grounds we have set out at [25] above. We will then address the fourth and fifth grounds together as they are closely related.

Was the Judge wrong to give little weight to the evidence of Mr Bird and Ms Machin?

[32] We acknowledge that, as Mr Manktelow submitted, the evidence of Mr Bird and Ms Machin did, in general terms, support Graeme's evidence about the extent of his contributions to the estate and to his mother's care. But, as will now be clear, the evidence about contributions was fiercely contested; while the fact that Graeme's account was apparently "corroborated" by others and this might have been a factor weighing in his favour, whether it was so depended on the quality and reliability of the corroboration.

[33] Here, the Judge clearly explained why he was not prepared to give the evidence of Mr Bird and Ms Machin any significant weight. We have set out the relevant passage from his judgment above at [13].

[34] We did not understand Mr Manktelow to take direct issue with those reasons which—on our own reading of the relevant affidavits—are unassailable. There was objective evidence (in the form of payslips) showing that Ms Machin had significantly overstated the length of time she had cared for Mrs Barnard; that mistake (or as the Judge termed it, "misremembering") inevitably gave rise to a real question about her reliability.[25] And Mr Bird's affidavit is undoubtedly vaguely expressed. Its terms raise genuine questions about whether he actually saw any of Graeme's more recent interactions with his mother or whether Graeme had simply told him about those. The words used, together with his close friendship with Graeme and the fact that he lived some considerable distance from Palmerston North (so likely had only a limited opportunity to observe Graeme and his mother together) all warranted caution in simply accepting what he said.

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[25] High Court judgment, above n 2, at [12].

[35] The wider point is that the onus was on Graeme to establish his claim. Any deficiencies in, or doubt about, the evidence filed in support of it, and any unresolvable evidentiary conflicts, necessarily counted against him. We see no error in the Judge's conclusion that he failed to meet the burden that was upon him.

Was the Judge wrong to hold that Graeme's contribution to his mother's estate did not merit special recognition?

[36] As he had in the High Court, Mr Manktelow submitted before us that because of the contributions made by Graeme to the farm prior to its sale, and the particular help and support given by him to his mother in her later years, he had a "special claim" on his mother's estate.

[37] Before turning to the merits of that position it is useful to observe that the notion of a "special claim" appears to have its origin in *Goodman v Windeyer* where the High Court of Australia said:[26]

> One of the circumstances that must be considered in deciding upon the deserts of a claimant to a testator's estate, and in determining whether proper maintenance has been provided, is the manner in which that claimant has conducted himself or herself in relation to the testator. If the claimant has contributed to building up the testator's estate, or has helped him in other ways, that may give the claimant a special claim on the testator's bounty.

[38] A careful reading of that passage makes it clear that such contributions do not themselves give rise to a discrete type of claim. Rather they form part of the overall circumstances that fall to be considered when assessing the extent of a particular testator's moral duty and what then constitutes the proper provision of maintenance. So, we agree with Ms Aldred for the beneficiaries that the question to be asked and answered here is not whether Graeme has a "special claim" on his mother's estate, but whether the High Court erred in assessing his contributions. That requires consideration of the extent of the moral duty owed, and the level of support or maintenance fulfilment of that duty demanded.

[39] It follows from that point that the matters said by Graeme to give rise to a "special claim" fall more properly to be considered in the context of the wider (and

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[26] *Goodman v Windeyer* (1980) 144 CLR 490 at 497.

related) questions of whether Mrs Barnard failed—in all the relevant circumstances—to act in accordance with her moral duty and make proper provision for Graeme in her will. We will address those questions shortly, after dealing with an issue raised by Mr Manktelow about the way the Judge calculated the value of Graeme's share of the estate.

Error in assessing Graeme's percentage share of the estate

[40] As recorded in the judgment under appeal, the 20 to 25 per cent figure referred to by Simon France J was based on a calculation of the value of Graeme's life interest that had been undertaken by the beneficiaries' then counsel, Mr Day, using the Estate and Gift Duties Act 1968 formula.[27] The judgment also records that, contrary to the position now taken on appeal, Mr Day's calculation of the life interest had not been contested by Mr Manktelow.

[41] We acknowledge that—beyond reference to the value of Graeme's life interest—the Judge did not explain how he reached the conclusion that Graeme's share amounts to 20 to 25 per cent of the value of the estate. But it can be observed that a 22 per cent share would be the result of a relatively robust calculation on the following lines:

Estate Assets	***Value***	***Graeme***	***Timothy***	***Roger***
Residue	$870,000	$290,000	$290,000	$290,000
1/3 share in Graeme's property	$386,000	$386,000		
Gifts	$500,000		$250,000	$250,000
2/3 share of investments	$1,785,949		$892,974.50	$892,974.50
Life interest in 1/3 share of investments	$360,173	$360,173		

[27] Contrary to the appellant's submissions the Judge did not say that Mr Day himself calculated the percentage value of Graeme's share.

Graeme's 1/3 share of investments (passes to his brothers on his death)	$892,974		$446,487.50	$446,487.50
TOTAL	$4,795,096	$1,036,173	$1,879,462	$1,879,462
RELATIVE SHARES		22 per cent	39 per cent	39 per cent

[42] Mr Manktelow took issue with the "20 to 25 per cent" conclusion on a number of grounds. He submitted that account needed to be taken of the value of the life interest in the capital sums received by Timothy and Roger, which he submits is $360,173 each. If that is done, then (he said) Graeme's share would only be 18.79 per cent. He said further that even 18.79 per cent is "almost certainly" too high because using the actuarial tables in the Estate and Gift Duties Act does not account for the various costs associated with the supervision of the investment portfolio, taxation and other ongoing matters of administration.

[43] Even if we were persuaded that the value of the brothers' life interest should be included in the calculation, the difference between 18.79 per cent and the Judge's 20 per cent is minimal. And as noted earlier, the Judge recorded that Mr Manktelow had agreed at trial that a calculation based on the actuarial tables in the Estate and Gift Duties Act was appropriate. But in any event, the signal and broader point is that whether proper provision was made for Graeme in the will is not a question that can be answered mathematically, as a matter of percentages. Mr Manktelow acknowledged as much. The appropriate focus in the moral duty inquiry is not on any disparity in treatment as between the claimant and other beneficiaries but rather on what is adequate in terms of the particular claimant's need for maintenance and support.[28] In the present case, we think comparison of respective percentage shares adds little to the undisputed point that—for reasons that remain unclear—Mrs Barnard's will gave Graeme a lesser share of the estate than it gave his two

[28] We accept that the respective shares received by a claimant and by other beneficiaries may be of some small relevance if a court is asked to consider whether the will has given the claimant justifiable cause to feel excluded from the family. But it is wrong to draw a direct line between a particular percentage and the fulfilment of moral duty to any particular beneficiary. See for example *Re Shirley* CA155/85, 6 July 1987 as confirmed in *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [48]–[50] and [77]; and *Worboys v Jones* [2004] NZFLR 360 (HC) at [16]–[31].

brothers. So, it is to the central and related questions of proper recognition and moral duty that we now turn.

Breach of moral duty?

[44] There were, in essence, two prongs to Mr Manktelow's attack on the Judge's conclusion that Mrs Barnard had not breached her moral duty to Graeme:

(a) that Graeme had a "special claim" on her estate due to his contribution to it and his care of his mother in her later years; and

(b) the will was (on the Judge's own analysis) "unfair" to Graeme as compared with his brothers and created a justified sense of exclusion on his part.

[45] In terms of the "special claim" we have already recorded that Simon France J did not, on the basis of the evidence, accept that Graeme's contribution either to the farming enterprise or the care he took of his mother went beyond that which was to be expected of a dutiful and loving son. While acknowledging that Graeme's involvement in his parents' lives may necessarily have been greater than that of his brothers by dint of geography, he did not consider that the level of this involvement could be regarded as "special" in any relevant sense.

[46] Again, the difficulty for Graeme is that the evidence about the nature and extent of his contributions was contested and, as already discussed, there was good reason for regarding the "corroborating" evidence of Mr Bird and Ms Machin as unreliable. The Judge's assessment was that the evidence upon which he *could* rely did not establish contributions that were sufficiently out of the ordinary so as to warrant greater recognition than that which the will afforded him.[29]

[47] We are unable to discern any error in the Judge's assessment. Graeme's evidence was contested and there was no forensic way of resolving the contest. The evidence of the "corroborative" witnesses was problematic, and it cannot be said the

[29] High Court judgment, above n 2, at [25].

Judge was wrong to have put it to one side. Nor are we able to agree that the Judge wrongly failed to have regard to the "cumulative" effect of Graeme's "contributions" (by which was meant that his contributions to the estate and to his mother's care in combination made them "special"). The Judge plainly considered all the asserted contributions (or at least all those which he accepted were made out on the evidence) and was unpersuaded that they warranted interfering with Mrs Barnard's testamentary wishes.

[48] As for "unfairness" as between Graeme and his brothers, Mr Manktelow referred us in particular to the High Court's decision in *Favel v Dorsey* where Holland J observed:[30]

> … a testatrix is not bound to leave her estate equally to her children but in assessing a child's claim the Court will usually commence on the premise that in normal circumstances a just parent will treat each child equally. From this starting base the just parent will consider the infinite variety of circumstances which will permit or justify a departure from equality including, in addition, the right to dispose of one's property as one wishes after having met the moral claims of members of the family.

[49] To the extent these dicta can be taken to suggest that there is something akin to a "presumption" of equality as between siblings in testamentary matters, or that any departure from equal sharing must be expressly justified, we do not think they can survive decisions of this Court such as *Williams v Aucutt*, *Brown v Auckland City Mission* and *Henry v Henry,* all of which emphasise the importance of testamentary freedom.[31] The FPA does not authorise the courts to rewrite a testator's will merely because it might seem unfair to a family member, and a beneficiary is not required to justify the share of the estate they have been given.[32]

[50] So, like the Judge in the High Court, we acknowledge that Graeme received a lesser share than his brothers. But despite any argument about percentage calculations, there can be no quibble with the Judge's more concrete assessment of Graeme's

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30 *Favel v Dorsey* HC Christchurch M278/87, 6 July 1988 at 9.

31 *Williams v Aucutt,* above n 28; *Auckland City Mission v Brown* [2002] NZCA 33, [2002] 2 NZLR 650 (CA); and *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.

32 *Williams v Aucutt*, above n 28, at [68] per Blanchard J, *Auckland City Mission v Brown*, above n 31, at [33]; and *Henry v Henry,* above n 31, at [47]–[49]. Here, the rewriting sought by Mr Manktelow in his submissions (provision to Graeme of a capital sum equating to a third share in the investments) would be significant.

existing assets and his future needs. Graeme's financial position before his mother's death could not be described as precarious and, as a result of the provision for him in her will, he is now considerably better off. The will provided him with substantial property, capital and income.

[51] While we accept that Mrs Barnard did not leave any express explanation for Graeme's differential treatment, we would be inclined to place more weight than did the Judge on the following points:

(a) Graeme was treated more favourably than his brothers during Mrs Barnard's lifetime;[33]

(b) the 2008 solicitor's letter addressed to both Mrs Barnard and Graeme suggests there was a reason for the differential testamentary treatment that was known to, and possibly (if the letter is accurate) even accepted by, Graeme at that time;[34] and

(c) as the Judge noted, Graeme himself accepted that Mrs Barnard may have had concerns about his former wife (from whom he was not divorced) having claims on his property.[35]

[52] In light of all the relevant circumstances, it certainly could not safely or fairly be concluded that Mrs Barnard's treatment of Graeme in her will was capricious or could reasonably be seen as giving rise to a sense of exclusion or as a failure to recognise him as a member of the Barnard family.

[53] The ultimate question here is whether there has been a failure by Mrs Barnard to fulfil her moral duty, judged by the standards of a wise and just testatrix. We agree

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33 Mrs Barnard's payment of $150,000 in 2008 enabled Graeme to keep his family home. Her subsequent repayment of his $47,000 mortgage relieved him of having to meet the mortgage payments on that amount over the years to come (the solicitor's 2008 letter records that his $47,000 mortgage was for a 25 year term with an interest rate of 10.3 per cent).

34 As noted above at [18], the High Court Judge observed that Graeme failed to address this letter in his evidence.

35 High Court judgment, above n 2, at [18].

with the High Court Judge that there has not. In all the circumstances we have discussed proper provision for Graeme's maintenance and support was made.

[54] The appeal is dismissed accordingly.

Costs

[55] Counsel were agreed that costs should follow the event in the usual way. The appellant must therefore pay the beneficiaries' costs for a standard appeal on a band A basis together with the usual disbursements. We do not certify for second counsel.

[56] The respondents' costs (which, given that Mr Paine played no part in the hearing of the appeal, we expect will be minimal) are payable out of the estate.

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