EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELETED.

IN THE FAMILY COURT
AT HASTINGS

FAM-2015-020-000248
[2016] NZFC 8163

IN THE MATTER OF	AN APPLICATION FOR PROVISION FROM THE ESTATE OF TREVA HAROLD LAMBERT
BETWEEN	JO-ANN GAIL WALSH OF HASTINGS WENDY MAREE BULLIVANT Applicant
AND	PUBLIC TRUST Respondent

Hearing:	7 September 2016
Appearances:	In person for the first and second Applicant Mr O'Leary for the Respondent
Judgment:	4 October 2016

JUDGMENT OF JUDGE A B LENDRUM

Introduction

[1] This judgment is the outcome of a submissions only hearing on 7 September 2016. The applicant is Jo-Anne Gail Walsh (Ms Walsh). She is supported by her sister Wendy Maree Bullivant (Ms Bullivant), who has filed a notice of intention to appear and supports her sister's application. The respondent is the Public Trust.

[2] The applicant seeks to obtain an appropriate provision out of the estate of her late father Treva Harold Lambert (the testator) who died on 14 August 2014 aged

90 years. Her claim is made pursuant to s 3(1)(b) of the Family Protection Act 1955. She claims her father had a moral duty to provide for her.

[3] The applicant represented herself with assistance from a lay assistant, (Mckenzie Friend); her daughter Linda Walsh. Mr O'Leary, a Napier practitioner, appeared on instructions for Mr Traves of the Public Trust at the hearing.

[4] The applicant and her sister are the only surviving children of the testator. Another daughter, Judith, predeceased the testator.

[5] There are nine grandchildren of the three daughters of the testator. They have all been served in accordance with the rules. Only two grandchildren have taken any steps in the matter. They are Timothy Robert Huff a child of the late Judith Huff and Linda Jane Walsh the daughter of the applicant. Their position has been to support the applicant's case.

[6] The applicant bought her application because in the last Will of the testator, dated 18 July 2014, and made only three weeks prior to his death, he made no provision whatsoever for her, or her sister, or any of his nine grandchildren.

[7] Instead he gifted his entire estate to one Ross Vincent Lee with any residuary estate to go to Karen Faye Lee the wife of the aforesaid. Mr and Mrs Lee have no family connection with the testator. Neither has taken any meaningful or appropriate part in these proceedings. Neither have any history of friendship with the Lambert family of any real duration.

Issue

[8] The issue for determination is whether the Will of 18 July 2014 should stand as to its terms and bequests or whether it requires alteration to take account of the claim of the applicant.

Background

[9] The testator was born on 3 September 1923. Following service overseas during the Second World War he married Coral Ethel Lambert. She predeceased him in 1999. Their marriage was never dissolved.

[10] In a copy of a Will dated 1998, which was not dated, and was unsigned in the copy provided to the Court, but to which no challenge was made as to its status as the testator's previous Will, he had provided for his entire estate to be divided between his two surviving daughters. He made no provision for any grandchild and did not make a per stirpes division to the children of his deceased daughter Judith.

[11] The unchallenged evidence is that the testator lived with his wife and children in three residences during the course of their married life and later following Mrs Lambert's death. All three properties are in Hastings. All three properties were rented properties. After the first six months of the applicant's life the family moved into a rented state house in Nikau Street, Hastings. The two younger sisters, Judith and Wendy were born while the family was living in that home. Subsequently when his children had grown up, and at a later time, the testator moved to a council pensioner flat in Southampton Street in Hastings.

[12] The testator lived in this council pensioner accommodation until November 2010 when, following a bout of ill health which required his hospitalisation, he moved to the Voguehaven Rest Home in Clive. His personal effects went with him to that rest home including a Victory mobility motor scooter.

[13] There is clear and compelling evidence from both the first and second applicants, as well as the granddaughter Linda Walsh and the grandson Timothy Huff, that the applicant was the primary caregiver or assistant to the deceased for a lengthy period prior to his admission to Voguehaven. I note their evidence that the first applicant was exhausted by her care for her father and the demands he placed upon her. There is also clear and corroborated evidence from Mr Huff, Ms Walsh and Mrs Bullivant that the applicant continued to attend on and look after the testator during his time at Voguehaven.

[14] After a period of at least five months in that rest home, but in all probability a somewhat longer time, the testator formed a friendship with Janice Ruth Hodges who had entered Voguehaven in April 2011. Mrs Hodges had come to Voguehaven because she had severe, and rapidly progressing, dementia

[15] Ross Lee, the primary beneficiary of the testator's estate, is the son in law of Mrs Hodges. The residuary beneficiary is her daughter Karen Lee.

[16] It is agreed that during the time that the testator and Mrs Hodges were at Voguehaven they formed a friendship of some sort. However the fact of Mrs Hodges dementia throughout the entire period she was at Voguehaven must raise issues as to the status of the friendship. I note that Karen Lee, in a letter dated 10 September 2013, stated that her mother arrived at Voguehaven suffering from geriatric dementia associated with advanced Alzheimer's disease.[1] She no longer had cognitive functioning or an ability to remember and reason. Her daughter had become her power of attorney, pursuant, presumably, to the Protection of Personal Property Rights Act 1988.

[17] The applicant informed me in submission that it was necessary for Mrs Hodge's caregivers to write the names of her visitors on Mrs Hodge's wrist because she could not remember the people visiting her. She confirmed that despite their friendship this process was necessary for her father also.

[18] While their friendship was seen as primarily positive, to the extent that Mrs Hodges had any cognisance of that state, there was an incident in September 2013 which involved the physical restraint of Mrs Hodges by the testator when she sought to leave his room. The first applicant was present during the incident. She deposed to Mrs Hodges being very distressed by the testator's actions. Ms Walsh's concern was such that she spoke to the management at Voguehaven about her father's actions.

[19] In her affidavit evidence the applicant set out the basis for her taking that action. She says that her father had a history of violence, and in particular domestic

[1] First affidavit of the Applicant 2 September 2015 Exhibit E.

violence, which had been directed at both her mother and herself when she was a young child. The violence towards her mother ceased only when her mother had a brain haemorrhage at the age of 40. She alleges, further, that he was psychologically abusive thereafter. This history made her concerned at her father's behaviour on this occasion.

[20] At some point between September 2013 and July 2014 Mrs Hodges was transferred from Voguehaven to the Gracelands Rest Home hospital wing and subsequently, to a terminal care facility at Colwyn House.

[21] At some point, either then or shortly thereafter, the testator transferred to Gracelands Hospital wing as well. It is unchallenged that Mr Lee was involved in organising the transfer of the testator from Voguehaven to Gracelands. That transfer occurred on 20 June 2014.

[22] The first applicant deposes that she was never advised as to that move. However she still continued to see her father both in hospital, where he had a brief period of hospitalisation, and then in Gracelands. She is supported in that view by Ms Bullivant who confirms that she was, similarly, not advised of this change in her father's care.

[23] Mrs Hodges died on 16 July 2014 and her funeral occurred three days later.

[24] Exhibited to an affidavit of assets and liabilities filed by the Public Trust on 15 April 2016 is a questionnaire administered to the testator by Ms Urquhart of the Public Trust and dated 18 July 2014. That questionnaire, as provided to the Court and the applicant, was manifestly defective. Not all the pages were included. At the hearing Mr O'Leary submitted another document which purported to be the correct document. It is clear from a perusal of both documents that there are significant differences which he could not explain and which I find must cast real doubt as to their accuracy and, therefore, the weight which can be accorded both documents.

[25] The second questionnaire purports to show that it was prepared by the testator and Ms Urquhart on 9 July 2014. That is seven days before Ms Hodges

passed away. He then signed his Will in front of Ms Urquhart, as one of the witnesses, on 18 July 2014; that is two days after the death of Mrs Hodges and one day prior to her funeral.

[26] The testator died less than four weeks after he executed the Will.

[27] The Public Trust obtained a grant of administration of the estate on 9 March 2015.

[28] On 14 August 2015 the Public Trust advised that they would consider a distribution of the estate in accordance with the terms of the Will on or about 9 September 2015.

[29] On 3 September 2015 the applicant's application was filed with the Court.

[30] The next day 4 September 2015, Judge Callinicos reviewed the matter and made directions which included that the Public Trust as executor should refrain from distributing the estate until further order of the Court.

[31] By letter dated 7 September 2015 the Court wrote to the Public Trust at Christchurch enclosing the application and ancillary documents together with a copy of Judge Callinicos' direction.

[32] The Public Trust did not respond to the letter sent by the Court. It appears they simply passed the matter within their office and made no formal, or appropriate, acknowledgment of both receipt of the document and their intentions. As a consequence the Court Registry at Hastings had to arrange for service by way of a bailiff in Christchurch. That occurred on 16 November 2015; that is over two months after Judge Callinicos made his direction. That very day the Public Trust filed a proforma notice of defence. No appropriate explanation has been provided for this delay.

[33] Five months later the Public Trust filed an affidavit as to assets and liabilities. The affidavit was just over one page long. It advised, or included, as follows:

(a) The capital balance of the estate was $9665.

(b) It included the questionnaire purportedly completed by the testator with Ms Urquhart.

(c) It annexed a copy of the Will of 18 July 2014; and

(d) It included a copy of a signed statement to accompany the Will in which the testator explained his reasons for making his Will in the manner he did.

[34] The matter came before his Honour Judge Neal on 14 June 2016. Mr Traves appeared by telephone for the Trustee. The Judge adjourned the matter for three days for the Public Trust to ascertain whether Mr Lee would attend a judicial settlement conference.

[35] On 17 June 2016 Judge Neal resumed the conference. He was informed by Mr Traves as follows:

(a) Mr Lee did not wish to attend a settlement conference;

(b) that the Public Trust's informal discovery would be completed within three weeks; and

(c) the Public Trustee wished to put the applicant's to proof as to their claim given the testator's views and the non-participation of the beneficiary.

Accordingly the matter was allocated a one and a half hour hearing.

[36] On 30 August 2016, over twice as long a time as the Public Trust had assured the Court they would need to complete their informal discovery, they filed a further affidavit by a Ms Mooney. In that affidavit she advised as follows:

(a) That the capital balance of the estate was now $6639; a reduction of over $3000 since April 2016.

(b) That their searches had disclosed that the testator owned no real estate in New Zealand or had any substantial funds as claimed in his statement to accompany his Will.

[37] That there were real issues of reliability, and possible testamentary capacity, of the testator in this case was not recognised by Ms Urquhart. She states she obtained a doctor's certificate but solely because "of the nature of his Will".[2] No evidence from that certificate was provided to the Court.

[38] At his death the testator was almost 91 years old. He was to die only three weeks later. His ability to write out the statement that accompanied his last Will, if that was what he did, must have been very limited. His handwritten signature to both the Will and the statement are evidence of his infirmity.

[39] The content of his exculpatory statement for the Will also raises issues of his capacity given that the content of the statement is ridden with errors of fact of such magnitude that they must raise the very real possibility that they were based on delusion or fantasy or both.

The Law

[40] In this case the Public Trust has met its duty as an administrator of the estate pursuant to ss 11 and 11A of the Act by making available to the Court the deceased's reasons for making the Will as he did and for not providing for the applicant.

[41] Although those sections do not specifically deal with the question of why a change was made between two Wills no reliable evidence has been given in this case which can explain the change between the Will of 1998 and the last Will. I note that the 1998 Will was made a year before the passing of his wife from whom he was estranged. There was no provision for her in that Will.

[2] Second questionnaire 9 July 2016 p 8.

Moral duty

[42] The concept of moral duty is set out at s 3(2) of the Family Protection Act 1955 pursuant to the Family Protection Amendment Act 1967. In terms of this case it states:

> The Court in considering the moral duty of the deceased at the date of his death, shall have regard to all the circumstances of the case, and shall have regard to any provision made by the deceased in favour of either or both of the grandchild's parents.

[43] As Bill Paterson[3] the learned author, commentator and leading counsel, in Family Protection and Testamentary Promise cases has opined:

> It has been a basic principle guiding the Court in the exercise of its discretion from the earliest days that the Court may not remake the testator's Will, although it has been held that in appropriate cases nothing less will suffice to repair the breach of moral duty.[4]

[44] The principles applicable in a case where moral duty is an issue were carefully set out by the High Court in *Vincent v Lewis*[5]. They can be summarised as follows:

(a) The test is whether, objectively considered, there has been a breach of moral duty by [the deceased] judged by the standards of a wise and just testator.

(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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[3] Law of Family Protection and Testamentary Promises Fourth Edition 2013.
[4] Re Wright (Dc'd) [1954] NZLR 630 (see A); *Re McInnes* [1942] NZLR 547 (SC); *Re Thomas* [1954] NZLR 302 (SC); *Re Strand* [2004] NZLR 452 (DC).
[5] *Vincent v Lewis* [2006] NZFLR 812 (HC) at [81].

(d) The size of the estate and any other moral claims on the deceased's bounty are relevant considerations.

(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.

(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 the perception that it is unfair.

(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 the parent and child during their joint lives.

[45] In *Williams v Aucutt* the Court of Appeal held:

> The test is whether adequate provision has been made for the proper maintenance and support of the claimant.

The Court continued:

> ... a child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased.[6]

[46] In *Henry v Henry* the Court of Appeal held that a Court can go no further than making an award, if it is appropriate to do so, that is sufficient, but no more than sufficient, to remedy a breach.[7] The Court went on to confirm that the general

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[6] *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].
[7] *Henry v Henry* [2007] NZFLR 640 (CA) at [55].

principle that an order should be only that which is sufficient to make adequate provision for a claimant was the same whether the claimant's case was based on financial needs, or in a broader need to support, or both.

[47] That Court's position on the issue of adequacy of recompense was further summarised in *Fisher v Kirby*[8]. In that case the Court made the following pronouncements:

> The question remains 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.
>
> … mere unfairness is not sufficient to warrant disturbing a testamentary disposition and that, where a breach of moral duty is established, the award is no more than is necessary to repair the breach by making adequate provision for the applicant's proper maintenance and support.
>
> The decisions of this Court … are properly viewed as a timely reminder that awards should not be unduly generous. But, in our view, neither should they be unduly niggedly, particularly where the estate is large and it is not necessary to endeavour to satisfy a number of deserving recipients from an inadequate estate. A broad judicial discretion is to be exercised in the particular circumstances of each case having regard to the factors identified in the authority.

[48] In the case of *Ormsby v Van Selm*[9] the Court of Appeal confirmed the approach set out above in upholding the High Court's decision of a breach of moral duty. That Court endorsed the High Court Judge's summary of the appropriate tests including that:

> In cases of financial need, the amount necessary to remedy the failure to make adequate provision in the will be able to be determined with greater precision than in cases where the need is more of a moral kind.[10]

[49] The Court also approved the High Court Judge's view that the focus was on what was necessary to provide for a claimant's proper maintenance and support, not what the Judge thinks would be "fair". It added that the task was to do "no more than the minimum to address the breach of moral duty that has occurred".[11]

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[8] *Fisher v Kirby* [2012] NZCA 310 @ [118 – 120].
[9] *Ormsby v Van Selm* [2016] NZCA 323.
[10] The High Court judgment, above n9, at [30].
[11] *Ormsby v Van Selm,* above n9.

[50] The decision is also helpful in considering awards to children made on a family recognition basis. The Judge in that case, as I do in this, saw the applicants as having a very strong claim to an award on that basis but, again as in this case, found there was a demonstrated financial need also. The existence of both factors took that case, and I find this case, significantly beyond those cases where awards have been made on family recognition grounds alone.

[51] Moreover in this case the applicant is both a beneficiary of over 65 years and is also caring for [details deleted]. Therefore she has a clearly demonstrated financial need. Accordingly the fact that no provision at all has been made for Ms Walsh clearly brings this case within the "not adequate" test. Therefore the applicant meets both limbs.

[52] The Court approved, again, the proposition that the size of the estate and any other moral claims on the deceased's bounty are relevant factors. While I accept that there is authority for the proposition that the smaller the estate the less likely the Court should be to adjust the testator's provisions within his Will if there is a need to meet other moral duties[12] in this case the estate is not small but it is, in fact, minimal and there is no moral duty owed to the beneficiary or the residuary beneficiary as they are not members of the testator's family.

[53] As Paterson says[13]:

> The Court however must make its decision as to how to repair the breach of moral duty in the light of all the relevant circumstances and the testator's wishes, to the extent that they conflict with the Court's assessment, will not be given weight.

and later:

> Where reasons are given for not making provision or sufficient provision for an applicant and the reasons are clearly not borne out by the evidence the Court may disregard them.[14]

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[12] *Re Allan* (dec'd) [1922] NZLR 218, [1921] GLR 613..
[13] Ibid 17.13 p 311.
[14] There is a long line of authority in support of this proposition. The principle was at time of publication last confirmed in *Henry v Henry* above n6.

Costs

[54] The Public Trustee obtained a Grant of Administration in March 2015. The High Court Rules in such a case states that:

> an administrative defendant who does not oppose the plaintiffs but who desires to be heard on any ancillary matter (including costs) may, without filing a statement of defence, file and serve an appearance setting forth those matters and thereafter no matter dealing with those shall be determined except on notice to that defendant.[15]

In such a case the principle is that a trustee who is required to appear by virtue of that capacity has his costs met out of the estate and no order for costs is generally required to be made.[16]

[55] In this case Mr Traves for the Public Trust advised Judge Neal on 17 June 2016 that "the Public Trustee wishes to put the applicants to proof as to their claim given the testator's views and the non-participation of the beneficiaries".[17]

[56] In these circumstances I note the ease of *R v R (costs)*.[18] In that case the Court set out the circumstances in which a Court should consider the matter of costs when there is a civil approach taken to the matter by the actions of the parties and, in this case, the Public Trust alone.

Process

[57] This hearing proceeded in the normal manner of family protection matters by way of a submissions only hearing.

[58] The principal beneficiary Mr Lee took no steps in respect of the matter. The Residuary beneficiary Mrs Lee also took no steps.

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[15] High Court Rules 18.11; Family Court Rules 387.
[16] *Little v Angus* [1981] 1 NZLR 126.
[17] Minute of Judge Neal 17 June 2016.
[18] *R v R (Costs)* [2005] NZFLR 461.

[59] The Public Trust's position, as advised to the Court by Mr O'Leary, was that they were neutral, and in effect, abiding the decision of the Court. That submission must however be seen in the light of Mr Traves's submission of 17 June 2016.

[60] Mr O'Leary did however inform me that while Mr Lee had taken no formal position in the proceedings he was neither:

(a) prepared to renounce the claim; or

(b) prepared to attend a judicial settlement conference.

Mr O'Leary advised that Mr Lee's position was based upon the allegation that the family (persons unspecified) had been abusive to him in the past.

[61] However Mr O'Leary further advised that the Public Trust had informed him that the applicant, and her daughter Linda Walsh, had been both helpful and courteous to the staff members of the Public Trust.

[62] The submissions from Ms Walsh at the hearing supplemented her earlier affidavit evidence.

[63] She confirmed that:

(a) She and her family had never met Mr Lee or his wife. Neither had attended the testator's funeral notwithstanding their knowledge that they were the sole beneficiaries of his estate.

(b) That on the day of their father's death Mr Lee had visited the Public Trust before he informed the applicants of their father's death.

(c) That Mr Lee had cleared out all of the testator's possessions and personal effects from his room on the very day he died and without any consultation with his family.

(d) That the personal effects he removed on the day of death were the second time he had removed the personal effects of the testator in a similar fashion. The first occasion had again been when Mr Lee moved the testator from Voguehaven to Gracelands. Some of the testator's personal effects were returned to them but most only much later and only those chosen by Mr Lee. He disposed of, or retained, the remainder unilaterally to her knowledge.

(e) That Mr Lee had taken possession of, and disposed of, the mobility scooter at the time he moved the testator from Voguehaven. She submitted that he had appropriated the proceeds of the sale to himself on the basis that no monies were deposited into her father's account following the removal of that item of property.

(f) That he had moved the testator from Voguehaven without any communication with her sister or herself.

[64] In this case I am confronted with limited evidence from the Public Trust. Some of that evidence has clearly apparent errors of fact and other evidence raises issues of significant importance which the trustee does not answer. On the other hand I have clear, compelling and corroborated evidence from at least four members of the testator's family. In these circumstances on all matters of significance I prefer the evidence of the applicant and her witnesses.

Analysis

The estate

[65] As I have set out the Public Trust submitted as part of their evidence a questionnaire in which Ms Urquhart had sought and obtained information from the testator as to his estate. That questionnaire was dated 18 July 2014. I shall refer to that as the "first questionnaire ". At the hearing Mr O'Leary sought to submit a second version of the questionnaire purportedly "created" on 9 July 2014 at 5.03 pm. I shall refer to that as the "second questionnaire". I accepted the document solely on

the grounds that it might clarify the manifest imperfections of the first questionnaire. No copy was provided by the Public Trust for the applicant.

[66] In his statements in respect of the first questionnaire[19] administered to him by Ms Urquhart the testator claimed the following constituted his estate:

(a) $2,000 in a Westpac account.

(b) $100,000 in a Westpac savings account.

The testator also cited his war pension as an asset. Those figures were duplicated in the second questionnaire provided to the Court at hearing.

[67] As I noted above, the value of the estate, at the time of the Public Trust's first affidavit of Assets and Liabilities dated 15 April 2016, was $9665. As such it is similar to the applicant's understanding of her father's estate as being in the order of $10000 at the time he gave her authority to act as his agent in respect of his pension/benefit on 22 December 2010. That was about the time of his admission to Voguehaven.

[68] Again, as I set out above, as at 30 August 2016 there was $6639 remaining in the estate subject to an income tax liability, which is still to be assessed, and the costs of these proceedings.

[69] The applicant's consistently expressed view of the testator's estate is unchallenged now following the Public Trust's further affidavit of 30 August 2016. That is that the testator never had the savings he claimed as an asset when making his last Will. The savings of $100,000 was either a deception by the testator upon the principal beneficiary, or evidence of or a delusion of his mind, or a fantasy.. It was not, and never had been, in existence.

[19] Exhibit C to the affidavit of 15 April 2016.

The questionnaires

[70] As I set out above[20] the first questionnaire[21] provided to the applicants and the Court is manifestly defective. It also contradicts the second questionnaire. Moreover the second questionnaire, submitted as appropriate and complete by the Public Trust only on the date of hearing, 7 September 2016, is also on its face defective.

[71] Mr O'Leary sought to explain the differences by advising that the testator had had a first interview with Ms Urquhart on 9 July 2014 and then a second meeting on 18 July 2014 when he signed his Will. In the second questionnaire that was stated as being a day after Mrs Hodges had died. It was in fact two days following her death. That is the first significant inconsistency.

[72] Mr O'Leary submitted that the questionnaire was created on 9 July 2014. However that is not possible because it refers to Janice Hodges passing away "yesterday"; that is 8 July 2014. In fact she passed away on 16 July 2014; some eight days later.

[73] The second questionnaire, purportedly of 9 July 2014, but clearly written at a later date given the comments I have made immediately above, purports to remedy some of the clear factual errors contained in the answers that the testator gave in the first questionnaire. Some of those errors are small but others are significant. I detail them as follows:

(a) The testator records his three daughters with the surname Lambert in the second questionnaire. In fact they were respectively Walsh, Bullivant and Huff.

(b) Judith Huff was omitted entirely from the first questionnaire.

[20] Above at [24].
[21] Exhibit C to the affidavit of 15 April 2016.

(c) At the second page 3 of the first questionnaire (which in fact followed page 7) the testator advised on his personal status as follows:

(i) He had begun living together with Mrs Hodges in January 2010.

(ii) He was divorced.

(iii) His partner was Janice Ruth Hodges.

(d) In fact the actual position was that:

(i) He did not meet Mrs Hodges prior to her admission to Voguehaven in April 2011, and while the actual date of their friendship commencing is unknown it was clearly later than that date.

(ii) The testator was not divorced; he was still married at the time of his wife Coral's death in 1999.

(iii) Mrs Hodges was not a partner. There is no evidence she was a partner in any legal sense. To commence a partnership of any kind entails both persons consenting to that partnership. Here on Mrs Lee's evidence[22] alone such a consent was beyond her mother's ability to give. They were in reality two elderly people who had a friendship. No clear or compelling evidence of anything more has been provided to the Court.

[74] Finally as set out above there was no $100,000 in a savings account; that claim was a fantasy at best.

[22] Exhibit E to applicant's affidavit of 2 September 2016 above n1.

[75] Importantly both questionnaires included an exculpatory statement which followed Ms Urquhart advising the testator of the provisions of Family Protection Act. Following that advice this statement was typed:

> "The Family Protection Act has been explained to me. My partner Janice of four years passed away yesterday. Her son-in-law Ross (and my friend) has been my total support over the last four years and apart from his wife Karen, has been the only person who has supported me in every aspect. My deceased daughter Judith has one son Tim who has nothing whatsoever to do with me. He never visits or supports me so I do not feel any obligation to provide any part of my estate to a person who does not care. My two daughters, Joanne and Wendy are a total disappointment to me. They both had authority over my bank accounts, and after my home was sold they stole funds to the value of approximately $200,000.00. I changed their authority after this was made known to me. I have had no visits from them for three years. They went to Voguehaven when I was recently ill in hospital knowing I would not be returning there and took a chair that was very dear to me, this was done without my permission. I absolutely do not want to provide for these girls after what they have done to their own father. Public Trust has made it very clear to me that my family can contest my Will but it is my wish and desire to provide for people that have made a difference in my life."

[76] Clearly that statement is inconsistent with the statement in the first questionnaire that he wished his war pension to be paid to Mrs Hodges. She had died before he expressed that wish on 18 July 2014 as recorded in the first questionnaire.

[77] As for the second questionnaire, being the one submitted at hearing, that document also has factual mistakes or differences from the first questionnaire in terms of the testator's dependents and family. They are as follows:

(a) In this document he includes his deceased daughter Judith as a child of the family.

(b) He refers to Judith as having one surviving child when in fact she had three children all of whom are alive.

(c) He refers to Wendy Bullivant as having one daughter when in fact she has two sons.

(d) There is no reference made as to the four Walsh grandchildren.

(e) He refers to all three daughters with the surname of Lambert as opposed to their actual surnames of Walsh, Bullivant and Huff respectively.

(f) In contrast he was apparently able to provide the full names of both Mr and Mrs Lee.

[78] A further concern in respect of the second questionnaire are the notes made purportedly at some time between 9 and18 July 2014. It is difficult to know the time the second note was made. The note records that in terms of the Family Protection Act note the testator was very clear what he wanted to do with is his Will. He had made it known to the beneficiary. The beneficiary had spoken with Ms Urquhart and claimed to be very uncomfortable with what the testator intended to do.

[79] In each questionnaire Ms Urquhart stated that she saw the testator alone. In each case she says it took place at his residence. However if she saw him alone then she cannot have spoken with the beneficiary yet she states clearly that she has. She does not explain why where when and how that occurred and the Public Trust offered no evidence other than the questionnaire. Moreover she may have known the beneficiary personally as she does not refer to him as Mr Lee but solely by his first Christian name.

[80] Furthermore Ms Urquhart sets out in the second questionnaire that the doctor's certificate has been saved. Given that the Will was challenged I am again very surprised that no information from the doctor which may well have commented as to capacity, when clearly by the date of the hearing capacity was an issue, was provided to the Court by the Public Trust.

[81] I am concerned that in this case where the applicant's concerns were made known to the respondent, both informally and in her application to the Court on 3 September 2015, and her evidence set out clear discrepancies between the testator's information provided to the Public Trust and reality, that there has been no affidavit from Ms Urquhart.

[82] A part of that concern arises because the testator was clearly frail when he completed the Will. Both his death within three weeks and his signature indicate that. I am also troubled that while the testator could not properly name any of his children he was apparently able to refer to Mr and Mrs Lee by their full names. I have a real concern as to how he would have remembered those names if they were not provided to him to provide to Ms Urquhart. If that occurred, then given his age and infirmity at that time, an issue of undue influence might well have been a consideration for Ms Urquhart.

[83] These matters and actions lead me to further concerns about the manner in which this matter has been handled by the Public Trust. Although Ms Urquhart claimed to have a doctor's certificate[23] there was no evidence that she considered the testator's state of mind and/or his emotional state in executing his Will only two days after Mrs Hodges death and one day before her funeral.

[84] However in the absence of appropriate evidence from Ms Urquhart and/or the Public Trust these concerns can be neither assuaged or resolved. Accordingly I find that on any material issue the questionnaires are not reliable evidence for the Court's purposes.

Statement to accompany the Will

[85] This statement is an exculpatory statement. It purports to provide grounds to validate the testator's decision to abandon any moral duty to his daughter(s) in respect of his estate and provide the entirety of the same to Mr Lee. The statement is however manifestly and unquestionably vitiated by significant, and demonstrably proven, errors. I note the following:

(a) The matter of the date of the statement and the date of Mrs Hodge's death.

(b) The unchallenged affidavit evidence of the two applicants, and the two grandchildren, that they all, and others, visited the testator

[23] Second questionnaire p8.

regularly for many years and, in particular, through the last four years of his life.

(c) Mr and Mrs Lee may have visited the testator, and Mr Lee more than Mrs Lee, but there is no compelling evidence before the Court which enables me to rely on the testator's memory of those actions by the beneficiary. Moreover no member of the applicant's extended family saw Mr and Mrs Lee visit the testator.

(d) The testator's deceased daughter Judith has not one son Tim but three sons.

(e) The unchallenged evidence that Tim visited the testator on many occasions.

(f) Ms Walsh and Ms Bullivant did not have authority over his bank accounts. The first applicant alone had authority only over the testator's benefit account pursuant to his providing her with an authority to so act as his agent.

(g) The testator never owned a home.

(h) Clearly without having owned a home he could not have sold a home.

(i) It follows, inexorably, that his two daughters could not have stolen funds of approximately $200,000 from him.

(j) The testator's claim he changed their bank accounts authority, after this action was made known to himself, equally evidently cannot be so. Moreover it begs the question of who could have made that known to him when in fact it never happened.

(k) The unchallenged affidavit evidence that the authority was changed a few months prior to his leaving Voguehaven Rest Home; clearly then

not at the time of a non-existent sale which had it occurred would have occurred at some point after his move into Voguehaven.

(l) The authority was changed to the sole beneficiary Mr Lee at the same time. That could not have occurred before April 2011 as the testator and Mr Lee clearly had not met prior to Mrs Hodges arrival at Voguehaven.

(m) The testator claimed that he had no visits from his daughters for three years. Clear compelling and corroborated evidence from the applicant and her three supporting deponents is that claim is completely incorrect (see (b) and (e) above also).

(n) A final reason given by the testator for his abdication of his moral duty is the assertion that his daughters removed a chair from Voguehaven that was dear to him and without his permission. The applicant's evidence is that she went to Voguehaven at the time Mr Lee was "cleaning out" the testator's room. However Mr Lee was not present at the time she and her sister removed the chair. .

(o) She removed the chair because it was not owned by the testator. She deposed it was an expensive orthopaedic chair purchased on a 50:50 basis by herself and her sister for their mother Coral when she was placed in a rest home. They made the chair available to the testator when he went to Voguehaven as it suited his physical difficulties. It was never in his ownership.

[86] On the basis of this evidence, together with the timing of the making of his Will and this statement, I have grave doubts as to the capacity of the testator. This is despite the note in the second questionnaire that Ms Urquhart requested a doctor's certificate but recorded she did not think there was a problem but sought it only apparently "because of the nature of his Will".[24] I consider that the reality and

[24] Second questionnaire above n8.

significance of the "errors" set out above render her apparent opinion as to capacity (if such it was) both unreliable and, therefore, unacceptable in this case.

[87] Accordingly in my view the exculpatory statement to accompany the last Will of the testator can be given no weight at all because it is vitiated with the serious errors of fact set out above and it has elements of fantasy and/or deception and/or delusion which in combination make it totally unreliable as a validation of the testator's decision to ignore his moral duty to his daughter.

The Beneficiary

[88] Finally there is a lack of any evidence, of any probative value, that the beneficiary, and/or the residuary beneficiary, performed any action sufficient to explain or justify the testator's abnegation of his moral duty to his daughter. I note that the beneficiary's actions in:

(a) Refusing to attend a judicial settlement conference at which he could have explained his position on all matters including his actions, and inactions, immediately following the testator's death and in respect of his family.

(b) Failing to provide any evidence of his actions which might have justified the testator's bequest.

(c) Failing to assist the Public Trust by providing any evidence which might rebut the inference that he may well have intervened in the Will making process as could be reasonably inferred from his communication with Ms Urquhart.

(d) Making allegations against the applicant when her unchallenged evidence is that they have never met; and

(e) Noting counsel for the Public Trust's submission as to her conduct with the Public Trust

do not assist in rebutting the applicant's claim.

[89] Indeed the only evidence that the beneficiary, and/or residuary beneficiary, did anything for the testator is contained in the latter's statement accompanying his Will. I have found already that statement is unreliable for the purpose for which it was made.

[90] I note that the law is clear that where reasons are given for not making provision, or sufficient provision, for an applicant and the reasons are clearly not borne out by the evidence (as is the case here), the Court may disregard them.[25] Finally I note also that statements submitted as evidence of the testator's reasons are not evidence of the truth of those reasons as stated by the testator.[26]

Findings

[91] In this case on the evidence and submissions I have received and on the balance of probabilities, and following the required legal principles, I find as follows:

(a) On any objective consideration of the evidence and the facts there has been a breach of moral duty by Treva Lambert as judged by the standards of a wise or just testator. In my view it is an egregious breach of the testator's moral duty given the, unchallenged, evidence before me.

(b) Mr Lambert's breach is not restricted to the applicant's financial needs and support but extends to family recognition grounds also. I refer particularly to the applicant's unchallenged assertion of Mr Lambert's domestic violence to her as a young child and, that notwithstanding, her subsequent, and corroborated, support of the testator throughout her adult life.

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[25] *Henry v Henry*, above n7.
[26] *Paterson*, above n3 at 17.13.

(c) This abnegation of moral duty is further emphasised by the incorrect allegations made in the exculpatory statement. Unfortunately due to the absence of any reliable evidence from the Public Trust I cannot determine if those allegations were as a consequence of an abnormal state of mind or were based upon deceit and/or delusions or fantasy.

(d) I have assessed this breach after considering all the circumstances of the case.

(e) I have noted the very small quantum of the estate but I find there are no other moral claims on the testator's bounty.

(f) I find that there is more than mere unfairness involved in this disposition. The applicant is on a widow's benefit and is supporting [details deleted]. She was, and is, in very definite need of maintenance and support from the testator and she was in that position, as he should have known, from at least 2010 when he entered Voguehaven.

(g) This is not a case of a mere disparity in the treatment of a number of beneficiaries. It is the complete alienation of his daughter to whom he had a very clear moral duty.

(h) This is not a case where I can be generous with the testator's property. There is not sufficient property to be generous.

(i) I find that it is necessary in this case to rewrite the Will. As I have said ((f) above) I do not do so because I think that it is unfair. Rather it requires to be rewritten in order to properly:

(i) acknowledge the moral duty due and owing by the testator to his daughter; and

(ii) because the Will, in its disposition of the testator's entire estate to Mr Lee, was clearly, on the only evidence available and

being the exculpatory statement, based on either events which never occurred or significant factual error.

(j) The moral obligation owed by Mr Lambert to his daughter in this case is an obligation which is clearly defined also by the relationship which actually existed between he and his daughter during their joint lives.

[92] It follows from all the evidence assessed on the balance of probabilities that I find the applicant has been wholly validated in bringing her application. There has been a clear case here of both a moral duty being owed by the testator to the applicant and that moral duty being ignored by him.

[93] That leaves me to determine what monies are to be paid to the applicant. In order to so determine I must now further consider the actions of the Public Trust.

[94] I find in this case the trustee went beyond the role of an administrative defendant.[27] Mr Traves' requirement of the applicant moved the respondent from its usual neutral stance into a party in the proceedings; a player in the arena. Although Mr O'Leary submitted at the hearing that the Trustee sought to be neutral I consider Mr Traves' action on 17 June 2016 meant that the Trustee was not taking such a neutral stance.

[95] Moreover I consider the Public Trust acting prudently (and efficiently) should have known that the testator's claims with regard to his estate were either deluded, or without reasonable foundation, no later than the end of 2015. If they had done so then they would have realised the real issues and taken the necessary and appropriate steps to bring this matter to a conclusion.

[96] Accordingly I find the Public Trust have not acted appropriately in their administration of Mr Lambert's estate. That is so both as to the actions of their office in Hastings prior to Mr Lambert's death and the manner in which they performed their role following the applicant's application.

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[27] High Court Rules 18.11, above n16.

[97] The test in respect to the matter of costs in such circumstances is set out in *R v R.*[28] I must consider the following criteria:

(a) The outcome of the proceedings. Here I have noted the applicant has been both wholly successful and therefore validated in bringing her application.

(b) As to the matters in issue there was a clear case of moral duty owed to the applicant. That the Public Trust was aware of that is evidenced by the questionnaire precedent warning that the Act had been explained to the testator.[29]

(c) The way in which the parties have conducted the proceeding:

(i) the applicant has attempted to clarify and explain the errors of fact as quickly as possible. She is a lay-litigant of over 65 years living on a widow's benefit. She has not either the income or assets to meet the cost of obtaining legal advice. While she may have been entitled to a grant of legal aid any such grant, and the aid which followed, would have been subject to a charge which would certainly have been more than the entire value of the estate.

(ii) I do not consider the Public Trustee has conducted the proceedings appropriately in this case. In my view their actions are properly subject to these criticisms:

- A significant initial delay in responding to the application notwithstanding their having been advised of a Family Court Judges direction, issued within one day of the application, and which clearly indicated an issue of concern to the Judge.

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[28] *R v R (Costs),* above n18.
[29] Second questionnaire, above at p 7.

- The Trustees Christchurch office solicitor's decision of 17 June 2016 requiring the applicant to prove her case.

- That this decision was made notwithstanding that it was demonstrably within the Trustees power to have determined, and many months prior to that date, that the testator's estate was only of the quantum they disclosed in their affidavit of 15 April 2016.

- The failure to provide proper credible evidence of the testator's capacity, or the doctor's certificate they obtained, at the least.

- The failure to provide accurate information to the Court (the two questionnaires).

- Notwithstanding her application of 3 September 2015 they failed to provide the applicant with the statement to accompany the Will for a period in excess of 7 months. Furthermore they provided no explanation to the Court as to why they did not do so when, by doing so, the errors inherent in that statement would have been exposed.

[98] I note that in between their two affidavits of 15 April 2016 and 30 August 2016, a period of only some four months, the Public Trust have apparently deducted costs of approximately $3,000 from the estate. That is the only inference I can draw from the evidence they have put before me.

[99] The only apparent justification for deductions of that sum (equating as it does to a third of the estate as advised on 15 April 2016) is the statement by Ms Mooney of the Christchurch office that Public Trust had completed its investigation of the deceased's assets.[30] That investigation can only have been as to the testator's bank

[30] Affidavit 30 August 2016 [7].

accounts and his claim as to the ownership of property. Indeed in that same paragraph the Trustee advises of the records searched in that regard. Given that:

(a) Ms Urquhart apparently did not seek the location and identity of the property, the purported sale of which was apparently a central reason for the testator's decision to spurn his moral duty to his child; and

(b) The property can only have been in the Hastings, or possibly Napier area, given the testator spent his whole adult life here, I find it difficult to accept that those searches could have required an expenditure of some $3,000.

(c) As the Trustee was aware by 15 April 2016 of the reality of the testator's bank accounts none of the $3000 can have been expended on ascertaining that particular property.

[100] In my view the real position of the testator's bank accounts must have been known to the Trustee well in advance of their first statement of assets and liabilities dated 15 April 2016. That is because the actual, as opposed to the claimed, funds available would have become apparent to the Public Trust as executor following his death and burial and the accounts rendered as a consequence.

[101] In summary despite the Public Trustee knowing, and from an early date, that the testator:

(a) Had no substantial funds as claimed.

(b) Had with his Will bought into issue a possible breach of his moral duty to the applicant; which

(c) Was sufficient to persuade their officer Ms Urquhart to seek a doctor's opinion but which opinion the Trustee did not divulge; and thereupon

(d) Undertook, or failed to take, the actions or inactions detailed above.

They did not disclose these to the applicant before April 2016; that is some 20 months' following the testator's death. This was despite the applicant's application to the Court in September 2015 and her discussions with the Public Trust prior to her application being filed.

[102] In doing so the Public Trust prevented the applicant from proving, and conclusively, that both the testator's claimed estate and his allegations as to his family's behaviour, used by him to justify his denial of his moral duty to them, were absolutely false.

[103] Accordingly in my view after considering all the above I find that the Public Trustee became a party in these proceedings no later than 17 June 2016 and that as such their actions and inactions can be viewed in respect of the matter of their costs. It follows that I find the Public Trust is not an administrative defendant.

[104] There is no evidence before me of the actual estate of Treva Lambert. The only information the Trustee has given of any reliability is a draft statement of assets and liabilities as at 5 April 2016. That does not provide any detail of the testator's estate as at the date of his death and nor does it advise what funds have been taken by the Public Trust since that date.

[105] In these circumstances I find that the Public Trust must carry some liability for their actions and inactions.

Orders

[106] I make the following orders and directions:

(a) The Will of the testator made on 14 August 2014 is altered so as to require the Trustee and executor to pay the testator's entire estate to the applicant Jo-Ann Gail Walsh in satisfaction of the testator's moral duty to her.

(b) The bequest of the testator to Ross Vincent Lee is vacated in its entirety.

(c) I direct the Public Trust is to provide to the Court and the applicant within 21 days of the date of this judgment a full accounting of all funds within the estate of the testator at the date of his death and the basis for any costs deducted from that estate down to the date of hearing.

(d) I direct the applicant may make any written submission she wishes on this point and, if so, is to file that submission within 14 days of her receipt of the Public Trust's submission.

[107] On receipt of the above memoranda, and any submissions filed in respect thereto, I will decide in chambers whether any costs taken to date in the administration of the estate are to be refunded to the applicant in whole or in part.

A B Lendrum
Family Court Judge