IN THE FAMILY COURT
AT NAPIER

I TE KŌTI WHĀNAU
KI AHURIRI

FAM-2016-041-000152
[2020] NZFC 770

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	V F BENNETT Applicant
AND	V C PERCY and A J GALLAGHER as executors of estate of Leone Helen Percy (deceased) Respondents

Hearing:	20 November 2019
Appearances:	A McEwan for the Applicant No appearance on behalf of the Respondents J O Upton and D J O'Connor for V C Percy in his personal capacity
Judgment:	5 February 2020

JUDGMENT OF JUDGE M A COURTNEY

The applications

[1] Virginia Bennett has made application under the Family Protection Act 1955 ("the Act") for further provision from her mother's estate than was provided for her in her late mother's will. Before identifying the specific issues the court is required to address with regard to these applications, it is necessary to set out some detailed background as to the applicant's family, related property matters, the proceedings filed to date relating to the estate and the procedure relating to applications under the Act.

Background

The family

[2] Leone Helen Percy ("the deceased") and her husband Frank Percy had three children, Vance, Douglas and the applicant, Virginia Bennett. Frank Percy died on 17 April 2008. The deceased died on 2 July 2015 and was survived by seven grandchildren, being five children of the applicant and two children of Vance, all of whom are adult.

The farm

[3] The deceased and her late husband farmed a property of around 333 acres at Kotemaori, between Napier and Wairoa. This was a property Mr Frank Percy obtained by way of a ballot following his return from World War 2, with the property being purchased in 1952 with assistance from the government.

[4] Vance worked on the farm when he was growing up. He left school at 16 and continued to work on the farm. He travelled to Australia to work there when he was about 20 years old. He subsequently returned to New Zealand at his father's request to help on the farm. He then lived with his parents on the farm and worked on the farm with them.

[5] In 1987 Vance married Denise. They lived together on the farm with Mr and Mrs Percy senior for a number of years.

[6] In 1994 Mr and Mrs Percy senior retired and moved to live in Wairoa. Vance and Denise have continued to live and work on the farm since then.

The F W Percy Farming Company Limited and the Percy Farming Trust

[7] On or around 15 December 1969 Frank Percy settled the Percy Farming Trust ("the Trust") and established F W Percy Farming Company Limited ("the company"). At some stage, presumably around December 1969, the farm was transferred into the ownership of the company.

[8] There are 200,000 shares in the company, comprising 20,000 ordinary "A" shares and 180,000 ordinary "B" shares. The A shares have full voting rights. The B shares have no voting rights.

[9] The original shareholding of the company is not identified, but at the date of death of the deceased the shareholding was:

1. 20,000 A shares owned by Vance Percy, which were purchased by him from his father on 16 May 2001.

2. 39,999 B shares owned by Vance Percy.

3. 1 B share owned by Denise Percy.

4. 40,000 B shares owned by the deceased.

5. 100,000 B shares owned by the trustees of the trust.

[10] The directors of the company are Vance and Denise.

[11] The discretionary beneficiaries of the trust as to both income and capital are the children and grandchildren of Frank Percy. The date of distribution of the trust is 15 December 2049 or such earlier date as the trustees may appoint.

[12] The current trustees of the trust are Vance and Mr Stephen Lunn, solicitor. As a result of proceedings brought by Douglas against the trustees in the High Court under the Trustee Act 1956, Vance and Mr Lunn have agreed to resign as trustees, to be replaced by agreed independent professional trustees, and failing such agreement by two independent professional trustees nominated by the President of the New Zealand Law Society. The appointment of new trustees has not yet taken place.

The deceased's will and her estate

[13] The deceased left a will dated 16 May 2001 together with two codicils. Pursuant to her will, the deceased appointed Vance and Mr Stephen Greer, solicitor, to

be the executors and trustees of her will. By codicil dated 13 November 2002 the deceased appointed Vance and Douglas to be the executors and trustees of her will. By a second codicil dated 4 December 2006 the deceased appointed Vance and Mr Allan Gallagher, solicitor, as executors and trustees of her will. This codicil was effective as at the deceased's death, leaving Vance and Mr Gallagher as executors and trustees of the estate.

[14] In terms of her will dated 16 May 2001 the deceased:

1. Left all her chattels and motor vehicles, but excluding jewellery, to her husband if he survived her, but otherwise to her three children in equal shares.

2. Left all shares held by her in F W Percy Farming Company Limited to Vance. As noted above, the deceased owned 40,000 B shares in the company.

3. Left $5,000.00 and her jewellery to Vance's wife, Denise.

4. Forgave any debt owed to her by the Percy Farming Trust, and

5. Left the residue of her estate to the trustees of the Percy Farming Trust.

[15] The deceased and her late husband owned a property at 8 Rimu Drive, Wairoa as tenants in common in equal shares. Mr Frank Percy left his half interest in the property to the Trust. The deceased continued to live in the Rimu Drive house until her death following which it was sold. The estate's share of the proceeds of sale amounted to $109,636.26.

[16] Those funds have been held in the trust account of AJ Gallagher Law Firm. Interest has been earned on those funds, fees and expenses paid, and as at 7 November 2019 $104,967.96 was held in the trust account.

[17] There is no evidence the deceased owned any motor vehicles at the date of her death.

[18] No valuation of the 40,000 B shares owned by the deceased in F W Percy Farming Company Limited has been provided to the court. Submissions filed on behalf of Virginia refer to the farm having a rateable value in 2017 of $2,330,000.00. As the deceased's shareholding in the company was some 20 percent of the total shares, it is submitted the shareholding is worth around $466,000.00.

[19] The deceased owned jewellery at the date of her death. No details of the jewellery or its value has been provided to the court.

[20] The deceased owned various chattels. A list has been provided by Denise of what are said to be the chattels in the deceased's estate. This list includes a number of items which are said to have been donated to the Salvation Army in accordance with the deceased's wishes and some items provided to Melinda Bennett, one of Virginia's children. No valuation of the chattels in the deceased's estate has been provided to the court.

[21] There did not appear to be any debt owed to the deceased by the Percy Farming Trust to be forgiven in terms of her will.

[22] There appear to be no liabilities owed by the deceased at the date of her death. There have been various expenses paid from the estate since her death, including legal fees and the probate application fee. The probate application fee of $1235.00 was paid from funds advanced to the estate by the company. The sum of $1235.00 is still to be repaid to the company from the estate.

Family Protection Act claim by Douglas

[23] In May 2016 Douglas commenced proceedings in the Family Court seeking provision from his mother's estate pursuant to the Family Protection Act 1955. Those proceedings were served on Virginia, as well as others directed to be served. Douglas' application was struck out on 18 July 2017 as a result of Douglas' (or more particularly his solicitors') failure to comply with directions made by the Court. On 28 August 2017 Douglas filed an application to reinstate his proceedings. That application was dismissed on 12 December 2017, for being filed out of time.

Family Protection Act claim by Virginia

[24] On 27 September 2018 Virginia filed an application seeking further provision for herself out of the estate pursuant to the Act.

[25] Section 9 of the Act provides that no application in respect of any estate shall be heard by the court unless the application is commenced within 12 months from the date of grant of administration. Probate of the deceased's will was granted on 17 February 2016. Virginia commenced her proceeding on 27 September 2018. These proceedings were therefore commenced over 19 months out of time.

[26] Section 9 goes on to provide that the time for making an application may be extended for a further period by the court after hearing such of the parties affected as the court thinks necessary.

[27] However, s 9 also goes on to provide that no such extension shall be granted unless the application for extension is made before the final distribution of the estate. No distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the court shall be disturbed by reason of the application or any order made as a result of it.

[28] Consequently, if the estate has been fully distributed, then an extension of the time within which to apply cannot be granted.

[29] Virginia has made application to extend the time for filing. This is opposed by Vance and Mr Lunn. Virginia also seeks to trace assets which may have been distributed from the estate for the purpose of making any award in her favour.

Service of Virginia's applications

[30] When filing her application, Virginia also applied seeking orders for directions as to service and representation. The proceedings were directed to be served on, and have been served on;

1. the executors of the estate,

2. Douglas,

3. Vance,

4. Denise, and

5. the seven grandchildren of the deceased.

[31] When considering directions as to service, the court was advised that the trustees of the Trust were, at that time, to be replaced. The court therefore deferred making any direction as to service on the trustees pending advice as to who the replacement trustees were.

[32] As noted above, the trustees have still not been replaced and continue to be Vance and Mr Lunn. As no formal direction has been made by the court requiring service on the trustees, they have not been formally served with the proceedings. They are well aware of the nature of the claim by Virginia. Affidavits have been filed by both Mr Lunn and Vance opposing the applications made by Virginia. No issue is taken with the fact that formal service on the trustees has not taken place.

Procedure relating to Family Protection Act applications

[33] The Family Court Rules 2002 ("FCR") set out the steps which can be taken by a person served with an application under the Family Protection Act 1955.

[34] A person served with an application under the Act is deemed to be a respondent in the proceedings, even though they are not named in the proceedings as a respondent[1].

[35] A person served with the proceedings may themselves make an application against the estate for an order under the Act[2]. A respondent who wishes to claim against the estate, having been served with an application filed by another person, must

[1] FCR 379.
[2] FCR 384.

make an application for an order themselves[3]. Such respondent is then treated in accordance with the FCR as if they were an applicant. They must serve documents in relation to their application on the personal representatives in the estate, the original applicant and all other persons who have previously been directed to be served with the proceedings[4].

[36] A respondent served with the proceedings may, instead of filing a claim against the estate, file and serve a notice of intention to appear or a notice of defence to the original application.[5] Any notice of intention to appear or notice of defence must be filed and served within 21 days of the person being served with the original application, or within 30 days if served in Australia.[6] The Court has a discretion to allow a person to appear and be heard in a proceeding even if they have not filed and served a notice of intention to appear or a notice of defence within the specified time.[7]

[37] Whilst FCR 386 sets out a time within which a notice of intention to appear or notice of defence must be filed and served, FCR 384 does not specify any time within which a respondent must file their application to claim against the estate.

Response by estate trustees to Virginia's applications

[38] Vance has filed documentation having been served with Virginia's application. The documentation filed by Vance has either been in his personal capacity or in his capacity as a trustee of the Trust. He has not filed any documentation in his capacity as an executor or trustee in the estate.

[39] Section 11A of the Act requires the administrators of the estate to place before the court all relevant information in their possession concerning the financial affairs of the estate plus, if known, the deceased's reasons for making the dispositions made by her will or for not making any further provision, as the case may be, for any person. Vance annexed to one of his affidavit an interim statement of the administration of the

[3] FCR 384 (1).
[4] FCR 384 (3).
[5] FCR 386.
[6] FCR 386 and FCR 41.
[7] FCR 42.

estate as at 29 June 2018 prepared by Mr Gallagher. An updated interim statement was provided to the court by Mr O'Connor, junior counsel for Vance, at the hearing. By the time of the hearing the court had not been provided with full details of the financial affairs of the estate nor any details as to the deceased's reasons for making her will, nor whether there had been any enquiries as to whether such reasons are available.

[40] At the conclusion of the hearing I therefore issued a minute requiring the remaining trustee, Mr Gallagher, to provide an affidavit informing the court of the matters required under s 11A of the Act. Mr Gallagher filed and served an affidavit as directed, dated 27 November 2019. As that affidavit contained obvious errors, I issued a further minute seeking clarification from Mr Gallagher. A further affidavit has been filed by him, dated 12 December 2019. Counsel for Vance have filed submissions having considered Mr Gallagher's first affidavit. Counsel for Virginia has filed submissions following consideration of both affidavits.

Vance's response to Virginia's claim

[41] In civil proceedings in the District Court, a person served with the proceedings may, instead of filing a statement of defence and if they believe the Court does not have jurisdiction to hear and determine the proceeding, file and serve an appearance stating their objection to the proceeding and the grounds for it.[8]

[42] Vance has not filed a notice of intention to appear or a notice of defence to Virginia's applications. He has filed an appearance under protest to jurisdiction dated 1 February 2019. The appearance does not set out the statutory basis upon which it is filed, but it is presumably in reliance on District Court Rule 5.51. Procedure in the Family Court is governed by the FCR's. FCR 5 A provides:

> A rule in the District Court Rules 2014 does not apply to proceedings in the Family Court unless that rule is specifically applied by these rules.

[43] The FCRs do not specifically apply District Court Rule 5.51 and there is no FCR allowing for the filing of an appearance and objection to jurisdiction. There is

[8] Rule 5.51 District Court Rules 2014.

no statutory basis allowing Vance to file an appearance under protest to jurisdiction in response to Virginia's claim.

[44] Vance's appearance under protest to jurisdiction raises various points. As there is no basis upon which the appearance under protest to jurisdiction can be filed, I need not consider it. However, some of the points raised in it are relevant to issues I do need to determine when addressing Virginia's applications. Submissions filed on behalf of Vance for the hearing address a number of the points raised in the protest to jurisdiction as well as addressing Virginia's substantive claim, submitting there is no breach of moral duty on the part of the deceased towards Virginia. Those are all matters which need to be addressed in the course of considering Virginia's application. As noted above, Vance opposes the applications made by Virginia.

Douglas' response to Virginia's claim

[45] Douglas has filed a notice of intention to appear, stating he supports the application for an order under the Family Protection Act and the interlocutory application to file out of time. Douglas has filed an affidavit in support of the notice of intention to appear which, in its entirety, states;

> 1. I am Leone Helen Percy's ("the Deceased (sic)") son.
>
> 2. I support the application by Virginia.
>
> 3. I think it is incredibly unfair that all of my parents' wealth has been left to my brother Vance and his wife. I don't think it was intentional, but my parents failed me in their moral duty by leaving their entire estate to one son, who has had the benefit of working for them and amassing his own wealth during their lifetime as well.

[46] Douglas has elected to file a notice of intention to appear in the proceedings commenced by Virginia. He has not made an application for an order for provision from the estate for himself pursuant to FCR 384. However, his notice of intention to

appear states "…(his) parents have failed (him) in their moral duty by leaving their entire estate to one son…".

[47] The lawyers acting for Douglas in these proceedings are the same lawyers who acted for him in his proceedings. They are the lawyers who are now acting for Virginia in these proceedings. Submissions filed by those solicitors on behalf of "the applicant" (singular) refer throughout to "the applicant" (singular), but when addressing the relief sought state:

> 24. The Applicant seeks that Leone's shares in F W Percy Farming Trust are divided as follows:
>
> - 20,000 shares to Vance
> - 10,000 shares to Virginia
> - 10,000 shares to Doug
>
> 25. The Applicant further seeks that the funds from the sale of the house be divided equally between the siblings.
>
> 26. It is submitted that this distribution recognizes (sic) that both Virginia and Doug were children of Frank and Leone, without re-writing the will.

[48] The submissions filed on behalf of Virginia therefore seek further provision for Douglas from the estate, despite him not having formally applied for such provision.

Other responses to Virginia's claim

[49] Melinda Bennett has filed an affidavit supporting her mother's claim. Melinda makes no separate claim for herself. Melinda believed from conversations with her grandfather, Frank Percy, that the family trust would "take care of everyone" after he died, which she took to be a reference to her grandmother, Frank's children and his grandchildren.

[50] Karrie Stephens, a further daughter of Virginia, has filed a notice of intention to appear advising she supports her mother's applications for an order under the Act and the application to file out of time. In her notice of intention to appear Karrie refers to an affidavit sworn by her when the proceedings were commenced, stating she believed from comments made to her by her grandfather that her grandparent's wealth would be distributed equally amongst the family. Karrie makes no separate claim for herself.

The Issues for Determination

[51] The parties and counsel agree that all matters should be heard at the same time, namely the application to file out of time, the dispute as to jurisdiction and the substantive claim against the estate.

[52] The issues for determination are:

1. Has the estate been finally distributed?

2. If not, should Virginia be granted leave to file her application out of time?

3. If leave to apply out of time is granted, what further provision should be made for Virginia?

4. Does there need to be any tracing of distributed assets in order to fulfil such provision?

5. Can the court make any further provision for Douglas, and, if so, what provision should be made?

Has the estate been finally distributed?

[53] For the purposes of the Act, an estate is "finally distributed" when all the assets have been transferred by the administrator to those beneficially entitled under the will[9].

[54] Section 2(4) of the Act provides:

> For purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person… shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator after he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

[55] This provision of the Act overruled the approach taken in decisions prior to its enactment that "final distribution" of an estate occurred as soon as the administrator ceased to hold the assets in his or her capacity as such, and held them as trustee, even though the assets might not have been physically transferred to the beneficiaries.

[56] The affidavits provided by Mr Gallagher address how various assets in the estate have been dealt with to date.

Jewellery

[57] Mr Gallagher states that Vance has delivered to Denise the jewellery of the deceased gifted pursuant to the will. It is not stated when this occurred. The jewellery has been distributed to Denise.

$5000 gift to Denise

[58] Mr Gallagher advises the sum of $5,000.00 gifted to Denise under the will was paid to her on 5 February 2018. This was after Douglas' proceedings had been concluded and prior to the commencement of Virginia's proceedings.

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[9] Patterson, *The Law of Family Protection and Testamentary Promises*, Lexis Nexis, 4th Edn, Chapter 16.3

[59] The gift to Denise has been implemented. Distribution of the $5000 has taken place.

Chattels

[60] At the time of the hearing, the three children of the deceased had not agreed on the distribution of chattels. On 26 November 2019[10] junior counsel for Vance confirmed his client's instructions that Douglas and Virginia could be invited by Mr Gallagher to select which of the chattels, from a list of chattels previously provided, Douglas and Virginia wished to have delivered to them in Napier. On 27 November Mr Gallagher wrote to counsel for Douglas and Virginia confirming such instruction as follows:

> I have now been instructed by Vance that he agrees that Douglas and Virginia may choose such of the scheduled Chattels as they wish to retain in their sole ownership with same to be delivered on receipt of their decision.
>
> As the other of the two Executors and Trustees of the Estate I confirm my agreement to proceed with distribution as stated. In my view this now disposes of any remaining issue in regards to distribution of the Chattels.
>
> If I do not hear from you within a reasonable period of time and/or unless the Family Court orders otherwise I will proceed on the basis that neither Douglas nor Virginia wishes to select any one or more of the Chattels.
>
> If Douglas and Virginia choose the same Chattel(s) then same will be either delivered to Langley Twigg so that division can be resolved or, if that is not acceptable then sold and the proceeds of sale divided equally between them.

[61] Whilst this advice from Vance and Mr Gallagher has disposed "… of any remaining **issue** in regards to distribution of the Chattels" (emphasis added), distribution of the chattels will only occur in accordance with the last two paragraphs of Mr Gallagher's letter as set out above. As this could include an order from the court relating to the chattels pursuant to these proceedings, final distribution of the chattels has not yet occurred.

[10] 6 days after the hearing

40,000 B shares in the company

[62] Mr Gallagher states he met with Vance on 21 September 2017 to discuss steps which would need to be taken to complete the administration of the estate. Mr Gallagher says that as part of those discussions, he advised Vance that documents relating to transmission and transfer of the shares could be signed, but would be held in escrow pending completion of final distribution of the estate, including resolution of all issues relating to distribution of chattels.

[63] Mr Gallagher says declarations of transmission of the shares were completed by himself and Vance in a meeting on 17 October 2017, on the basis they were to be held in escrow pending completion of final distribution of the estate.

[64] Mr Gallagher says Chris Wheeler, at that time a partner in the law firm AJ Gallagher, was present throughout the meeting with Vance. Mr Gallagher annexes to his first affidavit a file note prepared by Mr Wheeler as follows:

> 17/10/17
>
> Estate Percy
>
> Attending Vance Percy with AJG when AJG explained the Transmission documents in connection with shares.
>
> I then took declarations from Vance Percy & AJG & witnessed same.
>
> AJG explained the arrangements for dealing with distribution of chattels. Vance confirmed that he understood and accepted this as the appropriate course of action.
>
> Vance confirmed that he was happy with fees discussed earlier with AJG.
>
> The meeting was amicable & Vance shook AJG's hand and thanked him as he left.
>
> CW

[65] Submissions filed on behalf of Vance point out that Mr Wheeler's file note does not mention holding the transmission documents in escrow and, by implication, appeared to call into question Mr Gallagher's evidence in this regard. However, I note

Mr Gallagher's evidence is that he discussed this with Vance in a meeting on 21 September, not at the meeting on 17 October.

[66] Whilst Mr Wheeler's file note does not refer to the documentation being held in escrow, his note relates to the meeting on 17 October when the documents were signed and not to the meeting on 21 September. Further, the file note does not record any discussion suggesting the declarations would be released pending completion of final distribution. The file note does record the arrangements for dealing with distribution of the chattels were explained and Vance "understood and accepted this as the appropriate course of action" This is consistent with Mr Gallagher's account of the two meetings.

[67] Submissions filed on behalf of Virginia point out that Mr Gallagher is independent, in that he has no benefit to be gained either way in the outcome of the proceedings. They go on to note that Mr Gallagher is a solicitor of the court and has obligations to the court in terms of the evidence he has provided.

[68] I accept Mr Gallagher's sworn evidence that it was his intention to hold the documents in escrow when they were signed on 17 October and that Vance had been told this in the meeting on 21 September. The originals of those documents remain on Mr Gallagher's file.

[69] As the distribution of chattels has not been able to be agreed between the deceased's children, Mr Gallagher is therefore of the view the shares have not yet been transferred and remain in the ownership of the estate as an asset pending final distribution.

[70] Notwithstanding that position, Vance states in his affidavit dated 1 February 2019:

> Mum's shares were transferred to me under Mum's will on 17 October 2017. The declarations of transmission of the shares are annexed and marked "**A**".

[71] In his affidavit dated 18 April 2019 Vance states:

> Mum's "B" class shares were given to me under her Will. The "B" class shares were transferred to me on 17 October 2017.

[72] Mr Gallagher annexes to his first affidavit a Companies Office search for the company dated 26 November 2019 detailing a particulars of shareholding document registered on 12 December 2018, recording the transfer of 40,000 shares in the company from the deceased to Vance. The particulars of shareholding document is recorded as presented by Denise Percy. As the original documents are still held by Mr Gallagher, copies must have been presented for registration.

[73] Mr Gallagher says the recorded outcome with regard to completion of transfer of ownership of the shares to Vance was not his intention and does not have his consent as executor and/or trustee.

[74] The effect of the registration of the declarations of transmission was the subject of submissions in the course of the hearing. Mr O'Connor, on behalf of Vance, submitted legal transfer was effected once the declaration had been signed by both Vance and Mr Gallagher. Mr O'Connor submitted that whatever happens on the Companies Office records is irrelevant. He submitted legal title does not transfer by registration at the Companies Office, which only provides a public record of transfers which otherwise legally take place.

[75] I have accepted Mr Gallagher's evidence that it was explained to Vance at the time the documents were signed they would be held in escrow pending completion of final distribution of the estate, including resolution of all issues relating to distribution of chattels. I also accept his evidence that the registration at the Companies Office was not his intention and does not have his consent as executor and/or trustee.

[76] The Court of Appeal in *Re Stewart*[11] was required to address the provisions of s 9 in a situation where a testatrix made no provision for her adult children in her will

[11] *Re Stewart* [2004] 1 NZLR 354.

and left instructions that a death notice not be published and that her children not be advised of her death. In accordance with the testatrix's wishes the children were not contacted by the executors, who did not publish a death notice or advertise for claimants to the estate before probate was obtained. The High Court had granted a declaration that the time limit for commencing proceedings be extended as a result of concealed equitable fraud by the executors and beneficiaries. The Court of Appeal addressed the issue of "distribution" in such circumstances, as follows:

> [22] Moreover, we are not concerned in this case with a claim in equity. A claim under the Family Protection Act is a claim created by the legislature. If there were no Family Protection Act, the first respondents would have had no ability to bring proceeding against the estate seeking provision from it. But, in creating the right to claim, Parliament has also, in s 9, limited both the period and the circumstances in which it may be brought. Parliament has in fact provided for the Court to extend the time for making of a claim but has circumscribed that power. Section 9, in its statutory context, reflects the balance being struck between the efficient administration and distribution of estates on the one hand, and discretionary reallocations in recognition of moral duties on the other. Allowing an open-ended discoverability regime, even if it is only in the context of fraudulent concealment, would seriously undermine this balance. The Courts must therefore act strictly in accordance with the legislation when exercising jurisdiction under the Family Protection Act.
>
> [23] In order to be of practical assistance to the first respondents, it would furthermore be necessary for the Court not merely to ignore the first portion of the second proviso to s 9, by extending the 12-month period notwithstanding the prior making of a final distribution, but also to disturb that distribution when Parliament has said it shall not be disturbed. Mr Connell endeavoured to defend the result arrived at by the Judge by saying that "distribution" must be read as meaning only a distribution which was lawfully made. He said that was not the case if it was made in circumstances in which there had been fraudulent concealment. **It is, however, plain enough that Parliament was intending that no distribution made in terms of the will** (or, in the case of an intestacy, in terms of the Administration Act 1969) **should be disturbed. The distribution in this case was in terms of the will.** The statutory language leaves no room for disturbance because of a circumstance that has not vitiated the provisions of the will. The same parliamentary intention of protecting otherwise valid distributions can be seen in ss 47 – 49 of the Administration Act, which apply, inter alia, to Family Protection Act claims, especially in s 48(2).
>
> (Emphasis added)

[77] The facts in *Re Stewart* are distinguishable from the current case. In that case, the distribution was not only made in accordance with the will, but was made validly by the executors, as intended by them.

[78] In this case, Mr Gallagher has had the documentation prepared on the basis it will be held in escrow until the estate is ready to be finally distributed. As I have found above with regard to the chattels, and will address below with regard to the residue, the estate has not been finally distributed. The registration of the transmission of the shares was not carried out by both of the executors attending to such registration. The registration was carried out by neither of the executors, but by the wife of one of them. The registration of the transmission was certainly not carried out with the consent of Mr Gallagher.

[79] Under s 39 of the Companies Act 1993, a share is transferred by entry into the share register in accordance with s 84. Section 84 of the Companies Act provides that, subject to the company's constitution, shares in a company may be transferred by entry of the name of the transferee on the shares register. The 40,000 B shares in the name of the deceased have therefore been transferred into Vance's name as prescribed in the Companies Act. However, that does not necessarily determine there has been a distribution of the shares from the estate.

[80] In *Pabirowski v Pabirowski*[12]Associate Judge Robinson held that where an executor who is also a beneficiary transfers property to himself before effecting legacies to other beneficiaries, there is no distribution. The deceased left his widow a life interest in his estate, with the residue passing to one son, subject to a legacy to the deceased's other two children of $20,000.00. The son who received the residue was the sole executor of his father's estate following his mother's death. The only remaining asset of the father's estate following the widow's death was a farm property. There were no other assets in the estate from which to satisfy the $20,000.00 legacy.

[81] The two other children gave notice of an intention to claim further provision from their mother's estate, being under the mistaken belief the farm was owned by their mother's estate.

[82] On 20 November 2007 the executor brother executed a transmission of the farm property from his father's estate into his sole name as executor of his mother's estate in the mistaken belief the mother's estate received the farm under the father's

[12] *Pabirowski v Pabirowski,* HC Auckland, CIV 2008-488-000 555, 5 March 2009

will. It was later ascertained the farm was still an asset in the father's estate. On 23 May 2008 the defendant as executor in his father's estate transferred the farm to himself as residual beneficiary. He did not distribute the legacy of $20,000.00 to his siblings.

[83] The siblings commenced proceedings against their brother, claiming a breach of fiduciary duty to them as executor of their late father's estate. They also brought a claim against their brother for payment of the $20,000.00 legacy payable to them in terms of their father's will.

[84] The Court was not therefore addressing a claim under the Family Protection Act, but in its decision addressed the issue of "distribution" and the application of s 9 of the Family Protection Act 1955.

[85] Associate Judge Robinson decided that as the defendant had not paid the plaintiff's their legacy when the farm property was transmitted to him, the farm property was not distributed at that time.[13]

[86] His Honour went on to state at [33];

> Consequently, I do not consider the farm property to have been distributed to the defendant on the registration of the transmission in 2007. It must therefore follow that until registration of the transfer from the defendant as executor to the defendant as beneficial owner on 23 May 2008 the farm property had not been distributed and the plaintiff's could have applied for leave under s 9 Family Protection Act 1955 to bring a claim under that Act for further provision out of the estate of [the father], which included the farm property.

[87] The fact there had been a registration of the transmission from the father's estate to the mother's estate did not mean the farm property had been distributed from the father's estate. The distribution was achieved on the registration of the transfer by the executor to himself, as intended by him.

[88] In this case, the registration of the transfer has not been undertaken by either of the executors and was not undertaken with the consent of Mr Gallagher.

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[13] At [30].

[89] In *Kahn v Kahn*[14] the deceased's estate included a current account in a company. The deceased's son was one of the two executors.

[90] The executor son was entitled to the current account as residuary beneficiary. The son, as executor and residuary beneficiary, instructed the company's accountant to close the current account by an accounting entry and transfer the balance to him. There had been no resolution by the executors as provided for under the will.

[91] The Court held that while the deceased's current account in the company had been transferred to the son, it was not the subject of final distribution by the executors, because it had not been transferred by them.

[92] The Court noted;[15]

> [The current account] was an asset in [the deceased's] hands in the form of money owed to her by the company. It was transferred to [the son] through his direction as executor, and residuary beneficiary, and no contest can be taken over that. But it was nevertheless a debt or an asset owed to the estate. It may not have been able to be validly distributed by the estate through a direction of one executor, who happened to be the residuary beneficiary. While one executor left it to the other to make necessary arrangements with the family accountant to transfer the current account in the company from the deceased to [the son], in my view it may not have constituted a distribution in terms of s 9 of the Act, based on the authority of *re Wise* [1992] 9 FRNZ 225 (CA). Transfers to beneficiaries must be made in terms of the will, or under some other lawful authority, in order to fall within the designation of "distribution of an estate".

[93] In *Lai v Huang*[16] the Court of Appeal held that distribution is not complete until there is assent to a transfer by (in that case) the executrix and sole beneficiary.

[94] I distil from the above authorities that, for distribution of any part of the estate to be complete, not only must the asset be transferred to the specified beneficiary but this must be according to any process outlined in the will and with the assent of the executors. Where an executor is also the beneficiary of an asset, the assent of the other executor is still necessary for distribution to occur.

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[14] *Kahn v Kahn* [2008] NZFLR 782.
[15] At [28].
[16] *Lai v Huang* [2017] NZCA 499 at [34].

[95] I therefore determine that, notwithstanding the shares having been transferred into Vance's name in accordance with the provisions of the Companies Act, there has not yet been a distribution of those shares from the estate. This is because there has been no assent to any distribution of those shares by Mr Gallagher, the share transfer being held in escrow pending final distribution.

The residue of the estate

[96] The residue of $104,967.96 comprises the balance of the proceeds of sale of the Rimu Street property, together with accumulated interest and following the payment of the $5000.00 to Denise and various expenses. Those funds are still held in the trust account of A J Gallagher Law Firm.

[97] Mr Gallagher states in his first affidavit sworn on 27 November 2019 that the only liability then outstanding is the sum of $1,235.00 due to the company, which lodged funds with Mr Gallagher's firm in 2016 to pay for probate application fees. Mr Gallagher goes on to state:

> Further and final A J Gallagher Law Firm Accounts (Fees and Office Services and as per agreed terms of engagement interest due on Fees that have been outstanding for some time) will also be rendered in due course in regards to attendances completed for Estate L H Percy since 27 September 2017 in regards to administration, the various proceedings, and final distribution. In the usual manner we will discuss those further costs with Vance as Co-Executor & Co-Trustee when the Account is due to be rendered and of course Vance retains his lawful right to question the quantum of any Account rendered, presumably if justified.

[98] It is submitted on behalf of Vance that the funds remaining in the A J Gallagher Trust Account "…are held on trust for the trustees under the Will." This is a reference to the trustees of the Percy Farming Trust, the residuary beneficiaries.

[99] Until a debt due from the estate is satisfied, the trustees and executors' duties are not completed.[17] It is essential there is nothing left to be done by the trustees.

[100] Interestingly, Vance by email sent on 26 November 2019 (six days after the hearing) confirmed Mr Gallagher could pay his invoice outstanding from 29 June

[17] *Re Parry,* High Court, Auckland, M 791/97, 20 October 1997, Potter J.

2018. This approval does not mean the full balance remaining is to be paid to the trustees of the Trust pursuant to the provisions of the will. There are further legal fees to be rendered by A J Gallagher Law Firm and paid by the estate. Consequently, the trustees of the Trust are not entitled to the full sum held by A J Gallagher Law Firm. The sum due to the trustees is yet to be ascertained following payment of all fees. I therefore do not accept the submission that the sale proceeds retained by A J Gallagher Law Firm are "…held on trust for the trustees".

[101] In any event, even if the full sum were held for the trustees of the Trust with no further steps to be taken by the administrators/executors in the estate, the provisions of s 2(4) of the Act are such that those funds are not deemed to have been distributed nor ceased to be part of the estate.

Conclusion as to "final distribution"

[102] Having regard to the above determinations that;

1. final distribution of chattels has not yet occurred,

2. the 40,000 B shares in the company have not yet been distributed, even though they have been transferred into Vance's name,

3. the residue of the estate has not yet been identified, with a debt to the company still to be met and final legal fees remain to be paid by the estate,

I determine the estate has not been finally distributed. Consequently, Virginia's application for extension of time to bring her claim against the estate is not barred by the provisions of s 9 of the Act.

Should Virginia be granted leave to file her application out of time?

[103] The Court of Appeal in *Re Magson*[18] has identified a number of factors relevant to the exercise of the court's discretion to grant an extension of time, which factors have been adopted in a number of subsequent cases. The list of factors, which is not exhaustive, includes:

1. The length of delay.

2. Whether the delay can be regarded as fairly excusable.

3. The strength of the claim.

4. The extent of any prejudice to the beneficiaries who might have ordered their affairs in reliance on the will.

[104] A further issue raised on behalf of Vance with regard to the application to file out of time is that such application is an abuse of process as the principle of res judicata applies.

The Length of Delay

[105] Probate was granted on 17 February 2016. Section 9 required any application by Virginia to be filed by 17 February 2017. Virginia commenced her proceedings on 27 September 2018, over 19 months after the time allowed under s 9 to commence the proceedings.

[106] Proceedings were originally commenced by Douglas against the estate on 4 May 2016, within time. Those proceedings were served on Virginia in Australia on 1 November 2016. Whilst Virginia was therefore technically a respondent in those proceedings pursuant to the provisions of FCR 379 (2), this did not automatically signify that she was making a claim against the estate. FCR 384 (1) provides that a respondent who wishes to claim against the estate, having been served with an application filed by another person, must make an application for an order themselves. Such respondent is then treated in accordance with the FCR as if they were an

[18] *Re Magson* [1983] NZLR 592.

applicant. They must serve documents in relation to their application on the personal representatives in the estate, the original applicant and all other persons who have previously been directed to be served with the proceedings.[19]

[107] Virginia therefore had the opportunity to bring a claim against the estate in the context of the proceedings commenced by Douglas. Virginia did not file any documentation in response to having been served with Douglas' application. Whether Virginia would have been permitted to bring any claim by the time Douglas' application came for hearing is not known because Douglas' application was subsequently struck out for non-compliance with court directions. As FCR 386 does not specify a time within which Virginia had to make any claim, it is possible Virginia would have been permitted to apply prior to any hearing of Douglas' claim, had she chosen to make application.

[108] Virginia waited almost 22 months after being served with Douglas' claim before she filed her own proceedings making claim against the estate.

[109] Douglas' claim was struck out on 18 July 2017. Douglas filed an application to reinstate his proceedings. That was dismissed on 12 December 2017. If Virginia had ever wanted to make a claim in the context of Douglas' proceedings, such opportunity was lost in December 2017. Virginia commenced her application on 27 September 2018, some nine and a half months after it was finally confirmed by the court that Douglas' application could not proceed.

[110] The 19 month delay after the time limit under s 9 is, in my view, reasonably significant. The nine and a half month delay following Douglas' claim being struck out is also significant.

[111] In her affidavit sworn 1 August 2018 Virginia sets out facts in support of her application for leave to file out of time. She makes reference to the proceedings filed by Douglas in May 2016. Virginia refers to a delay until October 2016 while the court processed that application. As Douglas' application was not served on Virginia until 1 November 2016, that delay has no relevance to this issue.

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[19] FCR 384 (3).

[112] Virginia then states that once she was served with Douglas' application, Vance applied to strike the application out and Douglas' proceedings were ultimately dismissed in January 2018.

[113] These assertions are incorrect. Douglas' application was struck out on 18 July 2017, over seven months after Virginia was served. Douglas' application was struck out because he failed to file an affidavit as directed by the court. The strike out was not based on any application made by Vance. Douglas' application to reinstate his proceedings was dismissed on 12 December 2017.

[114] Virginia has not explained why she did not take any step to make a claim in the context of Douglas' application between being served on 1 November 2016 and Douglas' proceedings being struck out on 18 July 2017.

[115] If Virginia had filed a claim in the context of the proceedings commenced by Douglas, her claim would not have been affected by the strike out order made with regard to Douglas' claim. The lawyers acting in these proceedings for Virginia are the same lawyers who acted for Douglas in his proceedings. The Court is unaware of what advice, if any, Virginia was given by her current lawyers as to her ability to bring a separate claim in the context of Douglas' application.

[116] As for the delay in filing her claim following the dismissal of Douglas' application to reinstate his proceedings, Virginia states she had difficulty having her affidavit executed in Australia. Virginia makes reference to having her daughter, Karrie, file an appropriate affidavit to commence the proceedings. That affidavit was sworn on 25 July 2018. Both Karrie and Virginia's affidavits were filed in the Court on 27 September 2018.

[117] The delays by Virginia in bringing any claim in the context of Douglas' application and subsequently in bringing her separate application once it was identified Douglas' proceedings could not continue are significant.

Can the delay be regarded as fairly excusable?

[118] Virginia has given no explanation as to why she did not bring any claim in the context of Douglas' proceedings. There is then a delay of over seven months between the dismissal of Douglas' application to reinstate his proceedings and the swearing of Karrie's affidavit, with a further two-month delay until the application and those two affidavits were filed. Whilst the latter two-month delay could probably be due to action (or more likely inaction) on the part of Virginia's solicitors, the earlier delay is not reasonably explained.

[119] The effective delay by Virginia for some 19 months following the grant of probate is not fairly excusable.

Abuse of process/ res judicata

[120] Submissions on behalf of Vance refer to the proceedings commenced by Douglas in 2016, which were struck out in July 2017 and which the Court refused to reinstate later that year. It is submitted Virginia has filed effectively the same claim that Douglas filed, with much of the wording in Virginia's affidavit being exactly the same as the wording in Douglas' affidavit.

[121] The court is referred to s 4(2) of the Family Protection Act which states that an application on behalf of any person may be treated by the Court as an application on behalf of all persons who might apply.

[122] The submissions go on to refer to *Henderson v Henderson*[20] which held:

> "… where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly

[20] *Henderson v Henderson* (1843) All ER Rep 378

belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[123] *Henderson* is a decision of the Vice Chancellor's Court in the United Kingdom from 1843. A contemporary analysis of res judicata by the New Zealand Courts was given by the High Court in *Commissioner of Police v Geddis.*[21] The court stated:

> [40] Under the doctrine of *res judicata* ("the decision stands") a Court can prevent relitigation of questions which have already been determined. Thus, if a Court of competent jurisdiction has made a final decision over the parties to, and the subject matter of, a cause of action in litigation, then any party or privy to that litigation can be stopped from disputing or questioning that decision in subsequent litigation against the other party or privy to the decision. Issue estoppel is under the umbrella of *res judicata* and may be raised as to a particular fact or issue in a cause of action, rather than the cause of action as a whole.(19)
>
> (19) *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266
>
> [41] The purposes of the doctrine lie in public policy (that there should be an end to litigation) and hardship to the individual ("being vexed twice for the same cause").20
>
> (20) *Lockyer v Ferryman* (1877) 2 App Cas 519 (HL) at 530
>
> [42] For a proceeding to be dismissed on the grounds of *res judicata* or issue estoppel, there must be:
>
> (a) a final decision in an earlier proceeding by a Court of competent jurisdiction;
>
> (b) the decision is between the same parties (or their privies) as in the later proceedings; and
>
> (c) the decision is in relation to a cause of action, or a particular fact or issue, that is identical to a cause of action or fact or issue pleaded in the later proceeding.

[124] Whilst the decision in *Geddis* concerned criminal proceedings, *res judicata* applies generally to both civil and criminal proceedings[22].

[125] Whether or not Virginia's claim is exactly the same as that filed by Douglas is irrelevant. The court did not rule on the merits of Douglas' application. His substantive application was struck out for failure to comply with directions regarding the filing of evidence. His application to reinstate his proceedings was dismissed

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[21] *Commissioner of Police v Geddis* [2013] NZHC 1199
[22] The Dictionary of New Zealand Law (9th ed, 2020, online ed) at RE

because it was out of time. There has never been any final decision on the merits of Douglas' claim nor on any aspect of the present claim by Virginia. *Res judicata* does therefore not apply.

The extent of any prejudice to the beneficiaries who might have ordered their affairs in reliance on the will

[126] Submissions filed on behalf of Vance say the delays "…will cause significant prejudice to Vance". No evidence is given as to what that significant prejudice will be.

[127] It is submitted that Douglas knows the Trust relies on the money from the sale of the deceased's half share of the Wairoa house to pay the professional trustees, because the financial documents for the Trust were discovered in the High Court proceeding commenced by Douglas. It is said that Douglas is now threatening to sue Vance for breaching the settlement agreement and "…is making it impossible to appoint professional trustees and is using the Family Court proceeding to put pressure on [Vance] to sell the farm".[23]

[128] It is said this is the motivation behind the claim being made by Virginia, which motivation is supported by Douglas.

[129] Whatever may be the motivation on the part of Virginia, she has always had the right to bring a claim under the Family Protection Act against her mother's estate.

[130] Mr Lunn[24] refers to the trustees signing a settlement agreement with regard to Douglas' High Court claim after Douglas' Family Protection Act claim was struck out and the company shares had been transferred to Vance. Mr Lunn says the trustees would not have signed the settlement agreement if there was a claim in the Family Court challenging the transfer of the shares. He does not expand upon why the trustees would not have signed such settlement agreement.

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[23] Affidavit of Vance Percy dated 18 April 2019, paragraph 9.
[24] Affidavit sworn 18 April 2019, paragraph 6.

[131] Mr Lunn also states that the money from the deceased's half share in the Wairoa house is to be used to pay the professional trustees, who are yet to be appointed. No evidence is given as to what the fees of the professional trustees will be and it is not explained why the half share of the proceeds of sale of the Wairoa property received by the trust from Frank Percy's estate cannot be used to pay the professional trustees.

[132] There are undistributed assets in the estate. It has not been shown that if the court were to make an award to Virginia utilising any of those assets, then Vance will not be able to continue to run the company and as the farm and the trustees (existing or new) will not be able to properly carry out their functions as trustees. Vance will continue to own all the voting shares in the company, he and his wife will continue to own 50% of the total shares and they will both continue as directors of the company.

[133] I do not accept that any prejudice will occur for the beneficiaries as a result of them ordering their affairs in reliance on the will if further provision were to be made for Virginia.

The strength of the claim by Virginia

[134] In essence, Virginia's claim is that she has received little or nothing from either of her parents' estates.

[135] Frank Percy left all of his chattels to the deceased and the residue of his estate to the Percy Farming Trust. He made no provision for Virginia, nor his other two children.

[136] The only benefit Virginia receives from her mother's estate is a one third interest in the deceased's chattels, excluding jewellery.

[137] A list of chattels prepared by Vance and Denise has been annexed to Mr Gallagher's first affidavit. This firstly identifies a number of chattels which were donated to the Salvation Army as per the deceased's wishes, which are said to have had a value of approximately $500.00. The list goes on to identify that a framed print

of running horses, swan shaped vase, small swan ornaments, watch and necklace have been given to Virginia's daughter Melinda. No value is given for these.

[138] The remaining chattels are identified, but not valued. They include 150 souvenir teaspoons, 115 collectible cruet sets, nine china cup, saucer and plate sets, a set of six shot glasses, a set of five sherry glasses, and 19 other similarly identified forms of chattels. The chattels appear to be of minimal value.

[139] Vance has confirmed through his lawyer that Douglas and Virginia may be invited to select which of the chattels, possibly all if they wish, they wish to retain. Mr Gallagher has passed that advice on to counsel for Virginia. It is not known which, if any, of the chattels have been selected by Virginia and Douglas. Even if either of them were to select all of the chattels, that would appear to amount to extremely minimal provision to them from their mother's estate.

[140] The deceased has made minimal provision for Virginia in her will.

[141] The substantive assets acquired by or on behalf of the deceased and her late husband during their lifetimes are the Kotemaori farm and the proceeds of sale of the Wairoa property. The trust will receive all of the net proceeds of sale of the Wairoa property pursuant to the provisions of Frank's will and the deceased's will.

[142] The trust owns 50% of the shares in the company. These are all B shares. The provisions of the deceased's will will result in Vance and Denise owning the remaining 50% of the shares in the company, with Vance owning all voting shares.

[143] On 13 November 2002, Frank, as settlor of the Percy Farming Trust, signed a Memorandum of Guidance for the trustees from time to time of the trust which recorded;

> **Introduction**
>
> 1. This memorandum sets out my wishes concerning The Percy Farming Trust ("Trust") which I request you to take into account in the administration and management of the Trust.
>
> 2. I settled the Trust on 15 December 1969 for the general purpose of ensuring that my family's wealth is owned through one coherent

ownership vehicle and to ensure that members of my family are able to benefit from the capital and income of the Trust from time to time. To this end, my will provides that upon my death my residuary estate shall pass to the Trust.

Specific beneficiaries

3. When I have died, it is my wish that the reasonable needs and requirements of my wife Leone Helen Percy are met from the Trust.

4. After making such provision as may be necessary to give effect to my wishes in paragraph 3 above, it is my wish that the reasonable needs and requirements of my children Vance Charles Percy ("Vance"), Douglas William Percy ("Douglas") and Virginia Frances Bennett ("Virginia") are met from the Trust and my trustees at all times regard the interests of my children as taking next priority.

5. After making such provision as may be necessary to give effect to my wishes in paragraphs 3 and 4 above, in exercising your discretion, you should:

    5.1 Consider the reasonable needs of any of my grandchildren as having next priority, and

    5.2 Take into account the age and circumstances of each grandchild and encourage his or her self-reliance and independence.

General principles regarding discretions

6. My general wishes are as follows:

    6.1 Benefits can be made available for the purposes of education, health, general welfare, maintenance, wellbeing and business needs of the beneficiaries;

    6.2 As much as possible distributions to beneficiaries should be sourced from the income of the Trust, although capital advances may be made by the Trust if, in your opinion, such capital advances will be used for proper or productive purposes;

    6.3 If a beneficiary is married, in order to protect the beneficiary from the possibility of a matrimonial property claim in the event of a breakdown of his or her marriage, you should take into consideration the stability of the marriage and the purpose to which a distribution would be applied in deciding whether to make the distribution:

        6.3.1 to a trust of which that beneficiary is a beneficiary (assuming this is legally possible);

        6.3.2 by way of an interest free, repayable on demand loan;

6.3.3 outright to that beneficiary;

6.4 Generally, in the event of a significant distribution to a beneficiary, whether upon winding up or otherwise, you should consult with and have regard to the wishes of the beneficiary as to the timing of and the manner in which such distribution is made.

Specific Assets and Winding up of Trust

7. It is my wish that the Trustees retain any farming assets owned by the Trust such as the shares in FW Percy Farming Company Limited which owns the farm property and farm plant and livestock at Kotemaori and my son Vance continues to the good farming of that property. It is my wish that Vance eventually takes ownership of the Company so as to own all farming assets but in doing so a reasonable amount of money should be made available for distribution to each of my other children, Douglas and Virginia. The actual amount of money involved must depend upon the availability of cash resources at the time of distribution and/or the ability of Vance or the Company to borrow funds to enable Douglas and Virginia to be paid out a reasonable amount of money. What amounts to a reasonable amount of money is not expected or likely to be equal to the share that Vance takes as Vance has put a lot of time and effort into the good farming of the property over many years and has contributed greatly to its increase in value and he should be adequately compensated for the same.

8. If any of my children have died before the distribution date but are survived by a child or children who are living at the distribution date, such child or children shall stand in the place of their parent and benefit equally from the share in the trust fund that his, her or their parent would have received had he, she or they survived to the distribution date.

General

9. I acknowledge that this Memorandum is not binding on the Trustees but in so doing I confirm it sets out my express wishes and desires concerning the ongoing administration of the Trust and its ultimate distribution. It is for the guidance of my Trustees and is not intended in any way to fetter the discretionary powers vested in the Trustees under the Deed. From time to time I may amend my wishes in another Memorandum.

[144] In the 17 years since completion of the memorandum the trust has never made a distribution to Virginia, Douglas or any of Virginia's children. Distributions have been made for the benefit of Vance and his family. Vance continues to enjoy the benefit of living on and running the farm.

[145] Virginia therefore sees Vance as benefiting totally from her parent's bounty by living on the farm, owning all the voting shares in the company which owns the farm,

being a director of the company along with his wife Denise and by being a trustee of the farming trust, which trust owns 50% of the shares in the company and is entitled to all of the proceeds of sale of the Wairoa property.

[146] Douglas has similar concerns. In 2017 Douglas commenced proceedings in the High Court under s 51 of the Trustee Act 1956 claiming breaches of trust and fiduciary duty and seeking to remove the trustees and replace them with an independent professional trustee.[25]

[147] As a result of the proceedings issued by Douglas against the trustees, a deed of settlement has been entered into recording that Vance and Mr Lunn agree to resign as trustees to be replaced by agreed independent professional trustees, who are to have no conflict of interest. One of the trustees must come from an accounting firm or company and the other must come from a law firm or company. I understand potential trustees have been identified, but are not willing to accept appointment until these proceedings have been resolved.

[148] Section 4 of the Family Protection Act 1955 provides that where a deceased fails to make adequate protection from their estate for the proper maintenance and support of defined persons (including children), the Court may, at its discretion, order that any provision the Court thinks fit be made out of the deceased's estate for all or any of those defined persons. This recognises the moral duty on a testator to adequately provide for his or her children.

[149] Three decisions of the Court of Appeal[26] established that assessment of "proper maintenance and support" requires a broad approach, which includes the need to recognise the child as a valued member of the family and other social and ethical factors. In assessing whether the deceased has made adequate provision for the proper maintenance and support and in determining what would be required to remedy any failure, the Court is to adopt a conservative role. It should do no more than the minimum required to address a testator's breach of moral duty.

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[25] At that time the trustees were Vance and a Mr Murray Riddell, a retired farmer. Mr Riddell has subsequently been replaced by Mr Lunn as a trustee.

[26] *Williams v Aucutt* [2000] 2 NZLR 479; *Auckland City Mission v Brown* [2002] 2 NZLR 650 and *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.

[150] In exercising its discretion the Court may not remake the testator's will, although in appropriate cases nothing less will suffice to repair a breach of moral duty.[27] There is no presumption of equality of provision between children of a deceased.[28]

[151] The relationship between parent and child has primacy in our society.[29] The extent and even the existence of a parent's moral duty to provide maintenance and support for a child on the parent's death depends to a large degree on the nature of the relationship, its closeness, and the conduct of the parent and the child towards each other. Unless a claimant was wholly estranged from the parent or guilty of disentitling conduct, family recognition alone can give rise to a duty to provide for an adult child.[30]

[152] Virginia acknowledges that the relationship with her parents was estranged. She states that due to a number of unspecified "family disputes" she had not spoken to or seen her parents since 1988. Virginia says she believes her parents' behaviour "was influenced by many issues" which she does not identify, but she believes that her brother Vance was one of those influences.

[153] Vance stated in his affidavit that Virginia had nothing to do with their parents for much of Virginia's life, noting there was a big argument between them when Virginia was a teenager. He says Virginia left home when she was 15 years old, did not visit her parents when she returned to New Zealand to see her daughters in and around 2003 and did not attend either of her parents' funerals. This evidence was not responded to by Virginia in any subsequent affidavit.

[154] Whilst there is no evidence of disentitling conduct on the part of Virginia, the evidence clearly establishes a lengthy period of estrangement. Notwithstanding such estrangement, Frank Percy in his Memorandum of Guidance signed in 2002 recognised an ongoing obligation to ensure there was provision for all three of the

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[27] *RE Wright (deceased)* [1954] NZLR 630 (CA); *Little v Angus* [1981] 1 NZLR 126 (CA).
[28] *RE Lever* HC Christchurch m 278/87, 6 July 1988; *Vincent v Lewis* [2006] NZFLR 812; *Paewai-Kohe v Paewai* [2014] NZHC 3137.
[29] *Flathaug v Weaver* [2003] NZFLR 730 [CA]; *Fisher v Kirby* [2012] NZCA 310.
[30] *Williams v Aucutt* [2000] 2 NZLR 479.

children. There was, therefore, intended ongoing family recognition notwithstanding the estrangement.

[155] Virginia has provided very little information to the Court as to her financial circumstances. Her counsel confirmed in the course of submissions at the conclusion of the hearing that Virginia's claim is based on family recognition as opposed to financial need.

[156] The Court of Appeal held in *Re Wilson*[31] that a testator could not discharge his moral obligation to provide for his widow by the establishment of a discretionary trust in her favour. The Court of Appeal in *Flathaug v Weaver*[32] held that *Re Wilson* is not authority for any wider proposition and went on to say:

> We see no reason why, in a proper case, an entitlement to benefit under a trust, even of a fully discretionary nature, should not be taken into account in assessing a testator's duty to make provision. …. By leaving his entire estate to the trust, the testator plainly saw it as the means by which he would provide for his children and grandchildren. In our view, for the purpose of assessing their competing claims, that may be regarded as equivalent to direct testamentary provision.

[157] Notwithstanding those comments, the Court went on to confirm a separate award to the claimant daughter as being necessary to discharge the testator's moral duty to her.

[158] The provision of inter vivos support may reduce or even eliminate a parent's duty to provide support on death. The submissions filed on behalf of Vance refer to an affidavit sworn by Douglas in support of his claim which stated "Virginia was given about $30,000.00 years ago to help her buy a house". Counsel for Virginia confirmed did receive such gift, although it was not identified if this was from the deceased, Frank or both of them. It more likely to have been from both of them.

[159] The Court is to have regard to any reasons the deceased may have given for making her will as she did. Mr Gallagher has not been able to provide the Court with any instructions given by the deceased when her will was completed in 2001.

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[31] *RE Wilson* [1973] 2 NZLR 359.
[32] *Flathaug v Weaver* [2003] NZFLR at [36]

Sainsbury Logan & Williams, Lawyers, Napier prepared the last will for the deceased. The deceased subsequently instructed Mr Gallagher's firm. Shortly after the deceased's death Mr Gallagher wrote to Sainsbury Logan & Williams advising of her death and stating he would need to consider instructions taken and discussion notes relating to the preparation and execution of the deceased's will. He also asked for a copy of the relevant file. Sainsbury Logan & Williams responded advising they did not hold any files for the deceased, pointing out that the work carried out with regard to the deceased's will was well over 10 years previously and the files would have been destroyed.

[160] The Court therefore has no information before it as to why the deceased made such minimal provision for Virginia given the extent of her assets.

[161] The only item in the estate for which a precise value has been provided is the sum of $104,967.96 being the deceased's half share of the proceeds of sale of the Rimu Drive property after payment of various expenses and after payment of the $5000.00 legacy to Denise. The shares in the company, based solely on an apportionment of the rating value of the farm, could be worth in the vicinity of $466,000.00. No value is given for the jewellery and the chattels appear to be of minimal value. The estate assets therefore could amount to $500,000.00, possibly more, possibly less.

[162] Whilst Virginia is a beneficiary of the Trust, the evidence is that she has received no ongoing provision from the Trust since it was established in 1969 and certainly not since Frank Percy completed his memorandum of guidance in 2002. Apart from the funds the Trust has received from Frank's estate and will receive from the deceased's estate representing the proceeds of sale of the Wairoa property, there is no evidence of any income or capital which can be applied for Virginia's benefit before either the farm or the shares in the company are sold.

[163] Virginia has no certainty of entitlement, being a discretionary beneficiary of the trust. However, in the circumstances of this case there is extremely limited information to suggest she can expect to receive any provision from the trust in the near future and may possibly have to wait years until the farm is sold or Vance buys the Trust's shares in the company. The fact that Vance owns all voting shares in the

company adds to the uncertainty around any expectation Virginia may have for provision from the Trust.

[164] The deceased would have been aware of the circumstances surrounding the farm, the company and the Trust prior to her death, but was content to leave the provisions of her 2001 will in place. I consider the deceased in making the minimal, almost non-existent, provision for Virginia in her will has failed in her moral duty to Virginia. This is notwithstanding the estrangement between them and the fact Virginia did receive $30,000.00 from either or both of her parents. Virginia therefore has the basis of a claim against her late mother's estate.

[165] The strength of Virginia's claim is reduced by the lengthy period of estrangement between her and her mother. Whilst full details of the reasons for the estrangement are not given, and one could expect the parent should take steps to reinstate a relationship with a child, so too should Virginia have taken steps to re-establish a relationship with her parents. However, the requirement for recognition by a parent of family members is a strong one. The strength of Virginia's claim is increased by real likelihood she may see little or no benefit for the Trust for many years.

Decision on application to grant leave to file out of time

[166] Notwithstanding there has been a significant delay on the part of Virginia in commencing her claim, and the delay is not fairly excusable, the strength of her claim is such that she should be granted leave to commence her application out of time. There are undistributed assets in the estate to provide for any order. Accordingly, pursuant to s 9(1), the time for Virginia to file her application is extended to 27 September 2018, being the date on which she filed her application.

What further provision should be made for Virginia?

[167] The assets available for consideration by the court in determining the extent of further provision for Virginia are the 40,000 B shares in the company, the chattels and

the balance of the proceeds of sale of the Wairoa house. There is an arrangement in place for Virginia to choose any chattels she wishes to receive.

[168] Five thousand dollars and the deceased's jewellery have already been distributed to Denise. Virginia does not seek to disturb those provisions.

[169] Submissions filed on behalf of Virginia propose that the 40,000 shares owned by the estate in the company be divided as to 20,000 shares to Vance and 10,000 shares to each of Virginia and Douglas. It is also submitted the residue of the estate be divided equally among the three siblings. It is submitted this distribution would recognise both Virginia and Douglas as children of Frank and the deceased, without rewriting the will.

[170] Given the lack of any valuation of the company shares it is impossible to precisely calculate the effect of such submission. If, however, the shares were taken at a value of $466,000.00 and the residue at $105,000.00, (acknowledging there will still be costs to be paid), this proposed division would provide around $151,000.00 to each of Virginia and Douglas.

[171] I consider such provision would far exceed any requirement to recognise Virginia as family of the deceased, particularly having regard to the estrangement between them. The approach of the court in determining the application is not to achieve equality or any form of proportionality between Vance and Virginia. The court's function is to determine what provision the deceased needed to make in her will to fulfil her moral obligation to Virginia.

[172] In the circumstances, I believe that could have been achieved by provision of shares, reflecting the primary family asset, and a cash sum. The deceased appeared to be recognising a "family" relationship with Denise by leaving a cash legacy to her, although the deceased had no moral duty to Denise under the Act.

[173] In all the circumstances, I consider an appropriate provision for Virginia by way of family recognition to be 4,000 shares in the company and $10,000 in cash. Based on the information to hand, this would be just over 11% of the estate.

Does there need to be any tracing of assets in order to fulfil provision to Virginia?

[174] Given the award to Virginia is being made out of undistributed shares and funds held for the estate in the trust account of A J Gallagher Law Firm, there is no need to trace any distributed assets.

Can the court make any further provision for Douglas, and, if so what provision should be made?

[175] The options available to Douglas having been served with Virginia's claim have been set out above.[33]

[176] Douglas has elected to file a notice of intention to appear. He has not made an application for an order for provision from the estate for himself pursuant to FCR 384. I do not accept the statement in his notice of intention to appear that his parents have failed him in their moral duty by leaving their entire estate to one son amounts to an application for the purposes of FCR 384.

[177] There is, therefore, no application before the court by Douglas for further provision from his mother's estate. Accordingly, the court can make no order in his favour.

Outcome

[178] Virginia is granted leave under s 9 of the Act to commence her application out of time and she is to be provided with 4,000 shares in FW Percy Farming Company Limited and $10,000.00 from the estate in settlement of her claim.

Costs

[179] Historically, costs of all parties to a claim under the Act were often directed to be borne out of the residue of the estate. However, that has not been the approach of the courts in recent times[34].

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[33] At paragraphs [33] to [37].
[34] *Patterson, Law of Family Protection and Testamentary Promises,* 4th Ed, Ch 17.41

[180] Without having had the benefit of submissions on the point, this appears to be a case in which it may be appropriate for costs to lie where they fall. If, however, costs are an issue then any application is to be filed and served within 28 days of the release of this judgment, with any submissions and response served no later than 14 days thereafter.

M A Courtney
Family Court Judge