IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-7833
[2014] NZHC 2267

IN THE MATTER	of the Estate of GRAEME NIGEL THURSTON
UNDER	Part 18 of the High Court Rules and the Family Protection Act 1955
BETWEEN	LYALL GRAEME THURSTON, SIMON GRAEME THURSTON, OLIVER JOHN THURSTON and CHRISTIAN JAMES THURSTON Plaintiffs
AND	COLLEEN ELIZA THURSTON, BRIDGET GORINSKI and JOHN STEPHEN BURRETT as executors of the Estate of GRAEME NIGEL THURSTON Defendants

Hearing: 12 - 16 May 2014

Appearances: VT Bruton and DM Urmson for Lyall Thurston as plaintiff in the Family Protection proceeding and for Lyall Thurston and the grandchildren as parties served in the Property (Relationships) Act proceeding
WM Patterson for the grandchildren as plaintiffs in the Family Protection proceeding
P McKendrick for the executors and trustees in the Family Protection proceeding
AH Waalkens QC and VJ Knell for Colleen Thurston as cross-claimant in the Family Protection proceeding and as applicant in the Property (Relationships) Act proceeding

Judgment: 18 September 2014

JUDGMENT OF TOOGOOD J

CIV-2012-404-4529

IN THE MATTER	of the Property (Relationships) Act 1976
BETWEEN	COLLEEN ELIZA THURSTON Applicant
AND	COLLEEN ELIZA THURSTON, BRIDGET GORINSKI and JOHN STEPHEN BURRETT, in their capacity as executors of the Estate of GRAEME NIGEL THURSTON Respondents
AND	LYALL GRAEME THURSTON, SIMON GRAEME THURSTON, OLIVER JOHN THURSTON and CHRISTIAN JAMES THURSTON Parties Served

This judgment was delivered by me on 18 September 2014 at 2:00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] In 1926, Graeme Nigel Thurston began his life on a farm near Taihape. Leaving the farm in the early 1950s, he established and grew a highly successful business which had interests predominantly in timber and building. In 1983, the business was sold to New Zealand Forest Products Limited for a total sum of around $17 million. Then aged 57, Graeme Thurston retired and spent the remainder of his life managing his assets and enjoying the fruits of his labours. In September 2003, Graeme established the Thurston Family Trust ("the TF Trust") with investments valued at $5,281,913 and his substantial property in Ronaki Road, Mission Bay, which was then worth $5 million. He died on 28 September 2010, aged 84, leaving a will dated 14 August 2009.

[2] Graeme was survived by his widow Colleen, then aged 66, who was his second wife; his only child Lyall, then aged 60; and Lyall's three adult sons. Colleen, Lyall, and the grandsons are beneficiaries under Graeme's last will and the TF Trust deed. In this proceeding, each of them is a claimant for further provision from the estate under the Family Protection Act 1955 ("the FPA"). Colleen seeks an order transferring the Ronaki Road property to her under the Property (Relationships) Act 1976 ("the PRA").

Assets held by the family trust and in the estate

[3] The evidence establishes that Graeme Thurston was a careful manager of his assets. According to the TF Trust accountant's statements of financial position dated 30 September 2010, the combined net value of the assets in the estate and the TF Trust at Graeme's death was $16,654,342. The estate assets were valued at $12,274,652, made up of cash, term deposits, shares, an advance in excess of $9 million to the TF Trust, and a holiday home in Sanctuary Cove, Queensland. The TF Trust's assets comprised the Ronaki Road property, cash and investments worth $4,379,690 net in total.

Contracting out agreement dated 29 January 2002

[4] On 29 January 2002, some 28 years after they began living together in a de facto relationship, Graeme and Colleen entered into a contracting out agreement under s 21 of the PRA. This was just three days before the commencement of provisions in the 2001 amendment to the PRA which extended the statutory regime for the division of relationship property to couples in de facto relationships. The agreement identified the separate property owned by each of the partners and made provision for Colleen out of Graeme's separate property in the event of their separation or Graeme's death.

[5] When Graeme died, Colleen elected Option B under s 61 of the PRA, choosing not to apply for a division of relationship property under the Act but to receive the property left to her under Graeme's will.

The provisions made for the claimants under the TF Trust and under Graeme's will

[6] From the total pool of assets, Graeme provided that the claimants would be entitled to receive the following:

(a) In the will, Colleen was left $2 million cash, the Sanctuary Cove property (subject to conditions), and Graeme's personal chattels (now valued at approximately $500,000). Under the terms of the trust deed, a sum of $2.5 million was set aside for her in a sub-trust (the Group A fund) from which she receives the income; in the year ended 31 March 2013, she received $85,824 after tax from this source. Colleen's total net income from the Group A fund, her personal trust and other investments, and national superannuation is approximately $170,000 a year. The TF Trust owns the couple's home at Ronaki Road (now worth more than $6 million) but Colleen is entitled to live there rent free, with the trustees responsible for its maintenance. However, it is clear from the trust deed and from a 2010 memorandum of wishes that it was not Graeme's intention that Colleen should be able to live in the property for as long as she

wished. The trustees have the power to provide Colleen with a smaller property and release further cash into the general trust fund.

(b) Lyall is a discretionary beneficiary of the balance of the funds held in the TF Trust (the Group B or general fund). He received a legacy of $200,000 under the will.

(c) Simon, who is seriously physically disabled, became entitled to a legacy of $100,000 when he turned 30.

(d) Oliver becomes entitled to a legacy of $75,000 when he turns 30.

(e) Christian becomes entitled to a legacy of $75,000 when he turns 30, and was left the Thurston Family Bible.

The three grandsons are beneficiaries of the Group B trust fund with their father. Since the TF Trust was established in 2003, however, Colleen is the only beneficiary to have received anything from it, having been paid $6,500 in the 2004 financial year.

[7] Each of the claimants now contests their entitlement to share in the estate and in the assets held on trust. Colleen is particularly concerned by the fact that she is not entitled to stay on indefinitely in the Ronaki Road property and she wants to own it outright. Lyall and the grandsons argue that inadequate provision has been made for them from a substantial estate.

The issues arising from the claims by the parties

[8] Colleen applies under the PRA to be permitted to revoke her election of Option B and to set aside the contracting out agreement Graeme and she entered into in 2002; Lyall and the grandsons apply under s 4 of the FPA by for further provision from Graeme's estate; and Colleen cross-applies under the FPA.

[9] The principal question for the Court is whether the dispositions of property should be changed and, if so, how.

Colleen's challenges to the contracting out agreement

[10] Colleen became entitled to apply to set aside her choice of Option B when Lyall and the grandsons applied for further provision under the FPA.[1] At issue is her claim that it would be unjust to enforce her choice of option. First, she argues that the contracting out agreement is void because the requirements of s 21F of the PRA were not complied with. This argument is based on an allegation that, contrary to s 21F(5), the legal advice Colleen received as to the effect and implications of the agreement was so inadequate as to mean that she did not receive legal advice of the required standard.

[11] Second, and alternatively, Colleen argues under s 21J of the PRA that the agreement should be set aside because, in all the circumstances, giving effect to it will cause her serious injustice. The grounds for this claim are that the allocation of separate property in the agreement was unfairly disproportionate and, principally, that the terms of the agreement unfairly deprived her of the half share in the matrimonial home at Ronaki Road to which she would otherwise have become entitled on 1 February 2002. She says that, had the property not been allocated to Graeme as his separate property, it is highly likely that Graeme would have left his half share of the property to her absolutely in his will and she would have then been entitled to remain in her home for as long as she wishes.

[12] Colleen argues that the disposition of Graeme's property to the TF Trust in 2003 should be set aside and the Ronaki Road property transferred to her under either s 44 or s 44C of the PRA on the ground that the settlement had the effect of defeating her proper claim to it. Alternatively, she seeks compensation.

The FPA claims by Colleen, Lyall and the grandsons

[13] Whatever the outcome of Colleen's claims under the PRA, Lyall and the grandsons claim under s 4 of the FPA that Graeme failed in his duty to provide properly for their maintenance and support out of his $12 million estate. Colleen's cross-application under the FPA addresses whether Graeme's will adequately

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1 Property (Relationships) Act 1976, ss 69(1) and 69(2)(a)(iv).

provides for her proper maintenance and support in all the circumstances, including the disposition of property to the TF Trust.

Graeme Thurston's family

[14] It is necessary to begin the discussion and determination of the issues by describing the relevant family relationships and history.

Esther Muriel Thurston

[15] Graeme married his first wife Esther in 1950. She was 11 years his elder. There is no evidence that Esther played a significant role in the establishment and growth of the family business, Thurston Holdings Limited, but it appears from the evidence that she was a dutiful wife and a loving mother to her only son Lyall who was born in the first year of the marriage. Esther was living in the matrimonial home in Wylie Street, Rotorua, at the time Graeme and she separated in 1974, and she remained living there until her death in July 2008. Although it had been purchased by Graeme only, the property was registered as a joint family home around the time of the separation. Esther did not receive any benefit from the sale of Thurston Holdings to NZFP in 1983.

[16] The marriage between Esther and Graeme was dissolved on 9 January 2002, but from the date of separation and until Esther's death, Graeme paid Esther what he described as a tax-free allowance of $450 each fortnight and a further amount to cover the rates, insurance premiums, repairs and other outgoings on the Rotorua property. Esther never made a claim for the division of matrimonial property under the Matrimonial Property Act 1963 or under the PRA. On her death, the Rotorua property was transferred to Graeme by survivorship and he sold it.

Lyall Graeme Thurston

[17] After completing his secondary education in Rotorua, Lyall Thurston joined the family business in 1970, aged 20. He was employed as a timber cadet and worked his way up through the business in a relatively short time. In 1974, after a

period overseas, he was put in charge of one of the timber mills. Lyall was a shareholder and director of Thurston Holdings and at the time of the acquisition by NZFP in 1983 he was export manager for the business. He received $800,000 from the sale of his shares but remained employed in the business for a further three years.

[18] Lyall's first son, Simon, was born in 1983 suffering from serious spina bifida and other disabilities which mean that he is paralysed from the waist down and has bowel and bladder dysfunction. Using the proceeds of the sale of their first home and some of the proceeds of the sale of his Thurston Holdings shares, Lyall and his wife Gabrielle purchased a single-storey home which was adapted for Simon's use. It appears that Lyall and Gabrielle have devoted much of their lives since then, not only to caring for Simon, but also in making an extensive commitment to organisations concerned with disability and special education. Lyall has an impressive history of community service including an active participation in local body affairs in Rotorua since 1986. He was made a Companion of the Queen's Service Order in 1998.

[19] Lyall and Gabrielle are the directors of a family business. Lyall's gross income of $100,000 a year is derived from three appointments to governance roles in local authorities in the Lakes District and Bay of Plenty. The couple appear to live modestly.

Colleen Eliza Thurston

[20] Graeme Thurston met Colleen in 1970 when she was working as a hotel receptionist in Auckland. Graeme was then aged 44 years and Colleen 26 years, Colleen being only six years older than Lyall who was by then working in the family business. Colleen said Graeme and she began an intimate relationship in 1973 and started living together after Graeme separated from Esther in 1974. Graeme and Colleen enjoyed a stable and happy relationship for the next 36 years. Colleen did not need to work and she accepts she made no contribution to Graeme's business. I have no doubt, however, that she provided valued companionship to Graeme and supported him in his business activities up to the time Thurston Holdings was sold.

[21] Graeme and Colleen initially lived in Taupo and then moved to Auckland when Thurston Holdings was sold. In about 1985-86, they purchased and then developed the property at Ronaki Road which became their home for the next 25 years and in which Colleen still lives. The development project included purchasing adjacent land, demolishing an existing dwelling, and constructing a garage complex including a self-contained flat. In 1987, Graeme purchased the substantial residential property at Sanctuary Cove, Queensland, where the couple holidayed for several months each year.

[22] In 2005, aged 79, Graeme suffered a severe stroke; he did not enjoy good health during the rest of his lifetime. It is not disputed that Colleen continued to provide full physical and emotional support for Graeme thereafter, and it appears that she became more engaged in the couple's financial affairs, particularly after 2008 when Graeme was taken ill on a trip to Vienna. Although Graeme maintained control over his assets and was able to continue to make informed decisions about his financial affairs, his health continued to fail and in September 2010, after a major operation, he died.

[23] Colleen has continued to live in the Ronaki Road home rent free; the TF Trust pays the outgoings on the property which were estimated by Mr Burrett at around $80,000 per annum. The Sanctuary Cove property was transferred to Colleen under the terms of Graeme's will but she meets the outgoings which she estimates to be approximately $40,000-$50,000 a year.

Simon Graeme Thurston

[24] Simon Thurston is now 31 years old. Notwithstanding his significant physical disability and his need to use a wheelchair for mobility, he lives independently with the assistance of his parents and a cleaner. In 2006 he graduated with a Bachelor of Arts from Victoria University of Wellington with a triple major in politics, English literature and media studies, and he is part of the way through a law degree. Simon is employed as a policy planner at the Rotorua District Council earning approximately $61,000 a year before tax, which is just sufficient to cover his

rent and expenses. He has few assets and debt of around $8,000. Simon has managed to pay off his student loan.

Oliver John Thurston

[25] Oliver Thurston is 28 years old. He graduated from Victoria University of Wellington in 2009 with a Bachelor of Arts (double major in politics and classics) and a Bachelor of Commerce, majoring in commercial law. He is currently employed as Private Secretary for the Minister of Defence on a salary of approximately $62,000 per year, which just covers his rent and outgoings. He has a student loan of $26,000 and personal belongings.

Christian James Thurston

[26] Christian Thurston is the youngest of Lyall and Gabrielle's sons, now aged 23. Like his brothers, he is a successful student having completed a Bachelor of Music from Victoria University of Wellington, majoring in classical performance and he is currently undertaking post-graduate studies. He lives in a flat in Wellington and supports himself by undertaking casual work and drawing on a student loan which is currently around $35,000. Christian is a promising opera singer[2] and has the prospect of continuing further training at the renowned Juilliard School in New York, or elsewhere overseas, once he completes his post-graduate degree in Wellington. A potential barrier to continuing his professional development will be the cost of training and accommodating himself overseas.

[27] The Thurston grandsons had good relationships with their grandfather, even though they lived in different parts of the country. There is evidence that they saw less of Graeme after his stroke, because he travelled less, but they stayed in contact with him and I have no doubt he would have been proud of their achievements.

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[2] I take judicial notice that, on 26 July 2014, Christian was placed third out of six finalists in the Lexus Song Quest, the premier competition for young New Zealand opera singers.

The nature of the evidence

[28] The parties agreed that, along with the affidavits and exhibits filed in both the family protection proceedings and the relationship property proceedings, I should receive into evidence the affidavits and exhibits produced in a separate proceeding concerning the trusteeship of the TF Trust. In addition to himself, the trustees appointed by Graeme at the time of the settlement of the trust in September 2003 were Ms Bridget Gorinski, an investment advisor and professional trustee, and Mr John Burrett, a former bank officer and insurance broker who was a close friend of Graeme. When Graeme died, Colleen and a solicitor, Mr Jeremy Goodwin, were appointed trustees under the power of appointment in Graeme's will.

[29] Ms Gorinski, Mr Burrett and Mr Goodwin provided affidavit evidence and were cross-examined. I heard evidence also from Colleen and Lyall, and another solicitor, Mr Bruce Reid, who advised Colleen in January 2002. Other witnesses who provided evidence by affidavit, including the Thurston grandsons, were not required for cross-examination.

[30] As a result, I have received comprehensive evidence from relevant witnesses about the history of acquisition and disposition of assets by Graeme; establishment of the TF Trust and the management of its affairs; the circumstances in which Graeme and Colleen signed the contracting out agreement in 2002; the circumstances in which wills were executed from time to time, particularly Graeme's last will dated 14 August 2009; and the circumstances in which Graeme signed the memorandum of wishes shortly before his death.

Colleen's application to set aside the election of Option B

[31] Logically, it is necessary first to resolve Colleen's claim to set aside her election under the PRA of Option B, in which she accepted the provisions of Graeme's will.

[32] The Court is empowered by s 69(1) of the PRA to set aside the choice of Option B under s 61(1) of the Act if the Court is satisfied that any of the grounds provided in s 69(2) apply. Section 69(2) is as follows:

> **69 Chosen option may be set aside**
>
> …
>
> (2) The Court may set aside a choice of option only if—
>
> (a) it is satisfied that any of the following apply:
>
> (i) that the choice of option was not freely made:
>
> (ii) that the surviving spouse or partner did not fully understand the effect and implications of the choice:
>
> (iii) that since the choice of option was made, the surviving spouse or partner has become aware of information relevant to the making of a choice of option:
>
> (iv) that since the choice of option was made, a person (other than the surviving spouse or partner) has made an application under the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955 in respect of the estate of the deceased spouse or partner; and
>
> (b) having regard to all the circumstances, it is satisfied that it would be unjust to enforce the choice of option.

[33] Section 69(3) of the PRA provides that in deciding whether or not to set aside a choice of option, the Court must have regard to the circumstances in which the choice of option was made; the length of time since the choice was made; and any other matters that the Court considers relevant.

[34] Whether Colleen will suffer any injustice if her choice of Option B is enforced depends, in part at least, on whether her applications to set aside the 2002 contracting out agreement as void or to unwind its effect have merit.

The contracting out agreement under s 21 PRA

[35] Consistently with the statutory scope of such agreements, the contracting out agreement provides for the status, ownership, and division of property (including

future property), during the joint lives of the partners to what was then a de facto relationship, with other provisions addressing the division of property in the event of their death.[3] The document referred specifically to the provisions of the will which Graeme executed on 29 January 2002.

The preparation of the contracting out agreement

[36] The contracting out agreement was prepared by Graeme's solicitor, Mr Goodwin. In July 2001, Mr Goodwin had provided Graeme with a comprehensive memorandum of advice about the implications of the Property (Relationships) Amendment Act 2001, in light of Graeme's instructions that he did not wish to relinquish control over his assets. The terms of agreement addressed Graeme's wishes in response to what would otherwise have been, in effect, a statutory transfer of half the matrimonial home and chattels from 1 February 2002.

[37] Mr Goodwin's memorandum of advice recorded Graeme's intention to protect Colleen's position in terms of housing and an income level similar to that which Graeme and she enjoyed. Among the issues drawn to Graeme's attention by Mr Goodwin was the prospect that the estate-planning structure should protect Colleen's interests against future claims by "others" after Graeme's death. Given the 18-year age difference between Graeme and Colleen, the possibility of Colleen forming a new relationship after Graeme died was not fanciful. It was open to Graeme to take such steps as he thought appropriate to ensure that so much of his wealth as he passed on to Colleen should not end up in the hands of a stranger.

[38] Because the agreement was signed by Colleen without any amendment to the version shown to Mr Reid, the solicitor who advised her on its terms, it is appropriate to examine what Mr Goodwin prepared on the basis of Graeme's instructions. Two aspects of the agreement are significant for the proper understanding of the estate-planning arrangements which Graeme made subsequently, particularly at the time he settled the terms of the TF Trust in 2003 and when he executed his last will in August 2009. They are, first, the allocation of

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3 PRA, s 21(1) and (2).

separate property and, second, the provisions addressing the division of property on separation or death.

The allocation of separate property

[39] The agreement identified what Colleen and Graeme agreed was held by each of them as separate property. Graeme's separate property was listed in these terms:

> **SCHEDULE A**
>
> **Separate Property of Graeme N Thurston derived from the sale of Thurston Holdings Limited**

		$
1	Cash	142,962
2	Term Deposits	1,101,199
3	Bonds	2,220,660
4	Shares:	
	- Australia	2,361,533
	- Global	1,504,345
	- New Zealand	1,499,150
5	… Ronaki Road, Mission Bay	3,000,000
6	… Sanctuary Cove	AUD1,100,000
7	Motor vehicles	
	- Ford – Australia	AUD12,000
	- Lexus – New Zealand	30,000

[40] Colleen's separate property was identified in the agreement as follows:

> **SCHEDULE B**
>
> **Colleen's separate property**

		$
1	Audi A4	75,000
2	Bank accounts	55,000
3	JB Were portfolio investments	600,000 est
4	Jewellery	125,000

[41] I note that the Sanctuary Cove property is outside the jurisdiction of the New Zealand courts under the PRA,[4] but it is relevant for the purposes of determining the equities of the allocation of separate property as between Graeme and Colleen.

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4 PRA, s 7(1).

The arrangements to apply while Graeme and Colleen were living together as a couple

[42] When they signed the contracting out agreement in January 2002, Graeme and Colleen had been living together happily for nearly 30 years. There was no imminent likelihood of separation, and no suggestion that the continuation of the relationship depended on the signing of the agreement by Colleen. It was never suggested by Colleen that she lacked financial support from Graeme between 1974 and 2002, or thereafter, and nothing in the February 2002 arrangements prevented Graeme from continuing to be a loving and dutiful partner and husband. Notwithstanding the underlying assumption that Graeme's separate property was his to use as he saw fit, the assets were available to be used for the common benefit of the couple for the rest of his life.

What was to happen under the agreement if Graeme and Colleen separated

[43] The arrangements under the agreement which were to apply in the event of separation evince an intention by Graeme to provide sufficient assets for Colleen to enable her to either live in the property at Sanctuary Cove or dispose of it and acquire a residence in New Zealand, and to have sufficient capital to generate an income from which she could support herself comfortably. In addition to the Queensland property, Colleen would have had separate property valued (in 2002 terms) at $855,000 and a capital sum of $2.5 million held on trust from which she could draw up to $1.5 million for her own use, leaving $1 million in trust to provide further income.

[44] The Graeme Thurston Family Trust, which was recognised by the contracting out agreement as having been created contemporaneously, was never fully implemented. Apart from the initial settlement of $1,000, no assets were transferred to that trust which became defunct with the settlement of the TF Trust in September 2003.

What was to happen if Graeme died before Colleen

[45] In the agreement, which was binding upon the executors and administrators of each party, Colleen acknowledged that she was aware of and accepted the provisions Graeme had made for her in the will which he signed at the time of the agreement. She agreed "irrevocably" not to lodge a claim against the executors and trustees of his will under legislation relating to matrimonial or relationship property, nor to make any claim under the FPA or the Law Reform (Testamentary Promises) Act 1949 for any further provision.

[46] In return, Graeme agreed not to amend his will to alter the provisions made for Colleen without consulting her. The will provided that Colleen would receive a legacy of $1 million and the Sanctuary Cove property or a sum equivalent to the net proceeds received from its sale. It also provided that Colleen would be entitled to live in the Ronaki Road property rent free for a period of four years from the date of Graeme's death, with the estate meeting all outgoings including maintenance. As with the arrangements to apply on separation, a trust fund of $2.5 million would provide Colleen with an income and, upon her request, the right to draw up to $1.5 million of the capital.

[47] It is clear, therefore, that in 2002 Graeme intended that, after his death, Colleen would have the ownership of substantial cash and property assets and the ability to receive an income from which she could live comfortably. The balance of Graeme's separate property was to be distributed to Esther (who would have continued to receive a tax-free fortnightly allowance of $450 and sufficient funds to meet the outgoings on the Rotorua property), to Lyall ($250,000), Oliver and Christian ($150,000) when they turned 30, and Simon ($300,000) when he turned 25. Charitable bequests totalled $105,000. The balance of Graeme's assets would have been transferred to the Graeme Thurston Family Trust for the benefit of Lyall, the grandsons and their children.

Is the contracting out agreement void?

[48] Section 21F of the PRA provides:

21F Agreement void unless complies with certain requirements

(1) Subject to section 21H, an agreement entered into under section 21 or section 21A or section 21B is void unless the requirements set out in subsections (2) to (5) are complied with.

(2) The agreement must be in writing and signed by both parties.

(3) Each party to the agreement must have independent legal advice before signing the agreement.

(4) The signature of each party to the agreement must be witnessed by a lawyer.

(5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

Allegation that Colleen was not advised on the effect and implications of the agreement

[49] The agreement entered into on 29 January 2002 appears to meet the formal requirements of the section but Colleen seeks a declaration that the agreement is void because the independent legal advice she received from Mr Bruce Reid, the solicitor arranged to advise her by Graeme's solicitor, was wholly inadequate and did not meet the standard required by subsection (5) .

[50] Colleen saw Mr Reid on 21 January 2002 for no more than an hour and possibly less. Although Mr Reid suggested that he had received a draft of the agreement from Mr Goodwin prior to his initial meeting with Colleen, there is no evidence to support that suggestion and it seems probable that Colleen took a copy of the agreement with her to the meeting.

[51] It was Colleen's evidence that Mr Reid did not explain to her that within a few days of their meeting a change in the law would create in her favour a legal interest in the Ronaki Road property and the family chattels by virtue of their becoming relationship property. She claimed not to have been aware from other sources of the impending law change. I find that evidence to be improbable and that Colleen's recollection is faulty. Even if Colleen was unaware of the change in the law from news media coverage at that time, it is not at all likely that Graeme would

have commissioned, and asked her to see a lawyer about, a formal legal document dealing with property matters without some explanation. Colleen impressed me as an intelligent and capable woman and I do not accept that she did not understand the significance of the two schedules being headed "separate property".

[52] Mr Reid's file notes are no longer available to assist his recollection of his meeting with Colleen but he said in evidence that he remembered her because she arrived in an expensive car and he could not help but notice the large ring on her finger. He said that because of the impending change in the law he knew that he would have to take Colleen through the alternative scenarios of her legal position from 1 February 2002 if she did not enter into the agreement and her position under the agreement if she entered into it. Mr Reid said that he was certain that Colleen and he would have discussed that under the new law the Ronaki Road family home and chattels would become relationship property. He said he recalled Colleen telling him "she was not interested in Ronaki Road; while she did not want to be thrown out of it as soon as Graeme died, it was ultimately for his family."

[53] It was Mr Reid's evidence that he discussed with Colleen the disparity between the value of the schedule A assets recorded as Graeme's separate property and the value of the schedule B assets recorded as her separate property. He said that to the best of his recollection Colleen told him the disparity existed because the assets were derived from Graeme's business interests which Graeme had before they began living together. I consider it is likely, however, that Mr Reid understood that to be the position because of the recital to that effect under the heading to schedule A. Under close cross-examination by Mr Waalkens, Mr Reid conceded that he made no attempt to verify the provenance of the assets listed, nor their stated values, and that he was unaware of some significant assets – a boat worth $650,000 and a home built at Acacia Bay, Taupo – which had been bought and sold during the relationship.

[54] Mr Reid noted that the agreement contained an acknowledgement in clause 8.3 that Colleen was aware of and accepted the provisions Graeme had made for her in his will dated 29 January 2002. He advised Colleen, and informed Mr Goodwin, that he was not prepared to certify that Colleen had received full advice on the

implications of the agreement until after Graeme's signed will had been sighted. Relevant excerpts from Graeme's will were provided and Colleen returned to Mr Reid's office for a brief meeting on 29 January 2002 at which she signed the agreement.

Application of Coxhead v Coxhead *principles*

[55] Both Mr Waalkens QC and Ms Bruton referred me to the well-known observation of Hardie Boys J in *Coxhead v Coxhead* that the requirement under s 21F(5) of independent legal advice is no mere formalism. Delivering the judgment of the Court of Appeal, the Judge said:[5]

> Each party must receive professional opinion as to the fairness and appropriateness of the agreement at least as it affects that party's interests. The touchstone will be the entitlement that the Act gives, and the requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms of the agreement. Their implications must be explained as well. In other words the party concerned is entitled to an informed professional opinion as to the wisdom of entering into an agreement in those terms. This does not mean however that the adviser must always be in possession of all the facts. It may not be possible to obtain them. There may be constraints of time or other circumstances, or the other spouse may be unable or unwilling to give the necessary information. The party being advised may be content with known inadequate terms. He or she may insist on signing irrespective of advice to the contrary. In such circumstances, provided the advice is that the information is incomplete, and that the document should not be signed until further information is available, or should not be signed at all, the requirements of subs (5) have been satisfied.

[56] I accept that Mr Reid's advice to Colleen was perfunctory. Given the nature and value of the property concerned and the substantial disparity in the allocation of separate property after a de facto relationship which had lasted harmoniously for 28 years, a reasonably prudent legal adviser ought to have sought information about the source of the funds used to accumulate Graeme's purported separate property totalling approximately $13 million. In the absence of evidence supporting the assertion that Graeme's wealth was derived from the sale of his business, the least Mr Reid should have done was to advise Colleen that undertakings or warranties as to the source and value of the assets should be included in the agreement. But

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5 *Coxhead v Coxhead* [1993] 2 NZLR 397 (CA) at 403.

I accept that Mr Reid informed Colleen that the new law would entitle her to claim a half share of the Ronaki Road property and contents as relationship property.

[57] Mr Waalkens submitted that it was fanciful for Mr Reid to suggest, as he did in evidence, that Colleen told him she "had no interest" in the Ronaki Road property when it was clear that the property was "her pride and joy". On balance, however, I accept that Colleen told Mr Reid that, while she would not want to be required to leave the home she loved immediately after Graeme's death, she understood that Graeme wanted the property to be an asset for the benefit of his son and grandsons in due course. Such a concession was consistent with the evidence of Graeme's intentions regarding the property. Mr Burrett's evidence about the large home, which includes a separate gatehouse, was that Graeme told him that "one person rattling around in here is silly, you've got to buy something smaller." That is consistent with the history of the arrangements made by Graeme in the several iterations of estate-planning instruments he prepared after 2002. It is clear to me that Graeme never intended that Colleen would own the Ronaki Road property.

[58] Colleen's evidence was that she and Graeme enjoyed a happy relationship and that she trusted that the arrangements included by her husband's solicitor in the contracting out agreement were fair. It is improbable, in my view, that Colleen would have refused to sign the agreement if Mr Reid had advised her against it on the basis she would be giving up rights she would acquire under the new law in a few days. So long as Colleen and Graeme continued to enjoy a happy relationship, she would enjoy a very comfortable lifestyle living in Auckland and Queensland, travelling extensively, and sharing the benefits of the income derived from Graeme's substantial investments. In the event that the relationship ended by separation, Colleen would keep the separate property in Schedule B and become sole owner of the Sanctuary Cove property. Further, she would be the beneficiary of the sub-trust fund comprising $2.5 million of which she could draw up to $1.5 million for her own personal use and benefit. In the event of Graeme's death, Colleen would receive a $1 million legacy in addition to the transfer of the Sanctuary Cove property, the right to occupy Ronaki Road for a minimum of four years and the $2.5 million trust fund.

[59] Against a background of Colleen's understanding and acceptance that she had made no contribution to the assets, and that she trusted her loving partner to provide for her, it was not unreasonable for her to conclude that she was well provided for in the contracting out agreement.

[60] Applying the considerations discussed by Hardie Boys J in *Coxhead*, I am satisfied that Mr Reid explained, and more importantly that Colleen understood, the effect and implications of the agreement. The agreement may be seen as establishing between the parties a basis for the shared enjoyment of what were essentially Graeme's assets during their joint lives, with arrangements being made to accommodate future changes of circumstance through either separation or the death of one of the parties. I decline to hold that the agreement is void.

If necessary, declaration giving effect to agreement would be made under s 21H of the PRA

[61] If I am wrong in that conclusion, I am satisfied nonetheless that, in light of the history of the relationship after the agreement was signed and the provision for Colleen made by Graeme in the TF Trust deed and his last will, any non-compliance with the requirements of s 21F has not materially prejudiced Colleen's interests. It is significant that, although she undoubtedly understood the relationship between the provisions of the trust deed and the wills, Colleen never protested that the contracting out agreement was unfair to her until Lyall and the boys filed their claims under the FPA. I would declare under s 21H(1) of the PRA that the agreement has full effect, for reasons I give more fully in the next section.

Would giving effect to the contracting out agreement cause serious injustice?

[62] Section 21J of the PRA provides that even though an agreement satisfies the requirements of s 21F, the Court may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice. The remedies sought by Colleen in this part of her claim are the

transfer of the Ronaki Road property to her absolute and sole ownership, or compensation.[6]

[63] The essential principles for the application of s 21J can be briefly stated. The right to contract out of the provisions of the PRA is fundamentally important to the scheme of the relationship property regime. Agreements which accord with the formal requirements are not be lightly set aside, as indicated by Parliament in the amendments which came into effect on 1 August 2001 by requiring an applicant to prove that giving effect to the agreement would cause "a serious injustice".[7] The onus of proving serious injustice lies on the person alleging it.[8] In deciding whether giving effect to the agreement would cause serious injustice, I am required to have regard to the matters listed in s 21J(4).

Allegations of an unfair disparity and misstatement of asset values

[64] There was some dispute at the hearing over the amount paid by New Zealand Forest Products for the purchase of Graeme's business in 1983. Sir Selwyn Cushing, a business associate and long-time friend of Graeme, was a director of Thurston Holdings Limited. Sir Selwyn said that he negotiated the sale of the shares for a price of about $17 million. As I understand it, that estimate includes the value of a parcel of New Zealand Forest Products shares which Graeme acquired as part consideration for the sale of his shareholding.

[65] Colleen introduced into evidence a document suggesting that the purchase price was considerably lower than that estimated by Sir Selwyn, but that appears to be an early draft. I am satisfied on the evidence, including Sir Selwyn's and Lyall's recollections that Lyall received approximately $800,000 for his minority parcel of 115,000 shares, that the total sum received by Graeme is likely to have been as estimated by Sir Selwyn. I take that to be the sum from which Graeme acquired the separate property identified in the contracting out agreement.

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6 PRA, ss 44 and 44C.

7 See *Harrison v Harrison* [2005] 2 NZLR 349 (CA); *Wells v Wells* (2006) NZFLR 870 (HC); and *Clark v Sims* [2004] 2 NZLR 501 (HC).

8 *Wood v Wood* [1998] 3 NZLR 234 (HC).

[66] It was suggested on Colleen's behalf that the identification of the Ronaki Road property in the contracting out agreement as having a value of $3 million in 2002 was disingenuous, taking into account that it was valued at $5 million only 20 months later when the property was transferred to the TF Trust. Under cross-examination, Mr Goodwin was referred to a file note in which he suggested the property was worth $4.5 million in 2001. He conceded that the value may have been understated in the agreement to bring the respective figures for separate property closer together. That answer surprised me; Graeme Thurston does not appear to me to be a man who would have acted deceptively. But even if there was an element of dissembling in the figure, ascribing a greater value would have made no difference to the advice given by Mr Reid or Colleen's acceptance of the agreement.

[67] Colleen inherited a few thousand dollars from her parents. She said Graeme had given her $2,000 worth of shares in a private company and that she saved money out the funds Graeme gave her to run the household. She did not identify any other source of the $855,000 worth of separate property ascribed to her. In that regard, she may have been treated charitably in the allocation of her separate property in schedule B. Except for a faintly pressed argument that the cash and term deposits might have been considered relationship property under the PRA, it was not suggested to me that the agreement misrepresented the true status of the Ronaki Road property and the other schedule A items as the law stood on 29 January 2002. Colleen's evidence-in-chief contained this exchange:

> Q. Now you never challenged at the time that all those assets there [in schedule A] came from the sale of Thurston Holdings – were acquired as a result of the proceeds of sale of Thurston Holdings Limited – did you?
>
> A. Why would I?

Claims for transfer of property settled on trust or compensation

[68] In support of the claims to remedies under ss 44 and 44C of the PRA, Mr Waalkens QC submitted that the contracting out agreement was the precursor to the transfer of the matrimonial home to the TF Trust in September 2003 and that the settlement of that property on a trust was intended to defeat Colleen's claims under the PRA or, at the very least, had the effect of defeating them. For present purposes,

I put aside potential objections to Mr Waalkens's rather strained extension of s 44C to the settlement on trust of separate property. Counsel cited *Babylon v Babylon* as an instructive example of the Court setting aside the settlement of the matrimonial home on a trust where that device had been intended to defeat the wife's claims to the home and other assets.[9] But that was an entirely different case. The effect of the contracting out agreement in *Babylon* was to re-classify existing relationship property as separate property, so as to deprive the wife of relationship property rights to which she had formerly been entitled.[10] In contrast, the Ronaki Road property was never relationship property and Colleen never had a legal interest in it.

Legitimate purpose in contracting out of the PRA

[69] In the absence of the agreement, the statutory changes due to come into effect on 1 February 2002 would have converted the Ronaki Road property and chattels into relationship property in which Colleen would have had a half share. It is clear that Graeme wished to ensure, before that occurred, that while the matrimonial home would remain available for their joint use it should also remain under his separate ownership and control as a major asset for future estate-planning purposes. He was entitled to rely on s 21 of the PRA to achieve that objective, as subsections (1) and (2) provide expressly. In *Harrison v Harrison*, the Court of Appeal acknowledged that, given the extension of the relationship property regime to de facto partnerships, it was "perfectly clear that [in enacting the 2001 amendments] the legislature did indeed intend to impose a higher threshold" for the setting aside of a contracting out agreement than had previously been the case.[11]

[70] The 10-month delay between the enactment of the amending provisions in April 2001 and their commencement on 1 February 2002 was purposeful; it provided those persons potentially affected by the significant legislative change in property rights with an opportunity to organise their affairs to avoid the consequences of it.[12]

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9 *Babylon v Babylon* HC Auckland CIV-2006-404-3217, 12 October 2007 (interim judgment), and *Babylon v Babylon* (2009) 27 FRNZ 622 (HC).

10 See the interim judgment at [63].

11 *Harrison v Harrison*, above n 7, at [29] and [30].

12 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109-3) (select committee report) at 13.

[71] Mr Waalkens argued that it was highly likely that if Colleen had become entitled to a half share in Ronaki Road and the chattels, Graeme would have left his half share to her in his will. But for the reasons given above, I am far from satisfied that is correct. The Ronaki Road property represented a large portion of Graeme's assets and he was obviously concerned to ensure its preservation as an asset for the ultimate benefit of Lyall and his grandsons, as Colleen conceded. Furthermore, he had been expressly warned by Mr Goodwin about the risk of dissipation of that asset to a third party if a share passed to Colleen on his death. When Colleen challenged Mr Goodwin in 2009 over the provisions of the will Graeme executed in 2003, it was about the arrangements for the Sanctuary Cove property in which Graeme and she had spent many months each year, not about the Mission Bay home.

No order for transfer of trust property or compensation

[72] Those findings are sufficient to dispose of Colleen's claim that an order should be made under s 44 of the PRA directing the return of the Ronaki Road property to Graeme's estate, or under s 44C for compensation. The evidence establishes that Ronaki Road was separate property at the time the contracting out agreement was entered into and, since I have held that the agreement was effective in preserving that status, the settlement of the property on the trust in 2003 was not a disposition caught by the section. Colleen had no claim to the property which could be defeated by the disposition.

Summary of conclusions as to validity of contracting out agreement

[73] As the history of estate-planning arrangements put in place by Graeme demonstrates, the terms of wills and trusts executed by him in 2002 and subsequently up to the execution of his last will in August 2009, were founded upon the agreed allocation of separate property in 2002. Graeme said in his memorandum of wishes in August 2010 that his primary purpose in setting up the TF Trust was to provide specifically for Colleen in the event that he died before her. His intention to make substantial provision for Colleen out of his separate property was obvious in the provisions of the will and the contracting out agreement itself, and the different

arrangements put in place by Graeme from time to time were variations of that fundamental intention.

[74] I have concluded, for these reasons, that there is no principled basis upon which the contracting out agreement should be set aside. It was entered into over 14 years ago and the management of both Graeme's and Colleen's financial affairs over the first eight-and-a-half years of that period was predicated on the way in which separate property was allocated in that agreement. Far too much water has flowed under far too many bridges to now divert the flow in an entirely different direction. Bearing in mind the interwoven arrangements in the trust deed and the will, it is more appropriate to consider whether any injustice may be redressed under the provisions of the FPA.

Application to set aside Option B declined

[75] At the time Colleen applied for probate of Graeme's will, Mr Goodwin did not give her full advice about her choice of Option B. However, by the time Graeme executed his last will in September 2009, Colleen and Mr Goodwin were closely involved in the management of Graeme's financial affairs and Colleen had been advised in connection with mutual wills provisions in Graeme's and her wills. It was inevitable that she would elect to receive the benefits of Graeme's will, the terms of which she understood fully. I decline the application under 69 to set aside Colleen's election of Option B.

Claims under the FPA – applicable legal principles

[76] If adequate provision is not available from a deceased's estate for the proper maintenance and support of persons entitled to apply under the FPA, 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 persons.[13] Colleen, Lyall and the grandsons are persons entitled to make a claim under the Act.[14]

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13 Family Protection Act 1955, s 4(1).
14 Section 3(1)(a), (b) and (c).

[77] In assessing whether a claimant has received adequate provision from a deceased's estate, the courts are not concerned solely with financial need. Speaking for the plurality in *Williams v Aucutt*,[15] Richardson P said:

> The test is whether adequate provision has been made for the proper maintenance and support of the claimant. "Support" is an additional and wider term than "maintenance". In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. "Support" is used in its wider dictionary sense of "sustaining, providing comfort". 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. Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the particular case.

[78] In *Auckland City Mission v Brown*,[16] after citing that passage, the Court of Appeal observed that in many cases the question whether adequate provision has been made for proper maintenance and support is likely to involve a compendious inquiry into the combined elements of the composite expression. It is where it is accepted that the claimant has adequate provision from his or her own resources and the existing testamentary provision for their proper maintenance that the inquiry will focus on the adequacy of the provision for proper support in the circumstances.

[79] The well-known expression of the test by Cooke J in *Little v Angus*[17] was approved in *Williams v Aucutt* as being still applicable:

> The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events.

[80] In *Williams v Aucutt*, and again in *Henry v Henry*,[18] the Court of Appeal emphasised that the courts are not entitled to re-write the will on the basis of what

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15 *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].
16 *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA) at [35].
17 *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.

seems fair. The court's function is limited to ordering such provision as is sufficient to repair any breach of moral duty. Beyond that point, the testator's wishes should prevail even if the individual judge might have seen the matter differently.

Principal matters to be considered regarding FPA claims

[81] Determining the claims under the FPA requires a consideration of the provisions made, looking at both the will and the TF Trust deed; a consideration of the nature of the relationship between Graeme and each of the claimants, and his moral duties to them; and an assessment of the claimants' respective financial needs.

Graeme's September 2003 will

[82] Graeme and Colleen married in June 2003. Graeme signed a new will in contemplation of the marriage, in circumstances which breached his obligation to consult Colleen about any changes which affected her. The breach is immaterial, however. The changes benefited Colleen and, in any event, Graeme instructed Mr Goodwin only a month later that he wished to alter the will and trust arrangements to reduce the direct provision for Colleen by the estate and make her a beneficiary of the family trust. I infer that among the reasons for the new arrangement was that it would be administratively more efficient: the testamentary trusts could be wound up prior to Colleen's death, but the arrangements for her to be provided cost-free accommodation and substantial capital in her own right could be maintained under the terms of the ongoing family trust.

[83] The significance of Graeme's will dated 12 September 2003 lies in the inter-relationship between what Graeme intended should comprise his estate and the provisions of the TF Trust which was settled at the time the new will was executed and into which most of his assets were placed. The will maintained the charitable bequests and gifts to family members, including Esther who was to receive the former matrimonial home. A trust fund of $400,000 was to be set up to enable Esther's continued support. Colleen was to receive a cash sum of $1 million and a life interest in the Sanctuary Cove property.

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[18] *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.

[84] Once the specific bequests were met, Graeme's residuary estate was to be transferred to the TF Trust and any debt owed by the trust to the estate forgiven.

Settlement of the Thurston Family Trust on 12 September 2003

[85] The terms of the TF Trust are set out in a deed dated 12 September 2003. They continue to apply and are highly relevant to a consideration of the adequacy of the provisions made for the beneficiaries of the 2009 will.

[86] The documents executed on 12 September 2003 included Colleen's own new will which had been prepared by Mr Goodwin according to her instructions. Colleen said in evidence that she could not remember discussing with Mr Goodwin the arrangements to be put in place through the TF Trust. I am satisfied from Mr Goodwin's evidence, however, that Colleen did discuss the overall arrangements with him when she was advised in connection with her will, and that she was aware of how the provisions of Graeme's new will and the new trust affected her. The new arrangements assumed that the assets settled on the TF Trust (including the matrimonial home) were Graeme's separate property as provided in the 2002 agreement. Colleen did not take issue with that assumption at that time.

The terms of the TF Trust deed

[87] The trust deed provides for two relevant classes of beneficiary:

(a) Colleen is the Group A beneficiary;

(b) The issue of the marriage of Graeme and Esther (effectively, for present purposes, Lyall and the three grandsons) are the Group B beneficiaries.

The trustees have the power to advance both capital and income to any of the beneficiaries.

[88] The deed provides that after Graeme's death, if Colleen survived him, the trustees were to set aside a Group A fund comprising the sum of $2.5 million and the

Ronaki Road property "or any property purchased in substitution for it" for the benefit of Colleen during the remainder of her lifetime at the expense of the Group B fund.

A side issue – are the trustees obliged to maintain the Sanctuary Cove property?

[89] It is not disputed that the obligation to maintain the Ronaki Road property falls on the trustees; it is trust property. It is apparent from the evidence, however, that the trustees and the beneficiaries have been troubled by the effect of the clause 3.3(c) of the trust deed so far as they create an obligation on the trustees to maintain "any other real property occupied by [Colleen] which was acquired or held by [Graeme] during his lifetime". At present Colleen pays for the maintenance and outgoings on the Sanctuary Cove property which has been transferred to her in accordance with the 2009 will. She argues that that property falls within the definition and refers to a barrister's opinion in support. But assuming that she is correct about the application of the definition, as I am inclined to think she is, the trustees' obligation to maintain a property coming within the definition which may not belong to the TF Trust attaches only when "(a)ny surplus between the net sale proceeds of Ronaki Road and the purchase cost of the Substitute Property" is invested as part of the general trust fund and not the Group A fund. It was not unreasonable for Graeme to have decided that, although Colleen should maintain the Sanctuary Cove property while she was living in Ronaki Road, the TF Trust should assume that responsibility when Ronaki Road was sold and the surplus funds invested in the Trust.

[90] The incidence of the cost of maintaining the Sanctuary Cove property properly falls on Colleen at the moment. I shall return to that matter in the context of considering the adequacy of the 2009 will provisions for her.

Evidence of Graeme's intentions for the use of the TF Trust's funds

[91] On 26 August 2010, Graeme signed a memorandum of wishes setting out his general wishes regarding the administration of the TF Trust's funds, apart from what would become the Group A fund set aside for Colleen's benefit on his death. The

memorandum refers to income distributions being made for the education, health, general welfare, maintenance and wellbeing of the beneficiaries with the suggestion that at least 50 per cent of the trust's income could be reinvested each year. Specific reference is made to distributions from the trust to support Graeme's "grandsons by way of capital advances" for various purposes including acquiring a home and establishing a business. Ms Gorinski and Mr Burrett, who were the initial trustees with Graeme, said that the 2010 memorandum of wishes reflected the wishes Graeme had conveyed to his fellow trustees, and to Mr Goodwin, from time to time after the settlement of the trust in 2003. The terms of the trust deed permitted implementation of these wishes.

The performance and management of the TF Trust during Graeme's lifetime

[92] The trust performed very well over the period between settlement and Graeme's death. Between 31 March 2004 and 31 March 2010, the trust achieved annual income surpluses ranging between $381,000 and $499,000. By the end of March 2010, the trust equity had grown from nil in September 2003 to $4.4 million.

[93] Graeme supported Colleen's and his lifestyle from his personal funds and by drawing around $300,000 a year from the accumulated trust funds in repayment of the $10.2 million advance which he made at the time of settlement of the trust in 2003. Notwithstanding these repayments, the substantial net income earned and the overall improvement in the trust's financial position between 2003 and 2010 would have permitted significant distributions of either capital or income to the Group B beneficiaries. However, Lyall and his sons received nothing from the trust during that period. The only distribution to beneficiaries was the sum of $6,500 paid to Colleen in the 2004 financial year. All other income, after payment of trust expenses, was accumulated and added to capital.

Graeme's last will dated 14 August 2009

[94] In July 2009, Mr Goodwin provided Graeme with written advice about financial and estate-planning matters. The letter recorded that it followed a meeting at the beginning of the month at which Graeme and Mr Goodwin had discussed the

terms of and potential changes to his September 2003 will; the financial position of the TF Trust; and the implications of the Supreme Court's judgment in *Rose v Rose*.[19] That case concerned the setting aside of a pre-nuptial agreement entered into under s 21 of the PRA and the treatment of increases in the value of separate property over a 24-year relationship; judgment had been issued by the Supreme Court only two months earlier.

[95] It is apparent that, from the time Mr Goodwin first advised Graeme on relationship property matters in July 2001 to the time he provided further advice in July 2009, consideration had been given to the prospect, on Graeme's death, of Colleen's choice under s 61 of the PRA whether to accept the terms of Graeme's will in light of the property arrangements which were in place (Option B), or to apply instead for division of relationship property under the Act (Option A). Exercising Option A would necessarily involve her making a challenge to the 2002 contracting out agreement.

[96] Mr Goodwin prefaced the summary of his recommendations with advice that, in the light of *Rose v Rose*, the courts were showing a willingness to review contracting out agreements. He advised that it made sense for Graeme to use his will and the TF Trust Group A fund as a platform to maintain the integrity of the contracting out agreement "and achieve more certainty of outcome in relation to the post-death election by Colleen."

[97] Mr Goodwin reported that, at a meeting arranged at Graeme's request, Colleen had advised him that she did not agree with the change of provision in relation to Sanctuary Cove in the September 2003 will, and that she wished the position to return to that agreed as part of the PRA process in January 2002. In Graeme's 2002 will the Sanctuary Cove property was bequeathed to Colleen absolutely; in the September 2003 will she was left with a life interest in it.

[98] Mr Goodwin's letter recorded that he had been instructed by Colleen that she intended to leave all of her property to the TF Trust when she died. Mr Goodwin suggested that Graeme and Colleen could enter into mutual wills with Graeme

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19 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

making provision for Colleen to own the Sanctuary Cove property absolutely in exchange for Colleen agreeing to leave that property to the TF Trust. As the terms of Graeme's and Colleen's wills set out below indicate, that suggestion was adopted.

[99] It is not clear to me what advantage Mr Goodwin saw in the mutual wills provision over the provision under the September 2003 will which gave Colleen the right to use the Sanctuary Cove property or any property purchased in substitution for it during her lifetime. The disadvantage, as I have indicated above, is that as current owner of the Sanctuary Cove property, Colleen is under an obligation to pay for its maintenance. The position would have been otherwise had the property remained in the ownership of the trust.

[100] As a result of these discussions, Graeme drew up his final will dated 14 August 2009. In it, he appointed Ms Gorinski, Mr Burrett and Colleen to be the executors and trustees of his will. He also exercised the power of appointment in the TF Trust deed to appoint Colleen and Mr Goodwin as trustees of the TF Trust. He made the dispositions to Colleen, Lyall and his grandsons set out at [6] above. As in his September 2003 will, once the specific bequests were met and debts and funeral expenses paid, Graeme's residuary estate was to be transferred to the TF Trust and any debt owed by the trust to the estate forgiven.

[101] Graeme's will also contained a mutual wills provision. Colleen's will is consistent with the intentions expressed to Mr Goodwin. After payment of her debts and funeral expenses, Colleen's entire estate is left to the TF Trust, and she promises she "will not act in the manner set out in … the Wills Act 2007 to defeat that promise by revoking or changing my will or disposing of property received by me under his will."

[102] The mutual wills provisions contain unfortunate drafting errors. As set out in Mr Goodwin's letter of advice to Graeme, the mutual wills provisions were intended to give Colleen absolute ownership of Sanctuary Cove subject to an obligation to leave it to the TF Trust on her death. But the effect of clause 6.1 of Colleen's will as drafted is to require her to "leave to the Thurston Family Trust **any** property" she receives under the terms of Graeme's will. Read in conjunction with clause 12.1 of

Graeme's will, the property affected is "the property referred to in clause 4.1(a)" of Graeme's will; namely, the Sanctuary Cove property, the cash legacy of $2 million, and Graeme's personal chattels.

[103] It cannot have been intended that Colleen would be required to hold the cash received from the legacy to leave to the TF Trust and a requirement that she should retain all of Graeme's personal chattels for the same purpose is not sensible. The contracting out agreement entered into in January 2002 did not purport to override the provisions of s 8(1)(b) of the PRA which includes "family chattels whenever acquired" in the definition of relationship property. It was agreed at trial that Graeme's will should be amended to confine Colleen's obligation to returning the Sanctuary Cove property to the trust on her death. The drafting errors in the mutual wills provisions will be corrected by the orders made in this judgment.

What Colleen has received from the estate and under the Trust Deed

[104] Of the $2 million cash legacy to which Colleen was entitled under the will, she has received $1,780,000. The parties agree that the balance of $220,000 should be paid out. Colleen has also received the life interest in the $2.5 million Group A fund. The Ronaki Road property is currently worth over $6 million. Colleen is entitled to occupy it rent free, with the trustees being responsible for the maintenance of the property at a cost estimated by Mr Burrett to be around $80,000 a year.

The Sanctuary Cove property

[105] As Colleen wished, the Sanctuary Cove property was left to her absolutely in Graeme's will and the property has now been transferred into her name. I have already observed, however, that the mutual wills arrangement has created a dilemma for Colleen. She is obliged to maintain that property at her own expense until such time as the trustees take on that obligation upon the sale of the Ronaki Road property. It was not clear to me from the evidence whether Colleen spends as much time at the Queensland property as she and Graeme did and she may consider the cost of holding that property to be an unwelcome burden. She is prevented from disposing of it, however, despite Lyall and his sons not appearing to have any

particular interest in the property as such. To the Group B beneficiaries of the trust, the Sanctuary Cove property simply represents a contingent asset which will come into the fund on Colleen's death.

[106] Ms Bruton informed me in her closing address that, if the Court was to grant Lyall and the grandsons the remedies they were seeking under the FPA, they would consent to an order relieving Colleen of her mutual wills obligation regarding Sanctuary Cove.

[107] The family chattels now owned by Colleen are currently valued at approximately $500,000. Although on a strict interpretation of the will, Colleen is obliged to retain the chattels she inherited from Graeme for return to the TF Trust, it was not suggested to me on behalf of the other beneficiaries that she should be held to any such obligation.

[108] Ms Bruton submitted that Colleen is a wealthy woman who has been very well provided for and that she would continue to be such. She contrasted that with Lyall's circumstances.

What Lyall and the grandsons have received under the will

[109] Lyall has been paid the $200,000 legacy under clause 4.1(c) of the will. Despite being a beneficiary of a trust fund currently valued at approximately $13 million, he has received nothing else from the trustees of the trust or his father's estate over the past 11 years. In 2009, however, Graeme gave him $60,000 from his personal funds to buy a new car. As Esther's only child, Lyall received his mother's residuary estate which was barely sufficient to meet her debts and funeral expenses. His parents' former family home passed into Graeme's ownership.

[110] In his memorandum of wishes, Graeme confirmed discussions he had held with Ms Gorinski and Mr Burrett regarding the provision he made for Lyall through his participation in the sale of his business interests. Graeme recorded his view that the sum Lyall received for the sale of his Thurston Holdings shares was adequate for Lyall's personal needs. Mr Burrett said in evidence that he did not agree with that

sentiment but it is by no means clear that he encouraged Graeme to come to a different view.

[111] Simon became entitled to payment of his legacy of $100,000 when he turned 30, over a year ago. That sum has not been paid to him. Oliver and Christian are each entitled to legacies of $75,000 when they reach that age. Christian was also bequeathed the Thurston family bible but it has not been handed to him. None of the grandsons has received any financial support from the TF Trust.

Criticism of the trustees of the TF Trust

[112] Between 2003 and 2010, Lyall was earning a comparatively modest income from which he continued to provide support for his sons, particularly Simon, while they completed their education at secondary school and university. Each of the boys received a $10,000 birthday gift from Graeme when they turned 21 but it appears that the gifts were provided by Graeme personally rather than by the trust. Simon, Oliver and Christian were required to borrow funds under the student loan scheme to assist with financing their tertiary education.

[113] The failure of the trustees to make any distribution of income or capital to the beneficiaries during this period of over seven years was the subject of considerable criticism by counsel for Lyall and the Thurston grandsons at the hearing, and Ms Gorinski, Mr Burrett and Mr Goodwin were closely cross-examined on the point. While Graeme may have expressed good intentions concerning the use of up to 50 per cent of the trust's income each year, he does not appear to have been exhorted by his legal adviser and fellow trustees to give effect to them and he certainly did not do so. Ms Gorinski and Mr Burrett responded to the criticism by saying that any such distribution required Graeme's agreement which, by necessary inference, was not provided.

[114] I am satisfied that Ms Gorinski and Mr Burrett would have agreed to any suggestion by Graeme that distributions should be made by the trust to support his grandsons' university education, and there is no doubt that the trust was well placed to do so. Responsibility for the failure to consider the interests of Lyall and the

grandsons in this regard lies principally at Graeme's feet. The explanation for it may be that after Graeme's health failed in 2005, his attention became focused on using the funds of the trust to support himself and Colleen, although they were not beneficiaries, through repayments of his advance.

[115] It is also probable that, following his stroke, Graeme became increasingly dependent on Colleen and his solicitor in the conduct of his financial affairs. Mr Goodwin had acted for Graeme since 2001 but he did not meet Colleen until the Trust documents and new wills were prepared in September 2003. At least from 2005, however, Colleen and Mr Goodwin developed a close working relationship which included Mr Goodwin advising Colleen on personal matters and becoming a trustee of, and solicitor to, two trusts settled by her.

[116] I am not satisfied on the evidence that Graeme's ability to understand financial matters, to receive advice, and to make investment decisions was impeded materially by his health problems. It was acknowledged by Colleen and by Graeme's advisers, however, that from time to time he experienced difficulty in communicating and that reading was often a slow process for him.

[117] It is fair to say that there was no evidence that Lyall had pressed claims against the trustees either for his benefit or the benefit of his sons, but that may have more to do with his personality and character than the absence of any justification. I am satisfied that, during Graeme's lifetime, Lyall would not have contemplated questioning his father's decisions in TF Trust matters. After his father's death, Lyall engaged with the trustees, who by then included Mr Goodwin and Colleen. I accept that the evident differences of opinion between Mr Goodwin and Colleen on the one hand, and Ms Gorinski and Mr Burrett on the other, about estate and trust matters made it difficult for him to see any advantage in pushing ahead with a request for income or capital distributions in favour of his sons or himself.

The removal of Mr Goodwin and Colleen as trustees

[118] Due to his concerns about the management of the TF Trust, Lyall brought an application to have Colleen and Mr Goodwin removed as trustees. The principal

complaint was that Colleen had commissioned almost $900,000 of renovations to the Ronaki Road property at the expense of the TF Trust, without the unanimous approval of the trustees. This was inarguably a serious breach of Colleen's obligations as a trustee and Peters J was highly critical of Colleen's actions. The Judge also agreed that Mr Goodwin's approach as a trustee unduly favoured Colleen at the expense of the other beneficiaries. The Judge granted the application and Colleen and Mr Goodwin were removed as trustees by order of the Court on 26 July 2013.[20]

[119] I was invited by counsel for Lyall and the grandsons to colour my assessment of the appropriate remedies to be granted in this proceeding by consideration of the performance of the trustees to date. Any such issue has, however, now been resolved. Mr McKendrick, who appeared as counsel for the trustees, informed me by memorandum after the hearing that Ms Gorinski and Mr Burrett had retired with effect from 1 July 2014 and that Mr Bill Wilson QC, a former justice of the Supreme Court, and Mr John Shewan, a former chair of PriceWaterhouseCoopers, had been appointed as trustees in their place. I do not doubt that the new trustees are eminently well qualified to administer the affairs of the trust in accordance with the provisions of the trust deed, and to exercise wise and experienced judgment in doing so.

The respective financial needs of the claimants

[120] I turn to the claimants' respective needs for proper maintenance and support. The five claimants for further provision in the FPA proceeding may be assessed on a scale of financial need as follows:

(a) Colleen is a wealthy woman with a right to occupy the former matrimonial home, or some other property purchased in substitution for it, rent free for life. She has no need for further financial support from the estate and her claim could not be said to be based on a failure of any moral duty to make adequate financial provision for her maintenance and support.

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[20] *Thurston v Thurston* [2013] NZHC 1886.

(b) Lyall is fully employed and his wife and he apparently live modestly but comfortably in their own home. His gross income of $100,000 per annum places him in the higher ranks of income earners in this country, but I have no doubt that he has to be careful of his finances and that he carries a financial burden which is out of the ordinary in his support of Simon. Lyall's financial circumstances are far less favourable than Colleen's.

(c) Oliver has excellent career prospects and he is academically well-qualified to pursue a reasonably lucrative career. He is indebted to the State for the cost of his education and it will be some time yet before he could contemplate purchasing a home.

(d) Christian is about to complete his university education, or at least so much of it as he intends to complete in New Zealand, and he has had to place himself into debt in order to reach that point. To develop his prospective career as an opera singer he will need to seek funds from scholarships and sponsorship, or through further borrowing. I consider him to be in a category of claimant who can legitimately argue financial need to justify a claim that his grandfather had a moral duty to provide him with proper maintenance and support.

(e) Simon is the most financially vulnerable of the claimants. His level of achievement, given his profound disabilities, is nothing short of remarkable. It is to his great credit that, although he was required to borrow to fund his tertiary education, he has repaid that loan. He has other personal debts. Simon's disabilities require the provision of suitably adapted accommodation and ongoing assistance with even the basic necessities of adult life. Simon's financial needs include, in my view, resources sufficient to provide him with a home and an income which enables him to lead a life which is as normal as is possible.

Discussion of the claims by the family members

[121] I turn to consider the extent of Graeme's moral duty to each claimant and whether he met it in each instance.

Lyall's claims

[122] I consider Graeme to have failed in his moral duty to provide proper maintenance and support for his only child. Lyall's shareholding in Thurston Holdings may have been attributable in part to his family status but he was also a senior and undoubtedly valued employee and director of the company, and he would have made a contribution to the value of the shares which he held. He received the fruits of that shareholding over 30 years ago and there is no evidence that he benefited except to the extent that he was able to acquire a home which could be adapted for Simon's special needs. Lyall was a loving and dutiful son whose devotion to his father's grandsons and his standing in the community as a representative of the family entitled him to consideration for adequate provision from a large estate which could well afford that recognition.

[123] Furthermore, although Esther would have been entitled to a substantial portion of Graeme's assets had she brought proceedings under the Matrimonial Property Act 1976 or the PRA during her lifetime, the fact that she made no such claim meant that Lyall inherited nothing of value from her. Graeme should have taken that fact into account. Mr Waalkens QC argued it was not a matter for this Court at this time to revisit Esther's rights as Graeme's wife or former wife, but the fact that Lyall received nothing from the assets accumulated during the time his parents lived together is a matter which I consider goes to the existence and nature of Graeme's moral duty towards him.

[124] There is no evidence that Graeme took into account, in assessing the benefits Lyall would receive from his estate and under the terms of the trust deed, that Lyall and Colleen are relatively close in age. The benefits which will ultimately be available for the Group B beneficiaries when Colleen dies, by the release of such capital as is committed to providing accommodation for her and by the release of the

$2.5 million Group A fund, may not accrue for many years. Lyall is currently in his early 60s and it is unreasonable that he should have to wait. I acknowledge that he has the right to invite the trustees to provide for him by way of distribution of income and capital, but any such distribution would be discretionary and I am addressing here Graeme's moral duty to provide for his only son out of his estate.

[125] I was invited by Ms Bruton to provide a legacy for Lyall of several million dollars which he could then disperse among his sons as he saw fit. Counsel indicated that such a gift in recognition of Graeme's moral duty to his only child and his grandsons would be accepted by Simon, Oliver and Christian. But the moral duties owed by Graeme are better assessed and redressed in respect of the claimants individually.

[126] Having regard to all of these factors, I consider that the least Graeme should have done for his son was to provide him with a legacy of $1 million.

Simon's claims

[127] Simon's needs are obvious and I do not think they need further discussion. I consider a legacy of $500,000 would be sufficient to enable Simon to acquire a home suitable to his needs. Whether further support for him should be provided from the Group B fund in the trust will be a matter for the trustees, who have the power to make advances of capital and income.

[128] Simon should have been paid the legacy of $100,000 in terms of the will when it fell due on his 30th birthday (9 May 2013). He should receive interest on that amount for the period from three months after the payment was due to the date of payment.

Oliver's and Christian's claims

[129] The legacies to Oliver and Christian are not payable until they turn 30. Graeme no doubt considered that his grandsons should not receive the legacies under his will until they could be relied upon to use the money wisely. But it is clear that

Oliver and Christian are young men of considerable ability and maturity. I consider that requiring them to wait to receive legacies of only $75,000 from an estate valued at more than $12 million is an inadequate response to Graeme's moral duty to loving and dutiful grandsons. In my view, legacies of $300,000 to each of Oliver and Christian would recognise that duty in a proper relativity to the legacy I consider appropriate for Simon. In coming to this view, I have taken into account Mr Burrett's evidence that Graeme intended that the younger beneficiaries should complete their educations before receiving assistance from the trust for educational purposes. They are deserving recipients.

Colleen's claim

[130] Colleen's claim could only be considered on the basis of the wider definition of "proper maintenance and support" discussed in *Williams v Aucutt* and the other cases cited. Her principal objective in issuing her claim to set aside the contracting out agreement and her cross-claim under the FPA has been to secure an order transferring the Ronaki Road property to her absolutely. It is plain she loves the property and earnestly wishes she could remain living in it until she is no longer able to care for herself. Apparently both Graeme and Colleen regarded the property as their dream home and I do not doubt that she was fully involved in the decision-making at the time of the initial redevelopment of the property. Mr Waalkens QC said she considered the property to be "the jewel in the crown."

[131] But Graeme's intention that the property should remain a substantial asset of the trust for the ultimate benefit of the Group B beneficiaries was unequivocal and one he was entitled to hold. Had she remained a trustee, Colleen might have been able to influence decisions about how long the trust should continue to own the Ronaki Road property before substitute accommodation for her was purchased, but she did not have an absolute right of veto in that role. Although the trust deed requires unanimity of trustee decision-making, Colleen could not have expected to hold out against the sale of the Ronaki Road property if such a course was properly considered to be in the best interests of the beneficiaries as a whole.

[132] The arrangements for the retention or disposal of the Ronaki Road property are clearly expressed in the trust deed and I consider it to be appropriately left to the trustees to determine how long the property should be retained as a trust asset. The orders I intend to make for provision for Lyall and the grandsons will require the realisation of some Group B assets currently held in trust so that partial repayment of the debt to the estate can be made in order to meet the increased legacies. It will be a matter for the trustees to determine whether the repayment can be made out of investments in a manner which leaves the trust in a position to continue to earn adequate income to meet its purposes, including the upkeep of the Ronaki Road property. On the other hand, the trustees may consider that the additional provision made for Lyall and the grandsons in this judgment makes it reasonable to retain the Ronaki Road property as an asset for longer than might otherwise have been the case. Those are matters which are best left for their assessment.

The Sanctuary Cove property and other assets subject to mutual wills obligation

[133] In his closing, Mr Waalkens QC suggested that if the Ronaki Road property was transferred to Colleen, she would relinquish ownership of the Sanctuary Cove property in favour of the trust. In that way, some recognition might be given to the $900,000 of Group B funds spent on the unauthorised renovations to the Ronaki Road property by a reduction in the net value of the interests transferred to Colleen under the will.

[134] I have already noted that the gift of the Sanctuary Cove property to Colleen, on the condition that she must retain it and return it to the trust through her estate on her death, does not in fact provide her with the benefit of full ownership. While Colleen retains the right to use the property as she wishes and regard it as her own property, she would be obliged to retain it as an asset beyond the time at which it was of any use to her and, as I have held, at her own not inconsiderable expense. No doubt because of the many happy years Colleen and Graeme spent at the Queensland property during Graeme's life, Graeme wished to ensure that Colleen retained the use of it but the arrangements create a burden for her.

[135] I consider that the will provisions regarding the Sanctuary Cove property do not provide proper support for Colleen in the *Williams v Aucutt* sense. The provisions made by Graeme in his 2009 will did not alter significantly the arrangements provided in the will executed in September 2003, except for the increase in Colleen's legacy from $1 million to $2 million. That increase may be attributable to the reduction in the value of money due to inflation and to an increase in the value of the total asset pool. It is also relevant that Colleen does not have the ability to draw down 60 percent of the capital of the Group A fund. Between 2005 and Graeme's death in September 2010, however, Colleen carried the additional and substantial burden of caring for her husband during several years of ill health. I consider Graeme's moral duty towards Colleen was increased by that support. The moral duty to Colleen which Graeme no doubt considered he was honouring in the Sanctuary Cove arrangements can, I think, be exercised more wisely and justly by releasing Colleen from her mutual wills obligation in respect of the Queensland property.

[136] I have already observed that the obligation to retain the family chattels and the legacy of $2 million to pass it on to the TF Trust may have been unintended and is inappropriate. Colleen's current will leaves her entire residuary estate to the trust, in accordance with the intentions which I understand she expressed to Graeme and which she reiterated in evidence. The orders made to give effect to my views will release Colleen from any requirement to leave assets to the TF Trust; whether she does so will be a matter of choice rather than obligation.

The testator's wishes

[137] The constraints on the exercise of the judicial discretion under s 4 of the FPA are particularly relevant in a case such as this where a wealthy testator, well aware and fully in control of his financial resources, has devoted considerable time and attention to estate planning. There is no doubt that, from 2001 when Mr Goodwin first advised him of the implications of the impending changes to the relationship property regime, Graeme had an informed and fully considered view of how he should balance his concerns to provide appropriately for Colleen and for his son and grandsons respectively.

[138] The arrangements which will result from the orders made in this judgment properly retain the basic shape and structure of those planned by Graeme. The only constraints upon the powers of the trustees to provide for Lyall and the grandsons out of the Group B fund are those imposed by the obligation to maintain the Ronaki Road property, which is a significant burden. How the obligation to provide accommodation for Colleen should be balanced against the needs of the Group B beneficiaries is a discretionary exercise best left to the trustees.

Summary of findings

[139] I have found:

Claims under the PRA

(a) Although Mr Reid's advice to Colleen, prior to her signing the contracting out agreement in 2002, was inadequate in some respects, he did explain, and she understood, the effect and implications of the agreement before she signed it. Accordingly, I decline to hold that the agreement is void under s 21F(1) of the PRA.

(b) In any event, in light of the history of the relationship between Graeme and Colleen after the agreement was signed and the provision made for Colleen in the TF Trust deed and Graeme's will, I would declare under s 21H(1) of the PRA that the agreement has full effect.

(c) I do not accept that allegations of undue disparity or misstatement of asset values in the allocation of separate property in the contracting out agreement render it unfair. Colleen has always accepted that Graeme brought all of the assets to the relationship and that the allocation of his separate property in schedule A represented the true status of the property.

(d) Graeme was entitled to avoid the effects of the 1 February 2002 changes to the PRA by contracting out and retaining the Ronaki Road

property as separate property. It was always his intention, as Colleen accepted, that the home would become an asset for the benefit of Lyall and the grandsons in due course.

(e) Graeme's purpose in setting up the TF Trust was to provide specifically for Colleen in the event that he died before her. Graeme's intention to make substantial provision for Colleen out of his separate property was obvious in the provisions of the contracting out agreement and the will which he executed at the same time.

(f) I am not satisfied that giving effect to the agreement will cause serious injustice to Colleen. There is no basis for making orders under ss 44 or 44C of the PRA, and I decline to set aside the election of Option B under s 69 of the PRA.

Claims under the FPA

(g) Graeme failed to make adequate provision for the proper maintenance and support of Lyall and the grandsons.

(h) Further provision from the estate should be made:

(i) for Lyall by the payment of an additional $800,000;

(ii) for Simon by the payment of $500,000; and

(iii) for Oliver and Christian by the payment of $300,000 each.

(i) Graeme failed to make adequate provision for the proper maintenance and support of Colleen by imposing on her an obligation to leave the property she received under his will (including the Sanctuary Cove property) to the TF Trust. Colleen will be relieved of that obligation with the result that she will own the property free of any restrictions.

The form of the orders to be made

[140] In the course of the hearing, I indicated to counsel that, in order to avoid unintended consequences in a complex estate case, I was minded to issue a judgment explaining my decisions and to invite counsel to make further submissions on the precise form of the orders to be made. I also received from counsel draft orders which would achieve the outcomes for which they argued in the closing submissions.

[141] Because I consider the decisions I have reached to be capable of straightforward expression, I do not consider it necessary to seek the further assistance of counsel. Leave will be reserved, however, for the trustees and any claimant to make further submissions strictly as to the implementation of the orders made including, without limitation, submissions concerning the steps to be taken to enable the executors and trustees of the estate to make the payments ordered.

[142] It is appropriate that the payments ordered should be paid as soon as is reasonably practicable, but I recognise that it may take some time for the trustees to make the necessary funds available. The estate should pay interest on any sums remaining unpaid after six months from the date of judgment.

Orders

[143] In respect of the estate of Graeme Nigel Thurston, with reference to Graeme's last will dated 14 August 2009, I make these orders pursuant to s 4(1) of the Family Protection Act 1955:

(a) Further provision from the estate shall be made as follows:

(i) to Lyall Graeme Thurston, the sum of $800,000 in addition to the sum of $200,000 paid to him under clause 4.1(b) of the will;

(ii) to Simon Graeme Thurston, the sum of $500,000, which sum includes the $100,000 left to him under clause 4.1(c) of the will;

(iii) to Oliver John Thurston, the sum of $300,000, which sum includes the $75,000 left to him under clause 4.1(d) of the will; and

(iv) to Christian James Thurston, the sum of $300,000, which sum includes the $75,000 left to him under clause 4.1(e) of the will.

(b) The estate shall pay to Simon Graeme Thurston interest on the sum of $100,000, at a rate equivalent to the prescribed rate defined in s 87(3) of the Judicature Act 1908 which is applicable at the date of payment, for the period from 9 August 2013 to the date of payment.

(c) The sums payable in paragraph (a) shall be paid as soon as is reasonably practicable. The estate shall pay to each of the named recipients interest on such part of the sum ordered to be paid as remains unpaid after 18 March 2015, at a rate equivalent to the prescribed rate defined in s 87(3) of the Judicature Act 1908 which is applicable at the date of payment.

(d) Colleen Eliza Thurston shall not be required to leave to the Thurston Family Trust any property she has received or receives under the terms of the will.

[144] Leave is reserved for the trustees and any claimant to make further submissions strictly as to the implementation of the orders made including, without limitation, submissions concerning the steps to be taken to enable the estate to make the payments ordered. Any such submissions shall be filed and served not later than 18 November 2014.

[145] I dismiss Colleen's applications under the Property (Relationships) Act 1976.

Costs

[146] Any party seeking costs may apply by memorandum served and filed not later than 20 November 2014. Any memoranda in reply shall be filed and served by 18 December 2014.

[147] Decisions as to costs will be made on the papers unless the Court directs otherwise.

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Toogood J