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← Zhang → v ← Guo → [2021] NZHC 714 (7 April 2021)

Last Updated: 28 July 2021

IN THE HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA TĀMAKI MAKĀURAU ROHE
CIV-2019-404-453
[2021] NZHC 714

BETWEEN SHOUJUN ← ZHANG →
 Plaintiff
AND DANQIU ← GUO →
 First defendant
 CHUANZELONG ← GUO →
 Second defendant

Hearing: 9 November 2020 with reply submissions on 16 November 2020
Appearances: H Fulton for the plaintiff
 Appearance excused for first defendant
 S R Morris and F J McKechnie for the second defendant
Judgment: 7 April 2021

JUDGMENT OF PALMER J

This judgment was delivered by me on Wednesday 7 April 2021 at 10 am.

Pursuant to Rule 11.5 of the High Court Rules.

.....

Registrar/Deputy Registrar

Counsel/Solicitors:

H Fulton, Barrister, Auckland Bell-Booth Sherry, Auckland Morris Legal, Auckland

← ZHANG → v ← GUO → [2021] NZHC 714 [7 April 2021]

Summary

- [1] Ms Hui (Helen) Chai died in May 2018. She left \$80,000 and her remaining estate to her son, Mr Chuanzelong (Longee) ← Guo →. This included a property in Glenfield, Auckland, on the basis Ms Chai's mother would also live with Mr ← Guo → and be looked after. Ms Chai's half-share in another property, in Greenhithe Auckland, passed by survivorship to her de facto partner of six years, Mr Shoujun ← Zhang →, along with \$43,950 from their joint accounts. She considered that sufficiently provided for his interests. Mr ← Zhang → does not. He claims under the Family Protection Act 1955 (the Act) for an award for the breach of Ms Chai's moral obligation to provide maintenance and support for him. He also claims for an equitable contribution from the estate for the mortgage on the Greenhithe property. He made no relationship property claim.
- [2] I do not consider it was a breach of Ms Chai's moral obligations under the Act not to provide for Mr ← Zhang → in her will. She did so knowing that he would obtain sole ownership of the Greenhithe property, which the Court must take into account. Mr ← Zhang → elected not to pursue a relationship property claim. He benefits to the extent of approximately \$300,000 compared with an estate of around \$1.1 million. Mr ← Zhang → undoubtedly played an important part in the last six years of Ms Chai's life. But her mother and son could reasonably be considered to have played a more important part in her life overall. With a six-figure salary and an additional unmortgaged property providing rental income, in addition to the Greenhithe property, Mr ← Zhang → is not badly off. I consider it was reasonable for Ms Chai to believe that passage of that property, subject to the mortgage, would sufficiently provide for him.
- [3] The mortgage is secured over both the Glenfield and Greenhithe properties but was used to fund the purchase of the Greenhithe property. Under s 34(1) of the Administration Act 1969, I consider the Greenhithe property is liable for payment of amounts charged under the ANZ mortgage, and the Glenfield property is not. Accordingly, the estate does not owe Mr ← Zhang → an equitable contribution for the mortgage payments. And I order the parties to take all necessary steps for the ANZ mortgage, or any substitute for it, to be secured only over properties owned by Mr Zhang, and not over the Glenfield property.

What happened?

Ms Chai and Mr ← Zhang →

- [4] Ms Chai and her son Mr ← Guo → emigrated from China to New Zealand in 2002 to join her husband and his father, Mr Bao de ← Guo →. In 2005, Ms Chai and her husband bought a property in Edgeworth Road, Glenfield, Auckland (the Glenfield property), as their family home. They separated in July 2008. In 2010, the Glenfield property was transferred to Ms Chai as part of the division of their relationship property. A mortgage to Westpac was secured over the Glenfield property. Ms Chai lived there with her (now) 24-year-old son, Mr ← Guo →, and with her mother, Mrs Culan Lu, who is now 75. Mrs Danqiu ← Guo → was a friend of Ms Chai's and, later, the executor of Ms Chai's will.

- [5] Ms Chai met Mr **Zhang**, now in his mid-50s, in March 2012.¹ They were in a relationship for six years, until her death. Sometime in 2012, Mr **Zhang** moved into the Glenfield property with Ms Chai, her son, and her mother.² Mr **Zhang**'s evidence is that Ms Chai was a private person but their relationship was sound.³ He says their "routine was agreed and happy" during their time living together, leaving them "ample time to be together and relax".⁴ The couple were "happy...right to the end" according to Mr **Zhang**.⁵ The evidence of Mrs Lu, Mrs **Guo**, and Mr **Guo** is that Mr **Zhang** and Ms Chai were distant and had arguments, but that Ms Chai preferred to keep her "relationship troubles" private.⁶

Their businesses and property

- [6] When Mr **Zhang** began his relationship with Ms Chai he owned a property at Normanby Road, Mt Eden, Auckland. Once he moved into the Glenfield property with Ms Chai he rented out the Mt Eden property. The property now apparently has a

¹ Common Bundle of Documents (CBD) 1-35 at [5], 2-18, and 1-72 at [14].

² CBD 1-27 at [3] and 1-72 at [17].

³ Plaintiff's Submissions at [43].

⁴ CBD 1-42 at [40].

⁵ CBD 1-45 at [57].

⁶ CBD 1-53 at [13], 1-74 at [29] and [32], and 1-80 at [16].

council valuation of \$800,000 and is mortgage-free. Mr **Zhang**'s evidence is that his salary is over \$100,000.⁷

- [7] Ms Chai was the majority shareholder in White Flower Café Ltd, which owned a café of that name at Brown's Bay until it was sold in November 2011.⁸ Her business partner was Mr Qiang Shen. In May 2012, with the proceeds of the sale of the café and a loan facility from Westpac, the company bought the Vauxhall café in Devonport for \$290,000. Mr **Zhang** claims he helped Ms Chai to repay this loan by paying into her bank account.⁹ In May 2013, the company took over the lease of the Vauxhall café in Milford as well. Mr **Zhang** claims \$50,000 was spent renovating the Vauxhall Milford but produces no other evidence to corroborate this.¹⁰ Mr Shen's evidence is that their activity was limited to new lighting, repainting the walls, and installing a sandwich cabinet.¹¹
- [8] Ms Chai and Mr **Zhang** pooled their financial resources. Both Ms Chai and Mr **Zhang** contributed to paying down the Westpac loan facility. Mr **Zhang** says Ms Chai undertook to repay her borrowing from this facility of \$210,000 when the Vauxhall Devonport café was sold but there is no independent evidence of this undertaking.¹² Ms Chai opened two new loan accounts in August 2012 (Westpac-91 and Westpac-93).¹³
- [9] In September 2013, Mr **Zhang** loaned Ms Chai \$60,000 to on-lend to her brother in China to buy a home. Mr **Zhang**'s evidence is that Ms Chai agreed to repay it.¹⁴ Mrs **Guo**'s evidence is that it was not refundable, or that it has been refunded.¹⁵ Mr **Zhang** says it has

not been.¹⁶ Mr **Zhang** advanced a further \$28,000 to Ms Chai in August 2014, which was then transferred to Westpac-93.¹⁷

⁷ CBD 1-24 at [28].

⁸ CBD 1-85 at [5] and [7].

⁹ CBD 1-27 at [5].

¹⁰ CBD 1-22 at [16] and 1-43 at [48].

¹¹ CBD 1-86 at [13].

¹² CBD 1-38 at [18] and 2-17.

¹³ Supplementary Bundle of Documents (SBD) 013 and 016.

¹⁴ CBD 1-24 at [28], 1-28 at [7], and 1-38 at [21].

¹⁵ CBD 1-60 at [8].

¹⁶ CBD 1-38 at [21].

¹⁷ CBD 2-22 and 1-28 at [8].

- [10] By November 2014, the Westpac mortgage, secured over the Glenfield property, had been reduced to close to zero.¹⁸ In December 2014, Ms Chai and Mr **Zhang** entered into an agreement to buy a property at Mackay Drive, Greenhithe, Auckland (the Greenhithe property), to live in with Mrs Lu and Mr **Guo**. Mr **Guo** was then 18 and studying at the University of Canterbury. The \$50,000 deposit was paid from Ms Chai's Westpac investment loan account.¹⁹ The purchase price was

\$1,095,000. On 22 December 2014, Ms Chai drew down \$60,000 from Westpac-91.²⁰ This was used to pay the deposit and another unidentified bill payment.²¹ The balance of the sale price (\$1,045,000) was paid partly by a \$875,327 loan from ASB in the names of Ms Chai and Mr **Zhang**.²² This was secured over the Greenhithe property. There was also a loan from BNZ, in Ms Chai's name, in the amount of \$218,315.²³ This loan was used to pay the rest of the price of the Greenhithe property. It was secured over the Glenfield property. The sale and purchase settled in April 2015.

- [11] Mr **Zhang**'s evidence is that he worked at the Vauxhall Milford café from June to November 2015, full-time without remuneration.²⁴ Mr Shen denies that Mr **Zhang** worked for the company's café for more than three or four months.²⁵ Mr **Zhang** also claims that he worked for White Flower Café Ltd for three years.²⁶ He says he was involved in clearing tables, serving customers, cleaning, HR, and administration.²⁷ Mr Fulton, for Mr **Zhang**, says this was for three years until the cafes were sold, from 2014 to 2017, but there is no evidence supporting that.²⁸ Mr Shen does not agree with Mr **Zhang**'s claim that he worked at the cafés for three years.²⁹ In November 2015, the Vauxhall Milford cafe was sold for \$277,275.³⁰
- [12] A series of further re-financings and extensions followed. In April 2016, Ms Chai and Mr **Zhang** refinanced with ANZ for \$1,450,000. This was a joint loan

¹⁸ CBD 2-24.

¹⁹ CBD 2-24.

²⁰ SBD 058.

²¹ CBD 2-24.

²² SBD 063.

²³ CBD 2-43.

²⁴ CBD 1-43 at [50].

²⁵ CBD 1-86 at [16].

²⁶ CBD 1-32 at [28].



²⁷ CBD 1-43 at [49].

²⁸ Plaintiff's memorandum correcting error in reply submission, 19 November 2020.



















²⁹ CBD 1-32 at [28] and 1-86 at [16].

³⁰ CBD 2-35.

account. The ASB mortgage and the BNZ loans were repaid.³¹ The balance left over was paid to ANZ, leaving the balance of the ANZ loan at \$1,095,000. This ANZ loan was secured over both the Greenhithe property and the Glenfield property. The Glenfield property was rented out.

- [13] In November 2017, White Flower Café Ltd sold the Vauxhall Devonport café too.³² Mr  **Zhang**  says the company received \$363,858 but there is no corroboration of this.³³

Ms Chai's will

- [14] In May 2015, Ms Chai was diagnosed with cancer. Mr  **Guo**  returned to live with her in Auckland. Her health had deteriorated by 2018. In March and April Ms Chai and Mr  **Zhang**  travelled to Europe but had to return early due to her condition, on 10 April 2018.³⁴
- [15] On 14 April 2018, Mr Brendon Green took instructions from Ms Chai about her will. Mr  **Zhang**  was present. Mr Green says a dispute arose between Ms Chai and Mr  **Zhang**  during that discussion.³⁵ Mr Green says they were speaking in Chinese so he did not know what it was about, but their "conversation became heated".³⁶ Mr  **Zhang**  says the argument was about a direction or expectation that Mr  **Zhang**  should have responsibility for Mr  **Guo**  and Mrs Lu after Ms Chai's death.³⁷ He says there was no argument about Ms Chai using joint accounts for herself as she had that authority already.³⁸ But Mr Green was concerned Mr  **Zhang**  was putting pressure on Ms Chai, because she became "visibly upset and started crying".³⁹ He arranged to finalise the will, and have it witnessed, when Mr  **Zhang**  was not at home.⁴⁰

³¹ CBD 2-42 and 2-43.

³² CBD 1-87 at [20].

³³ CBD 1-30 at [17].

³⁴ CBD 1-23 at [23].

³⁵ CBD 1-68 at [14].

³⁶ CBD 1-68 at [14] and [15].

³⁷ CBD 1-44 at [53].

³⁸ CBD 1-39 at [25]; and Plaintiff's Submissions at [44].

³⁹ CBD 1-68 at [15].

⁴⁰ CBD 1-68 at [15] and [16].

- [16] Mr Green's evidence is that:⁴¹

[Ms Chai] understood that the Greenhithe house would pass by survivorship [to Mr **Zhang**] and there was a mortgage on the property but [Mr **Zhang**] would have the equity in the house. For this reason she did not see any need to, or want to provide anything further for [Mr **Zhang**] under her will.

...

[Ms Chai] was very clear that this was what she wanted to happen with the house and that she wanted everything else to go to [Mr **Guo**].

...

She intended that the house would pass to [Mr **Zhang**], subject to the mortgage. She wanted everything else to be left to her son.

- [17] Mr Green also annexes to his affidavit the will acknowledgement document, in which Ms Chai acknowledges that:⁴²

I have made no provision in my will for my partner [Mr **Zhang**]...I am aware that any assets I own jointly with [Mr **Zhang**] will pass to him automatically by survivorship and will not form part of my estate. I solely own the [Glenfield property] and intend for this to form part of my estate. I wish to provide for my son [Mr **Guo**] first and foremost.

- [18] The will instructions form appended to Mr Green's affidavit also sets out Ms Chai's intentions to provide for her son. Ms Chai specified in the form that she was aware that her jointly owned assets would pass to Mr **Zhang**. She understood that Mr **Zhang** may have a claim against her estate under the Act, but nevertheless wanted to support Mr **Guo** primarily.⁴³
- [19] The evidence of Mrs **Guo**, a friend of Ms Chai's and executor of the will, is that if Mr **Zhang** "got [Ms Chai's] share of the Greenhithe property, he would not ask for anything else".⁴⁴ Mrs **Guo** says that she suggested Ms Chai change the title of the Glenfield property so she could leave it to Mr **Guo** directly.⁴⁵ But Ms Chai told her

⁴¹ CBD 1-68–1-69.

⁴² CBD 2-14.

⁴³ CBD 2-13.

⁴⁴ CBD 1-54 at [18].

⁴⁵ CBD 1-54 at [19].

that the title could not be changed because it was being used as security for the mortgage on the Greenhithe property.⁴⁶

- [20] Ms Chai's will, dated 16 April 2018, provides for a gift of \$80,000 to Mr **Guo**. The remainder of the estate is to be held on trust and transferred to Mr **Guo** when he reaches the age of 25. Otherwise, the estate would go to Mrs Lu, Mr **Guo**'s grandmother. The will's provisions do not mention the ANZ mortgage explicitly.
- [21] There is evidence from Mrs Lu and Mr **Guo** of a cultural expectation that Mr **Guo** would continue to live with and provide for Mrs Lu.⁴⁷ Mrs Lu expects, and Mr **Guo** intends, that he will continue to take care of her. Mrs Lu says that:⁴⁸

I had always understood that [Ms Chai] would take care of me as I got older. I also have the expectation that [Mr **Guo**] will take care of me as I took care of [Mr **Guo**] since he was very young.

- [22] Mr **Guo** submits that this is why Ms Chai did not otherwise provide for her mother in the will. He says Ms Chai told him he would receive the Glenfield property when she died so that he and Mrs Lu would have security and a place to live.⁴⁹ Mrs Lu receives just over \$400 a week.⁵⁰ She pays Mr **Guo** \$150 per week for living expenses.⁵¹ Mr **Guo** has a student loan of over \$40,000 and expects to graduate from university in 2021.⁵² He is unlikely to receive any financial support from his father, with whom he does not have a meaningful relationship.⁵³

Ms Chai's death and estate

- [23] On 17 April 2018 Ms Chai travelled to China with her son, Mr **Guo**, in search of traditional Chinese remedies.⁵⁴ Mr **Zhang** did not follow until 29 April 2019 as he had been unwell.⁵⁵ Mr **Guo** left to return to his studies on 30 April 2018. Ms Chai died in China on 3 May 2018.

⁴⁶ CBD 1-54 at [20].

⁴⁷ CBD 1-77 at [60]–[61] and 1-83 at [41].

⁴⁸ CBD 1-83 at [41].

⁴⁹ CBD 1-77 at [60].

⁵⁰ CBD 1-82 at [34].

⁵¹ CBD 1-77 at [54].

⁵² CBD 1-77 at [57] and [58].

⁵³ CBD 1-71 at [8] and 1-77 at [59].

⁵⁴ CBD 1-74 at [33].

⁵⁵ Plaintiff's Submissions at [42].

- [24] Mr **Guo** was the beneficiary of Ms Chai's New Zealand and Chinese life insurance policies from which he received \$200,750 and around \$21,960 respectively.⁵⁶ At the time of her death, the value of Ms Chai's estate totalled about

\$1,113,589.⁵⁷ The most valuable assets were: the Glenfield property, with a council valuation of \$790,000; and shares in the White Flower Café Ltd valued at \$262,000.⁵⁸ The funds in the company bank account had been divided between Mr Shen and the estate of Ms Chai, reflecting Ms Chai's majority investment in the company.⁵⁹ As at 31 May 2020, the value of the estate was \$1,102,893, minus legal expenses for these proceedings.⁶⁰ There was also a liability of \$882,650 secured over the Glenfield property and the Greenhithe property as at 5 November 2020.⁶¹

- [25] On Ms Chai's death, Mr **Zhang** received \$43,950 from their joint accounts, by way of survivorship.⁶² Ms Chai's half-share in the Greenhithe property also passed to Mr **Zhang**, by survivorship. It has a council valuation of \$1,450,000.⁶³ At the time of Ms Chai's death, the amount owing on their joint financing facility was \$961,942.⁶⁴
- [26] Since then, Mr **Zhang**'s statement of claim pleads that Ms Chai's estate has contributed around \$14,000 to the ANZ mortgage outgoings.⁶⁵ But that stopped when the Glenfield property was no longer tenanted. Mr **Zhang**'s evidence is that he contributed around \$158,000 to the mortgage (up to 13 August 2020).⁶⁶ He claims that the original debt on the Glenfield property remains owing now as part of the joint ANZ mortgage. Mrs **Guo**'s evidence is that Ms Chai had fully repaid the debt on the Glenfield property.⁶⁷ Mr **Zhang** also claims that, over a longer period of his association with Ms Chai, he has paid approximately \$262,000 (or two-thirds of the total mortgage outgoings) and Ms Chai and her estate have paid about \$134,000.⁶⁸

⁵⁶ CBD 1-76 at [50]–[52].

⁵⁷ CBD 2-1.

⁵⁸ CBD 2-1.

⁵⁹ CBD 1-56 at [42].

⁶⁰ CBD 2-1.

⁶¹ SBD 074.

⁶² CBD 2-46.

⁶³ CBD 1-24 at [29] and Second Defendant's Submissions at [34].

⁶⁴ CBD 2-46.

⁶⁵ CBD 1-4 at [19]. The first defendant did not address this claim, and the second defendant had insufficient knowledge of the matter and therefore denied it.

⁶⁶ CBD 1-4 at [20].

⁶⁷ CBD 1-63 at [19].

⁶⁸ CBD 1-40 at [31] and [32].

- [27] Mr **Guo** and his grandmother, Mrs Lu, continued living with Mr **Zhang** at the Greenhithe property until October 2018. However, their relationship with Mr **Zhang** broke down. Mr **Guo** and Mrs Lu then moved to the Glenfield property and have lived there with a boarder since then. Mr **Guo**'s evidence is that Mr **Zhang**'s father had been living at the Glenfield property before Mr **Guo** and Mrs Lu moved back into it. Mr **Guo** and Mrs Lu say the property was extremely run down when they returned, with smoke-stained walls, stained and dirty carpet, damaged stove, broken kitchen bench, and broken window hinges.⁶⁹

Proceedings

- [28] Mr **Zhang** seeks an award under the Act from Ms Chai's estate for his proper maintenance and support, as well as interest and costs. Further, or alternatively, he seeks an award, based on equitable contribution, recognising his contributions to the couple's ventures. Mr Fulton, for Mr **Zhang**, submits that an award under either or both causes of action should be approximately \$250,000 to compensate for Mr **Zhang** meeting the obligations of the Glenfield mortgage when the estate defaulted, his alleged work in the café business, and other alleged loans and expenses.⁷⁰ Mr **Zhang** also pleaded unjust enrichment but did not pursue that. Mr **Guo** counterclaims for an order that the estate is not required to pay any funds to the plaintiff in relation to the mortgage, and an order that the plaintiff must do all that is necessary to discharge the mortgage secured over the Glenfield property.⁷¹ Mrs Lu supports Mr **Guo**.⁷²

Issue 1: Did Ms Chai breach her moral duty to Mr **Zhang?**

Law of moral duty

- [29] Section 4 of the Act allows a person, including a de facto partner, to claim against the estate of a family member if "adequate provision" is not available from it "for the proper maintenance and support" of the applicant.

⁶⁹ CBD 1-76 at [48] and 1-82 at [30]–[33].

⁷⁰ Plaintiff's Submissions at [55].

⁷¹ CBD 1-11 at [47].

⁷² CBD 1-82 at [38].

- [30] The principles relating to claims under the Act, originally set out in *Allardice v Allardice*, are well known.⁷³ They have evolved in response to changing social views, but remain "deeply embedded" in New Zealand law.⁷⁴ In *Williams v Aucutt*, in the plurality judgment of the Court of Appeal, Richardson P stated (with Blanchard J concurring):⁷⁵

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 in requiring "proper" maintenance and support, the legislation recognises that a broader

approach is required and . . . 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 [family member’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 ... is a matter of judgment in all the circumstances of the particular case ... where there is no economic need it may also be met by a legacy of a moderate amount. On the other hand, where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.

- [31] In *Fisher v Kirby*, the Court of Appeal stated courts should also consider “the provision made for [the claimant] under [the deceased’s] estate and during [their] lifetime”.⁷⁶ A “mere perception of unfairness” is not enough.⁷⁷ The Court cannot “rewrite a will simply because it may be perceived as being unfair to a family member”, and it is not for a beneficiary to justify the provision made under a will.⁷⁸ A conservative approach must also be taken regarding the amount of any award.⁷⁹
- [32] In *Vincent v Lewis*, in a formulation endorsed by the Court of Appeal, Randerson J summarised the principles, relevantly:⁸⁰

⁷³ *In re Allardice, Allardice v Allardice* (1910) 29 NZLR 959 (CA) at 973.

⁷⁴ *Little v Angus* [1981] 1 NZLR 126 at 127; and *Re Z (deceased)* [1979] 2 NZLR 495 (CA) at 506.

⁷⁵ *Williams v Aucutt* [2000] NZCA 289; [2000] 2 NZLR 479 (CA) at [52].

⁷⁶ *Fisher v Kirby* [2012] NZCA 310 at [135].

⁷⁷ *Henry v Henry* [2007] NZCA 42; [2007] NZFLR 640 (CA) at [53].

⁷⁸ *Auckland City Mission v Brown* [2002] NZCA 33; [2002] 2 NZLR 650 (CA) at [33]; *Williams v Aucutt*, above n 75, at [70]; and *Little v Angus*, above n 74, at 127.

⁷⁹ *Auckland City Mission v Brown*, above n 78, at [36].

⁸⁰ *Vincent v Lewis* [2006] NZFLR 812 (HC) at [81] endorsed in *Simpson v Walker* [2012] NZCA 191, (2012) 28 FRNZ 815 at fn 20; and *Talbot v Talbot* [2017] NZCA 507, [2018] NZFLR 128 at fns 20 and 26.

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

(b) Moral duty is a composite expression which is not restricted to mere financial need but includes moral and ethical considerations.

(c) Whether there has been such a breach is to be assessed in all the circumstances of the case including changing social attitudes.

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

(e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.

(f) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.

(g) If a breach of moral duty is established, it is not for the court to be generous with the testator’s

property beyond ordering such provision as is sufficient to repair the breach.

(h) The court’s power does not extend to rewriting a will because of a perception it is unfair.

...

- [33] In *Wylie v Wylie*, the surviving partner’s (half) share of relationship property, amounting to almost \$1 million, vested in her by consent. She was also a beneficiary of a family trust.⁸¹ Her claim under the Act did not succeed in the Court of Appeal. The Court held her claim was limited “to the extent of deficiency in terms of the statutory moral and ethical standards considered by this court in *Williams v Aucutt* ... [regarding] her need of proper ‘maintenance’ and her entitlement to the ‘support’ that includes due recognition of her role in the family”.⁸²
- [34] Finally, as the Family Court stated in *Saunders v Gambrill*, the Act “cannot be used as a backdoor method to achieve a division that may have been available under the Property (Relationships) Act”.⁸³

⁸¹ *Wylie v Wylie* [2003] NZCA 99; (2003) 23 FRNZ 156 (CA) at [16].



⁸² At [22].







⁸³ *Saunders v Gambrill* FC Auckland FAM-2007-004-3009, 26 February 2010 at [32].



Submissions

- [35] Mr Fulton, for Mr  Zhang , submits:





(a) The previous archaic view, that widowers have more difficulty establishing a claim than do widows, yields to today’s social climate of equality. I accept this.

(b) Mr  Guo ’s position is of considerable comfort. For him to get the Glenfield property debt-free lacks rationality.

(c) Mr  Zhang  poured his income from salary and rentals into his joint enterprise with Ms Chai to buy a home. There is no evidence she intended unequal sharing. She has left Mr  Zhang  to discharge her liability. There is no injustice in enforcing the mortgage according to its tenor. Ms Chai’s moral duty was, at the very least, to ensure the discharge of her debt for which Mr  Zhang  has shared liability. She also ought to have relieved him of part of the debt they both incurred in acquiring and retaining their home.

(d) Mr  Zhang  did not elect to bring a relationship property claim because it would be more complicated and would not give any better focus. He relies upon he and Ms Chai having their own property but maintains he ought to have been reimbursed for his loans and contributions to Ms Chai’s expenditure.

(e) The executor of Ms Chai’s estate, Mrs  Guo , is biased against Mr  Zhang .

- [36] Mrs  Guo , the first defendant as executrix of the estate, abides the Court’s decision.
- [37] Ms Morris, for Mr  Guo , opposes the claim and submits:

(a) The evidence is clear that Ms Chai intended Mr **Zhang** would receive her interest in the Greenhithe property and take responsibility for the mortgage.

(b) Ms Chai has not breached a moral duty to Mr **Zhang** because adequate and proper provision was made for him through survivorship. He received \$43,950 from their joint accounts and Ms Chai's half-share in the Greenhithe property which is likely to be worth over \$250,000 in the current market. The equity in the property, taking into account the mortgage, is at least \$488,058. So, Mr **Zhang** has received assets likely worth over \$300,000 by survivorship in the context of a modest estate worth around \$1.1 million. He has a six-figure salary, one mortgage-free property providing a rental income, and now another property worth around \$1.5 million. This was a later-in-life relationship of only six years. The moral claims of Mr **Guo** and Mrs Lu mean there is less of a moral duty to provide for Mr **Zhang**.

(c) Mr **Zhang** is likely to be receiving more than he would have received if he had elected to divide his and Ms Chai's relationship property under the Property (Relationships) Act 1976. In that case, Ms Chai's estate would have been entitled to half of the Greenhithe property. The Glenfield property and shares in her company were her separate property.

(d) Alternatively, if she did breach her moral duty, the Court should not exercise its discretion to make an award because the testator's wishes are to be respected by the Court even in unfair circumstances. Ms Chai carefully considered how she wanted to provide for Mr **Zhang**. She provided for both him and for Mr **Guo** in different ways, recognising their different roles in her life and family unit. If, nevertheless, the Court makes an award, it ought to be the minimum amount necessary to remedy any breach of moral duty.

Moral duty

- [38] Mr **Zhang** undoubtedly played an important part in the last six years of Ms Chai's life. But her mother and son could reasonably be considered to have played a more important part in her life overall. Ms Chai left Mr **Guo** with sufficient resources to look after himself and Ms Chai's mother, Mrs Lu. Disparity between Ms Chai's treatment of them and of Mr **Zhang** is not sufficient to establish a claim under the Act.
- [39] Ms Chai and Mr **Zhang** pooled their resources. His claims about various loans, various repayments, and working in her business must be viewed in the light of that. Mr **Zhang** elected not to pursue a relationship property claim. On the basis of the (presumably conservative) council valuation of the Greenhithe property at \$1,450,000, and the mortgage over it of \$961,942 at Ms Chai's death, Mr **Zhang** received property valued at approximately \$244,029 as well as \$43,950 from his joint accounts with Ms Chai. This is compared with an estate worth around \$1.1 million.
- [40] I accept that Ms Chai understood that her half-share of the Greenhithe property, subject to the mortgage, would pass to Mr **Zhang** by survivorship, as it has. That is important context that I must take into account in assessing Ms Chai's duty to Mr **Zhang** under the Act. I consider it was reasonable for Ms Chai to believe that passage of that property would sufficiently provide for Mr **Zhang**. With a six-figure salary and the unmortgaged Mt Eden property providing rental income, in addition to the Greenhithe property, Mr **Zhang** is not badly off. He does not have need of maintenance and support in a broad sense. He cannot use the Act as a backdoor method to achieve a division that may have been available under the Property (Relationships) Act 1975.
- [41] Accordingly, I do not consider it was a breach of Ms Chai's moral duty under the Act not to provide for Mr **Zhang** in her will.

Issue 2: Should Mr **Zhang receive an equitable contribution?**

Law of equitable contribution

- [42] In *Hotchin v New Zealand Guardian Trust Co Ltd*, the Supreme Court outlined a modern and “straightforward” approach to the doctrine of equitable contribution.⁸⁴ The Court stated that contribution may be available when a third party could pursue for payment either a claimant or the defendant, both of whom are liable in whole or in part for the same damage the third party suffered.⁸⁵ All that is required is liability for the same damage. Once the court determines there is a right to claim contribution, the amount of contribution will be determined with reference to relative culpability and causal connection.⁸⁶ This is consistent with s 17 of the Law Reform Act 1936.
- [43] Section 34 of the Administration Act 1969 provides, relevantly:

34 Charges on property of deceased to be paid primarily out of the property charged

(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his or her will disposes of, an interest in property, or where an interest in property passes by survivorship on the death of a person, and at the time of his or her death the interest is charged with the payment of money, whether by way of mortgage, charge, or otherwise, and the deceased has not by will, deed, or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for payment of all amounts charged thereon; and every part of the said interest, according to its value, shall bear a proportionate part of the amounts charged on the whole thereof.

...

(2) Such a contrary or other intention shall not be deemed to be signified—

(a) by a general direction for payment of debts or of all the debts of the testator out of his or her personal estate, or his or her residuary real and personal estate, or his or her residuary real estate, or his or her residuary personal estate; or

(b) by a charge of debts upon any such estate—

⁸⁴ *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906; and Victoria Stace “The Law of Contribution – An Equitable Doctrine or Part of the Law of Unjust Enrichment?” (2017) 48 VUWLR 471 at 472.

⁸⁵ *Hotchin*, above n [84](#), at [73].

⁸⁶ At [157].

unless that intention is further signified by words expressly or by necessary implication referring to all or some part of the charge on the interest in property.

- [44] In *Re Horton*, the Court held that nothing in the will or other associated documents there signified a contrary intention under s 149 of the Property Law Act (the predecessor of s 34).⁸⁷ The documents did not mention at all what was to happen to the interests after the will-maker’s death. Therefore, the operation of s 149 was not displaced.
- [45] In *Re Murray*, McGregor J held that a life insurance policy and an associated provision in a mortgage provided the necessary contrary intention under s 149.⁸⁸ He considered the general scheme of the will, other documents completed by the will-maker, and the circumstances surrounding the will. He inferred that provision for the daughter of the deceased would be inadequate if s 149 applied, and the deceased intended for the general rule not to apply.⁸⁹
- [46] The Court in *Dockerty v Ukich* held that life insurance policies were specifically intended to fund repayments of a mortgage in the event of the policy-holders’ deaths.⁹⁰ The Court implied this

from the phrase in the will “the balance proceeds of my AMP life insurance policy”.⁹¹ Its interpretation of the will took into account “the circumstances under which the will was made”, and concluded that “the balance proceeds” meant the balance remaining after the mortgage had been paid.⁹² There was a contrary intention expressed by the will-maker, and s 34 did not apply.

- [47] In *Official Assignee v Crooks*, the will-maker explicitly stated in the mortgage document that the repayments were to be made out of his life insurance policy.⁹³ Section 34 did not apply, as a clear contrary intention was present.

⁸⁷ *Re Horton (deceased)* [1969] NZLR 598 (SC) at 602.

⁸⁸ *Re Murray (deceased)* [1964] NZLR 627 (SC).

⁸⁹ At 633.

⁹⁰ *Dockerty v Ukich* [2003] BCL 50 (HC).

⁹¹ At [15].

⁹² At [15].

⁹³ *Official Assignee v Crooks* [1986] NZHC 50; [1986] 2 NZLR 322 (HC) at 326–327.

Submissions

- [48] Mr Fulton, for Mr **Zhang**, submits there is some overlap in the discretion regarding equitable contribution and the Act, but they are not necessarily the same. Whether a sufficient amount from the estate has been provided for maintenance and support is not necessarily the same as whether there is no injustice in the equal sharing of debt. He submits there is no evidence of intention that the contract between Mr **Zhang**, Ms Chai and ANZ would end on death. There is no authority for the proposition that a mortgagor who dies without retaining the mortgaged property should make no contribution to the mortgage. That would enrich the defaulting debtor. The mortgage is a liability of the estate. But Mr Fulton acknowledges the finding by Henry J in *Official Assignee v Crooks*, in terms of s 34 of the Administration Act, that where one joint tenant dies, their interest is extinguished and the other remains as the sole owner.⁹⁴ Under this cause of action, Mr **Zhang** claims: \$71,905, representing the estate’s alleged indebtedness to the plaintiff for contribution towards the mortgage debts; a declaration that the defendant is liable to pay ANZ half of the payments of principal, mortgage instalments and interest until the mortgage is redeemed; interest from 15 October 2018; and costs.
- [49] Ms Morris, for Mr **Guo**, submits:

(a) The estate should not have to contribute to the joint mortgage liability because the loans were incurred to fund the purchase of the Greenhithe property, which Mr **Zhang** received by survivorship. The debt should follow the asset it was incurred to purchase. Mr **Zhang** has been making payments towards loans taken out to purchase a property that he owns. That is his fair share of the debt.

(b) Neither has the estate been unjustly enriched, for the same reason. And Mr **Zhang** has no other claims for compensation. The estate stopped contributing to the ANZ loan because it stopped receiving a rental income from the Glenfield property when Mr **Guo** and Mrs Lu moved back to it. Ms Chai

clearly intended her share of the Greenhithe

⁹⁴ At 326.

property would pass to Mr **Zhang** and, in exchange, he would take over her responsibility for the mortgage.

(c) Section 34 of the Administration Act 1969 provides that where an interest in property passes by survivorship and is charged with a mortgage, the interest charged should be primarily liable for payment of the amounts charged. The debt follows the asset. That applies here. That is appropriate because the outstanding loans were completely paid off before the Greenhithe property was purchased. Once it was purchased, the joint facility was used only for its expenses and relationship expenses.

Equitable contribution

- [50] The ANZ mortgage is secured over both the Greenhithe and the Glenfield properties. That is because it refinanced both the ASB mortgage, secured over the Greenhithe property, and the BNZ mortgage, secured over the Glenfield property. Both the ASB and BNZ mortgages were used to fund the purchase of the Greenhithe property.
- [51] Under s 34(1) of the Administration Act, the Greenhithe property “passes by survivorship on the death of” Ms Chai, to Mr **Zhang**. Under s 34(1) also, the Greenhithe property is “primarily liable for payment of all amounts charged thereon” and bears a proportionate part of the amounts charged. There is no contrary or other intention in Ms Chai’s will. Her will acknowledgement document is explicit that she understood any assets she owned with Mr **Zhang** would pass to him automatically by survivorship and not form part of her estate. Mr Green’s evidence of her testamentary intention is that she understood there was a mortgage on the Greenhithe property but that Mr **Zhang** would have the equity.⁹⁵ Accordingly, under s 34(1), the Greenhithe property is liable for payment of amounts charged under the ANZ mortgage, which is partly a refinancing of the ASB mortgage secured over the Greenhithe property.

⁹⁵ CBD 1-68–1-69 at [18].

- [52] The Glenfield property also falls within s 34(1), because it is “an interest in property” of which Ms Chai died “possessed of”. But I consider there is a “contrary or other intention” signified by Ms Chai that the Glenfield property should not be liable for the mortgage. Her will left everything to Mr **Guo**. Her will acknowledgment document specifies that “I wish to provide for my son [Mr **Guo**] first and foremost”.⁹⁶ She stated that she solely owned the Glenfield property and wished this to form part of her estate, to go to Mr **Guo**. The Glenfield property was intended by Ms Chai under her will to be a primary means to provide for her son and her mother after her death.
- [53] As a contextual cross-check, Mr Green’s evidence of Ms Chai’s testamentary intentions is that she understood there was a mortgage on the Greenhithe property but recognised that Mr **Zhang** would have the equity.⁹⁷ The mortgage secured over both properties was raised to fund the purchase of the Greenhithe property. Mr Green’s evidence is that Ms Chai only mentioned the ongoing mortgage liability with respect to Mr **Zhang** and the Greenhithe property. According to Mr **Guo**, Ms Chai told him that the Glenfield house was mortgage free. This contextual evidence supports my view that the various will documents exemplify an intention on Ms Chai’s part for the Glenfield property to be free from liability for mortgage payments. Accordingly, under s 34(1), the Glenfield property is not liable for payment of amounts charged under the ANZ

mortgage, which is partly a refinancing of the BNZ mortgage raised to fund the purchase of the Greenhithe property but secured over the Glenfield property.

- [54] So, Mr **Zhang**'s mortgage repayments reflected his own liabilities and assets. I do not consider the estate or any other party owes Mr **Zhang** an equitable contribution towards the mortgage. This is consistent with my view of the overall equity of the situation.

Issue 3: Unjust enrichment

- [55] Mr **Zhang** pleads in his statement of claim that the estate has been unjustly enriched by Mr **Zhang** paying the mortgage principal and interest beyond a half-share. Mr Fulton did not pursue the claim of unjust enrichment at the hearing, at least not

⁹⁶ CBD 2-14.

⁹⁷ CBD 1-68–1-69.

independently of the other claims. Ms Morris submits that Mr **Zhang** has no claim for unjust enrichment because Mr **Zhang** has retained, and enjoys the full benefit of, the Greenhithe property. He also enjoyed the benefit of using the Glenfield property as security to purchase the Greenhithe property.

- [56] Mr **Zhang** does not pursue his claim of unjust enrichment. If he had, I consider that it would have failed on the basis that the estate has not been enriched. Mr **Zhang** retains the benefit of the Greenhithe property. He benefited from the use of the Glenfield property. The mortgage is not properly a liability of the estate, as I have found above.

Issue 4: Counterclaim

- [57] Mr **Guo** counterclaims for orders that the estate is not required to pay any funds to Mr **Zhang** in relation to the mortgage and that Mr **Zhang** must take all steps necessary to discharge the mortgage secured over the Glenfield property. Ms Morris, for Mr **Guo**, accepts this is a novel claim. Its purpose is to ensure that the estate is not required to pay funds towards the mortgage and that Mr **Zhang** must discharge it. Ms Morris submits that, where the executor has handed over defence of proceedings to a beneficiary, from whom the plaintiff was seeking payment for mortgage repayments, it is appropriate for the counterclaim to be made.
- [58] Mr Fulton, for Mr **Zhang**, submits Mr **Guo** has no standing to bring the counterclaim which, if anything lies at the suit of the executor, and is outside the scope of the proceeding. He submits ANZ did not finance the purchase of the Greenhithe property and, at best, there was a mixed purpose. There is no compensable benefit to Mr **Guo** or the executor, Mrs **Guo**. He submits the second order sought is too vague.
- [59] I have found above that the Greenhithe property, and not the Glenfield property, is liable for payment of amounts charged under the ANZ mortgage. The mortgage is properly to be attributed to the Greenhithe property and not to the Glenfield property. Accordingly, the mortgage now needs to be amended to be secured only over properties owned by Mr **Zhang**, and not over the Glenfield property in which he has no interest. Under the inherent jurisdiction of the High Court, I order the parties

to take all necessary steps to ensure that. I reserve leave to any of the parties to apply to the Court for any further orders that are necessary to achieve that.

Result

- [60] I dismiss Mr **Zhang**'s applications. I order the parties to take all necessary steps for the ANZ mortgage, or any substitute for it, to be secured only over properties owned by Mr **Zhang**, and not over the Glenfield property. I reserve leave to any of the parties to apply to the Court for any further orders that are necessary to achieve that. I award costs on a 2B basis, and reasonable disbursements, to the second defendant.

Palmer J

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