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Court of Appeal: $1 million sufficient provision for daughter

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In a recently released November 2017 decision *Talbot v Talbot*[1], the Court of Appeal upheld the High Court's decision to dismiss the daughter's application for further provision from the estates of her late parents. Jillian Talbot was not in any financial need and was left an equal share in the residue with her sister, worth just over $1 million.

Facts

The case involved a farming property, known as Kingsborough Farm in South Canterbury, which had been in the Talbot family for four generations. The father, Edwin died in November 2014 and his wife, Pamela died six months later, in May 2015. They left behind three adult children, Jillian, Graham and Rachel, all aged in their forties.

The children grew up at Kingsborough. When he was 17 years old, Graham left school and began work on the farm. In 1994 he joined his parents in partnership and the three of them continued to farm Kingsborough.

Jillian and Rachel pursued other opportunities, with Jillian becoming a public relations consultant and Rachel a vet.

Since the 1990's the parents had wanted Graham to take over Kingsborough, so that it would remain in the family. They helped Graham by advancing him an interest free loan of $265,000 to purchase land from their trust, which Graham subsequently repaid in full. In 2002 Graham merged his farming interests with the partnership, without receiving consideration for them.

On Christmas Day in 2005 the parents had a discussion with their children and were clear about leaving Kingsborough to Graham. In 2006 the parents sold one half share in Kingsborough to Graham, as well as their interests in the farming partnership. Graham's parents lent him funds for the purchase. Graham made repayments toward the loans and the parents gifted part of the loans.

Under the wills:

- Graham was left his parent's remaining half share in Kingsborough. A further amount was gifted towards Graham's loan, leaving a balance of $400,000 for Graham to repay to the estates. Taking a midway point of the valuations obtained by Jillian and Graham, the bequest to Graham was worth about $4.3millon (67 per cent of the estate).
- The residue was to be shared equally between Jillian and Rachel. This amounted to close to $1.1 million each (16.5 per cent). In the Court of Appeal, Jillian's counsel submitted the value was approximately $1.013 million.

The parent's solicitor gave evidence that the parent's priorities in creating their wills were threefold. First, they wanted to ensure they had enough funds for their lifetime and "not cut themselves short". Next, they wanted Kingsborough to be retained by Graham, who had proved that he was a worthy successor. The daughters were to be equally provided for. Finally, the parents were aware of the "vicissitudes of farming, the good seasons, the bad seasons", that it was capital intensive rather than income productive and they wanted to ensure that

no excess debt had to be raised by Graham, which "would affect the viability of the farming operation".

The High Court decision

In the High Court[2] Jillian claimed that her parents had breached their moral duty to her and sought relief under the Family Protection Act 1955. She argued that she was due a more substantial distribution as one of three children.

The High Court reviewed the financial positions of each of the three adult children.

Jillian's personal wealth was less than $450,000. Her net earnings as a public relations consultant had reduced to around $1,000 per month, due to her childcare commitments for her three young children. However, Jillian's fiancé was wealthy (net worth of $4.5 million, which Jillian contended was his separate property pursuant to a contracting out agreement). Nevertheless, Jillian's fiancé met the household expenses and supported the family. In emails to her mother, Jillian mentioned that that she personally had $500,000 in cash and assets, was saving a lot of money and paying no household expenses. She also discussed her expensive lifestyle, including overseas holidays, taking nannies on family trips, multi-million dollar home purchases and that she no longer needed to be in paid employment. In cross-examination, Jillian accepted that her family had a comfortable lifestyle and went on an overseas trip at least once a year.

Graham had four children. His existing half share in Kingsborough was worth around $3.5 million and unencumbered. His other land interests were heavily mortgaged. Graham's position was that through his own efforts on Kingsborough, he had substantially increased its value.

Rachel made it very clear that she was not seeking any further provision. Rachel and her husband had two children and net assets of $1.5 million. She was very clear that she was not seeking any further provision, but that she did not want the legal costs diminishing her entitlement.

The High Court summarised the law:

> ... unequal distribution of a deceased's estate is not in itself sufficient to warrant disturbing a testamentary disposition. The question whether a testator is in breach of their moral duty must be determined in light of all the prevailing circumstances and against the social attitudes of the day. While "proper maintenance and support" requires a broad interpretative approach, the Court's power does not extend to rewriting the will.

The High Court concluded that Jillian was not in any real financial or economic need. If necessary, Jillian would be able to financially support herself. In any case, $1 million was sufficient to provide her with a comfortable life. The court remarked that if Jillian and her fiancé contributed half each to a $1 million property, Jillian would still have $500,000 to invest and receive the income from.

Next the court considered whether the parents had fulfilled their moral obligation to make provision in recognition of Julian's position in the family. The court concluded that they had:

- The parents had given "considerable thought" about how to provide for their two daughters.
- They proactively built up the assets which would go to the daughters, with the benefit of professional advice.
- The parents held a number of family meetings to discuss their intention to leave the farm to Graham so that it would remain in the Talbot family. Graham had worked, supported and improved the farm since he was 17, so the parents thought it proper to leave it to him.
- The parents left all of their estates to immediate family members and no provision was made for others or charities.

The Court of Appeal judgment

On appeal to the Court of Appeal, Jillian argued that the High Court had adopted too narrow an approach and failed to consider various relevant matters. She asked the Court of Appeal to determine whether adequate provision was made and remedy any inadequacy.

The court clarified the question of whether there has been a breach is a "threshold issue, turning on matters of law, fact and degree". If there is a breach found, the remedy granted by the court is a discretion and an appellate court will treat it accordingly.

The court went through the leading decisions relating to adult children, in particular the trilogy of Williams v Aucutt, Auckland City Mission v Brown and Henry v Henry. It found that the lower court had not erred in its approach (inter alia):

- The Family Proceedings Act 1980 focusses on the estate of the deceased as at the date of death. A valuation obtained a year after of assets no longer in the estates was irrelevant.
- In the circumstances of this case, inter vivos gifts were not a critical factor.
- It was a large estate but Jillian was not in economic need. Proper maintenance and support could be provided by a moderate amount.
- It was hard to see how an inheritance of just over $1 million was insufficient to adequately provide for Jillian's proper maintenance and support. The court thought that there could be "no realistic argument to the contrary".
- A little in excess of $1 million was "not so small as to leave a justifiable sense of exclusion from participation in the family estate".
- The court referred to a survey carried out by Nicola Peart, which showed that in larger estates, where the testator is able to satisfy all moral claims, the courts have generally awarded between 12.5 and 20 per cent to a dutiful child not in financial need. Jillian's provision fell well within that range.
- Jillian had taken the family bach as a partial distribution. The court suspected that "might well have a special place in the family's life".
- The court concluded that Jillian had not been excluded from the family and appropriate recognition had been given to her as a dutiful and loving daughter.

The Court of Appeal decision confirms that there is no requirement for children to be treated equally.

1 *Talbot v Talbot* [2017] NZCA 507.
2 *Talbot v Talbot* [2016] NZHC 2382.