Family protection: is the tide turning for awards to those who don't need them?

A spouse in no financial need should not be eligible for a financial award under the Family Protection Act

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In *Christiansen v Jackson and Dodd* [2024] NZFC 2717, 1 March 2024 Judge Andrea Manuel ruled that a woman cohabitee had no right to an award under the Family Protection Act in circumstances where:

- she and her male co-habitee had agreed in a s 21 agreement that on separation and death, each would retain his or her own assets and have no right to the assets of the other;
- she had assets of about $2 million, "a good job" and was earning about $120,000 a year;
- her male partner had a child from a previous relationship for whom the father wanted to make provision; and
- she had a home and a rental property.

There was no 10% payment for "support" in accordance with the Court of Appeal's decision in *Williams v Aucutt* [2000] 2 NZLR 279; no percentage payment of any sort; and no payment based on the vague and unprincipled notion that has suffused this area of the law that spouses "should get something" at the end of a relationship. The woman had sufficient wealth and the Family Protection Act was not to be used to give her more.

Judge Manuel's decision is in line with the Law Commission's recommendations that a spouse who is well-off at the end of a relationship and who does not need more money should not be eligible to get an award under family protection legislation.

The first step in the court's reasoning in these cases is to decide whether a deceased owed a "moral duty" to a claimant.

What "moral duty" is owed to a person who has a house, a rental property, good health, a good earning capacity and who has formally agreed in a s 21 agreement (that she acknowledged to be "fair, just and equitable") that if her relationship with the man ended on death, each party would take the assets they own and not make a claim against the other's assets? I think that many, if not most, people would say "none".

A fundamental principle of the law of damages is that moneys that one person is ordered to pay to another ought not to exceed the other's loss. If a spouse at the end of a relationship is not in need of money and furthermore has formally agreed that she will not be entitled to any of the man's assets on separation or death, how can a substantial payment to her be justified?

In *Williams v Aucutt*, a five-judge Court of Appeal invented the notion that a wealthy claimant ought nevertheless to be awarded moneys to recognise what I will call that person's "membership of the family" or something of that sort. In reliance on that decision, there has been a widespread acceptance that a spouse who is not in financial need should get 10%, or perhaps 20% or some other unpredictable percentage of an estate.

The reasoning in *Aucutt* is flawed for claimants who are not in financial need. Why should moneys be paid for "support" for a person who has no need for money?

Whether knowingly or not, Judge Manuel may have started a move towards a regime that the Law Commission has recommended should be adopted in place of our existing law. In short, a spouse in no financial need should not be eligible for a financial award under the Family Protection Act.

Such a decision can fit comfortably within the parameters of the existing Act, with its requirement that no order should be made unless the deceased was in breach of a "moral duty" by not making the requested provision.

A judge needs only to hold that contemporary standards of morality in New Zealand in 2024 do not require that a will-maker who acted in that way had a "moral duty" to make the requested provision for the claimant. For some evidence of this the court can look at the Law Commission's recommendations which, in turn, were based on its assessment of the beliefs of the multi-faith and multi-cultural country that New Zealand has become in the many decades since the family protection legislation was originally enacted. ■

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Anthony Grant is an Auckland barrister and trustee specialising in trusts and estates ■