Family Provision: the Turning of the Worm

CRAIG BIRTLES

COLLEGE OF LAW

SPECIALIST LEGAL CONFERENCE: WILLS & ESTATES

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CRAIG BIRTLES | BARRISTER
THIRTEEN WENTWORTH SELBORNE

A LEVEL 13 | 174-180 PHILLIP STREET | SYDNEY NSW 2000 | T 02 8915 5133 | F 02 9232 4071 | DX 386 Sydney | E cbirtles@wentworthchambers.com.au | W www.13wentworthselbornechambers.com.au

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About the author

Craig was admitted to practice as a solicitor in 2008. He commenced practice with Teece Hodgson & Ward solicitors in 2008 and worked predominately in estate litigation and protective matters until April 2017.

Craig commenced practice as a barrister (with reader's conditions) at 13 Wentworth Selborne Chambers in May 2017, reading in the first year under Colin Hodgson (of 13 Wentworth Selborne Chambers) and Simon Chapple (of 13th Floor St James Hall Chambers). The restrictions on a reader's practicing certificate can be found here: http://www.nswbar.asn.au/coming-to-the-bar/reading-programme/conditions.

Before he was called to the Bar, Craig was an Accredited Specialist in Wills & Estates Law.

Craig is a member of the Society of Trust & Estate Practitioners (STEP) and an co-author of C Birtles and R Neal, Hutley's Australian Wills Precedents 8th Edition (LexisNexis Butterworths) 2013 and 9th Edition 2016. He is an adjunct lecturer for College of Law (Masters of Applied Law), Family Provision subject and is also a casual lecturer in the Law Extension Committee Diploma of Law, Succession Law subject.

Introduction

1. On 22 February 2016 I presented a paper entitled “The cause of disputes and why some matters do not settle: commentary on published Court statistics and a review of 2015 Family Provision judgments” for the Law Society of NSW.

2. In that paper I commented on the statistics most recently published by the Supreme Court of NSW (then, the Annual Review 2014 (published 2 October 2015), as well as my review of the Judgments published on the NSW Caselaw online database for the 2015 calendar year (as discovered by a search of judgments referring to Family Provision Act 1982, Succession Act 2006 and Probate and Administration Act 1898).

3. The purpose of that review was to conduct an analysis of the relative prevalence of types of estate litigation matters determined in the Supreme Court of NSW over a set period, based on a cross section of moderate sample size (noting that than there may be estate litigation cases which were not picked up by a search of the legislation referred to in the previous paragraph).

4. In this paper I set out my analysis and observations of a cross section of cases determined for the period 1 January 2016 to 30 April 2017 picked up by the same search method.

5. In order for some of the observations to have substance it is necessary to review in brief some of the basic principles.

Execution of a Will

6. In New South Wales the requirements for the formal execution of a Will are that it be signed by or at the direction of the testator in the presence of two witnesses who sign in the presence of the testator but not necessarily in the presence of each other – section 6 of the Succession Act 2006.

7. The Court has the power to dispense with formalities: that is, to dispense with the requirements for execution, alteration or revocation of Wills – section 8 of the Succession Act 2006. For a long time it was accepted that the requirements for an order under s 18A Wills Probate and Administration Act 1898 (as it was prior to the commencement of the Succession Act 2006) were those stated by Powell J in Hatsatouris v Hatsatouris [2001] NSWCA 408, as follows:

(a) "Was there a document;

(b) Did that document purport to embody the testamentary intentions of the person;

(c) Did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her or his part, operate as her or his will?"

8. There is debate as to whether the "without more" component of the Powell J test continues to apply. In a recent paper presented for UNSW CLE on 30 March 2017 "Informal Testamentary Documents" I noted that the "without more" component of the test continues to apply pending interference by an appellate Court but that those words do not seem to have the same significance as they might have had previously.

9. The testator must have the testamentary capacity to make the Will, and he or she must know and approve of the contents of the Will. These matters are usually dealt with by the presumptions arising from formal execution and the shifting of the burden of proof upon evidence of suspicious circumstances, a process summarized by Isaacs J in Bailey v Bailey (1924) 34 CLR 558 at 570. They were considered by Meagher JA (with whom Basten and Campbell JJA agreed) in Tobin v Ezekiel (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44] – [48] in a passage most recently cited, with approval, by Robb J in Hobhouse v Macarthur-Onslow [2016] NSWSC 1831 at [397]. But see Boyce v Bunce [2015] NSWSC 1924 (Lindsay J) at [58] – [59].

10. An informal testamentary document does not have the benefit of the presumption of due execution, but the rationality of the will and the process of its execution may lead to inferences of testamentary capacity and knowledge and approval: see Re Estate of Wai Fun CHAN, Deceased [2015] NSWSC 1107 (Lindsay J) at [18] – [24].

11. For those reasons I accept that there will be cases where the rationality or otherwise of the Will (in concert with other facts) is relevant to the validity of it.

12. That aside, as a general proposition the fairness or otherwise of the dispositions contained in a Will in New South Wales is not relevant to the validity of the Will.

Family Provision claims

13. However, certain categories of eligible persons are entitled to apply to the Supreme Court of NSW for an order that he or she receive provision, or additional provision, from a deceased person's estate or notional estate (**Family Provision Order**).

14. The power to make a Family Provision Order was introduced in New South Wales with the Testator's Family Maintenance and Guardianship of Infants Act 1916. Section 3 of that act provided that:

> "If any person (hereinafter called "the testator") dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any of them."

15. The Testator's Family Maintenance and Guardianship of Infants Act 1916 was revoked with the introduction of the Family Provision Act 1982. That Act applies where the deceased died on or after 1 September 1983 but before 1 March 2009. The definition of "eligible person" in s 6 of the Act included:

> "(a) a person who
>
> (i) was the wife or husband of the deceased person at the time of the deceased person's death;
>
> (ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or

(iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;

(b) a child of the deceased person;

(c) a former wife or husband of the deceased person; or

(d) a person:

(i) who was, at any particular time, wholly or partly dependent upon the deceased person; and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member."

16. The Property (Relationships) Act 1999 repealed paragraphs (a) and (b) of the definition of "eligible persons" and they were replaced with:

"(a) a person:

(i) who was the wife or husband of the deceased person at the time of the deceased person's death, or

(ii) with whom the deceased person was living in a domestic relationship at the time of the deceased person's death,

(b) a child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the Property (Relationships) Act 1984, a child of that relationship, or"

17. Section 9(2) of the Family Provision Act 1982 provided that:

"(2) The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that:

(a) the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate, or

(b) in the case of an order under section 8:

(i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person, or

(ii) the provision made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person,

is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person."

18. Under the Family Provision Act 1982, the Court applied a "two-stage" process as described in Singer v Berghouse [1994] HCA 40; 181 CLR 201 at 208-211 per Mason CJ, Deane and McHugh JJ:

"The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. [**the jurisdictional question**]

The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. **[the discretionary question**]".

19. In Vigolo v Bostin (2005) 213 ALR 692 at 722 Callinan and Heydon JJ said:

"We do not therefore think that the questions which the Court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or

live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

20. The Family Provision Act 1982 was repealed by the Succession Amendment (Family Provision) Act 2008 and Chapter 3 of the Succession Act 2006 now applies where the deceased died on or after 1 March 2009.

21. Section 57 of the Succession Act 2006 provides that:

"(1) The following are eligible persons who may apply to the Court for a family provision order in respect of the estate of a deceased person:

(a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,

(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,

(c) a child of the deceased person,

(d) a former wife or husband of the deceased person,

(e) a person:

(i) who was, at any particular time, wholly or partly dependent on the deceased person, and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,

(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death." [*Skarica v Toska* [2014] NSWSC 34]

22. Section 59 of the Succession Act 2006 provides that:

"(1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:

(a) the person in whose favour the order is to be made is an eligible person, and

(b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of eligible person in section 57—having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and

(c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both."

23. The Succession Act 2006 also introduced, at section 60(2), a list of matters which the Court may take into account in determining claims, the last of which is "any other matter which the court considers relevant". Some of these matters were drawn from section 9(3) of the Family Provision Act 1982. As cited in recent judgments by Hallen J (including for example, Hinderry v Hinderry (2016) NSWSC 780 at [241], the s60(2) matters have been described by Basten JA in Andrew v Andrew [2012] NSWCA 308; (2012) 81 NSWLR 656 at [37], as "a multifactorial list", and by Lindsay J in Verzar v Verzar [2012] NSWSC 1380 at [123], as "a valuable prompt".

Doubt about the continued application of the two stage test

24. In Andrew v Andrew [2012] NSWCA 308 Basten JA said (at [27]):

> “Under the former scheme the statute identified a non-inclusive list of considerations which might be taken into account in determining what provision (if any) ought to be made, a step only to be taken once the prohibition had been lifted. That is not to say that the listed considerations were not relevant to the first stage of the enquiry, but only that the earlier statute did not address the issue. The Succession Act, by contrast, states that the listed factors may be taken into account in determining whether to make a family provision order and the nature of any such order. The intention of a two stage process is no longer apparent in the structure of either s 59 or s 60 of the Succession Act.”

25. Allsop P said (at [6]):

> "I agree with Basten JA that the expression of the task in s 59 is subtly different from the previous legislation. A prohibition against making an order unless satisfied of circumstances of an evaluative character is different in emphasis from a permission to make an order if satisfied of circumstances of an evaluative character. Whether the process engaged by the Court in s 59 can still be described as "two staged" in the sense discussed in Singer v Berghouse may be an analytical question of little consequence.”

26. Barrett JA said (at [91]):

> “I am not persuaded that any change is evident here… The identified aim is to address cases in which the Court assesses the provision (if any) actually made to be not adequate. Once the Court has found lack of adequacy, it must make a discretionary judgment as to what, if any, order should be made.
> There is nothing in the present Act indicating that the court is to take an approach more "generous" to claimants than previously. It is true that s 60(2) refers to a greater number of matters that may be taken into account in deciding what order, if any should be made but, as I have said, to the extent that these go beyond the list in the former s 9(3) they reflect things to which it was open to the Court to pay attention under the superseded legislation in any event.”

27. In Poletti v Jones [2015] NSWCA 107 Basten JA said ([19] ff):

> “In Andrew v Andrew, I suggested that the changes in the structure of the legislative provisions resulting from the enactment of ss59 and 60 of the Succession Act meant that a two stage process was no longer required. That was

not to say that there might not be circumstances in which such an approach was the preferable way to proceed. My only point was that the legislation no longer dictated such an approach in circumstances where a rigid demarcation of issues along those lines would be artificial, a point made by Callinan and Heydon JJ in Vigolo v Bostin, a case under different legislation. …

In the present case the appellant submitted that a failure to address separately the precondition in s59(1)(c) was apt to distort the application of the power conferred on the court, because it would lead too readily to a conclusion that some provision should be made. In other words, the court should ask first whether the testator acted appropriately in excluding the respondents from any share in his estate, before asking what kind of provision might have been appropriate… Accepting that there will be cases in which that approach should be adopted, this is not such a case."

28. The present most commonly accepted view seems to be as stated by Bergin CJ in Eq in In the Estate of the late Anthony Marras [2014] NSWSC 915 at [15], as set out in the judgment of Brereton J in Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin [2017] NSWSC 10 at [47] as follows:

"15 There has been some difference of opinion about the approach to be adopted by the Court in applications under s 59 of the Act compared to applications under the Family Provision Act 1982 (Andrew v Andrew [2012] NSWCA 308; (2012) 81 NSWLR 656 per Basten JA at 663 [29]; and Hallen J's careful analysis in Aubrey v Kain [2014] NSWSC 15; and Dudic v Jakovljevic [2014] NSWSC 169). In hearing these applications judges at first instance are bound to adhere to the approach referred to in the decisions of the High Court in Singer v Berghouse (No 2) (1994) 181 CLR 201 and Vigolo v Bostin [2005] HCA 11; (2005) 221 CLR 191. In line with those cases the Court must determine whether the provision is inadequate for the applicant's proper maintenance, education and advancement in life and if so, whether any provision ought be made for the applicant. Although there may be some overlap in the matters to be considered in these determinations, the pre-requisite of a finding of inadequacy is pivotal to the restraint that courts must exercise in refraining from rewriting wills or interfering with the intestacy regime beyond what is necessary to make adequate provision, paying due regard to the intentions of the testator or in this case, that of the Parliament."

Practice Note SC Eq 7

29. The Supreme Court of NSW Practice Note SC Eq 7 (Family Provision) was issued on 12 February 2013 and commenced on 1 March 2013. The Practice Note prescribes:

    a. The documents required to be filed by the Plaintiff at the time of the filing of the Summons (paragraph 6).

    b. The documents required to be filed by the Defendant (paragraph 9).

    c. The necessity for mediation, and the procedure between the first directions listing and mediation, and following mediation (paragraphs 10 to 18).

    d. That certain matters be noted as agreed between the parties as part of any consent orders (paragraph 19).

    e. That certain matters may be proved with less than strict proof (paragraph 21).

    f. A pro forma plaintiff's affidavit (annexure 1).

How then has the Court approached determination of these matters?

30. In short, and for the purposes of a short form advice, having established eligibility and filed the application within time, on hearing the Court has a discretion as to what, if any provision or further provision ought to be awarded to a plaintiff.

31. For the purposes of submissions as to how the Court should exercise that discretion, it is necessary to go further.

32. In Andrew v Andrew [2012] 81 NSWLR 656 at 657, Allsopp P said:

> "[1] This is a difficult case. The difficulty arises from the need to apply a statutory test couched in evaluative language embodying human values and norms of conduct deeply personal to those involved and often incapable of clear expression. The human expression of will concerning the disposition of property flowing from considerations of emotion (including love and disappointment), reason and societal and family obligation cannot often be fully understood.

(…)

[12] Accepted and acceptable social and community values permeate or underpin many, if not most, of the individual factors in s 60(2) and are embedded in the words of s 59, in particular “proper” and “ought”. That such values may be contestable from time to time in the assessment of an individual circumstance, or that they may change over time as society changes and grows can be readily accepted. Customary morality develops “silently and unconsciously from one age to another”, shaping law: Benjamin N Cardozo, The Nature of the Judicial Process (1921) New Haven, Yale University Press at 104–105. The relation ship between law and morals or morality depends, of course, on the context of the enquiry: see for example, Roscoe Pound, The History and System of the Common Law (1939) New York, Collier, at 16–21. As Gleeson CJ said in Vigolo at [25], the language of the statute is “general but value-laden”, operating in connection with “community standards” that will see it given “practical meaning”, that is, to the people and community who and which the law serves.

[13] The values or morality of a civil society underpin or inform, at different levels and in different degrees of abstraction, law at all levels including interpretation of legal (including statutory) rules, evaluative assessment of standards (legal and factual) and discretionary judgments. To the extent that values are expressed by Parliament, they are interpreted and given limits and contours by the courts. Parliament may prescribe relevant factors to be taken into account, but community values are not the monopoly of Parliament. Ultimately they belong to civil society itself, to be ascertained or discerned by courts, whether by interpretation of statute or by the expression of the general law, when the application of judicial power requires it: cf Onus v Alcoa of Australia Ltd (1981) 149 CLR 27 at 42. Such does not obtain only in homogeneous or static societies. Diverse, tolerant and democratic societies governed by law and justice must, even more so, reflect the binding coherence of shared values and assumptions. Difficulty from time to time in accurate contemporaneous expression of such values and assumptions lessens not the need for the values or assumptions to be recognised or applied.

[14] In a broad evaluative judgment based necessarily upon community values, the task should be expressed broadly and not by precise rules, lest particular

> rules or duties expressed by reference to one age's values come to distort later evaluative assessments by the imposition of the earlier age's rules and values.
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> [15] The list of considerations in s 60(2) encompasses many, if not most, considerations likely to be of relevance to the resolving of the broad evaluative task.
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> [16] If I may respectfully paraphrase Sheller JA in Permanent Trustee v Fraser at 46, the court in assessing the matter at s 59(1) and the order that should be made under s 59(1) and s 59(2), should be guided and assisted by considering what provision, in accordance with perceived prevailing community standards of what is right and appropriate, ought be made. This, Sheller JA said, referring to Mahoney JA in Kearns v Ellis (Court of Appeal, 5 December 1984, unreported), involved speaking for the feeling and judgment of fair and reasonable members of the community. It is to be emphasised that s 59(1)(c) and s 59(2) refer to the time when the court is considering the application and the facts then known to the court. The evaluative assessment is to be undertaken assuming full knowledge and appreciation of all the circumstances of the case. This is another consideration which makes the notion of compliance by the testator with a moral duty (on what he or she knew) apt to distract from the statutory task of the court."

33. In Henry v Hancock [2016] NSWSC 71 at [69], Brereton J said (cited by Hallen J in Hinderry v Hinderry [2016] NSWSC 780 at [266]):

> "Formerly, the yardstick which was applied was that of the wise and just testator. Nowadays, it is fashionable to couch it in terms of "community standards", although I am not at all sure that this is any different from the moral obligation of a wise and just testator and, as has not infrequently been pointed out, there is no ascertainable external community standard to guide the decision, which involves a broad evaluative judgment unconstrained by preconceptions and predispositions, and affording due respect to the judgment of a capable testator who appears to have duly considered the claims on his or her testamentary bounty — subject to the qualification that the court's determination is made having regard to the circumstances at the time of the hearing, rather than at the time of the testator's will or death."

34. I have found that reference to the abstract concepts of the “just and wise testator” and “community standards of what is right and appropriate” are an unhelpful tool for the purpose of explaining my assessment of prospects of success, or possible ranges of outcomes when the disappointed eligible person (or the concerned beneficiary) is the audience.

35. A more useful tool for the purpose of client explanation are “general principles” (more recently described as “principles”) which might apply to a particular category of eligible person, as set out in judgments of Hallen J (Family Provision List Judge).

36. But before I set them out, a word of caution, as set out in the judgments of Hallen J (Meres v Meres [2017] NSWSC 285 at [150]):

> “As I have stated in a number of cases (see, for example, Bowditch v NSW Trustee and Guardian), I do not intend what I have described as “principles” or “general principles” to be elevated into rules of law, propositions of universal application, or rigid formulae. Nor do I wish to suggest that the jurisdiction should be unduly confined, or the discretion should be constrained, by statements of principle found in dicta in other decisions, or by preconceptions and predispositions. Decisions of the past do not, and cannot, put any fetters on the discretionary power, which is left largely unfettered. I do not intend a guide to be turned into a tyrant.”

37. In relation to a claim by an adult child, the most recent exposition of principles was in Meres v Meres [2017] NSWSC 285 at [133] as follows:

(a) The relationship between parent and child changes when the child attains adulthood. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.

(b) It is impossible to describe, in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, “…ordinarily the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life - such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where

assets permit and the relationship between the parties is such as to justify it, there might be such an obligation": Taylor v Farrugia, at [57]; McGrath v Eves [2005] NSWSC 1006; Kohari v Snow [2013] NSWSC 452 at [121]; Salmon v Osmond [2015] NSWCA 42 at [109].

(c) Generally, also, "…the community does not expect a parent to look after his or her children for the rest of [the child's life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute": Taylor v Farrugia at [58].

(d) There is no need for an applicant adult child to show some special need or some special claim: McCosker v McCosker; Kleinig v Neal (No 2) at 545; Bondelmonte v Blanckensee [1989] WAR 305; Hawkins v Prestage (1989) 1 WAR 37 at 45 (Nicholson J); Taylor v Farrugia, at 58.

(e) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: MacGregor v MacGregor [2003] WASC 169 at [179]-[182]; Crossman v Riedel [2004] ACTSC 127 at [49]. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life are relevant: Marks v Marks [2003] WASCA 297 at [43]. In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: Christie v Manera [2006] WASC 287; Butcher v Craig [2009] WASC 164 at [17].

(f) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim: Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134; [1979] HCA 2 at 149.

38. In relation to a claim (or competing beneficiary claim) by a spouse the principles were most recently set out in Clark v Ro [2016] NSWSC 1877 at [109] as follows:

(a) As a broad general rule, and in the absence of special circumstances, the general duty of the deceased to his spouse, to the extent to which his assets permit him to do so, is to ensure that she is secure in the matrimonial home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies. Generally speaking, the amount should be sufficient to free her mind from any reasonable fear of any insufficiency as she grows older and her health and strength fail (see: Permanent Trustee Co Ltd v Fraser (1995) 36 NSWLR 24). Concern as to the capacity of the spouse to maintain herself independently, and autonomously, may also bear upon the notion of what is proper provision.

(b) However, what is said above is not of immutable application: Marshall v Carruthers [2002] NSWCA 47; Clifford v Mayr [2010] NSWCA 6 at [142]-[144].

(c) The three elements identified in (a) above are not necessarily mutually independent. The Court is not to approach the assessment of what is proper for a competing claimant by attempting precisely to replicate the way of life that the deceased and his or her spouse planned to have, had he or she survived.

(d) There is binding authority which gives greater weight to the claims of a party who has entered "a formal and binding commitment to mutual support": Marshall v Carruthers; Re the Will of Sitch (deceased); Gillies v Executors of the Will of Sitch [2005] VSC 308; Sellers v Scrivenger [2010] VSC 320 at [68].

39. In relation to claims by grandchildren see Griffiths v Craigie [2014] NSWSC 1339 at [138] as follows:

(a) As a general rule, a grandparent does not have an obligation or responsibility to make provision for a grandchild; that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition.

(b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes a surrogate parent, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come

to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.

(c) The mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created, in a particular case, by reason, for example, of the care and affection provided by a grandchild to his, or her, grandparent.

(d) A pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.

(e) The fact that the grandparent occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the grandparent for the purposes of the Act.

(f) The grandchild's dependence, whether whole or partial, on the grandparent must be direct and immediate; it is not sufficient that the grandchild's dependence is the indirect result of the deceased providing support and maintenance for his, or her, own adult child, and thereby, incidentally, benefiting the deceased's grandchildren who are directly dependent on that child.

(g) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents. Yet, the obligation of a parent to provide for his, or her child does not, necessarily, negate, in an appropriate case, the moral obligation of a grandparent to make provision for the maintenance, education or advancement in life of a grandchild out of her, or his, estate.

(h) The fact that the parents, or either of them, of a grandchild have, or has, predeceased the grandparent may be a relevant factor in support of the claim made by a grandchild.

(i) A relative want of resources in the parent of the grandchild may create an obligation of the deceased towards a grandchild. For example, where the deceased is of ample

means, she or he, reflective of prevailing community standards, might well recognise, in certain circumstances, a duty to make provision out of her, or his, estate for the grandchild who has needs. If the estate or notional estate could satisfy the grandchild's claim without significant adverse impact on the chosen beneficiaries, a duty to provide for the education, maintenance and advancement in life may arise.

40. In relation to claims by a former spouse see Glynne v NSW Trustee and Guardian; Lindsay v NSW Trustee and Guardian [2011] NSWSC 535 at [89] as follows:

(a) "The policy of the law is to promote the finality of settlements of property disputes by orders made in the Family Court or by the amicable division of matrimonial property prior to death.

(b) Another policy of the law is that parties whose marriage has been dissolved, and in respect of whom orders have been made disposing of their matrimonial property, or where there has been an amicable division of that property, should be able to go their own separate ways. Except for the specific cases provided for under the Family Law Act 1975 (Cth), and provided there has been compliance with the orders, or the agreement for amicable division, made, such parties should, thereafter, face no financial obligation, one to the other.

(c) A settlement, whether by order of the Family Court, or by agreement reached amicably, and complied with, however, does not preclude a claim by a former spouse for a family provision order, but, in those circumstances, additional, and different, considerations will arise. The Act gives a specific entitlement to a former spouse to make a claim. That provision contemplates there will be cases where such a claim will succeed, notwithstanding the public policy of the finality of a property settlement.

(d) It is not the task of this Court to go behind the orders made in the Family Court or the amicable agreement of the parties unless a specific basis is advanced for this Court to do so (e.g. fraud).

(e) In every case involving a former spouse, it will be necessary to examine the actual relationship between the two people concerned, as far as possible without preconceptions based only on the fact of the dissolution of their marriage and their property division.

(f) The terms of the parties division of property will be relevant in determining the Plaintiff's needs and the extent to which those needs may have been satisfied in the deceased's lifetime, as will be the length of time from the separation of the former spouse to the death of the deceased, and the course that the lives of the two spouses have followed since separation.

(g) There is a distinction between "factors which warrant the making of the application' and the factors that warrant the making of an order. Merely establishing that an applicant is a former spouse and that she, or he, has a financial need, would not, as such, entitle her, or him, to an order. In addition, even if there are factors that warrant the making of the application, the applicant may fail in establishing that an order for provision should be made.

(h) What has to be decided is whether what is relied upon in the case by the applicant, in association with all other relevant matters, puts her, or him, within the class of persons to whom the deceased had an obligation to make provision."

Court statistics

41. The Supreme Court of NSW has published provisional statistics for the 2016 calendar year as at 25 January 2017[1]. The statistics for Estate Litigation and Protective matters are relevantly:

	Filings 2014	**Filings 2015**	**Filings 2016**
Probate applications	24,526	26,408	26,243
Proceedings in Probate List	212	207	262
Proceedings in Family Provision List	774	972	1,018
Proceedings in Protective List	110	107	81

[1] http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/sco2_statistics.aspx Last accessed on 3 May 2017,

Review of Judgments published between January 2015 and April 2017

42. Mediation is compulsory for Family Provision proceedings “unless otherwise ordered”. Most proceedings resolve prior to hearing. It is not possible to compile statistics for the number of claims filed sorted by category of eligibility.

43. I have reviewed the Judgments picked up by a search of those referring to the Family Provision Act 1982, Probate and Administration Act 1898 and the Succession Act 2006 for the 2015 calendar year, and January 2016 to April 2017. As stated in the introduction there may be estate litigation cases which were not picked up by a search of the legislation referred to, and the purpose of the analysis is to consider a modest cross section of matters over the relevant timeframe.

44. In terms of types of claims decided, the results are summarised as follows:

Claim type	2015	Percentage	Jan 2016 – Apr 2017	Percentage
Family Provision	53	55.2%	43	63.2%
Construction	15	15.6%	2	2.94%
Statutory Will	2	2.08%	0	0%
Order for distribution	2	2.08%	1	1.47%
Interim administrator	3	3.15%	2	2.94%
Informal testamentary document	6	6.25%	3	4.4%
Testamentary capacity/knowledge and approval	10	15.6%	8	11.7%
Enforcement of settlement agreement	0	0%	2	2.94%

Cy pres scheme/charitable gift	0	0%	1	1.47%
Intestacy	0	0%	2	2.94%
Revocation of grant/appointment of new administrator	0	0%	3	4.4%
Accounts/commission	0	0%	3	4.4%
Burial rights	0	0%	1	1.47%
Forfeiture	0	0%	1	1.47%
Total	96		72	

45. The number of judgments in respect of a statutory will application will not be reflective of the number of applications filed. In Fenwick, Re; Application of J.R. Fenwick & Re Charles [2009] NSWSC 530 Palmer J said (at [265]):

> "265 As with decisions made in Chambers in uncontested applications under the Protected Estates Act and the Adoption Act, there is no need for publication of reasons for a decision made in Chambers in straightforward, unopposed applications for a statutory will. Many of such applications will involve minors or mental health issues or matters of concern only to the immediate family members. There is no public interest in publishing reasons for judgment in such cases. Further, the dispensation of the requirement to give reasons in such applications will permit them to be dealt with far more quickly than otherwise. Of course, when an application is contested and heard in open Court, reasons for the decision will be required in the normal way."

46. Within the category of Family Provision, the claims by type of eligibility are as follows:

Eligibility type	**2015**	**Percentage**	**Jan 2016 – Apr 2017**	**Percentage**
Spouse	3	5.66%	2	4.65%

De facto spouse	3	5.66%	1	2.32%
Child	37	69.8%	32	74.4%
Grandchild	2	3.77%	3	6.97%
Dependent member of household	6	11.3%	4	9.3%
Close personal relationship	2	3.77%	0	0
Ex-spouse	0	0%	1	2.32%
Total	53		43	

47. Of the spouse claims:

    a. In the 2015 calendar year there were two successful applications, and one unsuccessful application.

    b. In the period January 2016 to April 2017 both applications were successful.

48. Of the de facto spouse claims:

    a. in the 2015 calendar year there was one successful application, and two unsuccessful applications.

    b. In the period January 2016 to April 2017 the application was successful.

49. Of the child claims:

    a. in the 2015 calendar year there were 20 successful applications, and 17 unsuccessful applications.

    b. In the period January 2016 to April 2017 there were 19 successful applications and 13 applications dismissed.

50. Of the dependent grandchild claims:

    a. in the 2015 calendar year there were 2 successful applications.

    b. In the period January 2016 to April 2017 there were 2 successful applications.

51. Of the dependent member of the household claims:

    a. in the 2015 calendar year there were 2 successful applications and 4 unsuccessful applications.

    b. In the period January 2016 to April 2017 there were 2 successful applications and 2 unsuccessful applications.

52. In 2015 the close personal relationship claim was successful.

Relevance to estate planning

53. The first observation I want to make is the proportion which the number of Family Provision List filings bears to the number of Probate applications is small. This is important to remember when you have cause to advise a testator in respect of their estate planning.

54. It is appropriate when instructed to prepare a Will that you:

    a. take instructions about the testator's family circumstances;

    b. take instructions about the testator's financial circumstances; and

    c. advise as to the existence of and general purport of Family Provision legislation.

55. If the testator's family circumstances and testamentary instructions give rise to an increased risk of a Family Provision claim being brought against his or her estate, it may be appropriate to give more detailed Family Provision advice.

56. But it is important not to over-egg the pudding. If a testator's instructions are that they Will to make a Will without making provision for an eligible person whose circumstances might be considered to give rise to a risk of a Family Provision claim my

view is that the draftsman should not stray into giving advice as to what provision might be considered to be adequate for these reasons:

a. The dispositions set out in a valid Will may only be interfered with if a Family Provision claim is commenced. If a claim is made then the Plaintiff will not agree to resolve the claim for less than what he or she is entitled to under the Will.

b. The choice to commence proceedings is an inherently personal one and making some provision in the Will may or may not influence the prospective plaintiff's decision making. If a claim is commenced, the plaintiff will not settle the proceedings for less than he or she receives in the Will.

c. The circumstances of beneficiaries change over time, and it may be many years between the making of the Will and the testator's death.

Relevance to estate administration

57. Under the Succession Act 2006 the prescribed period for commencing a Family provision claim is 12 months from the date of death. If a claim is brought pursuant to the Family Provision Act 1982 it will now be well out of time.

58. Ordinarily there will be some delay between the date of death and the obtaining of a grant of Probate, and thereafter to the point of bringing in the assets and paying the estate liabilities.

59. Section 92 of the Probate and Administration Act 1898 provides that:

"(1) The executor or administrator of the estate of a testator or an intestate may distribute the assets, or any part of the assets, of that estate among the persons entitled having regard to the claims of beneficiaries (including children conceived but not yet born at the date of the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of which the executor or administrator has notice at the time of distribution if:

(a) the assets are distributed at least 6 months after the testator's or intestate's death, and

(b) the executor or administrator has given notice in the form approved under section 17 of the Civil Procedure Act 2005 that the executor or administrator intends to distribute the assets in the estate after the expiration of a specified time, and

(c) the time specified in the notice is not less than 30 days after the notice is given, and

(d) the time specified in the notice has expired."

60. If an executor or administrator distributes a deceased estate between 6 and 12 months after the date of death, after following the section 92 procedure, the executor will not be at personal risk if a Family Provision claim of which he or she had no notice at the time of distribution is later commenced.

61. The proper procedure in that circumstance is for the beneficiaries holding distributed estate to be joined as defendants to the proceedings and for notional estate orders to be sought against the distributed estate.

62. If that happens, it may be appropriate for the executor to propose that the beneficiaries take carriage of the defence of the claim. The mechanics of facilitating agreement on the carriage of the defence of the claim is a little awkward as those circumstances may not strictly fall within the terms of r7.10(1) of the Uniform Civil Procedure Rules 2005 for the making of an order appointing the beneficiaries to represent the interests of the deceased's estate for the purpose of the proceedings. However, it ought to at least be possible for there to be directions limiting the executor's involvement in the proceedings to the filing of the formal affidavits, and to be excused from attendance at the hearing if the matter proceeds to that stage.

63. If notice of a claim is received prior to distribution of the estate then the executor is at personal risk if a distribution is made prior to the expiry of the prescribed period.

64. The formal way of dealing with a desire to distribute in those circumstances is for the service of a notice pursuant to section 93 of the Probate and Administration Act 1898 and to commence proceedings seeking an order barring the claim after the expiry of three months from the service of that notice.

65. If this is considered to be too costly or inefficient the other way of dealing with the matter may be to write to the prospective plaintiff or his or her solicitors:

    a. requesting that proceedings be commenced within a reasonable time period (which should be stated);

    b. noting that a partial distribution (particulars of which should be stated) will be made on or after that date without further notice in the absence of objection;

    c. requesting that in the event that there is objection to the proposed partial distribution, for the nature of the objection to be stated including by reference to the provision proposed to be sought by the plaintiff from the deceased's estate; and

    d. giving notice that in the event that objection to the proposed distribution remains then judicial advice may be sought pursuant to section 63 of the Trustee Act 1925 that the executor is justified making the distribution proposed.

66. These measures are a little cumbersome. Alternatively if the executor is on notice of a prospective claim but the lines of communication have gone quiet caution dictates that there should be some engagement with the prospective plaintiff notifying him or her of the distribution proposed prior to the end of the prescribed period, and giving a reasonable time period for objection to be received or proceedings otherwise commenced.

67. It is not unreasonable if a claim is threatened but there is no correspondence or proceedings for months for the executor to make a good faith assessment of whether a partial distribution might be appropriate and to act in accordance with his or her own assessment. But whether the executor wishes to pursue this course depends on the executor's tolerance for personal risk.

68. If notice of a prospective claim is received during the prescribed period but months pass and the prescribed period expires, enquiries should be made with the Registry of the Supreme Court of NSW as to whether any proceedings have been commenced. If the answer to that question is no, the executor might then take the view that proceedings although threatened have not been pursued, and that the estate can then be distributed.

69. If that happens:

    a. The fact of distribution may give rise to a prejudice relevant to the question of whether a plaintiff in filing a later claim is able to show “sufficient cause” for proceeding out of time; and

    b. The additional restrictions in section 90 of the Succession Act 2006 come into play, including that “special circumstances” must be shown.

Relevance to estate litigation

70. There are far more Family Provision matters than any other type of equity litigation. There seem to be few decided cases concerning the spouse or de facto spouse. That may be because testators in making Wills and executors in deciding whether to resolve claims at mediation have a fair idea of what provision might be awarded for that category of eligible person.

71. Other claims are more difficult.

72. Children claims, particularly adult children claims, are prevalent.

73. There were two first instance judgments in 2011 (prior to the introduction of the practice note), both delivered at about the same time, both the subject of appeal.

74. The facts of *Bourke v Keep* [2011] NSWSC 88 were as follows:

    a. The late Joyce Winifred Keep died on 29 August 2009, aged 82 years, survived by the plaintiff Marion Burke, her daughter Gwendoline and her son Graham.

    b. By her Will the deceased gave to Gwendoline and Graham in equal shares her house at Hurstville (in which they both lived). The only other asset of the estate was cash of $86,000 which if costs were ordered to be paid out of the deceased’s estate, would evaporate.

    c. Gwendoline was 62 years of age, single with no dependents. She had serious health problems and limited mobility. She had cash savings of $61,000 and received a disability support pension from Centrelink which she used in her expenses.

d. Graham was 55 years of age, single with no dependents. He had a small amount of cash, a 1992 Holden Station wagon worth $4,000 and superannuation worth $8,000. He had a credit card debt of $3,000. He received a newstart allowance from Centrelink. His health was poor.

e. Marion (the plaintiff) was single living in rented accommodation. Her son, who is disabled, did not live with her but stayed with her occasionally. She had various problems. She owned a 2004 Ford Territory worth $16,500, superannuation worth 4380 and shares worth $3,000. There was evidence that she was estranged from the deceased, although the extent and cause of the estrangement is considered in His Honour's Judgment.

75. At first instance the Marion Burke was awarded provision of $200,000 plus her costs on the ordinary basis out of the deceased's estate. On appeal Keep v Bourke [2012] NSWCA 64 the provision was reduced to $175,000 and the plaintiff/respondent was ordered to pay the costs of the appeal.

76. At about the same time, *Andrew v Andrew* [2011] NSWSC 115 was determined. In that case:

a. Lynne Christine Andrew asserted a Family Provision claim against the estate of her late mother, Rita Melba Andrew, who died on 9 March 2009 aged 83.

b. Under her Will, the deceased gave 40% of her home at Chifley to her son, a pecuniary legacy of $10,000 to the plaintiff, and divided the residue of the estate between the defendant and his three other siblings (not including the Plaintiff.

c. The net distributable estate was estimated to have a value of $800,000 (if both parites costs were paid from the estate the amount available for distribution would be $700,000).

d. Again the Plaintiff was found to be estranged from the deceased, but there was no evidence as to the cause of the estrangement.

e. The Plaintiff had no motor vehicle, and no assets to speak of except for a small amount of superannuation. She was not employed, and she wished to continue living in Port Macquarie. She had a son but he did not live with her, and she

shared care of a foster child. Her only income was from her Centrelink Newstart allowance and shared renting a flat with her friend Monica.

77. At first instance the Plaintiff's claim was dismissed. On appeal (Andrew v Andrew [2012] NSWCA 308), the NSW Court of Appeal ordered that the Plaintiff receive an additional legacy of $50,000, and that the plaintiff's costs at first instance, and on appeal, be paid out of the deceased's estate (reserving also the right of the defendant to apply to the trial judge for an order that his costs be paid out of the estate).

78. It is not difficult to see how decisions such as Bourke v Keep and Andrew v Andrew might have caused encouragement for prospective adult children plaintiffs to pursue Family Provision claims. On the other side of the coin, those cases provided encouragement for defendant executors to resolve claims earlier – based on an assessment of the risk, and the costs.

79. Practice Note SC Eq 7 was a welcome response, providing a framework for dealing with these matters in a more cost-effective mechanism.

80. I suggest that the high number of adult children claims *determined* in 2015, and more recently, is because:

    a. the number of Family Provision *filings* have increased over time, as follows[2]:

2007	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
624	641	512	858	803	792	790	774	972	1,018

    b. adult children claims are difficult to assess and claims by other categories of eligible persons are more likely to be resolved prior to hearing.

[2] Supreme Court of NSW Annual Review 2010/11 (<http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/SCO2_annualreviews.aspx>) and Preliminary Statistics 2016 (fn1), both last accessed on 4 May 2017

A selection of recent cases

Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin *[2017] NSWSC 10*

81. The facts of Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin [2017] NSWSC 10 are as follows:

    a. An application for a Family Provision order was made by Magdalena Lodin, the former spouse of the late Dr Mohammad Masoud Lodin who died between 9 and 12 June 2014 aged 65 years.

    b. Dr Lodin's estate, estimated to have a value of about $5,000,000, devolved to the daughter of the marriage Rebecca Lodin, on intestacy.

    c. In May 1984 the plaintiff consulted with the deceased, as medical practitioner. After a period spending some time together socially, they commenced a sexual relationship in December 1984. They married in September 1988 and cohabited, but they separated 18 months later.

    d. The deceased paid some child maintenance, and school fees. There was a property settlement by which the plaintiff ultimately received $55,000 and a car. No order for costs was made, on the basis that the deceased had understated his income (but not deliberately).

    e. The plaintiff made a complaint to the NSW Health Department Complaints Unit in 1993, based on an allegation that he had engaged in an inappropriate sexual relationship with her when she was his patient. The Plaintiff later made different allegations to the Police, which were not pursued. His Honour described (at [79]) the plaintiff's attitude to the deceased as "one of relentless hostility, and she carried into effect as best she could her stated aim of making his life a misery, pursuing him and his resources in every way she could – through reviews of child support, professional discipline, and actions for damages."

    f. The deceased and the plaintiff were divorced in 1995.

    g. The deceased paid child support for Rebecca, which increased over time until she was 18.

h. In 2007 the Plaintiff asked the deceased to pay her spousal maintenance to which he declined.

i. At the time of hearing the Plaintiff was 62 years of age and had assets valued at about $300,000. She resided in a one bedroom unit in Katoomba which she rented for $269 per week. She received a disability support pension. She suffered from diabetes, chronic pain and restrictions from her spinal injuries.

j. The defendant Rebecca left her mother's home in 2007 and had little to do with her subsequently. She did not have contact with the deceased until she received a letter from him in 2014.

k. At the time of hearing the defendant was a research and development engineer and received a salary of $1,436 per week gross. Her partner was a chemical metrologist on a salary of $1,392 per week gross. They had combined assets of $200,000, and no liabilities.

l. The plaintiff submitted that the deceased's understatement of income in the property settlement proceedings amounted to fraud, and a miscarriage of justice. His Honour did not accept these submissions.

m. The plaintiff further submitted that the deceased by should atone for his professional misconduct by the award of provision from his estate. This submission was not expressed to be persuasive.

n. His Honour found that:

    i. The marriage and breakdown had an unusually enduring impact on the plaintiff.

    ii. The assessment of Rourke J in the property settlement proceedings was not borne out by subsequent events. The plaintiff was far worse off than his Honour had predicted. She bore the psychological scars of the relationship, and was restricted in her earning capacity by the need to care for Rebecca. While the plaintiff struggled, the deceased prospered, untrammelled by his responsibility for his wife and child.

iii. The deceased's estate comprised ample resources to make adequate provision for the plaintiff, and to still provide a most substantial endowment for the defendant.

82. Brereton J ordered that the plaintiff receive provision of $750,000, calculated to assist her (with the benefit of her own savings) to purchase a two bedroom cottage in the Blue Mountains, to assist her with medical expenses and to leave a small amount for contingencies. The plaintiff's costs were ordered to be paid out of the deceased's estate.

83. I understand that a Notice of Appeal has been filed. The outcome is certainly outside of the band of outcomes that might apply according to the principles generally applicable to former spouses stated above. But those principles must yield to the circumstances in the appropriate case. I tend to the view that *having established factors warranting* the outcome is not outside of the range of provision which might be awarded having regard to:

a. The family dynamics: the competing beneficiary was the daughter of the deceased and the plaintiff.

b. The way in which the plaintiff's poor conduct towards the deceased comes through in the judgment by reference to the relationship history and medical observations.

c. The size of the deceased's estate.

d. The fact that the remaining estate is more than sufficient to provide adequately for the competing beneficiary.

Chan v Chan [2016] NSWCA 222

84. The facts of Chan v Chan [2016] NSWCA 222 were as follows:

a. The late August Chan died on 29 January 2011. His estate was estimated to have a value of between $9,000,000 and $15,000,000.

b. He was survived by four daughters and two sons.

c. Under the Will the appellant Clement Chan was entitled to receive a house in which he was then living at Robert Street, Gordon, and a legacy of $50,000.

d. At first instance (Beatrice McCleary v Metlik Investments Pty Ltd; Beatrice McCleary v Benedict Chan; Clement Chan v Benedict Chan [2015] NSWSC 1043) two of the daughters brought claims against a discretionary trust, and they each also brought Family Provision claims. However after the proceedings were commenced, but before the hearing, the trust made a substantial distribution to each of the daughters, and at the hearing their claims were dismissed.

e. The claim of Clement Chan was also dismissed at first instance.

f. Clement Chan was 65 years old at the time of the hearing. He had a history of dependence on the deceased. He was divorced, and he had no dependents.

g. The residuary beneficiary Benedict Chan filed evidence of the closeness of his relationship with the deceased, but not of his financial circumstances.

h. The medical evidence regarding Clement Chan was as follows (as set out at paragraph [8] and following of the judgment of Basten JA):

> [8] The trial judge summarised her evidence in the following terms:
> "Ms Longley reported that Clement Chan's level of intellectual functioning was estimated to fall within the low average/borderline range. That is to say, his overall intelligence quotient fell within the bottom 18% of the general population. She noted that he showed relative strengths in the areas of general knowledge, 'common sense' concepts, and arithmetical problem solving. However, his processing speed was extremely slow and he was particularly poor at understanding abstract concepts. In the section of her report dealing with practical implications, Ms Longley stated that she would expect him to struggle to competently self-manage any large sums of money or investments. She further stated, however, that he should be capable of learning a system of managing his own daily and monthly finances if a trusted financial manager or close family member could set up a practical management system for him and check on his progress with it. She further stated that it is likely that his unsophisticated understanding of the world might make him vulnerable to be exploited financially."

[9] The appellant had also been assessed by Dr Bruce Westmore, a forensic psychiatrist, who was later provided with a copy of the psychological report prepared by Ms Longley. Dr Westmore prepared a supplementary report dated 24 June 2014 which agreed with Ms Longley's assessment, but added some further opinions. One of the issues Dr Westmore addressed was the possibility that the appellant might move out of the Robert Street property into more suitable accommodation:

"I understand that Mr Chan has lived in his current accommodation for many years, in fact since 1990. Should Mr Chan be required to relocate from this particular accommodation, it will obviously be very difficult and stressful for him. Moving home is recognised as one of the major life events and it can affect anyone and everyone who is required to move home, but the impact of such a move is obviously greater if somebody has lived in a particular accommodation for many years and if they are comfortable and happy in that accommodation.

If one considers Mr Chan's psychological and intellectual difficulties, then moving out of his long term accommodation will be stressful and difficult for him. ...

In addition, as Mr Chan ages, any place of residence is likely to require regular maintenance and perhaps modifications. Mr Chan, because of his intellectual problems, is likely to have problems prioritising maintenance needs and he will have problems recognising that some situations might be more 'urgent' than others. In that regard, he is also going to require support, assistance and advice."

i. With respect to Clement Chan's accommodation, Basten JA said:

[18] … On the one hand, the Robert Street, Gordon property is undoubtedly too large for the appellant's needs and it is well beyond his capacity to maintain it. Part of the roof has fallen in; toilets and bathrooms do not work. There is clearly an urgent need for both maintenance and structural repair.

[19] On the other hand, the appellant expressed an unwillingness to move and a disbelief in the availability of alternative satisfactory accommodation, within his price range.

j. His Honour summarised the boundaries of the debate at first instance as follows:

> [26] (…) in leaving to the appellant the Robert Street property, the deceased effectively (and properly) recognised that the appellant had substantial needs for financial support and assistance which the deceased had met throughout his life. However, accepting that proposition, the appellant said, in substance, that he had been provided with accommodation, but not the means to maintain it or support himself in it. Thus, it was now clear, and indeed would have been at the date of the testator's death, that the legacy of $50,000 was nowhere near sufficient and, indeed, was not an equivalent figure to that which the deceased had provided for the appellant, whilst alive.
>
> [27] The countervailing proposition was that there was no obligation on the appellant to retain the house, nor did he have a need for the house. If the house were to be sold and appropriate alternative accommodation purchased, the appellant would have been adequately provided for. On that approach, it was wrong to see the appellant as having financial needs extending to the cost of repair and maintenance of the Robert Street property.
>
> [28] The trial judge accepted the latter approach, which was that put forward by the respondent. The judge supported that conclusion with the following calculations:
>
> "There was evidence that good quality two bedroom units in Gordon, close to the shops and public transport, could be purchased for between about $760,000 and $850,000, and one bedroom units in the area from about $575,000. If it is assumed that the Gordon property was sold for $1.7 million, a capital gains tax liability (as agreed between the parties) of about $240,000 would be payable. If net proceeds of sale (after payment of capital gains tax) of about $1.4 million is assumed, it would appear feasible for Clement Chan to acquire a two bedroom unit in the area and still be left with a fund well in excess of $500,000. Such a fund could be used to supplement income, meet special items of expenditure, or as a buffer against contingencies. It could be utilised to acquire some of the services which Ms Alcock referred to in her evidence, including domestic help and nursing support services."

85. The appeal was allowed. Basten JA said:

> [38] In an otherwise careful and considered judgment, dealing with a multitude of issues, and involving three separate proceedings, it should be accepted that

> the judge erred in so far as he determined the adequacy of the provision made by the appellant's father by reference to the appellant's objectively assessed financial need, divorced from the size of the estate and the claims of the only competing beneficiary. According to the assessment of the value of the estate at the time of Mr Chan's death, the appellant received 12.3% of the value and his brother 87.7%. It may be accepted that the respondent should properly retain the bulk of the estate, in part because he had looked after their father in his last few years and also because he had played an important role in managing the business which gave rise to his father's wealth. That is not to say that the respondent was not remunerated for his services along the way, nor that it is possible to place any proportionate benefit on his involvement. Certainly he did not proffer evidence to that end. On the other hand, the degree of functional impairment suffered by the appellant demonstrated a real need which should properly have been met from the estate. The appellant was living in a house which was barely habitable. He was clearly not in a position to obtain the assistance he needed in managing the property, nor that required for managing his own life. In assessing those needs, the Robert Street house provided during the testator's lifetime, should not have been treated as an asset which should be sold upon the testator's death, to justify rejecting a claim against his estate.

86. The appellant relied on evidence of a building consultant as to the cost of repairs to the house at Gordon. He estimated that the cost of repairs would be $529,000.

87. Additional provision of $700,000 was awarded, representing less than 20% of the estimated value of the deceased's estate. The respondent was ordered to pay the appellants costs of the appeal and of the first instance hearing. Simpson JA and Payne JA agreed.

Petkovic v Koutalianos [2016] NSWSC 1817

88. The facts of Petkovic v Koutalianos [2016] NSWSC 1817 were as follows:

    a. The Plaintiff and the Defendant were the daughters of the late Andronicki Koutalianos who died on 11 December 2014.

    b. The deceased's estate consisted of a property at Kingsgrove (estimated to have a value of $970,000) and little else.

    c. Hallen J described the family and living arrangements of the parties as follows:

[15] “The family lived what is described by the Defendant as “a very simple life”.

[16] The deceased lived in the Kingsgrove property until about 2012, when she was moved to a nursing home at Bexley. She later moved to a high care facility at Kogarah.

[17] In 1983, the Plaintiff left the family home and married Danny Papadopoulos. Their only son, Christopher, was born in September 1983. (He has played no part in these proceedings although he is an eligible person to whom I shall refer.)

[18] The Plaintiff and her first husband separated in 1985, following which she moved back, with Christopher, into the Kingsgrove property with her parents and the Defendant. The Plaintiff remained living there, with the other family members, until she married Zoran Petkovic, in September 1996. However, Christopher did not leave the Kingsgrove property until about 1998. He returned to live there, on occasions, subsequently.

[19] There were two children of the Plaintiff’s marriage to her second husband, namely, Aleksander, who was born in November 1997, and Nikki, who was born in January 2000. They continue to live with the Plaintiff. They, also, have played no part in these proceedings and it is not suggested that either is an eligible person.

[20] In 2003, the Plaintiff and her own family moved to a property at Umina Beach, on the Central Coast of New South Wales. The Umina Beach property was purchased, as to a 1/100th share, in the name of the Plaintiff, and, as to a 99/100th share, in the name of her husband. Title remains registered in this way. Together they built a house on the block and the Plaintiff and her two children continue to live there.

[21] The Plaintiff remains married to her second husband, although they are now separated. He left the Umina Beach property in about July 2015, although they separated in July 2014 (Ex. 1). The Plaintiff says that their marriage has broken down irretrievably.

[22] There is a dispute about the current value of the Umina Beach property, to which dispute I shall return later in these reasons.

[23] The Defendant lived with her parents, and then with the deceased, for her entire life. She has never moved out of the home in which the family has lived, to live alone or to live with anyone else. She continues to reside in the Kingsgrove property. She has no husband, de facto partner, or children."

d. As to representation of the Defendant, his Honour said:

[36] The Defendant was self-represented for four of the first five directions hearings. Subsequently, the Defendant's counsel and their instructing solicitors appeared for the Defendant on a pro bono basis up to, and including, a mediation which was held on 11 July 2016. After the failed mediation, the Court was informed that they would continue to represent the Defendant, who will continue to have no personal liability to either for any costs.

e. As to the Plaintiff's financial circumstances, his Honour said:

[105] The Plaintiff currently lives in the Umina Beach property. She is secure in that accommodation. She has a Holden Cruz motor vehicle, cash at the bank and other assets of $36,613. She also has superannuation of $29,566.

[106] Apart from a small credit card debt ($1,400), she has a personal loan ($44,222), part of which has been used to pay her lawyers in these proceedings.

[107] There was a dispute about the current value of the Umina Beach property, the Plaintiff asserting that it was $750,000 and the Defendant asserting (by reference to what appears in documents submitted to the Local Court at Woy Woy), that in April 2016 it was worth $805,000.

[108] The Plaintiff gave evidence that she and her husband had simply agreed on its value at that time and that they did not obtain any evidence of the property's value. However, in the document that both signed, a copy of which was tendered as Ex. 1, the Plaintiff had stated that "[w]here I give any estimate in this application, it is based on knowledge, information and belief and is given in good faith".

[109] On 11 July 2015, the Plaintiff and her husband finally separated. She says that they have entered into a property settlement even though they are not yet divorced. Orders were made on 17 May 2016 pursuant to the *Family Law Act 1975* (Cth) by the Local Court of New South Wales, at Woy Woy, giving effect to their property settlement.

[110] Relevantly, those Orders provided that on the Plaintiff's husband reaching the age of 55 years (in April 2018), he is to do all things necessary to pay half of his lump sum benefit received on commutation of his superannuation to the Plaintiff, which half is currently estimated to be approximately $359,000.

[111] On payment of that sum to her, the Plaintiff is to reduce the debt secured by the mortgage on the Umina Beach property (currently $503,727) and is to pay any balance from her own funds. On her doing so, her husband is to transfer all of his right, title and interest in the Umina Beach property to her.

[112] Should the Plaintiff fail to pay the balance of the debt secured by the mortgage within six months of receiving the payment from her husband, the Umina Beach property is to be sold and the net sale proceeds after, inter alia, repayment of the debt secured by the mortgage is to be provided to the Plaintiff.

[113] The Plaintiff estimates that the amount that she will need to pay out the balance of the debt secured by the mortgage, in April 2018, will be $121,988.

[114] Additionally, the Plaintiff and her husband have agreed, although the agreement has not been reduced to writing, that her husband will make the monthly mortgage repayments of $2,687 on the Umina Beach property in lieu of child support payments, which were assessed by the Child Support Agency, in December 2015, to be $1,285 per month.

f. As to the Defendant's financial circumstances, his Honour said:

[124] Currently, and excluding the Kingsgrove property, the Defendant has no accessible assets of any value. She is reliant on the Newstart Allowance of $504 per fortnight. There was evidence (Ex. F) that the annual income that the Defendant receives is $13,106, and that the cost of the services for which she pays in relation to the Kingsgrove property (council rates, electricity, water

rates, insurance and telephone) is $5,172. (It may be that if the Kingsgrove property is transmitted into the Defendant's name, her expenditure for rates will decrease.) Therefore, after the payment of the expenses for the Kingsgrove property, she has available for all other expenses about $152 per week.

[125] The Defendant gave evidence about her superannuation in her affidavits, which evidence was wrong. (I am satisfied that she did not give the erroneous evidence with the intention of misleading the Court but because she appears to be financially unsophisticated. In addition, since she believed that she could not get access to the superannuation funds until she reached 60 years of age, I am satisfied that she did not pay attention to the documents that she had received.)

The copy of Annual Statements produced by State Super SAS Trustee, for the years ending 30 June 2014 (Ex. B), 30 June 2015 (Ex. C) and 30 June 2016 (Ex. D) reveal that the immediate lump sum payment and the deferred lump sum payment has increased from about $85,012 to $149,600.

89. The following part of the Plaintiff's cross examination is set out in his Honour's judgment:

"HIS HONOUR
Q. As I understand the submissions made on your behalf
A. Yes.
Q. at least one element of what you are seeking is sufficient to enable you to pay off what you estimate the mortgage secured on the house will be?
A. Yes.
...
Q. At least since 1984, she's lived in the Kingsgrove property. You lived in the Umina Beach property since 2004, I think you told me earlier. So, the effect of what you're seeking is that the house in which you live should be retained but the house in which she has lived for many years more should not be retained, is that the effect of what you're seeking?
A. She, I just, I wanted something that's small. It's crumbling down. It's, it's, it's very (witness indicated).
Q. It's very?
A. It's, it's very old. It's crumbling down. The carpet stinks. There's holes in the

kitchen. Wind comes through in winter. The bathroom is in disrepair. She can't maintain it."

90. His Honour dismissed the Summons and made no order as to the costs of either party.

91. The nature of Family Provision matters is that no two cases will have identical facts, and so comparison of outcomes may not be productive. Bearing that in mind, and with respect, compare Bourke v Keep [2011] NSWSC 88/Keep v Bourke [2012] NSWCA 64.

Mead v Lemon [2015] WASC 71

92. The facts of Mead v Lemon [2015] WASC 71 were as follows:

a. As set out in paragraph [1] of his Honour's Judgment: The plaintiff was the daughter of the late Michael John Maynard Wright (the deceased). The deceased died on 26 April 2012 aged 74. He was survived by his wife Mary whom he married on 2 May 1997. He was survived by three adult children born of his earlier marriage to Jennifer Turner. The second defendant was born on 28 August 1971. The third defendant was born on 18 December 1973. The deceased's son Myles who is not a party to these proceedings is the other adult child. The deceased's three earlier wives (from whom he had been divorced) survived him. The plaintiff was born on 3 September 1995 from a relationship with Elizabeth Anne Mead.

b. The deceased's estate was estimated to have a value between $400m and $1bn.

c. The Plaintiff was 20 years old at time of hearing.

d. The Will contained provision for the Plaintiff in the form annexed to this paper and marked "A".

e. His Honour described the Plaintiff's evidence as follows:

> "[42] As part of the plaintiff's case evidence from an actuary was produced. I will deal with this evidence in due course. However, as part of preparing that evidence the plaintiff's solicitors asked the plaintiff to specify expenditure she was likely to make for the rest of her life. That was a big task for a 19 year old girl. She specified expenditure on some items which were clearly fanciful. For instance the plaintiff has a keen interest in music and learned to play the guitar. When specifying what guitar she might purchase if she had funds available she specified a guitar valued at $250,000. No one needs a guitar of

that value - particularly a 19 year old girl who is not now and never will be a professional musician and who has not had guitar lessons for some years. There were other items in a similar vein.

[43] Counsel for the defendants was particularly effective in drawing attention to the fact the plaintiff's likely expenditure throughout her life was overstated. But I was not left with the impression the plaintiff was a gold digger or in some way a narcissistic greedy individual. Faced with a question about what guitar she might like she let her imagination run wild. A 19 year old boy in the same position would probably, when asked about a car, have nominated a Ferrari or a Lamborghini. I do not draw any adverse inferences against the plaintiff consequent upon her answers to her solicitor's inquiries.

[44] What did emerge from the evidence was the plaintiff was a 19 year old woman who faced all the uncertainties and possibilities of a young adult in today's world. Upon completing a one year bridging course she enrolled to study commerce at Notre Dame University. She then changed her mind and is now studying for a Bachelor of Arts Degree with a double major in media and marketing and public relations. She had no real idea of what career path she would follow. She anticipated undertaking postgraduate studies but there was no certainty she would be in a position to do so. She hoped to live either in the Eastern States or overseas for a period but she had no concrete plans and much would depend on her academic results. No doubt this case and the uncertainty in her life as a consequence made formulating any plans difficult.

[45] The plaintiff did say she had a boyfriend whom she hoped to marry within the next two years. She anticipated having four children. Of course it is possible after one child she might reconsider; most sensible people do. Alternatively the joys of motherhood might be such that she may have six children. The point about all of this is the plaintiff's future is uncertain. Attempting to speculate now where she may be in two years' time, let alone in 50 or 60 years' time is impossible. Her relationship with her boyfriend may break down. She may decide media, marketing or public relations is not for her. The possibilities are endless. All that can be said is based upon the affidavit material she filed and the way she handled herself in cross-examination the plaintiff is a well-balanced, reasonably intelligent 19 year old. She has a life in front of her the same as any other 19 year old. Beyond that trite statement nothing is certain."

f. There was evidence of an actuary (paragraph 49) that the amount needed to provide for the plaintiff during her lifetime was $20,528,500 on the 3% discount scales and $15,371,000 on the 5% discount scales.

g. The Defendants conceded that any award would have no effect whatsoever on the beneficiaries under the Will (a privileged position to be in – but a difficult one to defend).

93. Master Sanderson said as follows:

> [11] "Much judicial ink has been split attempting to define what is meant by the expression 'adequate provision' in the section. In the end all that can be said is what is adequate depends on the circumstances of the case - the size of the estate, the nature of the relationship between the claimant and the deceased, the claimant's present circumstances and other legitimate claims. Any attempt to refine the meaning of this section runs the risk of putting a gloss on the statute."

94. As to the provision for the Plaintiff in the Will, his Honour said:

> [30] "…the whole structure is unwieldy. To have her fate in the hands of a man she had never met and who had close ties with other family members is unreasonable. How could the first defendant be expected to understand the wants and needs of a 19 year old girl living in Perth's outer suburbs when he was a solicitor in Sydney? How was the first defendant to ensure the plaintiff did not fall foul of any of the provisions of cl 14? The terms of the Trust make it incumbent upon him to ensure the plaintiff did not breach any of the terms of that clause. The first defendant may well have had a philosophy that it was best to retain earnings in the Trust so that when the plaintiff turned 30 she would come into a substantial fortune. All of that is uncertain. The whole system is unworkable."

95. As to the award of provision his Honour said:

> "[62] …When it comes to exercising a discretion three factors are consistently found in the cases - the size of the estate, the needs of the plaintiff and the interests of other parties having a legitimate call on the bounty of the deceased. From time to time other factors arise in particular cases. But these themes are universally present. The weight to be given to each of these factors varies between the cases, as is to be expected. But the result is always what might be called a triangulation - a balancing exercise within the reference points provided by the three factors. But this case is

different. The estate is massive and its value irrelevant in determining the outcome. No other individual will be prejudiced no matter what award (within reason) I make. That means there is no way of triangulating here; put another way, there are no factors to weigh in the balance. There are no markers for an exercise of discretion.

[64] In the exercise of my discretion I would award to the plaintiff a cash payment of $25 million conditional upon her forfeiting any right or interest in the Trust. Subject to hearing from the parties that amount ought be paid to the plaintiff within 60 days.

[65] …Even in this day and age $25 million is a considerable amount of money. But in the context of this estate it is little more than a rounding error."

96. I understand that an appeal is pending.

Other references for 2016 to April 2017

97. Spata v Tumino; Estate of Gina Spats [2017] NSWSC 111 – claim by stepson dismissed. See paragraphs [48] to [73] in relation to membership of the household and dependency.

98. Woodleigh v Williams [2016] NSWSC 979 – claim against notional estate dismissed.

99. Sellak v Sellak, estate of the late Corrado Simon Sellak; Sellak v Sellak (No 2) [2016] NSWSC 396 paragraphs [89] to [97] for an example of how the Court might approach obtaining submissions/evidence regarding the minor beneficiaries if the parties do not volunteer this evidence.

100. Kohari v NSW Trustee & Guardian [2016] NSWSC 1372, being an application for orders under s 26 of the Status of Children Act 1996 that there be a DNA test to determine parentage of plaintiff who claimed to be a child of the deceased.

101. Revell v Revell [2016] NSWSC 947 in which Pembroke J ordered that the plaintiff's costs be paid out of the deceased's estate on the ordinary basis, notwithstanding dismissal of his claim. The costs orders were later amended by consent of the parties.

102. Bremner v Graham [2016] NSWSC 633 on the claim by the deceased's mother, and provision of $38,000 awarded notwithstanding the mother's bankruptcy.

Closing

103. A cross-section review of cases over a few years is relevant to an understanding of what types of matters are running to hearing. The principles generally applicable to cases for a

particular category of eligibility is a helpful tool for the purpose of client explanation. But comparison of outcomes demonstrates that the principles generally applicable must yield where appropriate. For me the key to client explanation is that once eligibility is established, the Court has a discretion as to the outcome. Finally, the two stage test continues to apply but I am not sure that it matters a great deal beyond the fact that the plaintiff bears the onus of establishing that the Court ought to grant provision.

Craig Birtles
13 Wentworth Selborne Chambers
13/174-180 Phillip Street
SYDNEY NSW 2000
Ph: 9232 7750
Email: cbirtles@wentworthchambers.com.au

13 May 2017

ANNEXURE A

(E) Olivia Trust No. 2

(a) I note that I have given to the trustee of the trust called the Olivia Trust No 2 dated 18 April 2007 between Peter Cornelius Beekink as Settlor and me, Michael John Maynard Wright, as trustee (the 'Trust' as amended, supplemented, novated or replaced from time to time), sufficient funds to purchase a commercial building in Peel Street, O'Connor for $720,000 (which I currently rent from the Trust) plus $20,000.00 in cash. I note that periodically I place surplus cash on deposit with the trust at interest but on call;

(b) I propose to make 5 annual payments to the trustee of the Olivia Trust No 2 to increase the trust fund up to a maximum amount of $3 million in cash and/or property. These annual payments will be increased annually by the CPI increase;

(c) if I die prior to making all of those annual payments, and for so long as Olivia Mead is a beneficiary under the Olivia Trust No 2, to pay the balance of those 5 annual payments to the trustee of the Olivia Trust No 2 as if I were alive but only up to a maximum amount of $3 million (subject to CPI Increase) in cash and/or property inclusive of any amounts paid into that trust under Clause 3 above, as well as any loans I may have made to the Trust under Clause 6A(c)(i)(E)(a) above to which I waive repayment,

(d) subject to clause 6A(c)(i)(E)(b) and (c), the amount of the last payment I make to the trustee of the Olivia Trust No 2 before my death will be the amount of each of the balance of these payments to the trustee of the Olivia Trust No 2 under my Will;

(e) the amount of each payment referred to in clause 6A(c)(i)(E)(c) will be increased annually by the CPI increase;

(f) it is my belief that the payments contributed generally in support of Olivia Mead and to the trustee of the Olivia Trust No 2 during my lifetime (in this regard my Trustees should have my personal records to ascertain the extent of my support to Olivia Mead and provide evidence of this support to such persons as they consider appropriate) and the provision for further contributions to the trustee of the Olivia Trust No 2 after my death, are such as to provide for the adequate and proper maintenance, support, education and advancement in the life of Olivia Mead;

(g) for the purposes of this clause 6A(c)(i)(E) only:

CPI means the Consumer Price Index - All Groups for Perth, Western Australia, published by the Australian Bureau of Statistics, or any index which officially replaces it. If no index officially replaces it, the trustees will arrange for an expert to assess what it would have been

CPI Increase means the figure determined by dividing the current CPI by the previous CPI

Current CPI means the CPI number for the quarter ending immediately before the relevant payment

Previous CPI means the CPI for the quarter ending immediately before the payment immediately preceding the payment to be increased by the CPI increase

(The reference to the 'Olivia No. 2 Trust dated 18 April 2007' should be a reference to the Olivia Trust No 2 dated 18 April 2008. This was a typographical error and was acknowledged as such by the first defendant in his affidavit.)

15 To make sense of this clause it is necessary to refer to the provisions of the Trust Deed itself.

16 In some ways the Trust is a classic family discretionary trust; but in some respects it is highly idiosyncratic. Under the heading 'Background' there is a recital to the following effect:

One of the main objectives of the Olivia Trust No 2 is to provide for the advancement and benefit of Olivia Mead.

17 In the definition section, 'Vesting Date' is effectively the date upon which the plaintiff turns 30. However, there is an extended definition found in cl 5 of the Deed. It is in the following terms:

5. **Trust Fund at the Vesting Date**
5.1 If the Vesting Day is:

5.1.1 The date on which Olivia Mead attains the age of 30 years and:

(a) Olivia Mead satisfies the Trustee (acting reasonably) that she is the natural daughter of Michael John Maynard Wright, and

(b) Olivia Mead is not an Excluded Person,

the whole of the Trust Fund will vest in Olivia Mead.

5.1.2 After the date of Olivia Mead's death and:

(a) Olivia Mead has not attained the age of 30 years; and

(b) Michael John Maynard Wright is still alive,

the whole of the Trust Fund will vest in Michael John Maynard Wright.

5.1.3 After the date of Olivia Mead's death and:

(a) Olivia Mead has not attained the age of 30 years; and

(b) Michael John Maynard Wright is dead,

the whole of the Trust Fund will vest in the executor of the will of Michael John Maynard Wright to be held in accordance with the terms of the distribution of his estate.

5.1.4 any other date than those referred to in clauses 5.1.1 5.1.3 the Trustee has a discretion to pay or apply the entire amount, in such shares as the Trustee determines, to or for the benefit of one or more of the Beneficiaries (to the exclusion of the others) who are alive or in existence on the Vesting Date and if there are no Designated Beneficiaries then eligible, the whole of the Trust Fund shall vest in the executor of the will or personal representative of Michael John Maynard Wright to be held in accordance with the terms for the distribution of his estate.

18 The plaintiff is and always has been a beneficiary under the Trust. However, there is an extended definition of the term 'Beneficiary' found in the Deed. It reads as follows:

Beneficiary means any of the following:

(a) Olivia Mead, Michael John Maynard Wright, any other person nominated in writing by Michael John Maynard Wright personally (**Designated Beneficiaries**);

(b) any company in which any one or more of the Designated Beneficiaries, either directly or indirectly through one or more interposed entities:

- holds a controlling interest; or

- holds or is beneficially entitled to more than 50% of the voting power in the company or to rights to more than 50% of any dividends or any distribution of capital either on a return of capital or on a winding up,

(but only until such Designated Beneficiary becomes an Excluded Person) excluding

- the Settlor;
- any person in the capacity as trustee of any other trust to the extent that a distribution to that trustee would infringe the rule against perpetuities; and
- any Excluded Person.

(c) Any trust, association or company formed for charitable purposes.

19 The expression 'Excluded Person' which is referred to in cl 5 is defined in the definition section but more extensively defined in cl 14. That clause is in the following terms:

14. **Excluding Beneficiaries**
Excluded Persons

14.1 Any person whether a Designated Beneficiary or not who:

14.1.1 if Michael John Maynard Wright at any time before the Vesting Date, declares that person or class of persons is or are an Excluded Person;

14.1.2 is a child of Olivia Mead;

14.1.3 has become an alcoholic and/or whose capacity for rational behaviour in a competent and satisfactory manner has been impacted by alcohol;

14.1.4 has at any time suffered a conviction relating to drugs, their use or any other illegal association therewith in any recognised form;

14.1.5 is or has been in the opinion of my Trustees recently suspected or knowingly had any involvement or association whatsoever in relation to illegal drugs;

14.1.6 in the opinion of my Trustees has become a drug addict or become involved with illegal drugs in the manner described in the preceding subclauses as a result of the legal use of drugs fur any reason whatsoever;

14.1.7 is in the opinion of my Trustees a member of or in any other way involved with any religious body other than the Roman Catholic, Anglican, Presbyterian, Baptist, Uniting or other similar traditional faiths; or

14.1.8 has been convicted of a felony at any time after the death of Michael John Maynard Wright or within 10 years preceding the death of Michael John Maynard Wright,

will be an Excluded Person and, as such, will be excluded as a Beneficiary under this Deed.

Effect of declaration

14.2 A declaration in accordance with, or exclusion under, clause 14.1 takes effect on the date specified in the declaration or the occurrence of the relevant event (as the case may be) and continues to have effect thereafter. However, such declarations and events do not derogate from any interest in the Trust Fund to which any Beneficiary is indefeasibly entitled on or before the date of the declaration.

Declaration revocable unless otherwise specified

14.3 A declaration or opinion made in accordance with clause 14.1 may be revoked at any time before the Vesting Date, unless Michael John Maynard Wright specifies at the time of making the declaration or opinion that it is to be irrevocable.

20 The appointor of the Trust was the deceased. Pursuant to cl 7.1 of the Deed upon the death of the deceased his executor, the first defendant, became the appointor. He also became trustee of the Trust with power to appoint another trustee if he wished (cl 7.2). The Trust Deed contained provisions dealing with how the income of the Trust Fund was to be distributed and how the trustees were to deal with the capital of the Trust. Both are of some importance and I will quote each clause in full:

3. **Income of the Trust Fund**
Distributable Income

3.1 Notwithstanding the definition of Distributable Income in clause 1.1, the Trustee has a discretion to determine the amount of the Distributable Income of the Trust Fund with respect to an Accounting Period. Subject to the exercise of this discretion, the amount of the Distributable Income with respect to an Accounting Period is whichever is the greater of Trust Income or Tax Income for that Accounting Period.

Trustee's discretion

3.2 In relation to the Distributable Income of the Trust Fund, the Trustee has a discretion either:

3.2. 1 to pay or apply all or part of the Distributable Income as or for the benefit of Olivia Mead and in particular for her education (to the date Olivia Mead attains the age of 23 years or the attainment of her first tertiary qualification, whichever is the earlier to occur), maintenance, health and medical expenses;

3.2.2 to pay or apply all or part of the Distributable Income, in such shares as the Trustee determines, to or for the benefit of one or more of the Beneficiaries (to the exclusion of the others) who are alive or in existence from time to time; or

3.2.3 to accumulate all or part of the Distributable Income.

Exercise of Trustee's discretion

3.3 On or before the last day of each Accounting Period until the Vesting Date, the Trustee may exercise its discretion under clause 3.2 in respect of part or the entire Distributable Income of the Trust Fund for that Accounting Period.

Failure to exercise discretion

3.4 Where the Trustee fails to exercise its discretion in accordance with clause 3.3 in respect of all or any part of the Distributable Income of the Trust Fund for an Accounting Period (**unallocated amount**), the Trustee is deemed to have accumulated the Distributable Income.

Exercise of discretion irrevocable

3.5 Where the Trustee has exercised its discretion in accordance with clause 3.3 or is deemed to have exercised its discretion in accordance with clause 3.4 that exercise of discretion is irrevocable.

4. **Capital of the Trust Fund**
Trustee's discretion

4.1 In relation to the Capital of the Trust Fund, the Trustee or Michael John Maynard Wright has a discretion to pay or apply all or part of the Capital, in such shares as the Trustee or Michael John Maynard Wright determines, to or for the benefit of one or more of the Beneficiaries (to the

exclusion of the others) who are alive or in existence from time to time.

Exercise of Trustee's discretion

4.2 Without:

4.2.1 limiting clause 4.1, it is the intention and wish of the Trustee and the Appointor as at the date of this Deed that there will not be any vesting of any of the capital of Trust Fund [sic] upon Olivia Mead until both of the following events have occurred:

(a) Michael John Maynard Wright has died; and

(b) Olivia Mead has attained the age of 30 years; and

4.2.2 being under any obligation, until the Vesting Date Michael John Maynard Wright may exercise his discretion under clause 4.1 in respect of all or part of the Capital of the Trust Fund at any time.

Exercise of discretion irrevocable

4.3 Where Michael John Maynard Wright has exercised his discretion in accordance with clause 4.2, that exercise of discretion irrevocable.

Power of advancement

4.4 In exercise of the discretions conferred by either or both of clause 3 or clause 4 of this Deed, the Trustee may pay, apply or accumulate Property comprising or comprised in the Trust Fund for the advancement or benefit of Olivia Mead.