A Review of Family Provision Decisions published by the Supreme Court of NSW in 2022

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FOREWORD

Introduction:

The Supreme Court of NSW's *Provisional Statistics* publication reveals that in the 2022 calendar year, 897 family provision applications were filed (there may be more as the court's computer system does not appear to record cases where family provision claims are secondary claims or brought "defensively") and 866 concluded. As 31 decisions were judicially determined this is only 3.1% of the applications filed. Accepting that are timing differences between matters commencing and ending, around 831 applications, or about 97 in 100, were resolved extra-judicially.

In the 2022 calendar year, the Supreme Court of New South Wales published 52 decisions with a family provision component; 31 first-instance decisions, 5 Court of Appeal decisions and 16 interlocutory decisions which included 9 costs' decisions. The decisions are summarised in this paper in the hope that they may provide practitioners with useful guidance as one way to inform decision making "how much a claim is worth" is to consider recent judgments because, while facts will never be the same, judgments do provide relevant and reliable benchmarks, subject to the caveat that no two cases have the same facts.

Five themes emerge from 2022's decisions.

Evidence:

In their substantive affidavits, family provision claimants often adopt the premise that the court will be assisted if minute details of their relationship with a deceased are set out. This is a flawed approach. In *Hampson v Hampson* [2010] NSWCA 359, Campbell JA explained a court's task in family provision cases this way (at [80]) (Giles JA and Handley AJA agreeing):

> Consideration of the detail of the relationship is ordinarily not called for except where there is an unusual factor that bears on the quality of the relationship, such as hostility, estrangement, conduct on the part of the applicant that is hurtful to the deceased or of which the deceased seriously disapproves, or conduct on the part of the applicant that is significantly beneficial to the deceased and significantly detrimental to the applicant, such as when a daughter gives up her prospects of a career to care for an aging parent. Neither entitlement to an award, nor its quantum, accrues good deed by good deed. Indeed, it is a worrying feature of many Family Provision Act cases that the evidence goes into minutiae that are bitterly fought over, often at a cost that the parties cannot afford, and are ultimately of little or no help to the judge.

The court's task is to consider the "totality" of a relationship and this can usually be achieved in a fairly broad–brush way. This is also common sense because (a) how does minutiae assist the court to decide whether provision was "adequate and proper"? and (b) how is the court in a position to decide contested matters of fact when one of the parties is dead?

Notional estate:

The notional estate provision in Part 3.3 of the *Succession Act 2006* (NSW) are opaque. It is preferable however that a court has powers to "claw back" property and deem property notional estate because this increases the "property pool" from which a family provision order may be made. This was made clear in *O'Donnell v O'Donnell* [2022] NSWSC 1742 where Robb J considered family provision claims made by the one claimant pursuant to s 59 of the *Succession Act 2006* (NSW) and s 8 of the *Family Provision Act 1969* (ACT). The legislative scheme that determined the claim depended on where the deceased was "domiciled" at his death. There was no power in the *Family Provision Act* to deem property as notional estate and though actual estate was substantial, if the *Succession Act 2006* applied, "relevant property transactions" were considered and property was deemed notional estate, the

"property pool" was significantly larger and therefore the claimant, who sought provision in an amount approximately 4-times the size of the available estate, had better prospects of receiving provision in the amount she sought. Conversely, she had no prospects of receiving provision in the amount sought if the *Family Provision Act* applied.

In 2023, it is inexplicable that all Australian States and Territories do not have identical, or similar, family provision legislation which include power to deem property as notional estate.

Should testamentary intentions be given more consideration?

Family provision legislation in one form or another has existed in New South Wales for over 100-years and it is often said that the essence of a family provision claim is that a testator's testamentary intentions are being undone. Whilst a testator's intentions are one of the multi-factorial issues s 60(2) of the *Succession Act 2006* (NSW) prescribes, every family provision decision makes me wonder whether a testator's intentions should receive greater consideration.

Costs:

The perception that the usual rule in civil litigation that "costs follow the event" does not apply to family provision litigation, is erroneous. The correct view is that the usual rule applies but the court may depart from the rule if the "overall justice of the case" requires it.

Factors which may warrant a departure from the "usual rule" are: (a) whether one party engaged in unreasonable conduct in the commencement or maintenance of the proceedings which has resulted in the other party (or parties) to the proceeding incurring unnecessary costs; (b) whether an applicant's claim for provision out of an estate is frivolous, vexatious or made without reasonable prospects of success; (c) whether an applicant's claim, although unsuccessful, was otherwise reasonable, meritorious or borderline; (d) the relative size of the deceased estate; and (e) in some cases, the financial position of an unsuccessful plaintiff is relevant, but the fact that an adverse costs order will be significantly detrimental to an unsuccessful plaintiff's financial position will not ordinarily supply a good reason to depart from the usual rule.

Awards:

Family provision awards do not appear to be excessive. In 2022, whilst there were four awards of more than $1,000,000, awards of this size continue to be the exception rather than the norm.

This paper:

Decisions appear in chronological order unless they are related when they appear successively.

An index of topics is found at the end.

As far as possible, decisions and references are hyperlinked.

Happy reading and I welcome feedback; good and bad.

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$750,001 to $1 million

$1 million plus

Finlay v Pereg [2022] NSWSC 32

Judge and date:

Kunc J, 27 January 2022

Overview:

Adequacy of provision – De facto relationship – Forfeiture rule

Orders:

Provision of $685,000 net of costs ($95,000) in substitution for provision of $440,000 approx. provided in the deceased's will (i.e., further provision of $245,000 approximately)

Background:

In 2019, the deceased and her sister Pyrhia were murdered by Gilad, one of Pyrhia's children.

In a will dated August 2013 (**the Will**), the deceased appointed her de facto partner John executor and provided that after a mortgage secured against a property John owned was repaid, residue went equally to John and her siblings Moshe, Edna and Pyrhia, or if Pyrhia did not survive her, Pyrhia's children (the deceased's nephews), Guy, Lior, Vered, Yaron and Gilad.

John made an application for further provision from the deceased's estate. Moshe and Edna were appointed to defend the proceedings on the estate's behalf.

Family or other relationship between the applicant and the deceased (*s 60(2)(a)*):

John and the deceased met through an internet dating service in 2009. The deceased was divorced and had no children. John was also single and had no children. Originally from New Zealand, John was living in a unit he owned in Ocean Shores and working as a territory manager for a seed supplier. The deceased was a Senior Lecturer at the University of New England and lived in her own home on the outskirts of Armidale.

Within 6 months of their first meeting, the deceased asked John to move into her home and John lived there from 2009 until the deceased's death in 2019. They had a close and loving relationship.

While John made some contribution to household expenses, the deceased paid most living expenses. They kept their finances separate, they kept their own bank accounts and John was not a co-signatory on the deceased's accounts. Living with the deceased meant that John was able to rent out his property and use that income to pay down a mortgage secured over the property and meet other outgoings. The deceased also gave John $100,000 to reduce his mortgage.

In 2013, John and the deceased decided John would retire in order to devote himself full time to supporting the deceased and he became the principal homemaker. The deceased worked long hours and travelled frequently both in Australia and overseas, consulting, teaching and attending conferences. John and the deceased travelled together, using the deceased's commitments as an opportunity to see Australia and the world.

Also in 2013, John and the deceased made mirror wills by which each left his or her estate to the other.

Nature and extent of the deceased's estate (*s 60(2)(c)*):

The estate's assets (a death benefit and the deceased's house) had been converted to cash, as the Will provided a mortgage secured against John's property was paid-out ($36,810) and interim distributions of $40,000 ($120,000 in total) paid to John, Moshe and Enda. The remaining estate before the costs of the proceedings was $1,491,491.

If the interim distributions were added back, the residuary estate was $1,611,491 and John. Moshe and Edna would have received $402,873 each and Pyrhia's children $100,718 each.

John's costs were $75,000 on the ordinary basis and $97,500 on the indemnity basis.

Moshe and Edna's costs were $144,000 on the indemnity basis.

Though one of Pyrhia's children appeared at the hearing to represent them, for a time they were legally represented and their costs were $9,621 on the ordinary basis and $11,961 on the indemnity basis.

If an order was made that the parties' legal costs be paid from the estate, the net distributable residuary estate was $1,382,870 with each quarter share being $345,718.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

John's income was $2,612 per month received from Australian and New Zealand aged pensions and his superannuation benefit and his expenses were $4,828 per month, so his expenses exceeded his income by approximately $2,215 per month.

John had assets of $956,512 (a property ($780,000), cash at bank ($8,980) and superannuation ($167,532)) and liabilities of $19,666 (an offset mortgage ($9,914) and a NAB credit card ($9,752)).

When John received provision from the estate, irrespective of whether the Court ordered further provision, he would be ineligible to receive the Australian and New Zealand aged pensions as his assets (excluding his home) exceeded the assets test threshold of $593,000 and his superannuation benefit of would be his only income source and that would be insufficient to meet his annual costs of $57,935.

The beneficiaries elected not to lead evidence about their personal circumstances.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

John had his prostate removed in 2016 but was cancer free and had no adverse health issues.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

John was 68 years old and *Australian Bureau of Statistics Life Tables* indicated he had a life expectancy of 17.9 years.

Deceased's testamentary intentions (*s 60(2)(j)*):

In the Will, the deceased appointed John executor and provided that after a mortgage secured against a property John owned was paid out, residue went equally to John, the deceased's brother Moshe, the deceased's sisters Edna and Pyrhia, or if Pyrhia did not survive her, Pyrhia's children (the deceased' nephews), Guy, Lior, Vered and Gilad.

Determination:

The Court considered three issues: the forfeiture rule, the relevance of a plaintiff's current and future pension entitlements and whether further provision should be ordered.

The forfeiture rule is a rule of public policy to the effect that a person who is otherwise a beneficiary under a will is prevented from inheriting from the deceased if they have unlawfully killed the deceased: *Helton v Allen* (1940) 63 CLR 691.

Gilad was convicted in Argentina (where the killings occurred) of murdering the deceased and Pyrhia. The Court was satisfied that: (a) Gilad unlawfully killed the deceased and Pyrhia; (b) the deceased died before Pyrhia; and (c) that the forfeiture rule operated to prevent Gilad taking the share of the estate to which he would otherwise be entitled. The Court also accepted that if a further and alternative basis was required, it was only because Gilad had killed Pyrhia that the substitutionary gift to him came into operation and the forfeiture rule operated in this circumstance also/

The Court accepted that there may be occasions in family provision claims where a plaintiff's pension entitlements would be relevant, but, a wise and just testator, in making adequate provision for a beneficiary, would not be expected to take into account to what age or other means-tested pension the beneficiary may be entitled in the future. This reflected a public policy consideration that that the moral obligation of a testator includes, where it can be done having regard to the size of the estate and the circumstances of the beneficiaries, that provision ought to be made for a beneficiary without recourse to the state so as to relieve "the public purse" from the obligation to provide for a beneficiary.

As the object of family provision legislation is to encourage testators to make adequate provision from an estate, there are two points at which a beneficiary's pension entitlements may be relevant. The first is in determining whether the provision made for a beneficiary is adequate for the proper maintenance of the beneficiary. If they are in receipt of pension income, that will be relevant. However, the effect of the provision on that existing income will also be relevant. What the Court will not then usually consider is how that effect can be ameliorated by attempting to make findings about any future pension entitlement. The second point, if it is reached, is in determining what provision the Court should make for the maintenance of the beneficiary. At that point, the Court also should not usually attempt to make findings about what pension entitlement may become available to the beneficiary (as opposed to preserving an existing entitlement, especially in a small estate).

As the effect of the gift John would receive reduced his income significantly, the adequacy of the gift needed to be considered taking that consequence into consideration, as the deceased's moral obligation was to make a provision from the estate that was adequate to avoid the consequences of John's substantial loss of income from a gift by providing a gift of capital from the estate that would meet John's needs without reference to any future potential pension entitlement.

The Court accepted that if John required $57,900 per annum to meet his annual expenditures, he needed a capital sum of $1,036,410 (17.9 x $57,900) and that as he had current assets of $134,436, the sum required was $901,974. However, the hearing was conducted on the basis that John sought provision of $780,000, which after his costs of $95,000 were deducted, left a net sum of $685,000 and it was therefore inappropriate to award a larger sum. (The Court also performed a cross-check in support of its conclusion by assuming that John's annual expenditure was $49,200 would require $880,680 to live for the balance of his life (17.9 x $49,200) which after John's current assets of $134,436 were deducted, left John requiring $746,200, which was still higher than the effective level of provision of $685,000 he would receive.)

The award represented additional provision of $360,000 and the burden of the further provision was borne rateably by the Will's other beneficiaries.

Orders:

Provision of $685,000 net of costs ($95,000) was ordered in substitution for provision of $440,000 approx. provided in the deceased's will.

Finlay v Pereg (No 2) [2022] NSWSC 154

Judge and date:

Kunc J, 21 February 2022

Overview:

Costs

Orders:

See below

Background:

The Court's principal decision (Finlay v Pereg [2022] NSWSC 32) is summarised above. In this second judgment the Court corrected an error in its principal decision and considered whether a special costs order should be made.

Determination:

In the principal decision, the Court understood that it was submitted for John that he receive provision of $780,000 which included costs of $95,000 so that he received provision of $685,000, net of costs in substitution for provision of $440,000 approx. provided in the deceased's will. The Court accepted that it was submitted that John bear his own costs of $30,000 to 21 April 2020 (when a settlement conference occurred), and he receive his costs from the estate after 21 April 2020 ($72,500 on the indemnity basis and $58,000 on the ordinary basis).

The Court was satisfied that John's costs should be paid from the estate and he should still receive provision of $780,000 as (a) the net sum he would receive ($750,000) was still less than the evidence indicated he required and (b) an order that his costs be paid from the estate with the consequence that the other parties bear rateably John's costs of $58,000 would not have affected the Court's decision.

John, Moshe and Edna sought orders that their costs be paid from the date of the informal settlement conference on 21 April 2020, because an agreement was reached between the three of them on that date and Guy, Lior, Vered, Yaron and Gilad (**the Sarusi defendants**) had received a worse result than if they had agreed to abide by the agreement's terms and John, Moshe and Edna had incurred costs because of this and the costs should be visited on the Sarusi defendants on the indemnity basis.

The Court did not accept the contentions for two reasons.

Firstly, neither John, Moshe nor Edna had made a *Calderbank* offer or offer of compromise which squarely put the Sarusi defendants on notice of the potential costs consequences for them if they did not receive a better offer than the offer made to them.

Secondly, the Sarusi defendants were only joined to the proceedings in October 2020 and the Court was not satisfied that John, Moshe or Edna had demonstrate circumstances that justified

ordering the Sarusi defendants to pay the other parties' costs incurred when the Sarusi defendants were not joined as parties.

A further, but not dispositive matter, fortified the Court's conclusion. The Court's view of the respective interests in the estate which informed its ultimate conclusion was based on the net distributable estate after legal expenses, and a different discretionary landscape would have presented itself if the Sarusi defendants' entitlements were considered on the basis that they were substantially reduced because of costs.

Orders:

The Court ordered that (a) John's costs be paid from the deceased's estate on the ordinary basis; (b) Moshe and Edna's costs be paid from the estate on the indemnity basis; (c) there be no order as to the costs of the Sarusi defendants; and (d) costs be borne rateably by all parties having regard to their interests in the residuary estate.

Lalic v Lalic [2022] NSWSC 31

Judge and date:

Henry J, 27 January 2022

Overview:

Adequacy of provision – Adult child

Orders:

Provision of $125,000 in substitution for the provision made for the plaintiff in the will (i.e., additional provision of approximately $96,625)

Background:

Mrs Zorka Lalic (**the deceased**) died in October 2019, aged 89 years, survived by four adult children, Bud, Tony, Anne and Johnny.

The deceased's last will made in May 2008 (**Will**) appointed Anne sole executor, gifted the deceased's home and motor vehicle to Anne and Johnny in equal shares as tenants in common and divided residue equally amongst all her children.

Anne received probate of the Will in May 2020.

Tony applied for further provision from the estate of $547,000, in lieu of the provision made for him in the Will. The further provision comprised $227,000 (which when added to the proceeds from the sale of an interest in another property he co-owed) would enable him to purchase a two or three-bedroom villa in the Liverpool area, a lump sum of $270,000 to fund the deficit in his living expenses for the balance of his life ($17,000 for 19 years discounted at a 3 per cent per annum) and $50,000 for contingencies.

The deceased and her husband Edo were married in the former Yugoslavia in about 1953 and Edo died intestate in July 1995.

Bud and Tony were born in Yugoslavia in around 1953 and 1955.

In 1956, Edo migrated to Australia and the deceased Bud and Tony joined him in 1963 or 1964.

Edo operated a carting business and the deceased Bud and Tony helped him in the business.

Anne and Johnny were born in May 1972 and June 1973, respectively.

In 1989, Edo sold the family's home to land developers for $550,000. The sale terms also provided that Edo received three of the newly subdivided lots. Before the sale, Edo and the deceased had little money and the sale enabled them to buy a new home in Bonnyrigg Heights, to buy a new car, and for Edo who was 65 years, to retire.

Sometime in 1994, Edo and the deceased transferred one block of land to each of Bud and Tony and one block to Anne and Johnny jointly.

Bud and Tony subsequently sold their land and Anne and Johnny retained theirs.

In December 2005, Anne married. Before marrying, she told her husband that she had to remain living with the deceased whilst the deceased was alive, which Anne's husband-to-be agreed to. After Anne was married, she and her husband lived with the deceased in the deceased's Bonnyrigg Heights home.

In 2013, Johnny moved out of the deceased's home and he married in 2017.

Anne and her husband separated in 2015.

The deceased suffered a range of health issues over the years. In 2017, her health declined significantly. Each of the deceased's children spent time with the deceased in her later years but Anne was her principal carer and of her children, the deceased relied principally on Anne and Johnny for care and support.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Tony was a loving and dutiful son and the Lalic family was a close and loving family where members did what they could to help each other.

There was no evidence of disharmony in the family until these proceedings.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

Tony contended that the deceased owed him a moral duty to provide a buffer against contingencies when he was not well-off, he had health issues and his marriage had broken down.

Anne contended that the deceased's moral duty to her was superior to any moral obligation the deceased owed Tony as she (and to a lesser extent Johnny) had been the deceased's principal carer.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate comprised the deceased's Bonnyrigg Heights home ($850,000), a car ($10,000) and cash at bank ($143,189). When liabilities ($2,298) were allowed, the estate's net value was $971,204.

Tony's costs were estimated to be $85,000 on the ordinary basis and $95,000 on the indemnity basis.

The value of the benefit Johnny received in the Will (one-quarter share of residue) was approximately $28,375.

Anne's costs were estimated to be $55,000 on the ordinary basis and $85,000 on the indemnity basis.

If an order was made that the parties' costs be paid from the estate, available estate was approximately $801,204.

The value of the benefit Johnny received in the Will (one-quarter share of residue) was $28,375 approximately.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Tony was aged 66 years; he was divorced, single and on a disability pension.

Tony had triple by-pass surgery when he was 44 years old. At the end of 2013, he developed a skin disorder which was treated with high doses of steroids. In October 2014, he was diagnosed with an autoimmune disease. Tony had sepsis on four occasions (which required hospitalisations), he had high blood pressure, diabetes, gout, kidney stones, osteopenia, a persistent cough and sleep apnoea.

Tony received specialist treatment for his autoimmune disease, treatment by a cardiologist, respiratory physician and endocrinologist for diabetes, he had trouble walking, experienced shortness of breath from exertion and was on a range of prescription medications.

Tony had no income other than a disability pension of $2,064 per month and his current monthly expenditure was $4,344 approximately which exceeded his income by about $2,280 each month, or $27,364 per annum. His ex-wife funded the shortfall.

Tony's assets included a 50% share in his home which he co-owned with his ex-wife valued at $500,000, a car valued at $20,000, savings of $1,899 and a burial plot valued at $11,000 (i.e., total assets of $532,899).

Tony had no debts.

Only Anne elected to raise her financial circumstances in competition to Tony's claim.

Anne was aged 49 years. She had two dependent children and was separated from her husband.

Anne worked part-time to accommodate caring for her two school-aged children. Her monthly income was approximately $6,137 from work ($2,474), child support payments ($2,167), rent ($997) and family assistance tax benefits ($500).

Anne's monthly expenditure was estimated to be $7,367, comprising living expenses ($4,267) and child-related expenses ($3,500).

Anne had assets of $743,206, a superannuation benefit of $184,439 and liabilities of $26,212.

Applicant's contributions to the deceased's estate, the deceased and the deceased's family (*s 60(2)(h)*):

From the age of 17 when he left school, Tony worked on average between 25 and 30 hours each week for Edo's carting business and was not paid for the work. This assisted the deceased and Edo and the rest of the family in a material way.

Tony also undertook some improvements around the deceased's home.

Provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate *(s 60(2)(i))*:

Tony received a share of residue in the Will.

In the deceased's lifetime, Tony received a block of land which he sold in 1995 for $120,000. Tony was also provided with free accommodation when he and his ex-wife built their home and later when they separated. Tony also received $5,000 in December 1991 to pay off a third-party debt and a new fridge in 1999.

Deceased's testamentary intentions (*s 60(2)(j)*):

As noted above, in the Will the deceased appointed Anne sole executor, gifted her home and motor vehicle to Anne and Johnny in equal shares as tenants in common and divided residue equally amongst Bud, Tony, Anne and Johnny.

In clause 5 of the Will, the deceased stated that she had made greater provision for Anne and Johnny as both Bud and Tony received a block of land from Edo and her and she had lived with Anne and Johnny since Edo's death and been given emotional and material support by them.

Determination:

The Court made these findings.

Firstly, Tony was not in a strong financial position and Anne and Johnny were in better financial positions than him.

Secondly, Anne and Johnny had benefitted financially from living at home rent-free, but they had also contributed to the deceased's estate during that time by paying for household expenses and medications and providing the deceased with significant care and support.

Thirdly, the deceased's needs increased substantially over the years and Anne bore the heavy day-to-day burden of the care she required.

Fourthly, Anne had a need for secure accommodation and it was reasonable that she be permitted to continue living in the deceased's home as that had been her home for over 30 years.

Fifthly, the Will clearly expressed the deceased's wishes and the deceased was in a superior position to consider her children's claims on her estate.

Sixthly, Tony's financial position deteriorated after the Will was made in 2008.

Seventhly, Tony's health issues in 2014 and 2015 meant that he was not able to work after 2017 and he had no future earning capacity.

Eighthly, the Will recognised that the deceased owed a moral obligation to Tony, but the provision made for him was around 2.8% of the estate (excluding legal costs).

The Court determined that adequate and proper provision had not been made for Tony and that provision of a lump sum pecuniary legacy of $125,000, in substitution for the provision made in the Will should be ordered and the sum would provide Tony with capital to assist in covering the gap between his income and expenses (although not for 19 years) and a buffer for unexpected contingences.

Additional provision was not allowed for accommodation as Tony's interest in the former matrimonial home was sufficient to provide capital for him to find alternative accommodation and: (a) Tony had been financially independent of the deceased for many years; (b) the

financial arrangements between Tony and his ex-wife lacked detail; (c) Tony had made lifestyle choices over the years which had diminished his present financial resources; and (d) provision for Tony should not interfere with Anne's overall financial provision in a significant deleterious manner and some provision should be made for Johnny.

The burden of the provision was ordered to be borne by out of Johnny's share of the estate.

Orders:

Provision of $125,000 in substitution for the provision made for Tony in the will and costs were reserved.

Van Gorp v Davy [2022] NSWSC 39

Judge and date:

Ward CJ in Eq, 1 February 2022

Overview:

Practice and procedure

Orders:

The plaintiff notice of motion was dismissed with costs

Background:

In March 2020, the plaintiff commenced proceedings in the Succession List on behalf of his then two minor children seeking to set aside a will made by his former wife (**the deceased**) and in the alternative, orders that further provision be made for the children from the deceased's estate.

Complaint was made by the executors of the deceased's estate that the proceedings were invalidly constituted and an independent solicitor was appointed to represent one of the children. The proceedings were reconstituted and the second child, who had since become an adult, was not joined as a party.

In November 2020, the parties attended a settlement conference and an "in principle" agreement was made to settle the proceedings on the basis that the deceased's estate and notional estate would be divided equally between the deceased's two children.

In June 2021, the parties' settlement was reduced to writing in the form of consent orders and the orders were approved by Hallen J pursuant to s 76(4) of the *Civil Procedure Act 2005* (**consent orders**).

In a notice of motion filed on 12 November 2021, relevantly, the plaintiff applied to set aside the consent orders pursuant to *UCPR* r 36.15(1) on the basis that they were made irregularly and/or against good faith.

Determination:

The Court made these findings.

Firstly, the plaintiff was not formally appointed as a tutor when he commenced the proceedings and was not a proper party in his own right to the proceedings as they were initially constituted and he did not have standing.

Secondly, the power to vary judgments is not exercisable other than under the slip rule (*UCPR* r 36.17) unless the application is made with 14 days after the judgment or order is entered (*UCPR* r 36.16(3A). This reflects the finality of litigation principle.

Thirdly, the discretion to re-open or vary a judgment was to be used sparingly.

Fourthly, when serious issues of dishonesty or misconduct on the part of third parties to an application were raised, it was inappropriate to make any such finding without giving those parties an opportunity to be heard; nor was it appropriate to entertain any such application in the absence of parties who may be affected by it.

Fifthly, any application under s 70 of the *Succession Act 2006* should have been brought by the commencement of a fresh proceeding,

Orders:

The notice of motion was dismissed with costs.

Van Gorp v Davy [2022] NSWCA 117

Judge and date:

Meagher JA and Basten AJA, 6 July 2022

Overview:

Practice and procedure

Orders:

Summons seeking leave to appeal and notice of motion dismissed with costs

Background:

In *Van Gorp v Davy* [2022] NSWSC 39 (above), the primary judge dismissed Mr Van Gorp's notice of motion on the basis that he did not have standing to set aside or vary the consent orders and that any application should have been brought by summons in a fresh proceeding.

In a draft notice of appeal, Mr Van Gorp proposed 24 grounds of appeal but only one challenged the primary judge's conclusion that Mr Van Gorp did not have standing to seek the relief he had in his notice of motion.

Determination:

The Court held that each of the primary judges' conclusions was "undoubtedly correct" as Mr Van Gorp was not a party to the family provision proceedings at the time the consent orders were made and was not someone whose personal interests were in any way directly affected by the orders made in those proceedings and the application for leave to appeal should be dismissed with costs.

Mr Van Gorp also filed a notice of motion seeking to join parties to the appeal but as the application for leave to appeal was to be dismissed, there was no purpose or utility in the joinder of any of these persons as parties at this late stage of the proceedings and the notice of motion was dismissed.

Orders:

The application for leave to appeal and a notice of motion were dismissed, with costs.

Mikhaiel v Breene [2022] NSWSC 102

Judge and date:

Ward CJ in Eq, 11 February 2022

Overview:

Practice and procedure – Releases

Orders:

Mutual releases to apply for family provisions orders from the parties' respective estates, granted

Background:

The parties were in a domestic relationship which had "irretrievably" broken down.

In August 2021, the parties executed documents, including a deed of release, intended to give effect to a complete and final severance of their financial relationship.

The plaintiff applied for approval pursuant to s 95 of the *Succession Act 2006* of releases given by each of the parties, of their respective rights to apply for family provision orders in respect to the estate or notional estate of the other.

Determination:

These principles were applied.

Firstly, the power to approve a release of rights under s 95 of the *Succession Act 2006* is incidental to the exercise of the principal jurisdiction of the court under s 59 of the *Succession Act 2006* to make an order for provision out of the deceased's estate or notional estate.

Secondly, as application for a release must contain sufficient material to enable consideration of all the circumstances of the case.

Thirdly, there must be active consideration by the Court of the terms on which the release has been agreed and the circumstances of the case and particular attention must be focused on what is being released.

Fourthly, s 95(4) of the *Succession Act 2006* requires the Court to consider four matters. First, whether it is, or was to the releasing party's advantage, financially or otherwise, to make the release, in all the circumstances of the case, both at the time of the application and at the time of the making of the release. Second, in considering the prudence of making the release, the Court has regard to the standard of a prudent person being someone who acts with care and thought for the future, in particular in exercising care and good judgment in relation to his or her own interests. Third, regard is had to whether the provisions of the agreement to make the release are, or were at the time, fair and reasonable. Fourth, whether the releasing party has had the benefit of independent advice in the relation to the release and, if so, whether the releasing party has given due consideration to that advice.

Fifthly, no distinction is made between applications for approval of releases in relation to deceased estates and *inter vivos* releases.

Orders:

The releases were approved and there was no order as to costs.

Bracher v Jones (No 2) [2022] NSWSC 134

Judge and date:

Robb J, 18 February 2022

Overview:

Adequacy of provision

Orders:

Summons dismissed with no order as to costs with the intent that each party pay its own costs

Background:

The late Mrs Leila Jean Jones (**the deceased**) died in May 2015.

In May 2016, the deceased's daughter Diane filed a summons seeking a family provision order from the deceased's estate.

In October 2016, Diane commenced separate proceedings in which she alleged that when the deceased made her last will in June 2013, she did not have testamentary capacity, that the will was executed under the undue influence of her brother Stephen, that a grant of probate of the June 2013 will made to Stephen should be revoked and a will made in June 2010 be admitted to probate.

The deceased's June 2010 gifted a property referred to as "No 163" to Stephen and another property referred to as "No 165" to Dianne. The properties were adjacent to each other and there was a moderate difference in market value between them, but the values were roughly equal.

The deceased's June 2013 will gifted both properties to Stephen.

In March 2017, Stephen filed an amended cross-claim in which relevantly, he sought an order that time be extended for him to bring a family provision claim and that he receive further provision from the deceased's estate.

The probate proceedings were decided first and the Court published its judgment on 5 August 2020 (*Bracher v Jones* [2020] NSWSC 1024). In that decision, Dianne was successful and the June 2013 will was held to be invalid and the grant of probate was revoked. The effect of the decision was that Dianne and Stephen each received an approximately equal share of the deceased's estate. Consequently, Diane abandoned her family provision application, apparently in recognition of the situation that, given the relevant circumstances of the two siblings, Diane could not expect to receive the benefit of a family provision order that preferred her to Stephen's entitlement to share with approximate equality in the estate.

Stephen however continued to prosecute his family provision claim and a hearing took place in September 2021.

Determination:

The Court concluded that Stephen's application for further provision was "quite exceptional" and "entirely devoid of merit" for five reasons.

Firstly, the deceased had a loving and relatively close relationship with both her children.

Secondly, the deceased and her husband made long-term plans for the future financial welfare of their children by buying neighbouring ocean-front properties that were reasonably close in value, with the intent that one of the properties would be left to each of the children.

Thirdly, Diane's and Stephen's financial and medical circumstances were comparable and had been so at all times throughout the duration of the proceedings.

Fourthly, there was no likelihood that a judge of the Court would make a family provision order in Stephen's favour that gave him a substantial preference over Diane and disturbed the long-term testamentary intentions of the deceased and her husband.

Fifthly, the only circumstance that would create a substantial imbalance between the assets received by the parties from the deceased's estate was Stephen's liability for the costs of the proceedings but the Court was satisfied that Stephen should be held personally responsible for the diminution in his share of the estate that will result from his liability for costs, as his defence of the probate claims made by Diane and his prosecution of his own family provision claim were an extension of an obsession that was directed to securing the whole of Mrs Jones' estate.

Orders:

Stephen's proceedings were dismissed with no order as to costs with the intent that each party pay its own costs.

Le v Angius [2022] NSWSC 240

Judge and date:

Parker J, 18 February 2022

Overview:

Practice and procedure – Injunction – Interim provision

Orders:

The plaintiff's application for interim relief was dismissed with costs. The defendant however undertook to the Court to the pay the plaintiff interim provision pursuant to s 62 of the *Succession Act 2006* of $500 per week and not to interfere with the plaintiff's right to occupy a property at Waterloo without any obligation to pay rent, on condition all other obligations of a registered lease were complied with and outgoings paid

Background:

Mr John Anguis (**the deceased**) died on 31 January 2022.

The plaintiff claimed that she was the deceased's de facto partner, or companion for the last ten years of the deceased's life and she and the deceased were in a sexual relationship before that.

The plaintiff commenced proceedings for a family provision order from the deceased's estate.

In November 2011, the deceased and his wife granted the plaintiff a registered lease of one of newly constructed shops they owned in a Waterloo building. The plaintiff operated, and continued to operate, a laundromat business from the shop and in 2016, the lease was extended.

The plaintiff and her son were living in the deceased's former home at Coogee and were evicted from the property by the defendant's agents on 10 February 2022 (i.e., shortly after the deceased's death).

The plaintiff sought an injunction, or interim provision pursuant to s 62 of the *Succession Act 2006,* to restrain the deceased's daughter who was named as executor and sole beneficiary of the deceased's will dated April 2021, from taking possession of the Coogee property and evicting her and her son.

As no grant of probate had been made, the deceased's daughter was appointed to represent the deceased's estate pursuant to *UCPR* r 7.10. The defendant undertook to the Court in her capacity as the estate's legal representative, by way of interim distribution, to pay the plaintiff $500 per week commencing on the day of the undertaking and not to interfere with the plaintiff's right to occupy the Waterloo shop, without any obligation to pay rent, on condition all other obligations of a registered lease were complied with and outgoings paid.

Determination:

The plaintiff sought relief on two bases: a conventional injunction and for interim provision under s 62 of the *Succession Act 2006*.

As regards the interlocutory application, the Court accepted three propositions.

Firstly, that there was no difficulty in principle with the Court making an appropriately framed interlocutory order in family provision proceedings, to preserve a proprietary interest until final hearing, if the plaintiff could show sufficient prospects of obtaining provision in the form of a proprietary interest in specified property and it was otherwise proper to do so after considering the balance of convenience.

Secondly, that the plaintiff had presented evidence which, if accepted, would make her an eligible person for the purpose of the Act and would give her an arguable case for an order for provision in her favour at the final hearing.

Thirdly, that by claiming a right of occupation extending beyond the proceedings, the plaintiff had established a sufficient proprietary interest to support an injunction.

The Court however was not satisfied that the circumstances of the case justified an injunction because: (a) the Coogee property was large; (b) the prospects of the plaintiff obtaining a proprietary interest in the property at a final hearing were weak; and (c) it was not satisfied that the circumstances of the case justified an injunction permitting members of the plaintiff's family to reside in the Coogee property, as they had advanced no claim on the deceased's estate.

Section 62(1) of the *Succession Act 2006* provides that the Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order. The plaintiff contended that this was a more favourable basis for obtaining an order for interlocutory possession than a conventional injunction.

The Court accepted that for interim relief to be granted, the plaintiff had to establish by reference to the material before it, that provision would be awarded, and it was insufficient

merely to demonstrate an arguable case. The Court did not accept that the plaintiff had satisfied the requirement four reasons.

Firstly, the plaintiff's claim was denied by the defendant and there was a proper basis in the evidence for doing so.

Secondly, the defendant had not had a proper opportunity to investigate the evidence which the plaintiff had put before the Court on the application.

Thirdly, even if the plaintiff established an entitlement to provision, it was questionable whether provision would take the form of ownership, or possession of the Coogee property.

Fourthly, in a typical case where relief under s 62 involved the payment of money, the plaintiff's ability to repay the money if the order was revoked at a final hearing was a critical aspect of the balance of convenience and this had not been established.

The application for interim provision failed.

Orders:

As noted above, the defendant proffered an undertaking to the Court that she would pay the plaintiff interim provision pursuant to s 62 of $500 per week and not interfere with the plaintiff's right to occupy property at Waterloo without any obligation to pay rent, but on condition all other obligation of a registered lease were complied with and outgoings were paid. The Court noted the undertaking and dismissed the application with costs.

Le v Angius [2022] NSWSC 1150

Judge and date:

Richmond J, 30 August 2022

Overview:

Practice and procedure – Injunction

Orders:

Defendant's notice of motion to restrain solicitors acting for the plaintiff dismissed with costs

Background:

Mr John Anguis (**the deceased**) died on 31 January 2022.

The plaintiff claimed that she was the deceased's de facto partner, or companion for the last ten years of the deceased's life and they were in a sexual relationship before that. She commenced proceedings for a family provision order from the deceased's estate.

AKN & Associates Pty Limited (**AKN**) was acting for the plaintiff in her family provision proceedings.

AKN acted for the deceased between 9 July 2015 and 28 September 2015 and for a short period in November 2015 on two substantive matters.

Firstly, AKN and counsel gave advice regarding the prospects of an appeal from a judgment in proceedings concerning the construction of the deceased's wife's will and made submissions on costs in the proceedings.

Secondly, AKN and counsel acted for the deceased from 9 July 2015 in proceedings against his wife's estate in which the deceased sought orders to set aside separation agreements and consent orders and brought a family provision claim against his wife's estate.

By a notice of motion filed on 24 February 2022, the defendant sought to restrain AKN, or its directors or employed solicitors, from continuing to act as solicitors for the plaintiff in her family provision proceedings. The defendant contended that AKN should be restrained for two reasons.

Firstly, AKN had confidential information in its possession. The evidence did not disclose what the alleged confidential information was beyond a generalised description of how it was said that AKN still retained the information.

Secondly, AKN's solicitors were potential witnesses in the case because they were likely to be called by the defendant in support of her case, and as a result, a fair-minded, reasonably informed person would have reservations as to dutiful decision making as to the conduct of the plaintiff's case.

Determination:

The Court did not accept that the defendant had shown that AKN was in possession of confidential information which was relevant to the subject matter of the family provision claim as: (a) based on the general description of the information the defendant provided, the information was merely peripheral at best to the plaintiff's family provision claim; the matters on which AKN was retained by the deceased in 2015 were unrelated to the plaintiff's family provision claim; and (c) there was no evidence that AKN had retained any confidential information provided to it by the deceased, as it had returned all the physical files to the deceased in 2015 when its retainer was withdrawn.

The Court made these findings.

Firstly, deciding whether to restrain a legal practitioner from acting in a proceeding was an incident of its inherent jurisdiction over its officers and to control its processes in aid of the administration of justice.

Secondly, the test to be applied was whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

Thirdly, a fair-minded, reasonably informed member of the public would not conclude that the proper administration of justice required that AKN and its solicitors be prevented from continuing to act for the plaintiff, in view of the nature and relevance of the evidence which could be given by the solicitors as well as the significant inconvenience, cost and prejudice to the plaintiff in having to engage new solicitors at the stage the proceedings had reached.

Orders:

The defendant's notice of motion was dismissed with costs.

Kitteridge v Kitteridge [2022] NSWSC 193

Judge and date:

Robb J, 1 March 2022

Overview:

Adequacy of provision – Adult child – Estrangement

Orders:

Provision of $460,000 plus costs on the ordinary basis

Background:

Mrs Brenda Kitteridge (**the deceased**) died in September 2020, aged 80 years. She was survived by three sons, Robert, Lee and Steven.

In her will dated March 2017, the deceased appointed Steven executor, she gave a legacy of $10,000 to her sister-in-law, she gave 10 per cent of residue to her granddaughter and 90 per cent to Steven, and she stated that she made no provision for Robert and Lee as they had refused to have contact with her for many years.

Lee applied for a family provision order from the deceased's estate.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

Until about 1988, Lee had a "normal" mother-son relationship with the deceased. From about 1988 though, the deceased's marriage to her husband Robert began to break down and in 1989 the deceased demanded that Robert leave the family home which he did. Robert moved into a unit at Cammeray which at the time Lee had rented. In the wake of her separation from her husband, the deceased began to impress upon Lee her dissatisfaction with his association with his father which she perceived as incompatible with the maintenance with a relationship with her. After about 1990, Lee and the deceased had intermittent contact between then and 2006, but after they saw each other at Robert's funeral in 2006 they had no contact until Steven contacted him shortly before the deceased's death to advise him the deceased had suffered a stroke and when he visited her in hospital, she was unresponsive.

Steven and the deceased enjoyed a close relationship; Steven lived with the deceased for almost his entire life, he dutifully assisted her in her old age with household maintenance and care visits, he helped her with her finances and paid for significant expenses, about half of which were reimbursed in the deceased's lifetime.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's gross estate comprised a residential property in Middle Cove ($2,335,000), cash at bank ($147,867) and a car ($8,000), liabilities were $10,227 and net estate was $2,472,640.

Lee's costs on the ordinary basis were $78,055 and Steven's costs on the indemnity basis were $101,781, of which $52,781 had been paid by the deceased's estate.

If an order was made that the parties' costs be paid from the estate, available estate was $2,345, 585.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Lee was aged 55 years; he worked as an officer with the Australian Border Force earning a gross monthly income of approximately $6,275 and a net monthly income of approximately $3,463, which was reduced by the high costs of his commute to work.

Lee's wife was aged 64 years: she was employed with the Australian Border Force on a casual basis and earned $36,000 per annum; she suffered a stroke in 2004 which left her unable to work for a time; she continued to suffer stroke symptoms; she suffered endometriosis; she suffered a workplace injury in 2017 which affected her mobility; and she took a number of medications.

Lee and his wife did not own real property. Lee and his wife had superannuation benefits of $597,185 and $25,388, respectively. They had minimal other assets and owed joint liabilities of approximately $53,563 which included a $15,906 personal loan.

Lee sought further provision to buy a house in Northmead where a 3-bedroom house ranged in price from $1,200,000 to $1,660,000 and for an emergency fund. A 3-bedroom house in Northmead ranged in price from $1,200,000 to $1,660,000.

Steven was aged 45 years. He worked as a financial analyst and his net monthly income was approximately $6,700.

Steven was in good physical health but he suffered periodically from asthma and sinusitis and was concerned for his prospects of employment owing to his social anxiety disorder.

Steven lives with his wife and their two young children in the deceased's Middle Cove property. His wife was aged 48 years, she worked as a revenue operations manager and her net monthly income was approximately $6,000 and she expected to reduce her work hours to care for her children moving forward and because her long work hours affected her physical health.

Steven had assets of $15,383 and a superannuation benefit of $238,415 and his wife held a superannuation benefit of approximately $111,773. Steven and his wife jointly owned assets of $863,356 which comprised a St Ives property worth approximately $960,000 which was encumbered by a mortgage of $673,952.

Steven and his family had lived rent-free in the deceased's home since the deceased moved into aged care in 2017.

Steven wished to remain in the Middle Cove property with his family.

Deceased's testamentary intentions (*s 60(2)(j)*):

As noted above, in her will dated March 2017, the deceased appointed Steven executor, she gave a legacy of $10,000 to her sister-in-law, she gave 10 per cent of residue to her granddaughter and 90 per cent of residue to Steven, and she stated that she had made no provision for Robert and Lee as they had refused to have contact with her for many years.

The deceased made seven wills before her final will. In some of the wills, the deceased gave shall legacies to Lee and Robert but the wills consistently provided that Steven received the majority of her estate. The deceased also made nine statements of testamentary intention which stated that; (a) Lee had participated with her ex-husband in going to see doctors and telling them she had acted in a mentally deranged manner so she might be admitted to a mental institution; (b) In 1989, Lee had married and he informed the deceased that he and his wife would not be associating with the deceased's family as they preferred her family and the deceased had not seen or heard from Lee and his wife despite her efforts to contact them; (c) Steven had been her only source of help and support after her divorce; and (d) the deceased had not seen Lee's son or daughter since their births.

Any other matter (s 60(2)(p)):

The deceased was left out of both her parent's wills. The deceased's father had died in about June 1989 and the deceased and several of her brothers contested their father's will. The proceedings were resolved out of court and the deceased received a property at Greenwich valued at about $765,000.

The deceased's mother died in about 1995 or 1996. In her will, the deceased's mother divided her estate into 15 equal shares and gave them to her grandchildren (including Lee and Stephen) and some of her children, but not the deceased. The deceased and three of her brothers successfully contested the will and the deceased was awarded approximately $120,000. A consequence was that Lee and Steven's inheritance was reduced from about $120,000 to $46,000.

Determination:

The Court was satisfied that the estrangement between Lee and the deceased was caused by: (a) the deceased's inability to accept Lee's refusal to abandon Robert as the deceased had expected; the deceased's intense hatred of Robert; Lee's involvement in family provision proceedings which the deceased commenced against her mother's will, when the deceased expected Lee to defer to her claims and not to participate in the executor's defence of the deceased's mothers; and (d) the deceased's inability to recognise that her attitude to Lee was unwarranted and to effect a reconciliation.

In these circumstances, though the Court also accepted that Lee had made only limited efforts to reconnect with the deceased, it found that that estrangement was a neutral factor.

The Court decided that adequate and proper provision had not been made for Lee for the following reasons.

Firstly, contemporary community standards would, except in relatively extreme circumstances, require that: (a) a parent engaged in even a bitter marriage breakdown to go to lengths to spare their children from the need to choose between their parents, and to recognise and accept that their children may feel an obligation out of love and filial duty to split their devotion between their parents and to not take sides; and (b) each parent would understand the likelihood of emotional injury that children would innocently suffer because of the marital breach and the consequential upheaval in established family arrangements.

Secondly, a parent who provokes an estrangement with their child so the child is forced to make an unsatisfactory choice between their parents should recognise that it is expected of the parent to take the responsibility to break down emotional barriers created by the parent's conduct, and not to rely upon the child to do so.

Thirdly, the deceased had made no provision at all for Lee in her will and to entirely exclude a child from one's testamentary dispositions after requiring the child to choose between oneself and one's former husband, was not the act of the wise and just testator.

Fourthly, the deceased's estate was a reasonably substantial one that was sufficient to accommodate a reasonable testamentary provision for Lee, while leaving a sufficient balance that was sufficient to provide Steven with a substantially greater gift that was commensurate with the deceased's closer relationship with him.

Fifthly, although Lee and his wife between them had a reasonably substantial superannuation fund, the fund would not be sufficient to provide them with a secure residence as well as sufficient income, and their mutual need to continue to work until their retirement ages would prevent them from having access to their superannuation for a period in the order of a decade.

Sixthly, Lee and his wife had always lived in rental accommodation without the security of their own home. Although community expectations of a wise and just testator in the position of the deceased would not necessarily extend to the deceased providing Lee with the title to a suitable residential property, Lee was not seeking such provision but an equity contribution that would be sufficient to provide equity for the purchase and enable him to borrow commercially the balance of the price.

Seventhly, it was relevant that most of the deceased's estate was inherited from her parents, and that the deceased, by her family provision application in her own mother's estate, secured for herself an amount in the order of $74,000 that would otherwise have been given to Lee.

Eighthly, the deceased had told Lee that he could expect to receive his full inheritance from his grandmother on the deceased's death.

Ninthly, the deceased ought to have realised that she had become, in a sense, the custodian, for her lifetime, of Lee's intended share of the testamentary bounty of her own parents and it was probable that had the if the deceased had not made her family provision application, Lee would have had a much greater chance than to acquire his own home over the ensuing decades.

Tenthly, Lee and his wife's financial circumstances, though not dire were strained and their financial stability was threatened by Lee's wife's medical conditions and injuries and by difficulties posed by their current working arrangements and did not have the security afforded by owning real property.

Finally, if provision of $460,000 was made for Lee, Steven's share of the deceased's estate would be approximately $1,688,026 and they would have the means to continue living in the deceased's Middle Cove property, by raising the capital to cover Lee's order or selling their investment property.

Orders:

An order was made that Lee receive provision of $460,000 ($400,000 towards the purchase of a home and $60,000 as a fund for exigencies) and that his costs, on the ordinary basis, be paid from the deceased's estate.

Dodd v Dodd [2022] NSWSC 199

Judge and date:

Slattery J, 7 March 2022

Overview:

Adequacy of provision – Adult child – Estrangement

Orders:

Provision of $520,000 plus costs fixed in the sum of $105,000

Background:

Mr John Dodd (**the deceased**) died in March 2020, aged 78 years.

The deceased and his wife Colleen were unable to have children of their own and in April 1970, they adopted Peter when he was about one month old.

In his will made in 2007, the deceased gave the whole of his estate to his sister Marilyn and he appointed her his executor and trustee.

Peter applied for a family provision from the deceased's estate. He sought provision of a lump sum of $460,000 to enable him to purchase a property in the Port Stephens area ($400,000), costs to purchase the property including stamp duty ($20,000) and a replacement car ($20,000).

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

Peter had a long criminal record. In 1991 he was convicted for offensive conduct, assault, and possession of an offensive implement. In 1993 he was convicted of break, enter and steal. In 1998 he was convicted for assault occasioning actual bodily harm and contravening a domestic violence order. In 2000 he was convicted of aggravated break and enter and inflicting bodily harm of a police officer in the execution of duty for which he was imprisoned for two years and six months. (He was released in July 2001 on 12 months parole.) In April 2002, the deceased was granted an apprehended violence order against Peter and Peter was convicted of common assault and malicious damage to property. This incident occurred after the deceased invited Peter to live him when Peter was released from jail on parole and was the result of simmering resentment between father and son living in the one household. Between 2003 and 2020, Peter committed a range of offences that included offensive behaviour, misuse of a carriage service to menace harass or offend, assault occasioning actual bodily harm, malicious damage to property, PCA driving offences, the use of a prohibited drug, driving while unlicensed, driving while disqualified and larceny. Peter's convictions for misuse of a carriage service to menace harass or offend were particularly serious and resulted in him serving 18 months imprisonment between April 2016 and October 2017. In December 2020 Peter was given a community correction order for 18 months commencing in June 2021 and ending in December 2022, on charges of stalking and intimidation with the intent of inducing fear of physical harm.

A psychiatrist called in Peter's case, opined that Peter's "explosive behaviour" was a continuing expression of rage and frustration from the lack of a proper emotional relationship with his father at a young age and though the behaviour was exaggerated in Peter's later life by drugs and alcohol, that too was a predictable part of Peter's overall behaviour. The bases for the conclusion were: (a) the deceased's marriage to Colleen was marred by domestic violence inflicted on Colleen by the deceased which Peter observed; (b) the deceased was emotionally distant from Peter and physically disciplined him as a child with increasing intensity as Peter grew older; and (c) Peter was an "adventurous" teenager as he experimented with marijuana and took the deceased's car for a joyride and was involved in an accident.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's property at Shoal Bay had been sold and his superannuation entitlements redeemed so that net estate comprised cash of $1,012,000.

The plaintiff's costs of the proceedings were estimated to be $125,000 (GST incl) on the ordinary basis.

The defendant's costs of the proceedings were estimated to be $100,000 (GST incl) on the indemnity basis.

If the Court ordered that costs be paid from the estate, available estate was approximately $787,000.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Peter was aged 52 years. He was homeless and slept in his 1998 Nissan motor vehicle which he parked at a beach in Port Stephens. He used basic amenities at a caravan park for cooking and washing.

Peter was unable to afford the costs of long-term rental accommodation in the Hunter Valley area and he had applied for public housing but it was not known when he might be allocated accommodation.

Peter has not had full time employment since 2012 and he received a Centrelink disability pension and collected bottles from local bins to supplement his pension. His combined income fortnightly income was $1,067 and his expenses, including food, petrol, phone, medical, laundromat services, child support and state debt repayments, were $933 per fortnight.

Peter's only asset was his motor vehicle valued at $1,000; he owed the Office of State Revenue about $12,000 and his solicitor had lent him $15,062 interest free to meet medical expenses.

Marilyn was aged 69 years. She had never married and retired as a registered nurse in 2018.

Marilyn only income was the Centrelink single supplement aged pension of $472 per week. Her weekly expenses including insurance, rates, services, groceries, petrol, maintenance, medical and pet-related expenses, totalled approximately $443 per week.

Marilyn lived in an unencumbered property she owned. She also held an equal interest, as tenants-in-common, with her brother Alan of another property inherited from her late mother which Alan occupied. Marilyn's other assets included a Hyundai motor vehicle worth approximately $3,000, savings of $6,000 and superannuation of about $40,000. She had no liabilities.

Marilyn's home required extensive renovations and she intended to sell it and use the proceeds of sale and provision from the deceased's estate to buy a more modern home which would also accommodate Alan if he needed care in old age.

Deceased's testamentary intentions (*s 60(2)(j)*):

In a will made in 1996, the deceased excluded Peter and made a testamentary statement that he did so because there had been much animosity between them for eleven years, Peter had not communicated with him except to abuse him, Peter had once punched him and broken his nose, and their relationship was beyond salvaging and had irretrievably broken down.

As noted above, in his will made in 2007, the deceased gave the whole of his estate to Marilyn and appointed her his executor and trustee. The deceased also made a testamentary statement to accompany the will which repeated most of the matters in the 1996 statement.

Determination:

The Court found that the deceased failed to make adequate and proper provision for Peter in the will as: (a) the deceased had a continuing testamentary obligation to Peter and subject to estrangement and Peter's conduct, Peter's relationship with the deceased and his parlous financial position gave him a strong claim on the deceased's estate; (b) this was not an estrangement case because Peter had attempted to continue a relationship with the deceased and the deceased had rejected those efforts; (c) the dynamic of the relationship between Peter and the deceased had its origins long ago and the deceased bore significant responsibility for the poverty of the relationship due to his conduct neglecting Peter's emotional needs for a proper relationship with his father, when Peter was very young. The relationship was undoubtedly worsened by the Peter's propensity to adolescent mischief and ultimately violent and other criminal misbehaviour; and (d) Peter was open to having a relationship with the deceased but the deceased was not prepared to countenance that and blamed Peter for the relationship breaking down which showed a lack of objective insight. The deceased's thinking was also driven by his own caution about Peter's explosive temper, and though Peter did assault the deceased more than once, the last incident occurred almost 20 years before the deceased died.

The Court found that provision of $520,000 should be ordered as: (a) Peter's fundamental need was for accommodation and some capacity to travel to see friends and relatives and attend to his personal needs and gain some fulfilment in life. As his position on the waiting list for social housing was uncertain, the Court should not approach consideration of his case on

the basis he would be allocated affordable housing and he should receive $460,000 to enable him to secure appropriate shelter; (b) Peter also had pressing medical needs, which should be covered and included medical therapy by a psychiatrist ($25,000) and dentistry ($15,000); (c) a small further sum should be awarded to protect Peter against the vicissitudes of life ($20,000); and (d) Marilyn would receive in excess of $280,000 from the deceased's estate which was an adequate sum for her foreseeable needs as if she spent $80,000 renovating her house, she would still have $200,000 as a fund for exigencies and the same fund could be used to purchase another house if she chose to sell her home.

To ensure that the estate was sufficient to see the bases for its decision fulfilled, the Court fixed Peter's costs at $120,000 and the defendant's costs at $105,000.

An order was also made that the provision for Peter was to be administered pursuant to a protective trust upon terms and with trustees determined by the Court.

Order:

Provision of $520,000 plus costs fixed in the sum of $105,000 and the provision was to be administered pursuant to a protective trust upon terms and with trustees determined by the Court.

Sinclair v Creenaune [2022] NSWSC 230

Judge and date:

Hallen J, 8 March 2022

Overview:

Adjournment – Practice and procedure

Orders:

An adjournment application was dismissed and the plaintiff's summons was dismissed

Background:

Mrs Barbara Sinclair (**the deceased**) died in December 2018 and was survived by two children, Donna and David.

In her will dated April 2014, the deceased appointed a cousin (Noel) her executor and left her estate to Donna and David in different proportions; David received a devise of a property at Dubbo, Donna's debt to the estate was forgiven and rest and residue was divided equally between Donna and David.

The deceased's estate had an estimated gross value of approximately $553,578, liabilities were $2,500 and net estate was approximately $551,078.

Donna applied for a family provision order in a summons filed in December 2019.

They proceedings had a long procedural hearing which included the vacation of a hearing set down for December 2020.

In May 2021, the proceedings were listed again to obtain a hearing date, a hearing date of 21 February 2022 was allocated and a pre-trial directions hearing was listed for 30 November 2021.

At the directions hearing on 30 November 2021, Donna appeared in person, leave was sought by her solicitors to withdraw which was granted and the hearing date of 21 February 2022 was confirmed.

At the directions hearing and again at a subsequent mention, Donna was advised to consider obtaining legal representation.

On 21 February 2021, the hearing's first day, Donna appeared without legal representation although she was granted leave to be assisted by a "McKenzie Friend".

Shortly before the commencement of the hearing on the second day, Donna sent an email to the Court attaching an unfiled affidavit which deposed that she sought an adjournment so she might obtain legal representation and as she felt "completely overwhelmed and unable to proceed at this time".

When the proceedings commenced, on the second day, Donna confirmed that she sought an adjournment and that one of the matters concerning her was that she had not been able to consider documents produced to the Court pursuant to subpoenas she had caused the Court to issue and which were returnable a few days before the hearing commenced.

The defendant's counsel opposed an adjournment and the Court indicated that it would not grant an adjournment. Donna then said that she was not prepared to be cross-examined without legal representation being present. The Court then considered what should occur.

Determination:

The Court did not grant an adjournment for five reasons.

Firstly, the procedural history of the matter, the nature and value of the estate's and the Court's repeated suggestion that the plaintiff would be assisted by her obtaining legal representation.

Secondly, the requirements of the "dictates of justice' in s 56 of the *Civil Procedure Act*, the "elimination of delay" principle in s 59 of the *Civil Procedure Act* and the proportionality of costs principle in s 60 of the of the *Civil Procedure Act* militated against an adjournment.

Thirdly, granting an adjournment of the trial part-heard a second time, would cause significant injustice to the defendant which prejudice might not be remedied by an order for cost.

Fourthly, had Donna obtained legal representation, the problems she had encountered might have been avoided.

Fifthly, when the rules of procedural fairness had not been breached because the plaintiff had been given the opportunity to be heard.

When the Court indicated that it would not grant an adjournment, Donna stated that she was not prepared to be cross-examined without legal representation and the Court indicated that as the defendant had indicated her credit would be an issue and issues between the parties were, in large measure, resolved by cross-examination, it would be unfair to the defendant to allow Donna's affidavits to be read without cross-examination, or to adjourn the proceedings to allow Donna to make herself available for cross-examination with legal representation. The Court therefore retrospectively treated Donna's evidence as not being read.

Orders:

The proceedings were dismissed with costs.

Gardner v Selby [2022] NSWSC 298

Judge and date:

Hallen J, 22 March 2022

Overview:

Jurisdiction – Practice and procedure

Orders:

Notice of motion dismissed

Background:

Mr John Edward Selby (**the deceased**) died in June 2020, in Queensland, aged 42 years. The deceased lived, and was therefore domiciled, in Queensland.

The plaintiff applied for a family provision order. She contended that she was a person with whom the deceased was living in a de facto relationship at the time of his death; a person who was, at any particular time, wholly or partly dependent on the deceased, and who was, a member of the household of which the deceased was a member; and a person with whom the deceased was living in a close personal relationship at the time of his death.

The deceased's actual estate comprising cash at bank ($28,117), vehicles ($16,000) and personal effects ($10,000) was held in Queensland. The deceased was also the beneficiary of a life insurance policy ($1,628,891) and held two superannuation accounts ($40,000 and $7,441 respectively). The proceeds of one of the superannuation accounts was located in New South Wales and may have been capable of being designated as notional estate.

The defendants applied to have the plaintiff's summons summarily dismissed pursuant to *UCPR* r 13(4)(1) as the plaintiff's proceedings could not succeed as s 64 of the *Succession Act 2006* meant that the Court did not have jurisdiction to deal with moveable and immoveable property when the deceased was domiciled outside New South Wales.

Section 64 of the *Succession Act 2006* provides that a "family provision order may be made in respect of property situated outside New South Wales, when, or at any time after, the order is made, only if the deceased person was, at the time of death, domiciled in New South Wales".

UCPR r 13(4)(1) provides that if in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings, (a) the proceedings are frivolous or vexatious, or (b) no reasonable cause of action is disclosed, or (c) the proceedings are an abuse of the processes of the court, the court may order that the proceedings be dismissed generally, or in relation to that claim.

The common law position with respect to the New South Wales Supreme Court's jurisdiction under family provision legislation was set out in *Re Paulin* [1950] VLR 462 at 465 which determined that: (a) the court of the domicile alone can exercise jurisdiction in respect of moveable and immovable property of the deceased in the place of the deceased's domicile; (b) the court of the domicile alone can exercise jurisdiction in respect of moveable property of the deceased outside the place of domicile; and (c) the court of the situs alone can exercise jurisdiction in respect of immovable property of the deceased outside of the place of domicile and the court of the place of domicile cannot exercise such jurisdiction.

The plaintiff contended that the notice of motion should be dismissed as there was property in New South Wales that was capable of being designated as notional estate and the Court

therefore had jurisdiction to consider the application for a family provision order and it would be inappropriate to summarily dismiss the proceedings.

Determination:

The Court refused to summarily dismiss the plaintiff's claim for four reasons.

Firstly, s 64 of the *Succession Act 2006* was amended in 2018 and the meaning of the section in its amended form, and its statutory effect, were issues inherently unsuitable to be determined on a summary dismissal application without full and detailed argument.

Secondly, even if common law choice of law rules were applicable , succession to property depended upon whether that property was classified as movable or immovable and succession to movable property was determined according to the law of the deceased's domicile. It was an open question whether the rules had been amended by the *Succession Act 2006* and a serious legal question which should be determined at a trial.

Thirdly, New South Wales was the only state in Australia that had the concept of notional estate in family provision legislation and how the common law was affected, if at all, by that concept, as far as it related to property within New South Wales, should not be determined summarily.

Fourthly, the evidence about whether property might be designated as notional estate was incomplete, it should have been available to the defendants as the administrators of the deceased's estate and they had not given any evidence or explained its absence.

Orders:

The notice of motion was dismissed.

Karpin v Gough [2022] NSWSC 471

Judge and date:

Ward CJ in Eq, 21 April 2022

Overview:

Close personal relationship – Dependent household member relationship – Factors warranting a claim

Orders:

Summons dismissed and the plaintiff's costs to be paid by the deceased's estate on the ordinary basis

Background:

Mr Earle Cameron died in November 2019 aged 87 years, survived by three adult daughters.

In his will made in June 2017, the deceased appointed a solicitor as executor of his estate, he gifted $500,000 to a long-standing employee and left the whole of the balance to his three daughters, in equal shares, as tenants in common.

The plaintiff applied for a family provision order. She maintained she was an "eligible person" as she was wholly or partly dependent on the deceased and was a member of the deceased's household and sought provision of a sum so that she would "lived comfortably for the rest of

her life" and this was, at least, a sufficient sum to enable her to acquire a Paddington terrace house.

Determination:

Two issues determined the proceedings: eligibility and whether there were "factors warranting" the claim.

The plaintiff established that she was an "eligible person" as she was in a close personal relationship with the deceased and a member of the deceased's household between May 2016 and December 2016 and was at least partially dependent on the deceased, for food, accommodation, holidays and "the like" in the period.

As the plaintiff established eligibility pursuant to s 57(1)(e) and (f) of the *Succession Act 2006*, she was also required to establish that there were "factors warranting" her claim (s 59(1)(b) of the *Succession Act 2006*). The plaintiff did not satisfy the requirement as she was not a natural object of the deceased's testamentary bounty given the shortness of the relationship and as by the time of his death, the deceased had communicated a firm view that the plaintiff should have no claim on his estate and that he had made sufficient provision for her when she was in a relationship with him.

Orders:

The plaintiff's claim was dismissed and her costs were ordered to be paid from the deceased's estate on the ordinary basis.

Karpin v Gough (No 2) [2022] NSWSC 682

Judge and date:

Ward CJ in Eq

Overview:

Practice and procedure – Costs

Orders:

The plaintiff to pay the defendant's costs on the ordinary basis up to November 2020 and thereafter on the indemnity basis

Background:

In its principal judgment (*Karpin v Gough* [2022] NSWSC 471) above, the Court dismissed the plaintiff's claim and ordered that the plaintiff's costs be paid from the deceased's estate on the ordinary basis.

In November 2020, the defendant served an Offer or Compromise (**Offer**) complying with *UCPR* r 20.26 by which he offered to settle and compromise the plaintiff's claim by paying her $251,000.

Had the Offer been accepted, *UCPR* r 42.15 provided that the plaintiff received a party/party costs order in her favour and if it was not accepted, UCPR r 42.15A provided that if the defendant obtained an order or judgment on the claim no less favourable that in the Offer, the plaintiff was liable to pay the defendant's costs on the ordinary basis up to the day of the Offer, and assessed on an indemnity basis from the beginning of the next day.

The Offer was not accepted and the defendant sought a special costs order.

The plaintiff contended that that there should be no order for costs because it was unlikely that the plaintiff would be able to meet an order to pay the defendant's costs and that the persons who would suffer would be the plaintiff's lawyers not the plaintiff, as an order for costs would have a "detrimental effect" on the willingness of lawyers to take on family provision claims for impecunious plaintiffs.

Determination:

The Court accepted that: (a) an award of costs was discretionary to be exercised judicially; (b) costs orders were compensatory, not punitive, in nature; (c) the general rule (*UCPR* r 42.1) was that that costs follow the event but special costs orders were warranted in certain circumstances, including where the offer of compromise procedure under the *UCPR* was validly invoked; and (d) to enliven the discretion to make special costs orders by reference to the rejection of an Offer of Compromise, an offer had to be a genuine offer of compromise.

The Court reached six conclusions.

Firstly, the Offer comprised a genuine element of compromise as it provided for the payment of a substantial sum and if the offer had been accepted, the plaintiff would have received a party/party costs order in her favour in accordance with the *UCPR*.

Secondly, it was incumbent on the plaintiff to consider the strengths and weaknesses of her case in assessing whether to accept the Offer. The plaintiff knew of the relevant matters that would ultimately count against her case namely, that the relationship had not been of long-term duration; that, at the time of the deceased's death, she was not living with the deceased and therefore there might be a question as to the status of the relationship at that time; the circumstances in which the relationship had come to an end; and that the deceased had made significant provision for her during their relationship. The plaintiff's lawyers should also have known those matters and have been in a position to offer advice as to the strength and weaknesses of the case, and hence the reasonableness of the Offer.

Thirdly, the purpose of costs orders is not to ensure that a party's legal representatives will be paid; it is to compensate the relevant party for costs that have been incurred in the conduct of litigation in which there has been a relevant successful "event".

Fourthly, whilst the position in family provision cases may be more nuanced than in many other kinds of case, and the expectation of prospective applicants may be that an applicant's costs will be borne out of the estate even where the applicant may not succeed or may only partially succeed in the claim for provision, it cannot be assumed this will be the case.

Fifthly, an order for costs would not have the "floodgates" effect the plaintiff foreshadowed in her submissions but should have the salutary effect that proper consideration should be given to Offers of Compromise in future.

Finally, the plaintiff's conduct in giving, at times, false evidence and being prone to exaggeration, was not so unreasonable as, of itself, to warrant an order disentitling her to costs or requiring her to pay the defendant's costs.

Orders:

The plaintiff was ordered to pay the defendant's costs of the proceeding assessed on the ordinary basis up to and including the date of the Offer and thereafter on the indemnity basis.

Benz v Armstrong; Benz v Armstrong; Benz v Armstrong [2022] NSWSC 534

Judge and date:

Ward CJ in Eq, 5 May 2022

Overview:

Adequacy of provision – Adult child – Extension of time – Notional estate

Orders:

Provision of $1,900,000 plus costs
Provision of $900,000 plus costs (2x)

Background:

Dr William Benz (**the deceased**) died in April 2019, aged 89 years. The deceased was twice-married: his first wife, with whom he had six children, predeceased him in May 2011 and his second wife (**Erlita**), whom he married in June 2012 and who he was in a relationship for a period before his first wife's death, survived him.

In his will dated April 2019 (**Will**), the deceased: (a) appointed Erlita his executor and trustee, (b) left Erlita the proceeds of any pension scheme or superannuation fund or death benefit, a Centennial Park Property, money in a specified bank account and all his shares held in public companies, and (c) provided that residue be divided equally amongst his six children. The Will also directed Erlita to "do all in her power" to ensure that the deceased's "intention" that the balance of any superannuation fund or pension scheme be received by her was effected.

At his death, the deceased's superannuation benefit had a balance of $12,913,476. In May 2016, the deceased executed a binding death benefit in Erlita's favour. The superannuation benefit was held by a self-managed superannuation fund controlled by a corporate trustee and the deceased's was its sole director until his death and Erlita was appointed the trustee's director after the deceased's death.

Three of the deceased's children (Anna, Andrew and Catherine) brought family provision claims against the deceased's estate.

After family provision proceedings were commenced, Erlita received a transfer of $9,282,490 in shares *in specie* as a death benefit from the superannuation fund pursuant to the deceased's binding death nomination.

The deceased's actual estate had a net value of approximately $2,487,000 and after specific gifts to Erlita, it was probable that there was no residual estate and therefore the deceased's children would receive no provision. The plaintiffs claimed that property including interests in properties owned by the deceased and Erlita as joint tenants, the deceased's superannuation benefit and shares gifted to Erlita shortly before the deceased's death having a total value of between $17,900,000 and $18,300,000, could be designated as notional estate

Extension of time to bring applications:

Catherine's application for provision was filed a few days late and Andrew's three month's late.

Section 58 of the *Succession Act 2006* provides that an application for a family provision order must be made not later than 12 months after a deceased's death unless the Court otherwise

orders on "sufficient cause being shown", or the parties to the proceedings consent to the application being made out of time.

The Court accepted that Catherine's delay in filing a summons was minimal, the reason for delay related to filing documents in the Registry during the course of the Covid-19 pandemic and that no prejudice would be suffered by the grant of an extension.

Andrew received advice to make a claim and he made a forensic decision not to do so in time. The Court did not find that any material prejudice was caused by the delay.

Leave was granted for extensions of time to be granted for both claims.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Towards the end of the deceased's life his relationship with each of the plaintiffs deteriorated and he took steps to ensure that provision they received from the estate was reduced. The plaintiffs felt that Erlita was controlling the deceased and interfering with their access to him; and they had a genuine affection for the deceased and wanted to have a closer relationship with him.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

Catherine and Andrew submitted that the deceased owed a moral duty to his children and this gave rise to an expectation that provision would be made for them. Anna went further and submitted that of the deceased's children only she and Andrew had not received real estate from their parents and the position would have been different had the deceased's first wife's intention to financially to separate from the deceased proceeded instead of being stopped after intervention by the deceased so that a half share of the wife's assets went to the deceased rather than to her children.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The Court accepted that actual estate was around $6,407,294 (though Erlita received most of it and notional estate was approximately $14,139,305).

Anan's costs were estimated to be $75,000 inclusive of GST on the ordinary basis and $90,000 on the indemnity basis. Catherine costs were estimated to be $123,312 inclusive of GST. Andrew's costs were estimated to be $103,396 inclusive of GST calculated on the ordinary basis and $137,603 inclusive of GST on the indemnity basis. Erlita's costs were estimated to be $289,818.

If significant provision was made for the plaintiffs, orders declaring property as notional estate were required.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Anna was a qualified surgeon, who had commenced undertaking psychiatry training on a part-time basis as it was not financially viable for her to study full-time.

Anna's taxable income was $135,420 per year. She was a single parent with one child aged 12, and she also received a family allowance, but not child support.

Anna owned a car ($22,934), she had cash at bank ($608,000) and a superannuation benefit ($180,479).

Anna sought provision to purchase a two-bedroom unit for $2,000,000 and a sum for contingencies.

Catherine was an art curator and her after tax income was $5,002 per calendar month and her monthly expenditure approximately $4,368.

Catherine owned a house at Darlinghurst worth approximately $1,200,000 (which she received from a trust the deceased controlled essentially as a gift), cash at bank of $62,126, a Mercedes Benz car worth $1,500 and a superannuation benefit of $132,080. She owed liabilities of $56,888.

Catherine sought provision to: pay for private health insurance ($2,386 per annum); discharge a home loan ($6,888); home renovations ($722,000); purchase a new car ($52,640); repay debt ($50,000); a fund to pay rental costs while renovations occurred to her home ($35,000); removal and storage costs while renovations occurred ($5,908); legal costs ($19,938); and a capital sum of $500,000 to add to her superannuation.

Andrew was married and he and his wife had 4 children, aged between 13 and 22 years.

Andrew had been the primary caregiver for his children when they were younger but he had returned to paid workforce on a part-time basis, as a secondary school teacher.

Andrew's wife was an orchestral musician and her monthly income was $5,930 per month net.

Andrew and his wife jointly owned their home ($1,500,000), personal effects and home contents ($148,400) and a savings account ($38,219). Their liabilities were a home loan ($496,350), credit card and HECs debts ($29,190).

Andrew owned few assets and his superannuation benefit was $17,321. His wife's assets included three motor vehicles ($46,300); IAG shares ($11,507) and she had a superannuation benefit of $555,265.

Andrew sought provision of $1,975,499 to: build a new home ($900,000); repay his mortgage ($496,350); repay HECS debt ($28,649); purchase a new car ($32,500); dental work ($18,000) and a capital sum of up to $500,000.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Anna was aged 53 years; Catherine was aged 48 years and Andrew was aged 52 years.

Deceased's testamentary intentions (*s 60(2)(j)*):

The Will made provision for the plaintiffs as they each received a share of residue.

Is any other person liable to support the applicant *(s 60(2)(l))*:

No other person was liable to support Anna or Catherine. Andrew was married, and his wife owed him the usual moral obligations of one spouse to another in terms of support.

Determination:

The Court found that inadequate provision was made for Anna, Catherine and Andrew in the Will for five reasons.

Firstly, the deceased's estate was a large one.

Secondly, there was an expectation within the deceased's family that his children would receive a share of his estate.

Thirdly, the evidence established a history within the family of the deceased giving assistance to his children to purchase property.

Fourthly, the deceased's testamentary intention that his children receive provision from his estate would not be discharged unless orders for provision were made.

Fifthly, it was "extraordinary to think" that the deceased would have intended that his children receive nothing from his "very large estate", when Erlita had received substantial provision during her relationship with the deceased and in the Will, and the deceased's stepdaughter lived rent free in one of his former properties.

The Court made these orders for provision:

1. Anna received provision of $1,900,000 as the deceased had considered purchasing a property for her before his first wife's death and the sum would enable her to purchase a unit costing approximately $2,000,000 with a shall mortgage and allow $500,000 for contingencies.

2. Catherine received provision of $900,000 as the sum could be used to renovate her home ($750,000) and provide a small buffer for contingencies ($150,000).

3. Andrew received provision of $900,000 as this would provide sums to discharge his and his wife's existing mortgage and to contribute to house renovations or contingencies.

The orders for provision totalled $3,700,000. The Court also concluded that a notional estate orders should be made either because actual estate was insufficient or that provision should not be made wholly out of actual estate and it was appropriate to designate as notional estate sufficient property to enable the provision to be made and the Court make orders declaring shares and a real property at Pymble notional estate.

Orders:

See above.

Benz v Armstrong; Benz v Armstrong; Benz v Armstrong (No 2) [2022 NSWSC 688

Judge and date:

Ward CJ in Eq, 26 May 2022

Overview:

Costs

Orders:

Indemnity costs and "gross sum" costs orders made

Background:

In its principal judgment (*Benz v Armstrong; Benz v Armstrong; Benz v Armstrong* [2022] NSWSC 534), the Court ordered that provision of $1,900,000, $900,000 and $900,000 be made for three of the late Dr William Benz's children (Anna, Catherine and Andrew).

On 15 October 2021, Anna served a *Calderbank* offer on the defendant (Erlita) in which she offered to accept $1,700,000 inclusive of costs, in full and final settlement of her claim. Anna received a better result ($1,900,000 plus costs) than the offer she made and she sought an

order that her costs be paid on the ordinary basis up to the date of the offer, and on the indemnity basis thereafter.

Separately, Andrew contended that determining the amount of his costs would involve a level of "extreme practical difficulty" for the parties on an assessment and that the costs assessment process should be avoided and a lump sum costs order made.

Determination of the indemnity costs application:

The Court accepted that these principles applied when exercising the discretion to award costs.

Firstly, the usual order is that costs follow the event unless the Court considers that some other order ought to be made (*UCPR* r 42.1).

Secondly, costs orders in civil litigation are compensatory, not punitive in nature.

Thirdly, special costs orders will be warranted in certain circumstances, including where the special costs procedure for offers of compromise is validly invoked or the *Calderbank* principles apply.

Fourthly, when a *Calderbank* offer is not accepted two questions arise: did the offer contain a genuine compromise and was it unreasonable for the offeree not to accept it. The second question required an evaluative judgment to be made by reference to the terms of the offer and the surrounding circumstances. Factors to be considered in considering whether rejection of an offer was unreasonable include: the stage of proceedings at which the offer was received; the extent of the compromise offered; the offeree's prospects of success, assessed at the date of the offer; the clarity with which the offer was expressed; and whether the offer foreshadowed an application for indemnity costs if rejected. Factors to be considered in considering whether rejection of an offer was reasonable include: all relevant evidence had not been served at the time of the offer; the full parameters of the dispute remained unclear at the time of the offer; the offeror's case changed after the offer was made; the inclusion of conditions in the offer; and the issues in dispute were complex.

Fifthly, in family provision claims, ordinarily the costs of the successful plaintiff will be paid out of the estate on the ordinary basis and the executor's costs on the indemnity basis, although there is uncertainty that there is a "usual rule".

The Court concluded that it was unreasonable for Erlita to reject Anna's offer and indemnity costs were ordered as: (a) the offer involved a genuine element of compromise as it was for a sum approximately $300,000 less than the amount Anna sought and was inclusive of costs and it ought to have occurred to Erlita that as Anna stood to receive nothing from the deceased's large estate, it was "on the cards" that some order for provision would be made; (b) the offer's terms were clear; (c) the offer clearly foreshadowed an application for indemnity costs if it was rejected; (d) though the offer was made almost on the eve of a hearing, Erlita was in a position where she ought to have understood the strength and weaknesses of Anna's case and been able to assess the offer; and (e) though the time the offer was open for acceptance was short (only a few days), it allowed sufficient time in the circumstances and Erlita had made a counteroffer providing the same time for acceptance.

Determination of the "gross sum" costs order application:

The Court accepted that these principles applied when a "gross sum" costs order was being considered.

Firstly, it is appropriate to make an order when it is desirable to avoid the expense, delay and aggravation likely to be incurred in a costs assessment, where a party's conduct has unnecessarily contributed to the costs of the proceedings and where the costs incurred have been disproportionate to the result of the proceedings.

Secondly, considerations material to the exercise of the discretion include: the complexity of the proceedings in relation to their costs; whether the assessment of costs would be "protracted and expensive"; whether there was a risk that the unsuccessful party would not be able to meet a liability arising for an order; and the relative responsibility of the parties for the costs incurred, especially where the costs are disproportionate to the result of the proceedings.

Thirdly, the power to make a gross sum order should only be exercised when the Court considered that it could do so fairly between the parties which included the Court having confidence in the appropriate sum based upon the materials available.

The Court held that it would be appropriate to make a gross sum order but it did not accept that it had sufficient information to conclude that a gross sum costs order could be fairly assessed. Accordingly, it ordered that each party's costs be fixed as a gross sum, but that the determination of "the sum" be referred out to an expert whom the parties were to mutually agree, or who failing that, was appointed by the Court.

Orders:

An indemnity costs order and "gross sum" costs order were made.

Khadarou v Antarakis [2022] NSWCA 99

Judge and date:

White JA, Kirk JA and Basten AJA, 10 May 2022

Overview:

Close personal relationship

Orders:

Appeal dismissed with costs

Background:

At first instance (*Khadarou v Antarakis* [2021] NSWSC 743) the pivotal question was whether the plaintiff was an "eligible person" because he was someone with whom the deceased was "living in a close personal relationship" at the deceased's death as s 57(1)(f) of the *Succession Act 2006* requires.

(Section 3(3) of the *Succession Act 2006* defines "a close personal relationship" to be "a close personal relationship between two adult persons who are living together, one or each of whom provides the other with domestic support and personal care".)

The Court's opinion was that the concept of "living together" entailed the sharing of a home, such that it could be said that the plaintiff and the deceased were cohabiting and the test for determining the question was an objective one requiring an assessment of the nature and extent of the "living together" and that there needed to be a place or places in which both of them lived in as a home. The Court added that it was not necessary for each of person to spend the whole of their respective times in that place or those places although it was necessary to establish that each of the persons could be seen to regard the place or places in question as his or her home and to be doing so on a rational basis and this involved a consideration of such matters as: (a) whether the plaintiff and the deceased had a common residential address; (b) whether and how often the plaintiff and the deceased slept in the same premises; (c) whether the plaintiff and the deceased kept clothing, domestic and personal

effects at the same premises; (d) whether the plaintiff and the deceased were simultaneously present in the same residence; (e) whether the plaintiff and the deceased shared the facilities of day-to-day living on a regular and recurrent basis such that it could be said that they shared a household; (f) whether the plaintiff and the deceased decided household questions together and shared the burden of maintaining a household; and whether there was a place that each of the plaintiff and the deceased regarded as "home".

The plaintiff's claim was dismissed with costs as the Court held that even if it accepted all of the plaintiff's assertions about the assistance the plaintiff had provided to the deceased over several years, it did not consider that the plaintiff and the deceased were "living together" so as to satisfy the definition of a "close personal relationship". The Court also held that had it concluded differently, there were no "factors warranting" the plaintiff's claim, as what the plaintiff did for the deceased constituted the actions of a good friend and did not give him the status of a person who would generally be regarded as a natural object of the deceased's testamentary recognition.

On appeal, the plaintiff contended that he was entitled to compensation for the work he had done for, and the care he had provided, the deceased.

Determination:

The Court of Appeal held that the primary judge's finding that the plaintiff and the deceased were not "living together" was clearly correct, that it accorded with the Court's decision in *Yeshilhat v Calokerinos* [2021] NSWCA 110, that decision was not challenged and it followed that the plaintiff was not an eligible person.

The appellant required an extension of time to file an appeal and though the application was opposed as the respondent contended that she had compromised a claim for the costs of the proceedings below on terms that provided that no claim for the costs of those proceedings would be made, leave was granted as the respondent was on notice of the plaintiff's intention to file an appeal when a compromise was negotiated.

Orders:

The appeal was dismissed with costs.

Georgopoulos v Tsiokanis & Anor [2022] NSWSC 563

Judge and date:

Hallen J, 11 May 2022

Overview:

Adequacy of provision – Adult child – Estrangement – Extension of time

Orders:

Summons dismissed

Background:

Mr Nicholas Tsiokanis (**the deceased)** died in October 2019, aged 86 years. His former wife, whom the deceased divorced in 2007 and the mother of his three children (Barbara, George and Constantina), died in August 2012.

In his will dated March 2008 (**Will**), the deceased: (a) appointed George and Constantina joint executors of his estate, (b) devised three properties in Greece to George and Constantina, (c) gave a $100 bequest to Barbara, and (c) provided that the rest and residue went to George and Constantina in equal shares.

Barbara sought a family provision from the deceased's estate and George and Constantina were joined as defendants. The summons was filed late (December 2020) and Barbara sought an extension of time to bring a claim. As will be read, the Court did not need to deal with the issue, because it decided no order for provision should be made, but it did indicate that had it been necessary to deal with the issue, the interests of justice favoured an order that the time to bring a claim be extended as no prejudice was caused by the delay.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

The deceased explained in the Will that he had made the provision he had for Barbara as: (a) he had built an extension to a house he owned with his former wife so that Barbara and her children had a place to live when Barbara separated from her husband in 1993 and Barbara had not paid board, rent or contributed to any household expenses; (b) he had paid for Barbara's two overseas trips to Greece costing approximately $6,000; (c) when she was in Greece, Barbara received from the deceased's brother, spending money equivalent to one million Drachmas; (d) from 2003, Barbara physically assaulted the deceased by throwing fruit or vegetables at him while living in the deceased's Earlwood home; (e) Barbara threatened to physically harm the deceased until he obtained an AVO in about March 2007; and (f) Barbara's display of lack of respect for the deceased and concern for his health caused him great anxiety and stress during his lifetime.

Barbara and the deceased had no contact for the last 12 years of the deceased's life.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate comprised a one-half interest as tenant in common in a Blacktown property ($400,000) (George was the other co-owner) and cash at bank ($4,402).

The estate's liabilities comprised funeral expenses ($10,897), the costs of erecting a tombstone ($15,950) and a contingent liability for a one-half share of the costs and expenses of selling the Blacktown property ($8,750).

Net estate had a value of $368,805.

The plaintiff's costs of the proceedings calculated on the ordinary basis were estimated to be $47,478 (GST incl) and $61,638 (GST incl) on the indemnity basis.

The defendants' costs, calculated on the indemnity basis, were estimated to be $69,041.

If an order was made that costs be paid from the estate, costs totalled $116,519 and available estate was approximately $252,285.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Barbara received a disability pension of $2,120 per month and her expenses were claimed to be $7,936 per month.

Barbara owned assets of $6,300 and held a superannuation benefit of $48,000. She owed a credit card debt of $100.

Barbara sought provision of an amount between 20 and 25 per cent of the net estate to provide a sum for exigencies of life.

George was an industrial chemist and his weekly income was $1,500 and his expenses $927.

George owned assets including a half-share of the Blacktown property worth approximately $351,000 and he held a superannuation benefit of $350,000. George's sole liability was a credit card debt of $25,000.

George intended to continue living in the Blacktown property and he could not afford to buy the share left to Constantina in the Will.

Constantina was employed in the food and wine industry as a quality technician. She received a weekly gross wage of $1,057 per week and her expenses were $897 per week.

Constantina owned assets including her home worth approximately $1,020,000 and she had a superannuation benefit of $180,000.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Barbara was aged 65 years; George was aged 62 years and Constantina was aged 52 years.

Determination:

The Court held that judged by quantum and looked at through the prism of her financial and material circumstances, adequate provision for the plaintiff's maintenance or advancement in life was not made by the Will, no provision should be ordered as it was unable to conclude that adequate provision for the proper maintenance, education or advancement in life of the plaintiff had not been made by the Will, for six reasons.

Firstly, the scheme of the Will was rational on its face.

Secondly, the family relationship between the plaintiff and the deceased was a factor in the assessment of her claim and the plaintiff's conduct toward the deceased, particularly between about 2004 and 2007 was quite unjustifiable and reprehensible. Callousness and hostility during the lifetime of the deceased are not the only circumstances in which the community might reasonably consider it not inappropriate for there to be no, or virtually no, provision made for an estranged adult child even though that child was in straitened financial circumstances.

Thirdly, the plaintiff did nothing to attempt to repair the rift between her and the deceased.

Fourthly, in the circumstances, the plaintiff, could not, reasonably, have had a legitimate expectation that she would receive some, if diminished, recognition by way of provision out of the deceased's estate and the deceased took the reasonable and understandable view that the relationship was not a close, or loving one, but one characterised by the plaintiff's hostile, and, at times, violent, conduct towards him; that their relationship had broken down completely; and that he did not have any obligation to provide for the plaintiff. He was not blinded, simply by a degree of intergenerational disappointment, to the needs of the plaintiff. His reaction to the plaintiff's conduct was understandable and might have been shared by many parents.

Fifthly, after 2007, the plaintiff demonstrated an indifference to, and neglect of, the deceased, for the last 12 years of his life.

Sixthly, there are cases in which an estrangement, taken with other factors, is such that the deceased is entitled, without interference by the Court, to make little, if any, provision for the estranged child. This is particularly so, if there is overt hostility and violence on the part of the applicant, where the period of estrangement is long, where the estate is not large, and where there are competing claims on the bounty of the deceased and this was such a case.

The Court also concluded that if it were wrong in coming to that conclusion, the same considerations would produce the result that, as a matter of discretion, it would not be satisfied

that a family provision order ought to be made and that as the claim was to be dismissed, there was no purpose extending the time for the making of the application.

Orders:

The proceedings were dismissed with costs.

Wheatley v Lakshmanan [2022] NSWSC 583

Judge and date:

Ward CJ in Eq, 16 May 2022

Overview:

Adequacy of provision – Adult child

Orders:

Provision of $820,000, in substitution for that provided in the deceased's will

Background:

Mrs Dianne Lakshmanan (**the deceased**) died in February 2017, aged 65 years. The deceased was survived by two daughters, Alexis and Erin.

In her will dated August 2008 (**Will**), the deceased (a) appointed Erin to be executor and trustee, (b) gifted and devised a property at The Entrance to Alexis unencumbered and (c) gifted the rest of her estate to Erin. The deceased however did not own The Entrance property and it was owned by a company of which the deceased was the sole shareholder.

The Entrance property was sold by agreement between the parties and the proceeds of sale of $1,473,581 were retained in an account pending resolution of the proceedings. If the proceeds of sale were transferred to Alexis or held by the estate they would be treated as income and taxable. In the former case. Alexis would be liable to pay tax and Medicare levies of $646,959 and would receive about $820,000 net. Conversely, if there was an order for a legacy in Alexis' favour in substitution of the provision in the Will, and it was not paid from the proceeds of sale, no income tax was payable.

The company was also indebted to the deceased's estate in the sum of $328,918 and had only limited means to repay the debt. It had also paid capital gains tax of $260,000 arising from The Entrance property's sale.

The estate contended that the gift of The Entrance property to Alexis failed as the deceased had no power to make it. If this was correct Alexis received no provision under the Will.

Alexis applied for: (a) order that the Court declare how the gift of The Entrance property in the Will, should be constructed; (b) if necessary rectification of the Will so as to make effective the gift of The Entrance property; (c) determination of whether she was entitled to rental income received from The Entrance property from the date of death; (d) if appropriate, determination of the appropriate manner of performance of the gift; (e) and a family provision claim if the gift failed or a top-up if the gift was effective.

The Court determined that (a) the gift was ineffective because The Entrance property was not the deceased's to give and neither was the gift one of shares, (b) rectification should not be ordered as there no clear evidence that the deceased's intentions were that the executor have

power to transfer The Entrance property to Alexis, and (c) that as the gift failed, Alexis had no entitlement to rent.

The Court then considered Alexis's family provision claim.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

The deceased was responsible for much of Alexis' upbringing, Alexis lived with the deceased until shortly before her marriage and remained in regular contact with her.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The estate's assets comprised a Dover Heights property worth between $7,000,000 and $7,500,000, another investment property worth between $1,800,000 and $2,000,000 and The Entrance property's sale proceeds of $1,473,581.

The estate's liabilities comprised a mortgage secured against the Dover Heights property of $900,078 and a contingent liability for capital gains tax if the second investment property was sold of approximately $408,664.

Alexis' costs were estimated to be $626,963 and the estate's costs were estimated to be $456,350.

If costs were ordered to be paid from the estate, net estate was approximately $9,314,839.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Alexis had her own business as a financial planner and was a casual TAFE lecturer. Her income was approximately $35,000 per annum and her liabilities exceeded her assets.

Alexis' husband worked as a project manager and his taxable income in the 2021 financial year was $183,700. He owned the couple's home, a one-bedroom unit in Miller's Point worth $1,200,000 (which was encumbered by a mortgage of $284,285) and other assets worth $135,668 approximately.

Alexis and her husband also held superannuation benefits of $40,831 and $723,395, respectively.

Erin was employed on a full-time basis as a treaty reinsurance broker. She and her husband had combined annual incomes of USD399,000 (AUD555,417) and expenses of USD377,831 (AUD524,765).

Erin and her husband had combined assets of US$3,040,974 (AU$4,233,575) and liabilities of US$1,284,659 (AU$1,784,249).

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Alexis suffered a depressive disorder and required ongoing therapy and medications.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Alexis was agreed 44 years.

Is any other person liable to support the applicant *(s 60(2)(l))*:

Alexis was married and her husband had a moral obligation to support her.

Any other matter (s 60(2)(p)):

As noted above, the costs incurred were significant and it was submitted this was a case were a "costs capping" order ought to be made.

Determination:

As the gift Alexis received in the Will failed, she received no provision under the Will and the Court was therefore satisfied that adequate and proper provision had not been made for her as the deceased clearly intended to make a gift to Alexis, under the Will, of The Entrance property. The Court also concluded that had the gift not failed, adequate provision was made.

The Court held that provision of $820,000 should be ordered as the estate would have a tax burden of about $1,000,000 and though Erin would obtain a valuable real property she would have to meet the estate's liabilities from the estate's assets and provision of more than $820,000 was not warranted.

Orders:

Provision of $820,000 and costs were reserved but it was indicated that the Court was minded to cap costs.

Wheatley v Lakshmanan (No 2) [2022] NSWSC 851

Judge and date:

Ward CJ in Eq, 28 June 2022

Overview:

Costs

Orders:

The plaintiff receive a net sum of $160,000 as a capped and fixed amount in costs

Background:

In its principal judgment (*Wheatley v Lakshmanan* [2022] NSWSC 583). In that judgment, the Court ordered that provision be made for the plaintiff (Alexis) of $820,000, in substitution for the provision she received in the deceased's will. The Court also raised concerns about the magnitude of the costs incurred in the proceedings and indicated that it might be appropriate to order that Alexis bear her own costs related to an issue related to the estate's liability for tax. Costs were reserved and the parties were directed to file written submissions on the topic.

Alexis sought an order that her costs, capped at $456,000 (a sum that made some allowance for the fact that her success in the proceedings was limited to her claim for a family provision order), that there be a gross sum costs order in her favour in that amount and that there be no adverse costs order against her.

The defendant sought a more complicated costs regime; that Alexis pay 20% of the defendants' costs; that Alexis be paid 80% of her costs calculated on the ordinary basis and subject to a cap, up to times when the defendants made offers to pay Alexis various sum for her costs.

Determination:

The Court was troubled by three matters: the magnitude of the costs incurred in the proceedings; the prospect that the incidence of costs would put the deceased's long held testamentary intention that her daughter Erin receive her Dover Heights property at risk; and that Alexis had rejected at least one open offer to settle.

In considering costs, the Court accepted that it was reasonable for Alexis to have rejected offers of compromise made by the defendants as the tax consequences of the offers made it difficult to access their worth. This did not mean however that the making and rejection of offers was to be excluded altogether when considering costs as Alexis' forensic decisions to pursue an outcome whereby she would receive the estimated value of the proceeds of sale of The Entrance property and an additional amount for costs had led the parties to incur substantially increased costs.

The Court decided that it was preferable for a gross sum costs orders to be made and to cap costs given the conduct of the litigation and the magnitude of the costs incurred and that it was an inappropriate outcome for the estate to bear the whole of its costs and for Alexis to recover the whole of her party/party costs as this did not reflect the fact that the defendants were successful on a number of discrete issues and that Alexis failed on a number of discrete issues; nor the fact that Alexis made a forensic decision to pursue the litigation in the face of very reasonable settlement offers and there needed to be a balance between depriving Alexis of a substantial portion of the legacy ordered in her favour and the estate being further burdened of costs. Orders were made that: Alexis pay roughly 15% of the defendants' costs capped and fixed at $70,000; Alexis should bear the whole of the costs relating to the tax consequences of various outcomes and not recover those costs from the estate; and that Alexis should recover out of the estate the capped (and fixed) sum of $250,000 towards her costs on a party/party basis less $20,000 for a prior costs order Alexis was ordered to pay. Setting off the capped amount payable to the estate towards its costs ($70,000) and the net capped amount payable to Alexis out of the estate towards her costs ($230,000), left an amount payable to Alexis of $160,000 out of the estate.

Orders:

An order was made that Alexis be paid $160,000 for her costs.

Williams v Williams [2022] NSWSC 711

Judge and date:

Slattery J, 2 June 2022

Overview:

Adequacy of provision – Adult child – Estrangement – Costs

Orders:

Provision of $625,000 to be paid by 30 November 2024 and the plaintiff's costs were capped at $147,548

Background:

Mr Ioan Williams (**the deceased**) died in February 2019, aged 87 years. The deceased's wife predeceased him and he was survived by four children, Anne, Timothy, Catherine and Richard.

The deceased was a farmer and three generations of his family before him farmed a property located in northern New South Wales (**the Farm)**.

Relevantly, Timothy worked the Farm with the deceased and was doing so at the deceased's death and Richard was a stock and station agent.

In his last will made in 2013 (**Will**), the deceased: appointed Timothy and Anne executors; forgave any debts owed to him by Timothy and his wife; left Timothy his interests in various farming partnerships; left legacies of $1,000 to each of his grandchildren; left legacies of $170,000 to Anne and Cate payable in equal instalments over ten years; forgave a debt of $200,000 said to be owed to him by Richard on condition that Richard not commence family provision proceedings and Richard secured a release of the Farm from any indebtedness owed by Richard's company; and left residue to Timothy.

Anne, Cate and Richard commenced proceedings for further provision out of the deceased's estate.

Anne and Cate settled their proceedings on terms that provided that they receive legacies totalling $700,000, plus costs of $40,000. The judgment therefore concerned Richard's claim.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate comprised the Farm valued at $6,360,000 and liquid assets of $56,381, a gross value of $6,416,381.

The estate's settlement with each of Anne and Cate totalled $740,000, legacies to grandchildren amounted to $8,000 and the estate's legal costs of the proceedings were estimated at $117,000. The deceased had also pledged the Farm as security for a debt Richard incurred to buy a stock and station agency business and the contingent liability for the obligation was $885,057. The estate's liabilities therefore totalled $1,750,057.

Available estate was approximately $4,666,325.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Richard earned approximately $65,000 net per annum from his stock and station agency business; his wife earned approximately $63,000; he and his wife owned assets worth $712,720 net which included the stock and station agency business ($100,000) and their home ($720,000), plus superannuation benefits of $215,000. The figures allowed for a debt of $885,057 Richard owed and was secured by a mortgage over the Farm.

Timothy and his wife owned net assets of $2,146,168 which included a farm and the net assets of a farming partnership and superannuation benefits of $119,183.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Richard was aged 59 years.

Provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate *(s 60(2)(i))*:

In 2007, the deceased agreed to pledge the Farm as security for a loan so that Richard could purchase a stock and agent's business. By 2012, the deceased regretted doing this as it restricted his capacity to deal with the Farm as he wanted to do either during his lifetime or upon his death and he commenced unsuccessful proceedings against the lender to have the security discharged.

Until this litigation, Richard had enjoyed a good relationship with the deceased which had endured almost all their mutual lives but the litigation caused tension between them. The Court did not conclude there was an "estrangement" as: such cases were occasioned by emotional or physical abuse or other gross misconduct by a child towards a parent or vice versa; these factors were wholly absent in this case in what was a loving family; and any tensions in the relationship were caused by the deceased's regretting in retrospect his over generosity to Richard in encumbering the Farm.

Determination:

The Court accepted that adequate and proper provision was not made for Richard in the Will as the effect of the provision made for him in the Will was that he received no provision and this did not recognise his "compelling" financial needs which were principally to reduce the debt he had incurred to purchase his business, to retire with an asset to sell and be relatively debt-free and able to pay off the debt more quickly.

The Court concluded that a sum of $625,000 recognised Richard's need for capital for his maintenance and advancement in life as the sum would reduce the debt he owed to $250,000 and was an amount that would not add a significant financial burden on Timothy if the estate were permitted 2½ years to pay the legacy.

Orders:

Provision of $625,000 to be paid by 30 November 2024 and Richard's costs which were estimated to be $166,044 on the indemnity basis were capped at $147,548 which comprised 100% of counsel's fees ($73,564) and 80% of solicitor's fees ($73,984).

Estate Gooley, Deceased [2022] NSWSC 734

Judge and date:

Lindsay J, 7 June 2022

Overview:

Adequacy of provision – Extension of time – Factors warranting a claim – Grandchild

Orders:

Provision of a legacy of $250,000, with the legacy to be managed by NSW Trustee and for $130,000 of the legacy to be set aside as a fund dedicated to the plaintiff's rehabilitation from drug addiction with the balance of $120,000 for the plaintiff's general maintenance, education or advancement in life and charged with payment of the NSW Trustee's fees

Background:

Mr Melville Gooley (**the deceased**) died in December 2017, aged 92 years. The deceased's wife predeceased him and there were five children of the marriage (Aleta, Brett, Damon, Janine and Melinda) though one child predeceased him (Damon in August 1981) and another (Janine) died shortly after the deceased (in February 2018). Eleven grandchildren including the plaintiff also survived the deceased.

The deceased's will divided his estate between his four surviving children *per stirpes*, naming each child as a beneficiary of one or more specific gifts and all four surviving children as beneficiaries in equal shares of his residuary estate. There were no specific gifts for

grandchildren. The Court accepted that the deceased's intention was to make provision for his children, leaving them in turn to make provision for their own children in due course.

The precise value of the deceased's estate could not be determined because the estate was in dispute with Aleta and Melinda who had managed the deceased's financial affairs for many years before his death and had sought to propound various will which were found to be invalid in other contested probate proceedings (*Aleta Gooley & Anor v Brett Gooley* [2021] NSWSC 56). The Court accepted that: (a) the deceased's assets comprised a "complex web" of private companies and trusts; (b) the underlying assets of the "complex web" were mostly property holdings; (c) the estate has an estimated value of about $28,000,000; and (d) allowing for specific gifts in the deceased's will, his residuary estate has a value of approximately $16,980,000.

The plaintiff had a history of drug addiction and his father, the defendant, who was also a general practitioner, believed he had not overcome his addiction.

The plaintiff lived in straightened circumstances, because of, or related to, his drug addiction: he was aged 41 years; he was barely employable; his only income was a disability pension; he lived in public housing; his only asset was a small car he purchased in 2018 with his mother's assistance; and he had no prospects of improving his financial and personal circumstances.

Determination:

Five issues arose.

The first issue was whether the time for the plaintiff to bring an application should be extended as his summons was filed late. Three versions of the plaintiff's summons were filed and the different versions amended joined various defendants. All three versions of the summons were filed more than one year after the deceased's death though the plaintiff did attempt to file the first summons in time, but it was not accepted by the Court's registry because the plaintiff sought a waiver of the filing fee which was not approved as there was no supporting affidavit. The Court also considered that: (a) notice had to be taken of the objective uncertainty about the identity of the deceased's executor and the likely recipient of a grant of probate; (b) that the third and last version of the summons was filed less than two months after the defendant was granted probate; and (c) at the time of hearing, no part of the deceased's estate had been distributed.

The Court made an order that the time for the plaintiff to bring a claim be extended, up to and including the date on which the third version of his summons was filed.

The second issue was whether the plaintiff was wholly, or partly dependent upon the deceased.

The standing of a grandchild to bring a claim as an "eligible person" depends upon proof by the grandchild that he or she was, at a particular time, "wholly or partly dependent on the deceased person". The Court accepted these factors were relevant.

The fact of "dependency" might be informed by whether or not the grandchild was, at some time, "a member of the household" of the deceased, but proof of membership of the deceased's household is not enough and what is required is proof of a relationship of dependency.

In general, the word "dependent" connotes a person who relies upon support of another, whether that be financial and/or emotional support. Dependency is not limited only to a class of persons actually in receipt of financial assistance from the deceased. Section 57(1)(e) of the *Succession Act 2006* is wide enough to cover any person who would naturally rely upon, or look to, the deceased, rather than to others, for anything necessary, or desirable, for his or her maintenance and support. A common form of dependence is financial, but the concept of

"dependency" in the definition is not confined to financial dependency but emotional dependency is generally not, of itself, sufficient to establish a relationship of dependency.

The expression "partly dependent" in section 57(1)(e) is elastic in meaning; in its context, it does not necessarily mean "substantially"; rather, it suggests the meaning of "more than minimally" or, perhaps "significantly".

A person may be dependent on another for support if the former, in fact, depends on the latter for support even though he or she does not need to do so and could have provided some or all of his or her necessities from another source. It is not the mere fact of receipt of support but the dependence or reliance upon another to provide it that matters.

Throughout at least the first half of his life, the plaintiff was emotionally dependent upon the deceased as an available, senior male figure in his life.

When the plaintiff descended into drugs as a teenager, the deceased initiated his involvement in a rehabilitation programme in Adelaide.

When the plaintiff needed accommodation, the deceased allowed him to occupy a home unit he owned.

When the plaintiff lived in fear of intruders in his first home, the deceased installed bars on the windows to protect him from intruders.

The evidence established a relationship of dependency and it was something more than merely an ordinary relationship between a grandparent and a grandchild. The plaintiff looked to the deceased as a surrogate father and whatever misgivings the deceased had about the plaintiff's drug addition, he did not ever entirely dismiss the plaintiff as unworthy or undeserving.

The third issue was whether the plaintiff had established that there were "factors warranting" his claim.

The Court accepted that commonly, "factors warranting" are taken to be factors which, when added to facts which render the plaintiff an eligible person, give him or her the status of a person who would be generally regarded as a natural object of testamentary recognition by the deceased. The plaintiff satisfied the requirement given these matters: (a) his relationship with the deceased, coupled with his poverty and the need for assistance in escaping the drug culture which has blighted his life since his teens; (b) the deceased's recognition that the plaintiff as a grandchild was in need of special assistance, and (c) that his need continued despite the deceased's death.

The fourth issue was whether adequate and proper provision was made for the plaintiff in the deceased's will.

The starting point was that the deceased's will made no provision for the plaintiff as the will was predicated upon an assumption that each of the deceased's children would provide for their own children. The assumption was displaced by the corrosive effect of the plaintiff's drug addiction on his relationship with the defendant and the deceased's will left the plaintiff without adequate provision from that eventuality. The Court accepted that the defendant's proposal that the plaintiff submit to a rehabilitation programme costing as much as $130,000 was a starting point and the plaintiff also needed material support consequent upon participation in such a programme and a legacy of $250,000 was ordered to provide for both circumstances.

The final issue was whether the Court was satisfied that the plaintiff was incapable of managing his own financial affairs and it should order that the plaintiff receive the legacy on terms that required the legacy to be managed by NSW Trustee, for $130,000 of the legacy to be set aside as a fund dedicated to the plaintiff's rehabilitation with the balance of $120,000

for the plaintiff's general maintenance, education or advancement in life and charged with payment of the NSW Trustee's fees.

Orders:

Provision of a legacy of $250,000, with the legacy to be managed by NSW Trustee and for $130,000 of the legacy to be set aside as a fund dedicated to the plaintiff's rehabilitation from drug addiction with the balance of $120,000 for the plaintiff's general maintenance, education or advancement in life and charged with payment of the NSW Trustee's fees. The plaintiff's costs were also ordered to be paid out of the deceased's estate.

Cahn v Kosmin [2022] NSWSC 751

Judge and date:

Meek J, 8 June 2022

Overview:

Adequacy of provision – Adult child

Orders:

Provision of $1,450,000 in substitution for provision of $1,215,000 provided in the deceased's will (i.e., further provision of $235,000) and costs reserved

Background:

Ms Lilliane Cahn (**deceased**) died in February 2020, aged 85 years. She was survived by her son Stewart (58 years) and daughter Tracy (60 years).

The deceased's will dated December 2013 (**Will**) appointed a third party as executor, provided that her interests in property at Rose Bay were to be sold and net proceeds divided 70/30 between Stewart and Tracy and residue was divided equally.

In April 2022, after the Rose Bay property was sold an interim distribution occurred with Stewart receiving $1,750,000 and Tracy $750,000.

The balance of the deceased's estate was cash and $1,550,057 remained.

The effect of the Will was that Tracy received approximately $1,215,000.

Tracy applied for further provision.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

As noted above, the deceased's principal asset (her interests in Rose Bay property), an interim distribution had occurred and the balance of the deceased's estate was $1,550,057.

Tracy's costs on the ordinary basis were $147,680 of which $16,059 had been paid.

Stewart's costs on the indemnity basis were $59,444 and the executor's costs $38,260 of which $31,727 had been paid.

The parties agreed that when the executor's costs were paid and some or all of Tracy and Stewart's costs were paid from the estate, residue was extinguished and any entitlement Tracy

had to the remaining estate comprised the sale proceeds of the Rose Bay property interest and under the Will she had an entitlement to a 30 per cent share.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Tracy received income for Centrelink benefits and presumably interest earned on the interim distribution from the deceased's estate of $4,000 per month. Her expenses were $219,655 per month which included rent of $1,220 per week.

Tracy was made bankrupt in 2018, her home was sold by her trustee in bankruptcy and when her bankruptcy was annulled in September 2020, with creditors were paid in full, she received a cash sum from the remaining proceeds of sale of her home of $137,550. She had few other assets.

Stewart disclosed his personal and financial circumstances but elected not to make a competing claim to the deceased's estate.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Tracy had various health issues as did her school aged daughter for whom she had full-time care.

Provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate *(s 60(2)(i))*:

Tracy lived in a Double Bay unit that was owned by her parents (and then the deceased) from 187 until 2012, the unit was gifted to her by the deceased in 2008 and she sold it sold in late 2011 for $580,000.

Determination:

Tracy sought provision of $1,900,000.

The Court accepted that Tracey had a need of secure accommodation in the Rose Bay area and this was likely to cost up to $1,264,000 and that some further provision ought to be provided for her so she had a reasonable prospect of purchasing such accommodation but prophesised that as a "general rule" adult children should not expect a level of provision that funds them into unencumbered accommodation and provides them a fund to live and a sum for contingencies.

Orders:

The Court ordered that provision of $1,415,000 be provided in substitution for the provision provide for Tracy in the Will as that sum would enable Tracy to secure appropriate accommodation and leave her with other funds to allocate as may be appropriate to at least some of her other claimed needs including a buffer for exigencies. Costs were reserved.

Last v Lewis [2022] NSWSC 791

Judge and date:

Robb J, 16 June 2022

Overview:

Adequacy of provision – Adult child – Releases

Orders:

Provision of $425,000 plus costs

Background:

Mr Leslie Lewis (**deceased**) died in April 2019 aged 89 years, survived by four children, Robyn, Kevin, Debra and Bruce.

In his will dated January 2017, the deceased left one property to Bruce and Kevin in equal shares as tenants in common, left a second property to Kevin solely and divided residue equally between Robyn, Kevin, Debra and Bruce. The two properties had estimated total values of $7,750,000 and residue comprised cash of approximately $45,560.

Any distribution Robyn and Debra received was nominal.

Robyn sought a family provision order and Kevin, as the deceased's executor, was joined as the defendant.

Kevin filed a cross-claim in which he applied for a declaration that a deed of family arrangement dated September 2003 (**Deed**) executed by the deceased, Robyn and others included a release by Robyn for a family provision orders and an order pursuant to s 95 of the *Succession Act 2006* approving the release of Robyn's rights to apply for a family provision order.

Deed of family arrangement:

In the Deed, the deceased and his wife (who predeceased him) undertook a form of estate planning by selling two of their properties to Robyn and Debra at a undervalue of $200,000 and undertaking to give two other properties to Bruce and Kevin in their wills.

Robyn admitted that she had executed the Deed but denied that it bound her as she had received no legal advice before she executed it, she had not understood its terms, the deceased knew she was vulnerable because she was suffering matrimonial problems, it was unfair in comparison to the provision her siblings received, and it was the product of the deceased's duress because he had threatened her with eviction form the property she received in the Deed if she did not sign it.

Robyn received the property promised to her in the Deed and sold it. By accepting the sale proceeds from a third-party Robyn elected to affirm the Deed in a manner inconsistent with the exercise of a right to rescind it. Robyn's defences to the Deed's validity were therefore invalid and her entitlement to a family provision order was dependent on whether the Court approved the release the Deed made. The Court however was not satisfied that Robyn had received independent advice about the effect of the release and particularly about the consequences of having the property transferred into her and her former husband's joint names if, as occurred, her marriage broke down as s 95(4)(d) of the *Succession Act 2006* required.

It was therefore necessary for the Court to consider whether Robyn had established her claim for a family provision order.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The estate's assets comprised two properties worth approximately $7,750,000 and cash of $45,560, liabilities totalled $290,500 and net estate was approximately $7,505,060.

If costs were ordered to be paid from the estate, Robyn's costs on the ordinary basis were $113,068 and Kevin's costs on the indemnity basis were $169,450.

If costs were ordered to be paid from the estate, available estate was approximately $7,222,542.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Robyn owned her own home, which was bought in part with the proceeds of the property she received from the deceased's *inter vivos* gift (worth $940,000) and few other assets. She also had a superannuation benefit of $836,000.

Robyn received an income from a superannuation benefit of $40,000 net per annum and her annual expenses were approximately $40,257 per annum.

Bruce's gross weekly income was $1,935 gross and his expenses were $1,472.

Bruce lived in rented accommodation and he had assets of $404,125 and a superannuation benefit of $372,620.

Kevin and his wife's total weekly income from earnings was $2,450 and $915 from the rent received from two investment properties.

Kevin and his wife owned assets worth $2,729,000 and their liabilities were $600,000.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Robyn suffered a range of debilitating illnesses and the prognosis was that the illnesses were likely to progress and cause her substantial discomfort and impinge her mobility. There was also a significant likelihood that Robyn would need to incur substantial expenses in the future for medical treatment and equipment.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Robyn was aged 65 years.

Determination:

Though the Court accepted that the deceased had attempted to make an equal distribution of his estate, it held that this had not occurred and that provision of a fund of $425,000 was appropriate so that Robyn had a fund to provide for future contingencies and as provision of this sum would not impose an undue burden on Kevin and Bruce.

Orders:

Provision of $425,000 was ordered and costs were to be paid from the estate.

Daley v Donaldson [2022] NSWCA 96

Judge and date:

Leeming JA, White JA and Mitchelmore JA, 17 June 2022

Overview:

Settlements

Orders:

Leave to appeal granted and appeal dismissed with costs

Background:

In his last will made in June 2019, Mr John Bernard Robertson (**the deceased**) gave $5,000 each to his children, Glenn and Rosalie. He also expressed a wish that they receive no further provision from his estate.

Glenn and Rosalie were the deceased's biological children.

Separately, both Glenn and Rosalie applied for further provision from the deceased's estate. Glenn's proceedings, and the issue of his eligibility, needed to be decided before Rosalie's claim was determined.

Glenn claimed that he was an "eligible person" as he was the deceased's child. When he commenced proceedings, Glenn did not know that he had been adopted by Keith John Daley who was married to Glenn's mother, the deceased's former wife. Chapter 3, Part 11, of the *Adoption Act 2000* (NSW) provides that the effects of adoption orders include that at law, the adopted child is regarded as the child of the adoptive parent or parents and the adoptive parent or adoptive parents are regarded at law, as the parents of the adopted child and the adopted child ceases to be regarded as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child.

The proceedings were referred to a court-annexed mediation, they settled at the mediation and the parties' agreement was reduced to writing (**Agreement**).

After the mediation, the defendant discovered that Glenn had been adopted and that he was not an "eligible person". It is inferred that upon learning this, the defendant, explicitly or implicitly, refused to perform the Agreement.

In a notice of motion, Glenn asked the court, pursuant to s 73 of the *Civil Procedure Act*, to: (a) declare that the parties had reached a binding settlement of the plaintiff's claim as evidenced by the Agreement; (b) to make orders giving effect to the settlement; and (c) to order the defendant to pay his costs of the motion.

The defendant opposed the relief sought and contended that the parties were operating under the mistaken assumption when they made the Agreement that Glenn was an "eligible person" and that he was lawfully Keith Daley's child and not the deceased's child.

In *Daley v Donaldson* [2021] NSWSC 1507 the Court (Hallen J) accepted that: (a) when they signed the Agreement, neither party was aware of the actual existence of an adoption order and there was a common mistake and misapprehension that Glenn was the deceased's child which was fundamental to them entering into the Agreement on the terms that they did; and (b) that if someone had pointed out to the parties that Glenn was not an eligible person, it would have been "plain and obvious" that the matter should not be settled on the basis that it was.

The Court held that there was no settlement or compromise for three reasons.

Firstly, the parties' common mistake went to the root of the Agreement and the Agreement was void or voidable at common law.

Secondly, the common misapprehension about Glenn's status attracted the Court's equitable jurisdiction to relieve against injustice.

Any settlement or compromise required the Court to make orders to give effect to it and as a matter of discretion, it would not make orders giving effect to the Agreement.

The notice of motion was dismissed, costs were ordered to be the defendant's costs in the cause and the proceedings were adjourned for further directions.

Determination:

Glenn appealed on three grounds.

The first ground was that the effect of ss 95 and 97 of the *Adoption Act 2000* were not as the primary judge had found and he continued to be the deceased's son at law, after his adoption. Though the Court of Appeal accepted that the effects of the section were not straightforward, it did not find that the interpretation Glenn argued, was available.

The second ground was that the primary judge was incorrect not to have considered an affidavit supplied after judgment was reserved. The Court of Appeal did not need to consider the ground as Glenn accepted that if his argument about the interpretation of the *Adoption Act 2000* was not accepted, the issue did not arise. Irrespective, the Court counselled against allegations of procedural unfairness being made on an interlocutory hearing.

The third ground contended that the primary judge was wrong to find that the parties laboured under a common mistake but the Court of Appeal did not find that the issue arose as the primary judge was exercising discretion, it was open to him to decline to make orders and no appealable error was shown.

Orders:

Leave was granted to appeal and for a notice of appeal to be filed and the notice of appeal was dismissed with costs.

Chisak v Presot [2022] NSWCA 100

Judge and date:

Macfarlan JA, Gleeson JA and White JA, 21 June 2022

Overview:

Adequacy of provision – Grandchild

Orders:

Appeal dismissed with costs

Background:

Mrs Lily Savransky (**the deceased)** died in September 2017, aged 87 years. A grandchild (Ivy) survived her.

The deceased made wills dated June 2009 (**2009 Will**) and April 2017 (**2017 Will**).

In the 2009 Will, the deceased: revoked all former wills; appointed two friends (**Emanuela and Adelina**) executors and trustees of her will and estate; directed her trustees to sell her

Lidcombe property; gave legacies totalling $25,000 to Emanuela, Adelina and two others; and gave the residue of her estate to Ivy when she turned 25 years.

In the 2017 Will, the deceased: revoked all former wills; appointed Emanuela and Adelina executors and trustees of her will and estate; directed her trustees to sell her Lidcombe property; and gave residue to Ivy, Emanuela, Adelina and two others as tenants in common, in equal shares.

In November 2017, probate of the 2017 Will was granted to Emanuela and Adelina.

Ivy sought to set aside the grant of probate and for a grant to be made of the 2009 Will as she alleged that the deceased did not have testamentary capacity when she made the 2017 Will and did not know and approve the will's contents. If Ivy was unsuccessful, she sought a family provision order.

In *Chisak v Presot* [2021] NSWSC 597, the Court (Hallen J) found that the deceased had testamentary capacity when she made the 2017 Will and Ivy therefore failed to have the 2017 Will set aside. The Court then considered Ivy's family provision claim and it was not satisfied that Ivy was wholly or partly dependent on the deceased and therefore an "eligible person" as: (a) her needs to be fed, cared for, and accommodated, were all provided by her father and not the deceased; (b) occasional, or even frequent, gifts did not make Ivy wholly, or partially, dependent on the deceased; and (c) to qualify a grandchild as a dependant, the gifts or benefits provided by the will-maker, must be of such regularity and significance that it could be said that the will-maker had clearly assumed a continuing responsibility for the grandchild's maintenance education, or advancement in life.

Ivy's claim therefore did not pass the "jurisdictional" hurdle.

If the Court were wrong in its finding, it concluded that there were factors warranting Ivy's claim as she was a beneficiary named in the 2017 Will but would not have made an order for provision for four reasons.

Firstly, Ivy and the deceased had minimal contact for the last 14 years of the deceased's life and the level of provision Ivy received had to be restrained.

Secondly, the deceased provided "generously" for Ivy in the 2017 Will.

Thirdly, the deceased's freedom of testamentary disposition had to be respected and it was not appropriate that the court have "the real dispositive power.

Fourthly, Ivy's relationship with the deceased was a substantially, and significantly, less close relationship that the deceased's relationship with the 2017 Will's other beneficiaries.

Determination:

Ivy appealed on three grounds.

The first ground contended that the 2017 Will was invalid as the deceased lacked testamentary capacity and did not know and approve the contents of the will. In reaching his finding, the primary judge preferred the evidence of one expert over another and the Court of Appeal accepted that he was correct to do so. The ground therefore failed.

The second ground contended that Ivy was an "eligible person". The Court of Appeal held that the primary judge was wrong to limit dependency to the provision of financial or other material assistance. The Court added that a restrictive meaning of the word "dependent" should not be adopted, that a narrow meaning was not warranted because the statute provided for dependence to be assessed "at any particular time" and an applicant need only show that he or she was partly dependent on the deceased.

The third ground of appeal argued that the primary judge was wrong to find that adequate and proper provision was made for Ivy in the 2017 Will. The Court of Appeal rejected the contention as the primary judge was exercising a discretion and no basis was shown to interfere with the finding.

Orders:

The notice of appeal was dismissed with costs.

The Estate of Alberto Magri [2022] NSWSC 873

Judge and date:

Henry J, 29 June 2022

Overview:

Practice and procedure

Orders:

Defendants' application to proceed in the absence of the plaintiff granted

Background:

In a statement of claim the plaintiff made four claims: (a) she applied to set aside a grant of probate made in respect to a will dated August 2015 made by the late Alberto Magri (**the deceased**); (b) she challenged a deed in which she purported to disclaim her interest in the deceased's estate; (c) she alleged that the executor of the deceased's estate had not accounted for her administration of the deceased's estate, misappropriated funds from the deceased's estate and sold the deceased's former home without authority; and (d) she applied for a family provision order from the deceased's estate.

At the first day of the hearing the proceedings were adjourned to midday the following day by consent.

Prior to the hearing commencing on the second day, the plaintiff advised the Court by email that she would not be appearing. The hearing resumed and the proceedings were adjourned to 2pm the following day. Later the same day, the plaintiff sent a further email to the Court which attached a medical certificate that stated the plaintiff was "unfit to continue his/her usual occupation".

On the third day, the plaintiff sent a further email to the Court which advised that she was unwell and noted that the trial judge had a "conflict of interest" and was required by law to adjourn the matter "back to the Judges List". The Court subsequently sent an email to the plaintiff advising her that the proceedings were adjourned until 2pm.

When the hearing resumed, the plaintiff did not appear and the defendant's counsel applied for the hearing to continue in the plaintiff's absence.

Determination:

The Court elected to continue the hearing in the plaintiff's absence as: (a) it was required to facilitate the just, quick and cheap resolution of the proceedings; (b) the plaintiff's medical evidence did not adequately explain her illness; (c) the Court's duty was to ensure that a trial

was fair and the duty extended to both parties; and (d) the plaintiff had received indulgences as the hearing had been twice-adjourned.

The Court also considered that a fair-minded lay observer would not apprehend that the trial judge would not bring an impartial mind to the resolution of the questions she was required to decide and declined the plaintiff's application that the trail judge recuse herself.

Orders:

The proceedings were adjourned to 10am the next day, which gave the plaintiff a further opportunity to attend and the defendants' solicitors were directed to notify the plaintiff of this.

KD v BS [2022] NSWSC 887

Judge and date:

Stevenson J, 5 July 2022

Overview:

Adequacy of provision – Adult child

Orders:

Provision of $60,000, plus costs capped at $40,000

Background:

The deceased died in July 2020, aged 83 years and was survived by three daughters BS, CC and KD. Names were anonymised.

In her last will dated July 2020, the deceased left her estate to BS and CC.

KD applied for a family provision order.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

KD had a warm and loving relationship with the deceased until April or May 2018, when she made a series of applications to the Guardianship Divisions of the New South Wales Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal which angered the deceased and caused her to exclude KD from her will.

They did not see each other after this but KD visited her mother shortly before she died and it appeared as though KD and her mother achieved a reconciliation.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate had a value of $534,000.

KD's costs on the ordinary basis were $73,500 albeit she appeared unrepresented at the hearing and the defendants' costs on the indemnity basis were $124,000.

If costs were ordered to be paid from the estate, available estate was $336,500.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

KD was aged 65 years. She lived in a home she owned at Warners Bay worth $466,000 which required extensive renovations and was barely liveable.

KD received a Centrelink benefit of $353 per week.

The Court did not think it necessary to consider BS and CC's financial circumstances.

Determination:

The Court accepted that as KD received no provision from the deceased's estate, if regard was had to KD's circumstances, she did not receive adequate provision. But there are other factors to be considered, which were that the estate was relatively small and weight should be given to the deceased's deliberate decision to exclude KD from her will and the Court should always be cautious about interfering with a testator's or testatrix's decision, especially where there was an identified reason for the decision. On balance, the Court accepted that adequate provision was not made and that modest provision should be ordered.

The Court next held that KD's costs should be capped at $40,000 and the consequence of this was available estate was $375,000.

The Court did not accept that KD should receive an equal share of the estate with her sisters and that an order for provision of $60,000 or almost 16% of the estate was appropriate.

Orders:

Provision of $60,000 was ordered and costs were capped at $40,000.

Paul v Satici [2022] NSWSC 922

Judge and date:

Kunc J, 8 July 2022

Overview:

Adequacy of provision – Adult child

Orders:

Provision of $700,000 in substitution for the provision provided in the deceased's will (approximately $407,400, so a further $292,600 approximately) and costs on the ordinary basis up to $100,000, unless another amount was agreed and with liberty to apply as to costs

Background:

Mr Yilmaz Satici (**the deceased**) died in February 2020. At his death, the deceased had been widowed for nearly ten years and he was survived by three adult children (Esin, Fisun and Erkan) and ten grandchildren.

In his will dated August 2012 and a subsequent codicil (**Will and Codicil**), the deceased appointed Erkan his executor, he gave a legacy of $300,000 to him and quarter shares of residue to Esin, Fisun and Erkan and a one quarter share to each of his grandchildren that vested upon marriage, turning twenty-five years of age, or the purchase of real estate or a business.

Esin, Fisun and Alina (one of the deceased's grandchildren) applied for a family provision order. The three proceedings were to be heard at the same time however Fisun's proceedings were dismissed by consent before the hearing commenced and Alina's claim settled on terms that provided that she receive $200,000 in lieu of her share of the residue as a grandchild. Only Esin's case therefore proceeded to a contested hearing.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Esin was the deceased's eldest daughter and they enjoyed a close and enduring relationship at the time of his death. She also provided him with care and assistance during the last decade of his life

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

There were thirteen beneficiaries under the Will and Codicil, being the deceased's three children and ten grandchildren. Erkan received a legacy of $300,000 as repayment for monies he loaned the deceased to undertake improvements to the deceased's property. Otherwise, the deceased 's obligations were those of a father of adult children and grandfather.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate was largely derived from the proceeds of the sale of his former home.

Available estate was approximately $1,630,000.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Esin was a single mother who: owned no real property; received government benefits and child support; and her earning capacity was impacted by her medical situation, age, formal qualifications and the amount of time she had spent outside of the workforce.

The financial circumstances of the other person, if the applicant is cohabiting with another person *(s 60(2)(e))*:

Esin cohabitated with her three youngest children, all of whom were studying and financially dependent upon her. Esin was also studying and hoped to complete her studies in 2024 and obtain employment as a jeweller.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Esin had medical issues that impacted her ability to work although she intended to return to work as a jeweller.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Esin was aged 53 years**.**

Applicant's contributions to the deceased's estate, the deceased and the deceased's family (*s 60(2)(h)*):

Esin provided care and assistance to the deceased over the final decade of his life. For some of those years (2014-2020) she received a carer's pension.

Provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate *(s 60(2)(i))*:

Under the Will and Codicil, Esin received a quarter share of the Estate, being approximately $407,500. Esin's parents had also assisted her with payments for a mortgage on a property she had previously owned.

Deceased's testamentary intentions (*s 60(2)(j)*):

The Will and Codicil provided evidence that the deceased wanted to provide for his children and to a lesser extent, his grandchildren.

Is any other person liable to support the applicant *(s 60(2)(l))*:

Esin received child support from her former husband for her youngest children, Josh (16) and Tejahn (13).

Determination:

The Court concluded that Esin should receive $700,000 in lieu of the quarter share of the residue that she would otherwise receive which was additional provision of just under $300,000. The decisive matter the Court considered was that given Esin's needs, the size of the estate, and the claims of the other family members, was that she needed a fund to pay rent while her children were in their minority, to establish herself in a new career and for general purposes.

The Court checked the amount of provision it had ordered in two ways.

Firstly, it reasoned that Esin's unsubsidised rent was $806 per week ($41,912 per annum). A sufficient fund to cover the rent for the 4½ years until her youngest child turned 18 33333333was $185,380. When the sum was added to the $407,500 she otherwise received, this gave a total of $592,880. The Court accepted that applications for family provision do not call for a precise delineation of the components of the provision, but rather an evaluative assessment of what will meet the proven needs of the plaintiff in the light of all the facts before the Court, a sum of $700,000 was held to be proper provision, which allowed a sum of just over $100,000 as a fund for general purposes in addition to the amount for rent.

Secondly, the Court made deductions from the amount that Esin submitted she should receive and concluded that Esin's own calculation resulted in provision of $692,000.

The Court determined that the burden of the provision should be borne rateably by Fisun and Erkan.

As to costs, the Court concluded that Esin should have her costs of the proceedings out of the Estate on the ordinary basis up to $100,000, with liberty for a greater sum to be agreed by the parties, or an application.

Orders:

Provision of $700,000 was ordered in substitution for the provision provided in the deceased's will and costs on the ordinary basis up to $100,000 unless another amount was agreed and with liberty to apply as to costs.

Scott v Scott (No 2) [2022] NSWSC 914

Judge and date:

Parker J, 8 July 2022

Overview:

Practice and procedure - Costs

Orders:

The plaintiff's costs be paid out of the defendant's share of the estate on the ordinary basis and the defendant's costs be paid out of the defendant's share of the estate on the indemnity basis

Background:

In its principal judgment *Scott v Scott* [2021] NSWSC 1619, the Court held that the plaintiff (Coralynne) should receive provision of $180,000, in lieu of the existing provision in her favour in her late mother's (Mrs Coral Scott) will dated May 2019 ($40,000). The Court adjourned the proceedings to allow the parties to agree, if possible, on the form of orders to give effect to its judgment, and on costs.

The parties agreed on the form of orders to give effect to the Court's order for provision but costs remained in dispute and were the subject of this judgment.

Coralynne sought an order for indemnity costs in her favour. The application was based on several offers to compromise the proceedings.

In a letter dated 2 November 2020, Coralynne's solicitor made a *Calderbank* offer by which his client offered to settle on the basis of a payment to her of $130,000 including costs.

In a letter dated 16 November 2020, Coralynne's solicitor made a second *Calderbank* offer by which his client offered to settle on the basis of a payment to her of $100,000 plus costs and that party/party costs be agreed at $25,000.

In an Offer of Compromise dated 3 December 2020, Coralynne offered to settle on the basis of a payment to her of $100,000 "inclusive" of her legacy in the deceased's will, plus costs of $25,000.

In a letter dated 14 October 2021, Coralynne's solicitor made a third *Calderbank* offer by which his client offered to settle on the basis of a payment to her of $100,000 in lieu of the provision made for her in the deceased's will and that her costs of $40,000 be paid from the estate.

The unsuccessful defendant opposed the application and contended that Coralynne should receive only an order for costs on the ordinary basis and that her costs be paid out of the estate on an indemnity basis.

Determination:

Four issues arose.

The first issue was how costs were to be paid. The parties agreed that both parties' costs were to be paid from the estate. The Court though did not accept the proposition as, if such an order was made, it had the effect of reducing the provision that the deceased's will made for a third beneficiary who received a legacy of $40,000. The Court therefore indicated that the legacy should be preserved and costs were to be paid from assets that the defendant would receive from the estate.

The second issue was whether the Offer of Compromise dated 3 December 2020, was a valid offer under the Rules, as if it were, it triggered a prima facie right to costs subject to the Court ordering otherwise. The Court did not find it was not a valid offer because it failed to specify the fund from which the further provision was to be made.

The third issue was whether it was unreasonable for the defendant to have rejected the informal offers. The Court held they it was not because a "significant factor" at the trial was evidence that the defendant was responsible for effecting a change to the deceased's will which favoured her and the defendant's legal representatives may not have known, and therefore not appreciated, the potential significance of the evidence and the merits of the case may have appeared quite different when the offers were made and rejected.

The final issue was whether the Offer of Compromise, though ineffective, had effect as an informal offer. The Court held that it did not, because whether a purported formal offer which happens to be invalid takes effect as an informal offer is a question of intention to be determined objectively form the terms of the offer and the matrix of facts known to both parties. Here, the covering letter did not contain any suggestion that the Offer of Compromise would be relied upon as an informal offer if it failed to comply with the Rules.

Orders:

Coralynne costs were ordered to be paid out of the defendant's share of the estate on the ordinary basis and the defendant's costs were ordered to be paid out of the defendant's share of the estate on the indemnity basis.

Scott v Scott [2022] NSWCA 182

Judge and date:

Ward P, Meagher JA and Kirk JA, 20 September 2022

Overview:

Adequate and proper provision – Adult child

Orders:

Notice of appeal dismissed with costs

Background:

In *Scott v Scott* [2021] NSWSC 1619, the primary judge (Parker J) ordered that in lieu of provision of $40,000 made for the respondent (Coralynne) in the deceased's will dated May 2019, Coralynne receive $180,000 out of the appellant's (Charlene) share of the deceased's estate.

Charlene appealed.

Determination:

There were five issues on appeal.

The first issue was whether the primary judge erred in failing to take into account Coralynne's superannuation entitlements when assessing whether adequate provision had not been made. The Court accepted that whilst the primary judge had omitted Coralynne's superannuation entitlements of $668,839 from a table of assets and liabilities set out in his reasons, this did not indicate that he had overlooked those entitlements when assessing Coralynne's financial "need" and in the absence of evidence as to when Coralynne might access her superannuation or how her doing so might affect her eligibility for the age pension, there was no compelling basis for treating those entitlements as an asset rather than as a potential future income stream.

The second issue was whether it was open to the primary judge to find that in providing financial and other assistance to the deceased before her death, Coralynne was influenced by an understanding that she was to receive a share of the Fairfield property under the deceased's 2015 will. In 2015, the deceased and her husband who predeceased her, made "mirror" wills in which they each gave equal shares of their estates to their children if they survived the other. In 2019, the deceased made a will in which she left her home to Charlene and gifts of $40,000 to Coralynne and her son. The deceased also made a testamentary statement explaining why she had made the gifts she had and the primary judge found that the reasons set out in the statement were false and it followed that the 2019 will was not the product of a "fair and considered testamentary judgment". The Court held that as a matter of ordinary human experience and psychology it was open to the primary judge to infer that in circumstances where Coralynne knew of the 2015 "mirror" wills, she continued to provide assistance to her father and mother with an understanding that she would take a one-third share in the Fairfield property under those wills.

The third issue was whether, in not being satisfied that adequate provision for Coralynne's proper advancement had been made, the primary judge did so solely on the basis that the reasons given in the deceased's testamentary statement were false. The Court held that the primary judge was not to be understood as saying that the falsity of the grounds relied on to justify Coralynne's disinheritance by the 2019 will was the basis for finding that inadequate provision had been made by that will for Coralynne's advancement. Rather, the primary judge's reasoning was that, in circumstances where the deceased's 2015 will reflected her fair and considered judgment as to what would constituted adequate provision, the provision subsequently made for Coralynne in the 2019 will, which deprived her of a substantial share of the estate and on grounds which were false, could not be regarded as adequate and proper.

The fourth issue was whether the rule in *Browne v Dunn* precluded the primary judge from concluding that Charlene had deprived Coralynne of a one-third share of the deceased's estate by a process of manipulation and misinformation. The Court held that the rule in *Browne v Dunn* did not preclude the primary judge from finding that the deceased's 2019 will and testamentary statement were the result of a "process of manipulation and misinformation" by Charlene. The allegations underlying that conclusion had been either foreshadowed or made in affidavits exchanged before the hearing, or put in cross-examination, or were a necessary consequence of established facts.

The fifth issue was whether the primary judge relied on the statement in *Taylor v Farrugia* [2009] NSWSC 801 that the community does not ordinarily expect a parent to provide an adult child with an unencumbered home as an answer to any competing claim of Charlene as principal beneficiary under the 2019 will. The Court held that the primary judge did not disregard Charlene's competing claim as principal beneficiary under the 2019 will and the reference to the statement in *Taylor v Farrugia* was made in addressing the matter of Charlene's financial circumstances, a matter on which she had separately relied as an answer to Coralynne's claim for provision.

Orders:

The Notice of Appeal was dismissed with costs.

Pollock v New South Wales Trustee & Guardian [2022] NSWSC 923

Judge and date:

Hallen J, 14 July 2022

Overview:

Adequacy of provision – De facto relationship

Orders:

Provision of $850,000 and the issue of costs reserved

Background:

Mr Geoffrey Benfield (**the deceased**) died in September 2020, aged 70 years. The deceased married in March 1972 and the marriage ended when a decree nisi became absolute in February 1999. There were three children of the marriage, Trenton, Dean and Wayne.

In his last will dated October 1978 (**Will**), the deceased appointed the Public Trustee (the predecessor to the NSW Trustee and Guardian) to administer his will and left his estate to his three children in equal shares.

The plaintiff Ms Christine Pollock filed a summons seeking an order for provision from the deceased's estate.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

The plaintiff claimed she was an "eligible person" as she was in a de facto relationship with the deceased at his death or in the alternative was a person who was a member of a household of which the deceased was a member and was wholly, or partly dependent at that time, or any other time.

The defendant accepted that the plaintiff was a member of the deceased's household and that she had been in a de facto relationship with the deceased but alleged that the relationship ended before the deceased's death.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate comprised a property at Glenorie worth approximately $2,800,000, monies in the bank of $471,160, shares in family companies worth approximately $2,416,637 a death benefit of $640,884, an interest in a family trust of $442,333, shares of $4,195 and household contents of $24,915. When liabilities were deducted available estate was approximately $6,557,517.

The plaintiff's estimated costs were $91,350 on the ordinary basis.

The defendant's costs were estimated to be $139,365 on the indemnity basis of which $15,364 had been paid, leaving $124,000 to be paid.

If costs were ordered to be paid from the estate, available estate was approximately $6,342,167.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

The plaintiff was employed as a contract cleaner and worked between 15 to 20 hours per week. Her monthly income was approximately $2,465 from employment and $2,000 from the rental of a property she owned at McGraths Hill, NSW. The plaintiff's monthly expenditure was approximately $4,000 per month and she drew on savings to meet the living expenses she could not meet from income.

The plaintiff's assets included the McGraths Hill property worth around $763,000, a car and saving of under $6,000. Her liabilities included a debt secured by mortgage on the McGraths Hill property ($262,467) and a loan from her daughters ($26,000).

Each of the deceased's children led evidence about their personal financial circumstances. Trenton had his own plumbing business but his income in the 201 financial year was $24,503 from government support payments. He owned his own home and his assets totalled approximately $1,400,000 and he had a superannuation benefit of $303,589. Dean and his wife operated their own landscaping business but its turnover was significantly affected, and continued to be affected, by the COVID pandemic. Dean and his wife owned assets worth $876,849 and held superannuation benefits of $256,842. Wayne was a carpenter by trade and he and his wife's annual income was approximately $160,000, they owned assets worth $1,204,000 and held superannuation benefits of $330,174.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

The plaintiff was aged 71 years.

Determination:

The Court held that when it looked at the composite picture of the plaintiff's and the deceased's relationship, and it accepted that the relationship had experienced serious difficulties at times, it was satisfied that the plaintiff was living with the deceased in the de facto relationship at the time of his death.

The Court then held that it was satisfied that the deceased's failure to make any provision for the plaintiff was not proper, that the deceased had a "significant obligation and responsibility" to the plaintiff as the person with whom he was living in a de facto relationship and that the plaintiff should receive provision of $850,000 which was a sum that would enable her to pay off debts ($300,000) leaving a capital sum of about $550,000 for exigencies of life.

The Court also considered that even if a de facto relationship had not existed, the deceased's obligations and responsibilities remained the same if the plaintiff had been a member of the household and who was wholly or partly depended on the deceased.

Finally, the Court reasoned that after provision was provided and costs were allowed, the remaining estate was approximately $5,400,000 and each of the deceased's children would receive approximately $1,800,000 which it would be inferred the Court considered was reasonable.

Order:

Provision of $850,000 and costs reserved.

Dixon v Dixon (No 2) [2022] NSWSC 944

Judge and date:

Parker J, 15 July 2022

Overview:

Practice and procedure - Costs

Orders:

See below

Background:

The late Edward James Dixon (**the deceased**) and his wife, who predeceased him, had four children, Stephen, Lois, Eunice and James.

In his will made in November 2015, the deceased appointed James his executor and divided his estate into four shares, one for each of his children. Lois' share (Lois was disabled) was made the subject of a trust of which Eunice was to be the trustee and to be held in trust for Lois' lifetime with Lois to receive income and a power to appoint capital, and after her death for the benefit of the Uniting Church. There was also a power to appoint capital. The other children received direct gifts of their shares.

Each share was worth approximately $290,000.

A rift in the family occurred. On one side were Lois (represented by her tutor Stephen) and Stephen and on the other side were James and Eunice. Lois did not want Eunice to be trustee of the trust fund set aside for her in the deceased's will and wanted Stephen to be the trustee. Eunice contended that Stephen was an unsuitable person to be trustee of the fund because he was likely to be a beneficiary in Lois' will and as he had a power to appoint capital of the trust in Lois' favour during her lifetime, he might not do so and would instead prefer his own interests as a beneficiary of Lois' estate.

Lois filed a summons in which she sought a family provision order and an order that Stephen be appointed trustee of Lois' trust pursuant to s 70 of the *Trustee Act 1925 (*NSW*)*. James was named as the defendant. Lois' family provision claim was ultimately abandoned and only the claim that Stephen be appointed trustee was pressed. Eunice was also joined as a defendant to that claim.

In *Dixon v Dixon* [2022] NSWSC 721, the Court held that Stephen should be appointed as the new trustee in place of Eunice.

Various costs orders were sought.

Determination:

Four issues were decided.

Firstly, the Court ordered that James should have his costs of defending Lois' family provision claim and those costs should be paid from the estate and include half of the costs of the costs argument.

Secondly, the Court ordered that James' solicitor-client costs of the proceedings, to the extent attributable to the application for family provision and including half of the costs of the costs argument should be paid from the deceased's estate.

Thirdly, the Court ordered that as Eunice successfully defended Lois' claim for the appointment of a new trustee she should be ordered to pay Lois' costs of the proceedings from the time she was joined as a party, including half of the costs of the costs argument.

Finally, the Court ordered that Eunice should have no recourse to the trust for her costs of the proceedings, or the costs awarded against her as she had failed to obtain judicial advice and she had chosen to unsuccessfully embark on litigation and she only had herself to blame if she was not found to be entitled to be e reimbursed for her costs from trust assets.

Orders:

See above.

Estate of the late Genevieve Bryan [2022] NSWSC 965

Judge and date:

Ward CJ in Eq, 21 July 2022

Overview:

Adequacy of provision

Orders:

If a will made in 2019 had been admitted to probate, provision of $500,000 would have been ordered, however the Court held that the deceased did not have testamentary capacity when she made the will, an earlier will was admitted to probate and the family provision application was considered only in the event the Court's conclusions about testamentary capacity was held to be wrong

Background:

Mrs Genevieve Bryan (**the deceased**) died in November 2019, aged 93 years.

The deceased last will was made in October 2019 (**the 2019 Will**). That will appointed the deceased's nephew Mr Elias Chakty as her executor and trustee, it gifted one of the deceased's two properties to Mr Chakty and gifted the second property to a number of named beneficiaries (including Mr Chakty and Mr Daniel) in various percentages.

The deceased's penultimate will was made in December 2014 (**the 2014 Will**). That will appointed the deceased's "dear friend" Mr George Daniel her executor and trustee and gifted one property and residue to Mr Daniel, it gifted the proceeds of sale of a second property in differing percentages among various family members and godchildren (including Mr Chakty) and made bequests to two charities.

Mr Chakty propounded the 2019 Will. Mr Daniel contended that the deceased did not have testamentary capacity when she made the 2019 Will and he propounded the 2014 Will. The Court determined that the deceased did not have testamentary capacity when she made the 2019 Will and it admitted the 2014 Will to probate.

In the event that the 2019 Will was admitted to probate, Mr Daniel made a family provision claim. As this outcome did not occur, the Court considered the family provision claim in the event its conclusions about testamentary capacity were wrong.

The family provision claim is considered briefly below.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Mr Daniel and the deceased had a close association over a long period of time and from 2013 onwards Mr Daniel provided assistance to the deceased.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

The deceased had no immediate family to whom she owed obligations or responsibilities and no other person sought provision or put his or her circumstances in issue.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate comprised property and cash of around $4,000,000.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Mr Daniel worked as a personal assistance for a doctor in Liverpool and his net monthly income was approximately $3,000.

Mr Daniel owned a Wollongong unit which he purchased in 2019 for $645,000.

The beneficiaries under the 2019 Will did not put forward their competing needs in competition to Mr Daniel's claim.

The financial circumstances of the other person, if the applicant is cohabiting with another person *(s 60(2)(e))*:

Mr Daniel was not cohabitating with any other person.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Mr Daniel did not have any physical, intellectual or mental disability.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Mr Daniel was aged 51 years.

Applicant's contributions to the deceased's estate, the deceased and the deceased's family (*s 60(2)(h)*):

Mr Daniel was the deceased's carer and he provided the deceased companionship and assistance over a number of years. Mr Daniel also paid for the deceased's funeral costs of approximately $18,000.

Provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate *(s 60(2)(i))*:

The deceased provided Mr Daniel rent-free accommodation at her home during her lifetime in and gifted him $179,000 so he could buy a unit in Wollongong Unit.

The deceased also made provision for Mr Daniel in the 2019 Will by gifting him a 6% share of the proceeds of sale of one of her properties.

Deceased's testamentary intentions (*s 60(2)(j)*):

The deceased made provision for Mr Daniel in her various wills.

Was the applicant being maintained by the deceased before the deceased death (*s 60(2)(k)*):

Mr Daniel received the benefit of accommodation from 2013 to 2015 on an intermittent basis and full-time from mid-2015 onwards but he was otherwise not maintained by the deceased.

The applicant's character and conduct before and after the deceased's death *(s 60(2)(m))*:

Mr Daniel assisted the deceased in the years before her death and provided the deceased with companionship.

Determination:

The Court accepted that Mr Daniel was a member of the deceased's household and was partly dependent on the deceased for a time and was therefore an "eligible person", that he was a natural object of the deceased's testamentary bounty as he was included in the 2014 Will and the 2019 Will and there were "factors warranting" his claim and he did not receive adequate and proper provision as he lived with the deceased for the last years of her life and gave her assistance and support. A legacy in the form of a lump sum of $500,000 was held to be adequate and proper provision in addition to his 6 per cent share in the proceeds of sale of the deceased's property, as this would enable Mr Daniel to discharge the balance of the mortgage over his Wollongong property ($470,000).

Orders:

As noted above, no order for provision was made, as the family provision claim was brought "defensively" and only needed to be considered if the 2019 Will was admitted to probate, however the Court held that the deceased did not have testamentary capacity when she made the will, an earlier will was admitted to probate and the application was considered in the event the Court's conclusions about testamentary capacity were held to be wrong.

Moore v McLean [2022] NSWSC 978

Judge and date:

Hallen J, 21 July 2022

Overview:

Interim provision

Orders:

Notice of motion dismissed

Background:

The plaintiff applied for interim provision of $40,000, pursuant to s 62 of the *Succession Act 2006* from the estate of his mother Ms Elza Moore (**the deceased**) who died in October 2020.

Interim provision was sought to enable the plaintiff to pay debts (about $13,000) and to provide a fund to enable him to leave Hanover, Germany, for London, so he could live there and complete accreditation for, and work in, the finance industry in the hope of finding employment which he had been unable to do in Germany.

In her last will dated September 2020, the deceased made no provision for the plaintiff and noted that this was because the plaintiff had received "significant financial assistance" from her and her late husband during their lifetimes.

In the substantive proceedings, the plaintiff sought a family provision order and various forms of equitable relief related to his late father and mother's estates.

The deceased's estate comprised largely cash of approximately $1,962,000. The parties' costs of the proceedings were estimated to be $300,000 and if costs were ordered to be paid from the estate, the distributable estate from which an order for provision could be made was approximately $1,700,000.

The plaintiff was impecunious and by a deed made in June 2000, he accepted that he owed the deceased and her husband $2,000,000.

Determination:

The Court set out fifteen general principles to be considered when an application for interim provision was made.

Firstly, the onus of proof was on the applicant to establish that an interim order should be made.

Secondly, for an interim order to be made, the applicant must establish that he, or she, is an eligible person, not a person who "may be" an eligible person. That is a finding of fact to be made on all the evidence in the context of the application as a whole.

Thirdly, it is not enough for the applicant to show that his, or her, case, at a final hearing, is arguable. The Court must consider the evidence that has been read, even though, on the application, it cannot make findings of fact in order to form the opinion.

Fourthly, the necessary precondition for the making of an interim order is the formation of the opinion, reached on the balance of probabilities, after the untested evidence is fully considered, that no less provision than that proposed in the interim order would be made in favour of the applicant at the final hearing.

Fifthly, it is not enough that the Court is of the opinion, on the balance of probabilities, that the applicant will obtain a family provision order at the final hearing. The Court must also be of the opinion that the final family provision order will be no less than the interim family provision order.

Sixthly, in relation to a final family provision order, s 59 of the *Succession Act 2006* requires the Court to make such order for provision out of the estate of the deceased as the Court thinks ought to be made for his, or her, maintenance, education, or advancement in life, having regard to the facts known to the Court at the time the order is made. Thus, in determining the application for an interim order, the Court must assess the evidence, and form the opinion, that the Plaintiff will receive no less provision than that proposed in the interim order, notionally at the time the final order is likely to be made (which to all intents and purposes is at the final hearing). In forming its opinion, the Court must assess what the plaintiff's, and what the estate's, circumstances, are likely to be, at that time. However, the Act does not attempt, and the Court has not attempted, to proscribe the relevant matters to be taken into account in forming the opinion.

Seventhly, whilst there is power given to the Court to make an interim order, whether to grant that relief is discretionary. The Court must consider whether it is appropriate to exercise the discretion to make an order even if the preconditions in the section are satisfied.

Eighthly, the use of the word "may" before "make an interim order" demonstrates that the Court's power is permissive, rather than compulsive. The power may be used, or not, at the Court's discretion: s 9(1) Interpretation Act 1987 (NSW). That this is so, is not contradicted by any contrary intention appearing in the Act: s 5(2) of the Interpretation Act.

Ninthly, the statutory intention in relation to the making of a family provision order under s 59 is not that a power to do so must be exercised, even if an applicant can establish that 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.

Tenthly, the existence of the state of affairs identified in s 62 enlivens the discretion but does not dictate the outcome of its exercise, other than by reference to "no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order".

Eleventhly, the discretion given to the Court is fairly wide, but it is not unlimited and the discretion should be exercised judicially i.e., fairly and reasonably, having regard to the subject matter, scope and purpose of the Act, and in the interests of justice.

Twelfthly, the Court is not required to determine the precise order for provision that the applicant may receive at the final hearing. The Court need only form the opinion that the applicant will receive no less provision, by way of final order, than that proposed in the interim order. Only then will it be necessary to decide whether to exercise its discretion.

Thirteenthly, a relevant consideration is whether any lump sum paid by way of interim provision order would be able to be repaid by the applicant if the interim order were revoked. The basis for such a consideration is s 62(2) of the Act which includes a reference to the Court "revoking" the interim order. The answer to that question may depend upon whether the applicant receives any provision in the deceased's will or under the operation of the rules of intestacy. If he, or she does, and if the interim provision that is sought is less than the provision made, that the estate is not at risk is a factor that may warrant the exercise of discretion.

Fourteenthly, there may be cases where the Court will make an interim order for an impecunious applicant, even though he, or she, could not repay it if the substantive case failed.

Lastly, an order under s 62 of the Act, whilst an order for interim provision, is an order for provision for the purposes of the Act and it takes (interim) effect as a deemed codicil to the will.

The Court was unable to form an "opinion" that despite the quantum of the interim provision sought being small, it was unlikely the plaintiff would not be obliged, as a condition of the relief sought, to repay what was said to be a debt owed to the estate and that the plaintiff would be entitled to final relief of more than $40,000. Additionally, as a matter of discretion, the Court would not have made an order as there were many factual issues that needed to be resolved which was better done at a final hearing, there was no likelihood that the plaintiff would repay the interim provision if an interim order was revoked and the Court could consider at a final hearing whether any order for provision should be made which benefitted only some of the plaintiff's creditors.

Order:

The plaintiff's notice of motion was dismissed with costs.

Sun v Chapman [2022] NSWCA 132

Judge and date:

Lemming JA, White JA and Brereton JA, 26 July 2022

Overview:

Adequate and proper provision – De facto relationship

Orders:

Provision of $550,000

Background:

No provision was made for the plaintiff (**Rose**) Rose in the late Mr Robin Chapman's (**the deceased**) will made in 1996 and she sought a family provision order. Rose contended she

was an "eligible person" as she and the deceased were in a de facto relationship or a close personal relationship at the deceased's death.

Rose was born in the People's Republic of China. She met the deceased in 1998 after she came to Australia, moved into his Seaforth house soon after and remained living there when he died.

Rose obtained Australian citizenship in 2001 and in support of her application for citizenship the deceased made a statutory declaration that he and Rose were living in a de facto relationship.

Records kept by NSW Police indicated that between 2014 and 2018, police attended the deceased's Seaforth home on numerous occasions responding to complaints by Rose about the deceased, or vice versa. The records also referred to Rose and the deceased being in a de facto relationship and to Rose being the deceased's carer.

In January 2019, Rose and the deceased acknowledged that they were in a "relationship as a couple" when a relationship certificate was issued pursuant to the *Relationships Register Act 2010* (NSW).

Rose and the deceased maintained separate bank accounts, Rose worked full time, she accumulated assets in her own name and made substantial gifts to her son.

After the deceased's death, Rose received a "widow's" pension from the Department of Veteran's Affairs and the executor of the deceased's estate received a letter of demand from the department claiming that the deceased's pension had been overpaid since 2000 as he was paid at a single rate when he was in a relationship with Rose and he ought to have been paid a reduced pension and a debt of $186,863.29 was owed as a consequence. Rose's income and assets were therefore considered when the deceased's entitlement to a war-pension and its quantification were assessed.

In *Sun v Chapman* [2021] NSWSC 955, the primary judge (Emmett AJA), did not accept that Rose and the deceased were living in a de facto relationship principally because: (a) their finances were kept separate; (b) they were financially independent; (c) there did not appear to have been any arrangements for financial support between them; and (d) there was no evidence that the deceased participated in Rose's decision-making when she bought and sold properties and gifted substantial monies to her son. The primary judge did accept that Rose and the deceased were living in a close personal relationship, but he did not find that there "factors warranting" Rose's claim as: (a) there was no evidence that they ever discussed Rose's finances or her intentions to make gifts to her son; and (b) the gifts the deceased made in the Will were in accordance with community expectations of a man in his position and community expectations would not consider that the deceased should make provision for Rose from his estate.

In a second judgment *Sun v Chapman (No 2)* [2021] NSWSC 1231, the primary judge declined to order costs against Rose and the executor cross-appealed that decision.

Determination:

There were five issues on appeal.

The first issue was whether the de facto relationship between Rose and the deceased ended before the deceased's death. The Court held that the evidence "overwhelmingly" pointed to the existence of a de facto relationship and that even if that were not so, the parties were in a close personal relationship and the primary judge was wrong to find that there were no "factors warranting" Rose's claim.

The second issue concerned the nature of appellate review of the finding that the deceased and Rose were not in a de facto relationship at the deceased's death. The executor contended

this was an "evaluative judgment" and though it was not the exercise of a discretion, review was constrained by, or analogous to, *House v The King* considerations. The Court disagreed on two bases. White JA held that the issue did not arise because the primary judge erred in finding that the deceased and Rose were not in a de facto relationship at the deceased's death. Leeming and Brereton JJA's held that it was insufficient in an appeal raising the correctness of a factual finding whether a person was an "eligible person" to submit that the issue was an evaluative one and should be accorded the deference given to a discretionary decision.

The third issue was whether there were "factors warranting" Rose's claims and the Court was satisfied that there were.

The fourth issue was what provision should be ordered. Rose owned a property which was encumbered by a mortgage of $550,000 and she was only just able to cover the mortgage and her living expenses from her income. The Court held that if the mortgage were discharged and Rose received a pension from the Department of Veterans Affairs the measures would provide Rose secure accommodation and an adequate income. The Court was not prepared to also order a fund for contingencies because of the strength of other beneficiaries competing claims and because Rose's son had a moral duty to support her as he had been the recipient of generous gifts from Rose and the deceased's moral obligation to Rose did not extend beyond provision of an amount to discharge the mortgage of $550,000.

The fifth issue was whether the primary judge erred in refusing to make a costs order against Ms Sun and the Court held that he had not.

Orders:

The appeal was allowed, provision of $550,000 ordered and the executor was restrained from distributing the estate until Rose was notified by the Department of Veteran's Affairs that her pension and gold card were reinstated. The cross-appeal was also dismissed.

Mallitt v Gow [2022] NSWSC 1012

Judge and date:

Hallen J, 28 July 2022

Overview:

Adequacy of provision – Dependent household member relationship – Extension of time – Factors warranting a claim

Orders:

Provision of $80,000

Background:

Mrs Elsie Mallitt (the **deceased**) died in October 2020, aged 85 years. She was survived by **Wayne** Mallitt who was said to be her step-child although there was no evidence that Wayne's biological father and the deceased married, and three adult children.

In her will dated May 2017 (**Will**), the deceased appointed one of her children (**Colin**) as sole executor, devised her home at Culburra Beach to Colin and his wife Jacqui and left the rest of her estate, after payment of funeral and testamentary expenses, to Colin and his two brothers, Neil and Carl. (There was unlikely to be any residual estate.)

Wayne received no provision in the Will and five months out of time he applied for a family provision order and an extension of time to bring a claim.

The deceased's estate comprised the Culburra Beach property worth approximately $725,000 and cash at bank of $8,770 (i.e., $733,770 in total).

The parties agreed that if Wayne was successful, he should receive a gross sum for his costs from the estate of $49,256 inclusive of GST and Colin should receive a gross sum of $15,000 for his costs from the estate ($7,968 had been paid).

When costs, and a sum for the costs of selling the Culburra Beach property ($27,250) were allowed, available estate was approximately $642,164.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Wayne's father began a relationship with the deceased in around 1972 when Wayne was aged about 12½ years and Wayne lived with his father and the deceased in a house the deceased owned on a part-time basis for almost two years and then on a full-time basis until he was aged 25 years.

Wayne was dependent on the deceased during his teenage years for accommodation, food and clothing, he called her "mum" and the deceased supported him when he "came out" and declared that he was gay.

After Wayne left the deceased and his father's home, his contact with the deceased lessened and when his father died, there was no face-to-face contact and occasional telephone calls and birthday or Christmas cards were exchanged.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

Whilst Wayne lived with the deceased and his father for a time and was dependent on one or both of them, Wayne was financially independent of the deceased for many years before her death. In addition, the deceased elected to make Colin who was her child and Jacqui the principal beneficiaries of her will.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

As noted above, available estate was approximately $642,164.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Wayne was employed as a supervisor at a bowling club and earned $4,750 per month. His monthly expenses including rent totalled $3,415 and he had a surplus of about $1,335 per month.

Wayne lived with his partner (Nigel) in a property Nigel owned. Wayne's most substantial asset was superannuation ($181,199); he also owned a car ($7,000), furniture ($5,000) and money in the bank ($5,784). He had no liabilities.

Colin and Jacqui married in 1984, they had three adult children and one dependent child who suffered mental health issues, including ADHD and autism though most costs for the child's professional support were paid by the NDIS.

In 2017, Colin resigned from his full-time job to care for the deceased and he had not looked for work since the deceased's death. Jacqui worked as a receptionist earning $1,800 gross per fortnight. Colin and Jacqui's monthly expenditure was $2,933.

Colin and Jacqui had total assets of approximately $192,157 which included Jacqui's superannuation ($160,000), a car ($17,000), a camper trailer ($2,000) and a boat ($3,000).

Colin and Jacqui lived in the deceased's Culburra Beach property and Colin accepted that the property would probably need to be sold and he and his family would need to find somewhere else to live.

Colin and Jacqui made a significant contribution, financial and otherwise, to the deceased's welfare, the conservation of her estate and also to the deceased's husband's welfare.

The financial circumstances of the other person, if the applicant is cohabiting with another person *(s 60(2)(e))*:

Wayne's partner (Nigel) earned a monthly income of $600 which was supplemented when he worked additional shifts. Nigel also received rent payments from Wayne of $1,600 per month and his monthly expenditure totalled $1,824.

Nigel's major assets was his home ($750,000) and superannuation ($334,594). He had no liabilities.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Wayne had a number of medical conditions including ongoing prostate issues as a result of cancer, depression, anxiety, tinnitus and hypertension. His future medical treatment might require hormone injections and chemotherapy.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Wayne was aged 63 years.

Applicant's contributions to the deceased's estate, the deceased and the deceased's family (*s 60(2)(h)*):

Wayne made no direct financial contributions to the acquisition of the deceased's estate.

Provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate *(s 60(2)(i))*:

The deceased made no provision for Wayne during her lifetime, or out of her estate.

Deceased's testamentary intentions (*s 60(2)(j)*):

In a will made in 2014, the deceased left the residue of her estate to be shared equally by Wayne and Colin.

Was the applicant being maintained by the deceased before the deceased death (*s 60(2)(k)*):

Wayne was not maintained, either wholly or partly, by the deceased after he moved out of the deceased's and his father's home in 1984.

Is any other person liable to support the applicant *(s 60(2)(l))*:

No other person was liable to support Wayne, although he was in a long-term relationship with Nigel.

The conduct of any other person before and after the deceased's death *(s 60(2)(n))*:

Colin and Jacqui had a close and loving relationship with the deceased, they were the chosen objects of the deceased's bounty, they looked after the deceased when her husband died and their care enabled the deceased to continue living in her home until shortly before her death.

Determination:

Three preliminary matters were considered before the Court determined that a family provision order should be made.

The first matter was whether an extension of time should be granted. The Court accepted that the parties spent time attempting to settle the proceedings before a summons was filed and this explained why an application was made out of time. Colin also accepted that the estate had not been distributed and that no prejudice would be suffered if time to bring a claim was extended. Time for Wayne to bring a claim was therefore extended.

The second matter was whether Wayne was an "eligible person". The Court accepted that Wayne was wholly or partially dependent upon the deceased and a member of the household of which the deceased was also a member.

Thirdly, the Court accepted that there were "factors warranting" Wayne's claim and that he was someone who the deceased regarded as an object of her testamentary bounty as: (i) the deceased's relationship with him spanned a significant period of his life; (ii) the deceased referred to Wayne as her "step son:" in her 2014 will; (iii) there was some understanding between the deceased and her husband that Wayne would receive a benefit under her will if she survived her husband; (iv) the deceased received her husband's interest in the Culburra Beach by survivorship and this created an obligation or responsibility to make provision for Wayne in the Will; and Wayne did not make a claim for provision against his father's estate with the result that the deceased received all that estate when Wayne had a claim for provision against his father's estate.

The Court then considered Wayne's claim and was satisfied that as Wayne had little capital to provide for the exigencies of life, adequate provision was not made for him in the Will and that given the size and nature of the estate provision of $80,000 should be ordered. The Court also considered that $80,000 was a sum that might be raised without Colin having to sell the Culburra Beach property and that if that were not possible within two months of orders and notations being made, the property should be sold and Wayne would receive 12.5 per cent of the property's net proceeds of sale which equated to about $80,000.

Orders:

Time to bring a claim was extended, provision of a lump sum of $80,000 was ordered on condition that if the lump sum could not be paid within two months of the date of the making of orders and notations, the Culburra Beach property was to be sold and Wayne would receive 12.5 per cent of the property's net proceeds of sale. Wayne's costs of $49,256 (GST incl) and Colin's costs of $15,000 (GST incl) were also ordered to be paid out of the estate.

Shymko v Lach [2022] NSWSC 1096

Judge and date:

Meek J, 18 August 2022

Overview:

Adequacy of provision – Factors warranting a claim - Grandchildren

Orders:

Summons dismissed (2x)

Background:

Mrs Teofilia Shymko (**the deceased**) died in August 2020. Her husband Dido predeceased her and the marriage produced two children, Myron and Mary. Myron died in 2002 from kidney disease and he and his wife had two children, Natalie and Kathy.

In her will dated March 2010 (**Will**), the deceased appointed Mary executor and after payment of expenses and debts, left residue to Mary absolutely.

Natalie and Kathy initially commenced proceedings seeking family provision relief. They subsequently added claims that the deceased's estate was bound by alleged statements made by the deceased in about 2002, shortly after Myron's death, that the deceased would make provision for them of one-half her distributable estate and that the Will and any will made between January 2002 and March 2010 were the product of undue influence and should be set aside. Natalie also claimed that the deceased's estate was bound by a testamentary contract or estoppel that the deceased would leave her $50,000.

All the claims were successfully opposed and the proceedings were dismissed.

Set out below are brief details of Natalie and Kathy's family provision claims.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Natalie and Kathy were the deceased's grandchildren and claimed they were wholly, or partly, dependent on the deceased as they lived with her for between 14 and 16 months in about 1978 and 1979 and during that time the deceased collected them from school on at least three out of five school days and escorted them home and provided them with afternoon tea and supervision.

Natalie and Kathy had a close and loving relationship with the deceased.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The estate's principal asset was a property at Guildford, worth approximately $975,000. The property was to be sold and net estate, after payment of costs and expenses, was approximately $949,000.

The plaintiffs' costs on the ordinary basis were $138,702 and Mary's costs on the indemnity basis were $110,000.

If costs were ordered to be paid from the estate, available estate was approximately $700,928.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Natalie worked as a Communications Manage and earned $5,423 per month. Her husband was retired and received approximately $4,000 per month from an investment account. Their monthly expenses were $9,798. They had assets of $2,651,932 and liabilities of $138,727. They also had an obligation to complete the purchase of a unit for $1,805,000. Natalie also had a superannuation benefit of approximately $331,408.

Natalie sought provision of $350,000 to provide funds for her retirement and contingencies.

Kathy and her husband received a monthly income of $5,734 and their expenditure was $4,904. They owned various properties worth approximately $3,610,299 and other assets. Kathy had a superannuation benefit of $550,507 and her husband a benefit of $176,743.

Kathy sought provision of $448,000 to reduce the balance of a mortgage ($208,000), to add to superannuation ($200,000) and replace a motor vehicle ($40,000).

Mary and her husband had assets worth $1,646,525 and liabilities of $1,056,915. They were both retired and did not receive a pension. They were building a home and required approximately $757,950 to complete the purchase of that home and were relying on Mary's inheritance from the deceased's estate to fund the obligation.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Natalie was aged 52 years; Kathy 51 years and Mary 72 years.

Determination:

Three issues were decided.

The first issue was eligibility and the Court accepted that Natalie and Kathy were at least partly dependent on the deceased for accommodation for at least a year and for regular care for three days a week, during that period.

The second issue was whether there were factors warranting the claim and the Court accepted there were as the parties had a warm and loving relationship and the deceased made general inheritance promises to both Kathy and Natalie.

Finally the Court considered whether Kathy and Natalie were left without adequate provision and it concluded they were not as they had significant net worth and Mary had a stronger claim on the deceased's bounty and greater financial need given her age.

Orders:

The proceedings were dismissed.

Panagopoulos v Panagopoulos [2022] NSWSC 1151

Judge and date:

Robb J, 30 August 2022

Overview:

Adequacy of provision – Extension of time

Orders:

Summons dismissed

Background:

Mr Theodoros Panagopoulos (**the deceased**) died in October 2000 survived by two sons, Jim and George.

The deceased's estate comprised a property at Marrickville valued at $400,000 (**Property**) and $25,000 in two bank accounts.

The deceased's will made in December 1997 (**Will)** appointed George executor of his estate but its wording was uncertain in three respects. Firstly, it gave Jim a life interest in the Property and gave his children the same interest when he died, however as the gift was conditional on Jim's death, there could be no interest for Jim's children to receive. Secondly, residue went equally to Jim and George if they survived the deceased which had the effect that George received a life estate in the Property and that upon his death his estate shared residue which included the Property. Thirdly, the deceased purported to make no provision for George but the effect of the gift of residue to him meant the clause was inexplicable.

At all times, Jim occupied the Property.

In December 2003, George applied to rectify the Will so that it provided: (a) for Jim's natural children to receive the Property on his death; and (b) that if Jim died without leaving children, his interest in the Property passed to George. In March 2004, an order was made that the Will be rectified to this effect.

Jim became bankrupt in January 2006 when he presented a Debtor's Petition. He was discharged in January 2009. Upon his bankruptcy, Jim's life estate in the Property vested in the Official Trustee. In his statement of affairs, Jim did not disclose his life estate in the Property and the Official Trustee was ignorant of the interest and took no step to realise the interest for the benefit of Jim's creditors.

In July 2018, almost 18 years after the deceased's death, Jim filed a statement of claim in which he applied for orders that the rectification order be set aside and that the Property vest in him absolutely. Alternatively, he sought a family provision order pursuant to s 16 of the *Family Provision Act 1982 (*NSW*)*. He also needed an order extending time for him to bring a claim.

Determination:

The Court was not persuaded that the rectification order should be set aside. It also did not accept that: (a) Jim had had shown "sufficient cause" for his delay in bringing a family provision claim; (b) that even had he done so, it would not have exercised its discretion to extend time as it was not satisfied that Jim had established George would not suffer prejudice; and (c) that Jim had established that he was left without adequate and proper provision as the decease had made an effort to provide Jim a home for his lifetime and neither moral duty, nor community standards required the deceased to do more to the effect that it would deprive other beneficiaries of the inheritance the deceased intended they should receive.

Order:

The proceedings were dismissed with costs.

William Walter Nespolon v Lindy van Camp [2022] NSWSC 1190

Judge and date:

Williams J, 6 September 2022

Overview:

Judicial advice

Orders:

See below

Background:

Dr Harry Nespolon (**the deceased**) died in July 2020, survived by his partner Ms van Camp and two minor children.

The deceased's last will gave personal property and a right to reside in a property at Cremorne to Ms van Camp and settled residue in a testamentary trust of which Ms van Camp and her children were eligible beneficiaries. The terms of the trust also provided that superannuation or life insurance proceeds could be paid to the deceased's estate, used to pay debts and residue form part of the trust's assets.

The deceased's estate had net assets of approximately $4,591,194 before additional companies and trusts, in which the deceased had a direct or indirect interest, were included. The deceased was also the sole member of a superannuation fund and his member death benefit was approximately $4,401,422.

On the date of his death, the deceased executed a Binding Death Benefits Notice in which he nominated Ms Camp to receive all of his superannuation member death benefit upon his death (**Nomination**).

Ms van Camp commenced proceedings seeking a declaration that the Nomination was valid and binding and an order that the superannuation fund pay the benefit to her. Alternatively, she sought a family provision order. The executors of the deceased's estate, and the superannuation fund's trustee, denied that the Nomination was valid and contended that the deceased did not have capacity when it was executed and that Ms van Camp acted unconscionably when she procured the deceased's signature on the Nomination. They also filed a cross-claim making the same claims and which sought an order that the Nomination be set aside and that it was void and unenforceable.

Two of the deceased's executors (Ms van Camp was the third) and the superannuation fund's trustee sought judicial advice pursuant to s 63 of the *Trustee Act 1925 (*NSW*)* about whether they would be justified in defending Ms Van Camp's claims, whether they would be justified in advancing a cross-claim and whether they were entitled to be indemnified out of the deceased's estate and the superannuation fund for their reasonable legal costs of the advice proceedings.

Determination:

The Court declined to give judicial advice to the trustees that they would be justified in defending Ms Van Camp's claims and prosecuting a cross-claim as it did not conclude the trustees had a right to superintendent the exercise of the trustee's discretion to determine how a death benefit should be paid. As a matter of discretion, the Court would also not have given advice when the trustee was defending Ms van Camp's claim and prosecuting the cross claim.

The Court accepted that the defences and the cross-claim the trustee was prosecuting were properly arguable and gave advice that trustee company would be justified in defending Ms van Camp claims and prosecuting its cross-claim.

The Court declined to give judicial advice to the trustees that they would be justified in defending Ms van Camp's family provision claim because it had insufficient information about the proceedings to give advice.

Order:

See above.

Ballam & Ors v Ferro & Anor [2022] NSWSC 1200

Judge and date:

Hallen J, 7 September 2022

Overview:

Adequacy of provision – Grandchildren – Dependent household member relationship

Orders:

Summons dismissed (3x)

Background:

Mr Rosario Maiorana (**the deceased**) died in June 2020 aged 89 years, survived by two daughters Carmelina and Daniela. His wife and a third daughter (Vincenza) predeceased him and Vincenza who died in September 2003, was survived by three children, Maree-Marcelle, Claudia and Benjamin.

In a handwritten will made in December 2012 (**Will**), as his wife did not survive him, the deceased appointed Carmelina and Daniela his executors, gave various interests in real properties to them (with a minor interest in one property to Daniela's daughter) and one-third interests in property in Italy to Carmelina and Daniela, Maree-Marcelle, Claudia and Benjamin.

The deceased's estate had a value of between $4,108,363 and $6,346,862.

In August 2020, Carmelina and Daniela caused a Notice of Intended Application for Probate of the Will to be published.

In December 2020, Maree Marcelle filed a general caveat against a grant of probate in the deceased's estate without notice to her.

In July 2021, Maree-Marcelle, Claudia and Benjamin filed a summons in which they each sought family provision orders from the deceased's estate. Carmelina and Daniela subsequently sought an order that probate of the Will be granted to them or in the alternative, that probate of an earlier will be granted to them.

Determination:

In the probate proceedings the Court determined that the Will was executed in accordance with internal law in New South Wales, at the time of the deceased's death, that the deceased had testamentary capacity when he executed the Will, that the deceased knew and approved the Will's contents and that no "suspicious circumstances" surrounded the Will's execution.

The Court determined that Maree-Marcelle, Claudia and Benjamin's were never wholly or partially dependent on the deceased as: (a) the deceased never stood in loco parentis to them; (b) they never lived, nor stayed with the deceased or the deceased and his wife; (c) they never came into the deceased's, nor his wife's, custody and care; (d) when their mother died, they were adults and self-supporting and the deceased did not act in a parental role; (e) after their mother died, there was no evidence they were financially, or materially, dependent on the deceased; (f) there was no evidence that they were physically or emotionally, incapable of

living on their own or providing for themselves; (g) they did not suggest that when their mother died they were supported by the deceased, or that they received financial support from the deceased; (h) evidence was not led about the circumstances in which they lived rent-free in a house the deceased owned; (i) they lived in a residence the deceased own as part of a commercial arrangement which was strict, adhered to, and maintained; (j) they did not have a close relationship with the deceased; and (k) the evidence did not indicate what interaction there was between them and the deceased and there did not appear to have been very much contact between them.

The Court therefore did not find that Maree-Marcelle, Claudia and Benjamin were "eligible persons" and their claims were incompetent.

Order:

The summons was dismissed and costs were reserved.

Ballam & Ors v Ferro & Anor (No 2) [2022] NSWSC 1358

Judge and date:

Hallen J, 10 October 2022

Overview:

Practice and procedure - Costs

Orders:

See below.

Background:

In *Ballam & Ors v Ferro & Anor* [2022] NSWSC 1200 the Court held that the late Mr Rosario Maiorana's will made in December 2012 should be admitted to probate and that family provision claims by three of his grandchildren (Maree-Marcelle, Claudia and Benjamin) should be dismissed. Costs were reserved and this decision determined what costs orders should be made.

In September 2021, the deceased's executors cause an Offer of Compromise to be served that offered to pay each of the plaintiff's $150,000 and for their costs, as agreed or assessed, to be paid out of the estate.

The offer was not accepted.

Maree-Marcelle, Claudia and Benjamin resisted any order for costs of the probate and family provision claims. The executors relied on the Offer of Compromise and sought orders that the plaintiffs pay their costs of the proceedings.

Determination:

The Court dealt with the costs of the probate suit and the family provision proceedings separately.

Maree-Marcelle, Claudia and Benjamin were held to have had no proper basis for challenging the legitimacy of the deceased's 2012 will and ordered them to pay the executors' costs on the ordinary basis and that to the extent the costs did not meet all the executors' costs, the

balance of those costs, calculated in the indemnity basis were to be paid from the deceased's estate.

The Court next held that Maree-Marcelle, Claudia and Benjamin led no evidence about why they should not pay the executors' costs of the family provision proceedings and that there was no basis for an "otherwise order". It was ordered that there should be no order as to their costs of the claim and that they should pay the executors' costs on the ordinary basis up to 31 January 2022 and thereafter on the indemnity basis and that to the extent the costs did not meet all the executors' costs, the balance of those costs, calculated in the indemnity basis should be paid from the deceased's estate.

Order:

See above.

Lucas v Salman [2022] NSWSC 1301

Judge and date:

Kunc J, 28 September 2022

Overview:

Dependent household member relationship – Extension of time – Factors warranting a claim

Orders:

Family provision claims dismissed (2x) but the plaintiffs received a sum of $211,892.64 plus interest from the deceased's estate as an estoppel claim succeeded

Background:

Mr George Salmon (**the deceased**) died in April 2019, aged 61 years, survived by his third wife (Jodie) and two adult children (Joanne and Paul).

Between 2000 and her death in February 2016, the deceased was in a relationship with, and married his second wife Jill. When the relationship commenced, Jill lived in a property at Rouse Hill with her two children, Paul and Karl. In around 2002, the deceased moved into the Rouse Hill property with them. Paul continued living at the Rouse Hill property for 12 months after this and Karl lived there for about six years.

When Jill died, she owned as a joint tenant with the deceased, a property at Illawong (which the deceased received by survivorship), superannuation of approximately $202,000 and an interest in an import company worth approximately $50,000.

In April 2016, George made a will which provided that his estate was to be shared equally by Paul, Karl, Joanne, and Paul.

In May 2016, the deceased met Jodie.

In June 2016, the deceased informed Paul and Karl that the trustees of Jill's superannuation fund had advised him he was to receive Jill's superannuation benefit unless Paul and Karl had an "issue with that". Also in June 2016, Paul said he had a conversation with the deceased in which the deceased told him that if he let him have Jill's superannuation and did not make a claim on Jill's estate, he would ensure that he and Karl received a quarter share of his estate, that he would repay Jill's superannuation to them and they would get a quarter share of his life insurance benefit.

In July 2016, Paul told Karl (who was living in the United States) about his conversation with the deceased and they agreed to accept the deceased's proposal. Also in July 2016, Paul and Karl received a letter from the superannuation fund's trustee which advised that the trustees were intending to pay Jill's superannuation benefit to the deceased as he was Jill's surviving spouse and they had 28 days to lodge a complaint.

In September 2016, Jill's superannuation benefit of $202,000 was paid to the deceased and he was also paid the proceeds ($710,280) of a life insurance policy on Jill's life.

On 15 October 2017, the deceased made a new will in which he left a car to his brother, gave Jodie $100,000 and gifted residue to Joanne and Paul equally. The deceased also swore a statutory declaration in which he said that he had provided funds for Jill to make contributions to her superannuation, that he did not have a relationship with Paul and Karl and he did not want them to take any part of his estate.

On 25 October 2017, the deceased's superannuation benefit of $211,893 was paid to him.

In December 2018, the deceased and Jodie were married.

In February 2019, the deceased made his final will in which he left a car to his brother, gave Jodie $350,000 and gifted residue to Joanne and Paul equally.

Paul and Karl commenced proceedings against the deceased's estate claiming that: (a) there was a contract between them and the deceased that the deceased would leave each of them by will, a half-share of his superannuation benefits and a quarter share of any life insurance policy he had effected on his life; and (b) the deceased was estopped from denying that he would leave each of them by will, a half-share of his superannuation benefits and quarter share of ant life insurance policy he had effected on his life. They also made family provision claims against the deceased's estate and Jill's estate.

Determination:

Paul and Karl's estoppel claim (and not the contract claim) succeeded as the Court was satisfied they had established that the deceased made a representation that they would receive his superannuation in exchange for not making a clam against Jill's estate.

The family provision claim against the deceased's estate failed as though the Court accepted that both Paul and Karl were members of the deceased's household and dependent upon him, it did not accept that as a matter of discretion it should allow their claim given the length of time they were members of his household and as there were no factors warranting their claims. On the latter matter, the Court concluded that Paul and Karl were not natural objects of the deceased's testamentary recognition when he made his last will as they were the deceased's children, it had been many years since they were dependent on the deceased, the dependency was relatively minimal as both were into young adulthood when they met and Joanne, Paul and Jodie had moral claims that outweighed Paul and Karl's claims.

The Court also indicated that recognition in an earlier will was not sufficient to establish that there were "factors warranting" a claim.

The family provision claim against Jill's estate failed as the Court was not satisfied the level of provision Paul and Karl would receive would exceed the amount of their successful estoppel claim and as a matter of discretion, it would be inappropriate to allow them to bring a claim when they suffered no prejudice because they had successfully prosecuted an alternative remedy.

Order:

Paul and Karl were entitled to receive judgment for a sum equal to the balance of the deceased's superannuation of $211,893, plus interest from the date of his death. Costs were reserved.

Lucas v Salman (No 2) [2022] NSWSC 1527

Judge and date:

Kunc J, 9 November 2022

Overview:

Practice and procedure – Costs

Orders:

The estate was ordered to pay the plaintiffs' costs.

Background:

In its primary judgment (*Lucas v Salman* [2022] NSWSC 1301), the plaintiffs' (Paul and Karl) estoppel claim succeeded and it was held they were entitled to receive judgment for a sum equal to the balance of the deceased's superannuation of $211,893, plus interest. A contract claim and family provision claims were unsuccessful. Costs were reserved and this decision considered costs.

Paul and Karl submitted they had been successful and the usual costs order should be made that costs "follow the event".

The deceased's estate submitted that the substantial majority of work done by both parties had been directed to claims upon which Paul and Karl failed, that the issues in the proceedings were clearly separable and that each party should pay its own costs up to 22 October 2022 when a *Calderbank* offer (**Offer**) was served and thereafter on the indemnity basis.

In the Offer, the estate offered to settle Paul and Karl's claims on the basis that they receive $400,000 inclusive of interest and costs on the supposition that they had agreed to lend their mother's superannuation of $200,000 to the deceased on condition it was to be repaid to them on the deceased's death together with interest. Implicit was that Paul and Karl's costs were between $150,000 and $175,000.

Determination:

The Court accepted that all Paul and Karl's claims involved a consideration of substantially the same evidence and although evidence about Paul and Karl's financial circumstances was relevant to the family provision claims, it was not sufficiently substantial, or time consuming, to displace the usual rule that costs "follow the event", subject to a consideration of whether the Offer displaced the effect of the "usual rule".

The Court accepted that Paul and Karl had achieved a result no less than that they would have received had they accepted the Offer as judgment was entered for $246,192, their costs were estimated to be $170,000 and they would therefore receive approximately $416,192 i.e., $16,192 more than they would have received had they accepted the Offer.

The Court also found that two matters provided additional support for its conclusion. Firstly, the Offer did not include a submission to judgment which would have provided security for its performance. Secondly, the Offer was made immediately after and before the estate's principal beneficiaries served evidence about their personal and financial circumstances and

before documents were produced by the estate which enabled Paul and Karl to evaluate their status as competing claimants on the deceased's estate and notional estate.

Order:

The estate was ordered to pay Paul and Karl costs.

Brown v Brown [2022] NSWSC 1393

Judge and date:

Henry J, 14 October 2022

Overview:

Adequate and proper provision – Factors warranting a claim

Orders:

Summons dismissed with costs

Background:

Mr John William Brown (**the deceased**) died in October 2019, aged 76 years.

In 1971, the deceased commenced a relationship with Margaret who had been married previously and had two children from that marriage, David and Allison.

In mid-1971, the deceased commenced living with Margaret, David and Alison in a house Margaret rented.

In mid-1973, Margaret gave birth to the deceased's child, Robert.

In January 1984, the deceased and Margaret separated and a property settlement provided that Margaret received a 57.5 per cent share of the net proceeds of a sale of a house they had owned together and the deceased received the balance.

In his will dated July 2018, the deceased appointed Robert his executor and gave the whole of his estate to him.

David applied for a family provision order. Alison also indicated she was intending to bring a claim, but her claim settled for $50,825.

The deceased's net estate was worth approximately $476,249 and comprised mostly cash. The deceased also had superannuation benefits at death of approximately $240,300 which were paid to Robert after the deceased's death as he was the deceased's child and a "dependent" within the meaning of the term in s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

David's legal costs were estimated to be $101,414 on the indemnity basis and $120,000 on the indemnity basis of which he had paid $38,953.

Robert's legal costs were estimated to be $101,503 on the indemnity basis of which $63,003 had been paid out of the estate.

If costs were ordered to be paid out of the estate, available estate was approximately $273,332.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

David left home in 1982 and he had intermittent contact with the deceased between 1982 and 2004. He neither saw, nor spoke, to the deceased after 2004.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

David was the deceased's step-child and he claimed that the meaning of the term "child" in s 57(1)(c)) of the *Succession Act 2006* could be construed as extending to a step-child.

Robert did not dispute that David was a member of the deceased's household and was at any particular time, wholly or partly dependent on the deceased and was an "eligible person" for this reason, but he submitted that as David fell within the second tier of eligible persons he had to establish that there were factors warranting his claim.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

As noted above, the deceased's net estate was worth approximately $476,249 and if costs were ordered to be paid out of the estate, available estate was approximately $273,332.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

David's income was approximately $60,000 per annum and he met his usual expenses from this and his assets were worth approximately $178,140. He also owned an interest in a company which held the management and letting rights for a residential apartment building in Teneriffe, Queensland.

Robert worked for a cleaning services company and earned approximately $130,000 per annum gross. He and his partner had net assets of approximately $369,821 and superannuation of $318,794.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

David was aged 61 years.

Applicant's contributions to the deceased's estate, the deceased and the deceased's family (*s 60(2)(h)*):

David made no contribution to the deceased's estate or to his welfare.

Deceased's testamentary intentions (*s 60(2)(j)*):

As noted above, the deceased chose to give all his estate to Robert in his will.

Determination:

The first issue the Court considered was whether David was the deceased's "child". It concluded that the weight of judicial authority was that stepchildren were to be considered as dependent members of a household but not a child of a deceased and that although the definition of the term "child" could extend beyond the legal meaning of "children by blood", that meaning had not evolved to include a stepchild.

As David was in the second tier of eligible persons, the Court then had to find that there were "factors warranting" his claim. The Court was satisfied that a parent and child relationship existed between David and the deceased for a significant period of David's life such that David could be considered a natural object of the deceased's testamentary recognition and thus there were factors warranting his claim.

Finally, the Court considered whether David was left without adequate and proper provision and it held that he was not given the modest size of the deceased's estate and Robert's strong competing claim.

Order:

The proceedings were dismissed with costs, but leave was given for either party to apply for a different costs order within 14 days.

Re Estate Soulos [2022] NSWSC 1507

Judge and date:

Lindsay J, 7 November 2022

Overview:

Adequacy of provision

Orders:

See below

Background:

Mrs Irene (Rene) Soulos (**the deceased**) died in January 2018, aged 98 years. Her husband predeceased her in 2003 and she was survived by four children: Dimitrios (James) aged 81 years; Maria aged 77 years; Dimosthenis (Dennis) aged 73 years and Nicholas (Nick) aged 71 years.

At her death, the deceased owned land holdings in her name and in corporate interests (principally Esperia Court Pty Ltd (**Esperia Court**) and A & R Management Pty Ltd (**A & R**) with an estimated worth of $35,854,000.

Dennis, James, Maria and Nick were told by their parents that Esperia Court was used by the deceased's husband, and then the deceased, to accumulate property and wealth for the Soulos family and they would share the family's wealth equally. The company's constitution vested control in a "governing director", management shares were held by the deceased's husband until his death and then the deceased and Dennis, James, Maria and Nick held different numbers of "A", "B", "C" and "D" class shares.

In her will dated March 2017 (**Will**), which was rectified by the Court in a previous proceeding, the deceased made these gifts to her children: (a) Nick received 500 management shares, 1,000 "A" class shares and 1,000 "B" class shares in Esperia Court, a real property, a right of burial and a one-quarter share of residuary estate; (b) James received 2,000 "B" class shares in Esperia Court, a real property, a right of burial and a one-quarter share of residuary estate; (c) Dennis received 2,000 "A" class shares in Esperia Court, a real property, a right of burial and a one-quarter share of residuary estate; and Maria received a Strathfield property, a real property in Greece, a legacy of $25,000 and a one-quarter share of residuary estate.

Gifts were also made to the deceased's grandchildren.

Dennis, James and Maria brought proceedings in which they made various claims against the deceased's estate.

Dennis alleged that he was entitled to beneficial ownership of a real property and he sought a family provision order as he contended that the value of his shares in Esperia Court should be "unlocked".

James contended that a family provision order should be made so that he received 1,000 "B" class Esperia Court shares, that Esperia Court be wound up and that he be released from an obligation contained in the Will that he was to give a right of first refusal to Nick and his son if he elected to sell a real property he received in the Will.

Maria sought a declaration that Esperia Court's affairs were conducted "oppressively" in breach of s 232 of the *Corporations Act 2001* (Cth), that the company be wound up or in the alternative, a family provision that she receive a lump sum and 125 Esperia Court management shares, in lieu of the provision she received in the Will,. Maria's major complaint related to the purchase of a property in 2017 for almost $30,000,000 owned 80 per cent by Esperia Court and 20 per cent by Nick and his son.

Determination:

The principal issue was Maria's oppression claim. The Court held that the deceased, Nick and his son disregarded Maria's interests in the company as a shareholder and that Nick and his son preferred their personal interests over Maria's in decision-making on Esperia Court's behalf.

The Court also accepted that James, Maria and Dennis had been left without adequate and proper provision in the Will as they were unable to unlock the asset-backed value of their Esperia Court shares and they remained without a voice in the company's management when the deceased's husband, and the deceased, had told them that the shares would enable them to enjoy substantial material wealth in their mature years and the shares provided a measure of what the deceased and her husband regarded as proper provision for their children.

The Court proposed a series of orders that equalised shareholdings in Esperia Court between the deceased children and which invalidated dealings Nick and his son had transacted.

Orders:

Final orders were not made but the Court indicated that the following orders appeared necessary to dispose of the substantive disputes in the proceedings:

Firstly, various orders pursuant to s 233 of the *Corporations Act 2001* (Cth) intended to equalise shareholdings in Esperia Court and invalidate dealings Nick and his son conducted to the company's detriment.

Secondly, orders to give James 3,000 Esperia Court shares and 125 management shares.

Thirdly, orders to give Maria 1 A & R share and 125 Esperia Court management shares; and

Fourthly, Orders to give Dennis the beneficial and legal interest in a real property, the deceased's shares in A & R and 125 Esperia Court management shares.

Robertson & Anor v Byrne & Anor [2022] NSWSC 1713

Judge and date:

Slattery J, 14 December 2022

Overview:

Dependent household member relationship – Factors warranting a claim – Grandchild

Orders:

Claim dismissed

Background:

Ms Gloria Reside (aka Gloria McDonough, Gloria Martinsen and Gloria Dunn) (**the deceased**) died in January 2018.

In a will dated July 2017, the deceased appointed her neighbour Ms Lucy Byrne her executor, she left a property at Woy Woy to six beneficiaries and one-third shares of residue to a godson, the Salvation Army and the RSPCA.

An inventory of property lodged with an application for probate declared that the deceased's estate had total assets of $2,829,234 which comprised the Woy Woy property with an estimated value of $540,000, a Woollahra property (**the Woollahra property**) with an estimated value of $2,200,000 and cash.

Probate of the deceased's will was granted to Ms Byrne in May 2018.

In the deceased's will, the Woollahra property was not specifically devised and formed part of residue. It was sold and in September 2018 an interim distribution of $619,234 was paid to each of the residuary beneficiaries.

In 1946, the deceased, her mother Ethel, step-father Richard senior and step-brother Raymond began living in the Woollahra property when it was rented to them. The deceased's mother and step-father subsequently had a child, Trevor.

In 1965, the deceased purchased the Woollahra property for £2,200. The terms on which the deceased acquired her interest in the property was the central issue in the proceedings.

For a time after the deceased purchased the Woollahra property, the deceased, her then partner and her extended family which included Raymond, his then wife and their child Richard junior, lived together at the property.

Section 92 of the *Probate and Administration Act 1898* protects an executor from liability to any person with a claim against an estate, for distributing the assets of the estate after having given notice in the approved form of distribution of the assets of the estate.

Section 93 of the *Probate and Administration Act 1898* provides that where an executor has notice of a claim, he or she may serve a notice on the claimant disputing the claim and calling on the claimant to take proceedings to enforce the claim within three months and the Court is then entitled, on the executor's application, to make orders barring a claim.

Part 78, r 93(a) of the *Supreme Court Rules 1970* provides that a notice under ss 92 or 93 of the *Probate and Administration Act 1898* must be published on the New South Wales Online Registry website if the notice relates to the intended distribution of the estate of a deceased person in relation to which a grant of representation has been made or resealed by the Court, or in any other case, in a Sydney daily newspaper.

On 16 August 2018, solicitors Ms Byrne had appointed to act for her as the estate's executor, published a notice of intended distribution in the Sydney Morning Herald but not on the Supreme Court's website. When a notice was published, the solicitors had notice of an intended claim by at least Raymond. As Ms Byrne had received a grant of administration,

publication of the notice of intended distribution did not comply with the rules and the executor was potentially personally liable if a distribution was made from the estate, improperly.

Richard senior died in the early 1980s, Trevor died in 2006 and Raymond in 2020. Their estates contended the following.

Firstly, that an agreement was made between the deceased and Richard senior pursuant to which the deceased made an irrevocable promise to leave the Woollahra property to Raymond and Trevor.

Secondly, that the deceased (and subsequently her estate) was estopped from denying that the deceased represented to Richard senior that in return for him loaning her £1,100 to assist her in the purchase of the Woollahra property she would purchase the property and make, and not revoke, a will leaving the property to Raymond and Trevor. Alternatively, that a common intention constructive trust arose on this basis.

Thirdly, that the deceased (and subsequently her estate) was estopped from denying that the deceased represented to Richard senior that in return for him loaning her £1,100 she would make, and not revoke, a will leaving the property to Raymond and Trevor. Alternatively, that a common intention constructive trust arose on this basis.

Raymond and Trevor's estates sought equitable compensation against Ms Byrne for breach of trust arising from her failure to distribute the Woollahra property to them and declaratory relief that the recipients of the Woollahra's property's proceeds of sale (i.e., the deceased's godson, the Salvation Army and the RSPCA) held the proceeds, or assets acquired with the proceeds, on constructive trust for them, or a charge in their favour, together with consequential orders and orders for the payment of monies or compensation.

Richard junior sought a family provision order.

The equitable compensation and declaratory relief claims were successful as the Court held that the deceased made the representations the plaintiffs contended.

Richard junior lived with his parents at the Woollahra property between March 1962, when he was born, and about 1966, when his parents moved to other accommodation. As an adult he visited the deceased infrequently, he did not visit her in the last few years of her life and he provided her with financial assistance at times. He claimed to be an "eligible person" as he was wholly or partly dependent on the deceased and lived as a member of the household of which the deceased was a member. It was conceded that Richard junior was a member of the household of which the deceased was a member but disputed that he was dependent upon her.

Richard junior also had to establish that there were factors warranting his claim.

Determination:

The Court accepted that Richard junior lived in the same household as the deceased in his early years but found that he was dependent on his parents and not the deceased and that there was no evidence that the deceased materially contributed to his financial support. His claimed therefore failed at the jurisdictional level.

The Court also found that there were no factors warranting the claim as there was no evidence the deceased expressed any testamentary intentions in Richard junior's favour and he only saw the deceased intermittently through her life and had little contact with her towards the end of her life.

Order:

The claim was dismissed and otherwise the parties were directed to bring in short minutes of order to give effect to the Court's reasons.

Clarke v Clarke and Anor [2022] NSWSC 1721

Judge and date:

Hallen J, 15 December 2022

Overview:

Adequacy of provision – Spouse

Orders:

Further provision of about $340,000 by way of a lump sum of $40,000 and a loan of $300,000 secured by a mortgage and bearing interest

Background:

Mr Mervyn Clarke (**the deceased**) died in April 2021, aged 82 years. He was survived by his second wife Robyn (the plaintiff) and two children from a first marriage, Todd and Michelle (the defendants).

In his will dated April 2019, the deceased: (a) gave Robyn a bequest of any motor vehicle, caravan, furniture and any money in a bank account and a right to reside in a property at North Haven (**North Haven property**) for so long as she wished on certain terms and conditions; (b) directed that if the North Haven property was sold, the net proceeds of sale were to be distributed in equal shares to Robyn, Michelle and Todd; and (c) that residue, after payment of debts funeral and testamentary expenses, was to be divided equally between Robyn, Michelle and Todd.

The deceased's estate comprised the North Haven property worth $650,000 money in bank ($9) and a boat ($10,000). Liabilities included a reverse mortgage ($65,437), unpaid administration costs ($8,000) and the costs and expenses of selling the North Haven property ($23,300). Net estate was approximately $563,272.

The parties agreed that Robyn's costs should be taken to be $30,000 and the executors' costs $90,000, so that total costs were $120,000.

If costs were ordered to be paid from the deceased's estate, available estate was approximately $443,272.

If the estate were distributed in accordance with the terms of the deceased's will, Robyn, Todd and Michelle each would have received a lump sum of approximately $144,521.

Robyn applied for a family provision order.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

The deceased and Robyn commenced a relationship in October 1995 and they married in September 2004. They therefore had a relationship spanning 25 years. They had a close and loving relationship and Robyn made contributions to the conservation and improvement of the North Haven property and the deceased's welfare.

Nature and extent of obligations and responsibilities owed by the deceased to the applicant and others *(s 60(2)(b))*:

Given the length of his relationship with Robyn, the deceased had an obligation to provide for Robyn out of his estate.

The deceased also had a close and loving relationship with Todd, he was best man at Todd's wedding and he and Todd frequently socialised.

The deceased and Michelle also had a close relationship and the deceased lived with Michelle and her partner for a time.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

As noted above, net estate was approximately $563,272 and if costs were ordered to be paid from the estate ($120,000), available estate was approximately $443,272.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Robyn received $2,224 per month from a Centrelink pension, her expenses were $2,191 per month and she had a modest surplus of $34 per month.

Robyn owned $43,000 in asserts which included a car ($32,000), cash in bank ($6,010) and personal effects and furniture ($5,000).

Robyn needed to acquire permanent accommodation, if, as seemed likely, the North Haven property was sold.

Todd was a delivery truck driver and earned approximately $4,597 per month, his partner earned $4,396 per month and their combined expenses were $5,620 per month.

Todd and his partner owned their home, they had total assets of $772,000, superannuation of $67,168 and liabilities of $535,000.

Michelle received an unemployment benefit of $1,277 per month, her partner's gross income was $6,000 per month and Michelle's expenses were $3,217 per month.

Michelle owned her home, she had total assets of $555,000, she had a superannuation benefit of $41,308 and owed liabilities of $141,126.

Michelle needed a new car, her home required extensive renovations and her furniture was old and tired.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Robyn was a Type 2 diabetic and she struggled to control the condition, she suffered shingles and in April 2022, she fractured her pelvis.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Robyn was aged 75 years.

Applicant's contributions to the deceased's estate, the deceased and the deceased's family (*s 60(2)(h)*):

Robyn made various direct and indirect contributions to the conservation and improvement of the North Haven property, funds she received from a sale of a property went to fund her 's and the deceased's lifestyle and she cared for the deceased.

Determination:

The Court accepted that that the deceased's testamentary scheme provided that Robyn would receive one-third of the proceeds of sale of the North Haven property, that her share would be less than $150,000 and she would have nowhere live when the property was sold and the provision was neither adequate not proper. The Court concluded that Robyn should receive a lump sum of $40,000 in addition to a one-third share of the net estate and that the balance of the North Haven property's proceeds of sale should be advanced to her as a loan for Robyn's life, bearing interest at 3 per cent per annum and secured by a mortgage, so that she could buy alternative accommodation and in this way she would be the "mistress of her own life", for the balance of her life.

Orders:

The parties were directed to confer and submit short minutes of order reflecting the Court's reasons.

Daniel v Athans [2022] NSWSC 1712

Judge and date:

Robb J, 16 December 2022

Overview:

Adequacy of provision – Dependent household member relationship – Extension of time – Factors warranting a claim

Orders:

Provision of $750,000 would have been ordered had the plaintiff's estoppel claim failed

Background:

Mr Richard Janson (**the deceased**) died in April 2019 in a car accident, aged 67 years, survived by his mother (Val) and two persons who played a significant role in his and Val's lives, Mr Raymond Daniel (Raymond) and Ms Francine Daniel.

The deceased died intestate.

In September 2019, letters of administration were granted to Val. When the grant was made, the effect of the intestacy provision was to make Val the sole beneficiary of the deceased's estate.

The defendant was the deceased's biological son Luke. He never knew the deceased and only became aware the deceased was his father after his death. DNA testing subsequently proved this and Val's grant was revoked. Also, Val died before the hearing and Luke was appointed to represent the deceased's estate.

The deceased and Val owned and lived in adjoining properties which were referred to as No 34 and No 36. Val owned No 34 and the deceased No 36.

Raymond was the deceased's long-time friend and had lived in No 36 continuously from about 2005. He alleged that sometime in 2005, the deceased made representations to him that if he helped look after Val when the deceased was not around, helped to clean up the property and assisted in the payment of bill and rates, he could occupy No 36 for as long as he wished. Raymond also alleged that in 2016, the deceased made representations to him that he would give No 36 to Raymond and that the property belonged to him. Raymond contended that he relied on the representations, that Luke, as the administrator of the deceased's estate was estopped from denying his claim and that No 36 was held on trust for him and should be transferred to him. The claim succeeded.

In the alternative, Raymond made a family provision claim. For completeness, the Court considered that claim.

Family or other relationship between the applicant and the deceased *(s 60(2)(a))*:

Raymond and the deceased had a mutually supportive relationship for over 23 years.

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The estate comprised two real properties worth about $2,587,500, shares ($27,284) and a debt to Val's estate ($18,932).

If costs were paid from the estate, available estate was approximately $2,247,951.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Raymond was unemployed, his expenses exceeded income by $300 per month, he had $100 in a bank account and a liability of $25,000. He was a beneficiary of Val's estate which had not been administered and he expected to receive between $150,000 and $200,000.

If Raymond was unable to continue living in No 36, he required a place to live and a 1- or 2-bedroom unit in the Merrylands area cost between $395,000 and $780,000.

Luke worked as a lawn mower, he lived with a girlfriend in a house she owned and he had a net worth of $22,727.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Raymond suffered range of conditions which included depression, lumbar spondylosis and Type 2 diabetes.

Applicant's age (when the application is considered) *(s 60(2)(g))*:

Raymond was aged 57 years.

Any other matter (s 60(2)(p)):

The deceased intended to sell No 34 when Val died and to give No 36 to Raymond.

Determination:

The Court considered six issue.

The first issue was whether Raymond should be granted an extension of time to bring a claim as he commenced proceedings approximately 15 months late. The Court accepted Raymond's evidence that he had no reason to doubt his entitlement to receive No 36 until Luke announced himself as the deceased's son and then proved parentage in June 2021 and that as Raymond commenced proceedings by filing a claim in July 2021, delay was explicable and Luke suffered no prejudice by the delay.

The second issue was whether Raymond was, at any particular time, wholly or partly dependent on the deceased. The Court accepted that Raymond was at least partly dependent on the deceased for a six or seven-month period in 2010, when Raymond was depressed and the deceased did all the shopping for the household and offered him emotional support.

The third issue was whether Raymond was a member of a household of which the deceased was a member. The Court accepted that the deceased lived between No 34 and No 36 and treated the two properties as a unified domestic space in which he could move freely and into which he invited Raymond to live and thus the deceased and Raymond were members of the same household between 2005 and 2016.

The fourth issue was whether there were factors warranting Raymond's claim. The Court found that Raymond contributed in a substantial way to Val's welfare and therefore to the deceased's life and that the deceased intended him to be receive No 36 and his contribution to the deceased's and Val's lives justified that status on an objective basis.

The fifth issue was whether the deceased failed to make adequate and proper provision for Raymond as he did not discharge his moral duty to him as he failed to make provision for him from his estate as the intestacy rules left all his estate to Luke.

Sixthly, the Court held that it would have ordered provision of $750,000 as that sum would ensure that Raymond could purchase suitable accommodation and possibly retain a sum for contingencies and leave almost $1,500,000 for Luke.

Orders:

Orders were made to effect a transfer of No 36 to Raymond, his costs were ordered to be paid from the deceased's estate on the ordinary basis and Luke's costs were ordered to be paid from the estate on the indemnity basis.

O'Donnell v O'Donnell [2022] NSWSC 1742

Judge and date:

Robb J, 16 December 2022

Overview:

Adequacy of provision – Domicile

Orders:

Provision of $2,000,000 approximately

Background:

Mr Garry Francis O'Donnell (**the deceased**) died in November 2018, aged 67 years.

The deceased had a number of marriages and relationships during his lifetime.

In 1971, the deceased married Cheryl and they divorced in 1972. The relationship produced one child, Jamie. Cheryl and Jamie both outlived the deceased and Jamie was a defendant in these proceedings.

In January 1975, the deceased married Joan and they separated in about 1987 and subsequently divorced. The relationship produced two children, Vanessa and Laura. Joan, Vanessa and Laura outlived the deceased and Vanessa and Laura were defendants in these proceedings.

In June 1990, the deceased married Fiona and they separated in about 1996 and divorced in 1998. The relationship produced two children, Ashley and Simon. Fiona, Ashley and Simon outlived the deceased and Ashley was a defendant in these proceedings.

From approximately 2000, the deceased had a relationship with Anna which ended in about mid-2013. Anna commenced Family Court proceedings against the deceased which settled in 2015, without a judicial determination about the nature of the relationship. Terms of settlement were reduced to writing in the form of a deed of settlement which included covenants that the deceased would pay Anna $1,000,000 and Anna released the deceased's estate from any claim by her for a further family provision under the legislation of any Australian State or Territory. In October 2015, orders were made in the Family Court by consent, which noted the terms of the parties' agreement. Anna had two children from a prior marriage, Jurek and Kristina. Anna, and her children survived the deceased.

In May 2013, the deceased married Kalpana and she survived him.

In his will dated August 2015, the deceased appointed four of his five children (Jamie, Vanessa, Laura and Ashley) his executors and established separate testamentary discretionary trusts for each of his five children (Jamie, Vanessa, Laura, Ashley and Simon).

Kalpana received no provision from the deceased's estate.

In a statutory declaration sworn when he made the will, the deceased stated that he had made no provision for Kalpana because he believed that his relationship with her would be short, she would receive significant provision from her parents who he believed to be wealthy and he wished to provide for his children.

The deceased's estate had assets of approximately $2,058,460. He was a successful businessman who operated and controlled a corporate group through a series of trusts and companies with net assets of between $28,170,00 and $32,721,000.

In April 2019, Kalpana commenced proceedings in the Supreme Court of NSW, seeking an order for provision from the deceased's estate and notional estate, pursuant to s 59 of the *Succession Act 2006*.

In June 2019, Kalpana commenced proceedings in the Supreme Court of the ACT, seeking an order for provision from the deceased's estate pursuant to s 8 of the *Family Provision Act 1969* (ACT).

In September 2019, Anna commenced proceedings in the Supreme Court of the ACT, seeking an order for provision from the deceased's estate pursuant to s 8 of the *Family Provision Act 1969* (ACT).

Kristina and Jurek commenced proceedings in the Supreme Court of NSW, seeking an order for provision from the deceased's estate and notional estate, pursuant to s 59 of the *Succession Act 2006*.

In July 2020, Anna, commenced proceedings in the Family Court of Australia at Canberra for an order that the deed of settlement made between her and the deceased be set aside.

In July 2021, Kalpana commenced proceedings for a declaration that the executors had wasted the estate's assets (devastavit) by wrongfully depleting the deceased's estate by transferring shares registered in the deceased's name for no consideration.

All proceedings commenced in the Supreme Court of NSW were listed for hearing together, and proceedings brought in other jurisdictions were transferred to the Court and heard together.

Kalpana sought provision of approximately $9,471,249 which included sums for her to purchase accommodation ($5,600,000), pay stamp duty ($329,000) and provide a fund to live from and from which to repay debts and costs ($3,000,000).

Pursuant to the terms of his will, the deceased's children received approximately $6,000,000 each in distributions from the trust and companies the deceased's controlled.

In Part 3.3 of the *Succession Act 2006*, a court is permitted to make orders designating notional estate for the purposes of meeting an application for a family provision. There was no equivalent provisions in the *Family Provision Act 1969* (ACT).

The deceased had residences in NSW and the ACT and spent time at both. The Court was entitled to apply the *Succession Act 2006*, and therefore made orders designating notional estate, only if the deceased was domiciled in NSW when he died.

Kalpana was aged 59 years and she owned few assets and had a superannuation benefit of $753,000, she owed debts of approximately $451,462 and had received interim provision of $356,000 and the executors were paying her $3,000 a week on a continuing basis.

Determination:

The pivotal issue was whether the deceased was domiciled in NSW or the ACT when he died. The Court accepted that: (a) every person has at every moment of their life, one, and only one, domicile; (b) that domicile may change during the person's life; and (c) domicile was important because a person's domicile is a conceptual legal device for ascertaining the law that governs aspects of the person's status which has implications for other persons who have relationships with the person that are governed by the person's domicile. The Court held that the deceased was domiciled in the ACT albeit that he formed an intention to eventually retire to a residence in NSW that would have seen him obtain a domicile of choice in NSW but he had not sufficiently manifested and implemented that intention before his death.

The consequence of the choice of law decision was that Kalpana's family provision claim was determined by the provisions of the *Family Provision Act 1969* (ACT), which did not include powers to make notional estate declarations which placed an upper limit on the claim of $2,058,460, the amount of the deceased's available estate The Court was satisfied that Kalpana should receive an order for provision that gave her all the deceased's remaining estate, subject to the effect of costs orders that would be made, that the estate's costs should not be paid out of the estate and that interim provision should not be repaid.

The Court also held that Kalpana's devastavit claim failed, that Anna's claims failed and that Kristina and Jurek's family provision claims failed because they were brought, pursuant to s 59 of the *Succession Act 2006* when the deceased did not die resident in NSW and they had not brought claims pursuant to the *Family Provision Act 1969* (ACT).

Order:

Reasons were published and the parties were given time to consider what final orders should be made to give effect to the Court's reasons.

Weisbord v Rodny (No 4) [2022] NSWSC 1726

Judge and date:

Robb J, 16 December 2022

Overview:

Adequacy of provision – Adult child – Close personal relationship – Extension of time – Factors warranting a claim – Grandchild

Orders:

Provision of $1,000,000 (2x)
Summons dismissed

Background:

Mrs Rose Rodny (**the deceased**) died in August 2014, aged 92 years.

In December 2018, the Court ordered that an informal will be admitted to probate (*Weisbord v Rodny; Rodney v Weisbord* [2018] NSWSC 1866). The Court deferred consideration of whether family provision claims brought by the deceased's daughter Jeannette and grandchildren Joel and Alexander (Jeannette's children) should be ordered out of the deceased's estate.

In June 2019, the Court made costs orders consequent upon its primary decision (*Weisbord v Rodny (No 2)* [2019] NSWSC 739).

In February 2020, the Court of Appeal set aside the primary judge's orders and ordered that a will dated December 1997 be admitted to probate in solemn form, that costs be paid from the deceased's estate and that the proceedings be remitted to the primary judge to determine the family provision claims (*Rodny v Weisbord* [2020] NSWCA 22).

In April 2021, the Court refused the defendant's (Laurence the deceased's son) application to lead updating evidence as it considered its judgment was reserved on the plaintiffs' family provision claims and that it would give judgment on the applications, based on the evidence tendered at the hearing (*Weisbord v Rodny (No 3)* [2021] NSWSC 458).

Nature and extent of the deceased's estate *(s 60(2)(c))*:

The deceased's estate comprised four parcels of land, an interest in a deceased estate with a net value of approximately $11,591,775.

Nature and extent of the applicant and any beneficiary's financial resources and financial needs *(s 60(2)(d))*:

Jeannette owned and operated a shoe business which traded at a loss but provided her with a level of psychological stability and she was afraid to close it down. Her sole source of income was rent from an investment property of $750 per week which was fully expended paying household expenses.

Jeannette owned her own home worth $3,200,000, an investment property worth approximately $1,500,000 and in the deceased's 1995 will received a property at Rose Bay worth approximately $4,000,000. She owned, or was entitled to, unencumbered real property worth approximately $8,700,000 and had debts of approximately $113,000.

Joel was a disability pensioner and his medical conditions made it difficult for him to work. He owned few assets and owed debts in excess of $30,000.

Alex was undertaking an apprenticeship and received income of $480 per week and often did not have enough money for food and went to sleep hungry. He had assets of approximately $12,000 and liabilities of $30,000.

Laurence did not put his financial circumstances into issue and the Court was entitled to conclude that he was financially comfortable.

Any physical, intellectual or mental disability of the applicant or a beneficiary *(s 60(2)(f))*:

Jeannette, Joel and Alexander each suffered from substantial medical and psychological disabilities.

Deceased's testamentary intentions (*s 60(2)(j)*):

In her will dated December 1997 will, the deceased appointed Laurence as sole executor, gave a property at Rose Bay to Jeannette free of any mortgage, gave another property at Rose Bay and shares in in private company to Laurence subject to a mortgage, gave a property at Carramar to Laurence to hold on trust for her grandchildren who survived her and turned 25 years and gave shares in a private company and residue to Laurence.

At the deceased's death, the Carramar property had been sold and the gift adeemed. As a consequence, the deceased's grandchildren (including Joel and Alexander) received no provision from the deceased's estate.

Between 2006 and 2008, the deceased set out to make a new will. The second version of a draft will appointed Jeannette and Laurence her executors, gave a property at Rose Bay to her four grandchildren free of any mortgage, gave another property at Rose Bay to Jeannette free of any mortgage, gave shares in in private company to Laurence and gave residue to Jeannette and Laurence equally. In the Court's first decision, it found that this will should be admitted to probate.

Had the informal will been upheld Jeannette would have received additional provision of approximately $495,388 and Joel and Alexander would have received provision of approximately $1,275,000 each. The Court concluded that these figures represented the upper limits of their family provision claims.

Determination:

Six issues were considered.

The first issue was whether time for Jeannette, Joel and Alexander to bring claims should be extended. The claims were filed approximately 2½ months late and the Court was satisfied that they had shown sufficient cause why time should be extended as they were probably distracted about whether the deceased had made a will in 2008 and their general disabilities meant they were indecisive people who would have found it difficult to organise themselves and act promptly when they discovered that the deceased's last will was made in December 1997. The Court also accepted that each claim had sufficient prospects of success to warrant an order extending time.

The second issue was whether Joel and Alexander were dependent upon the deceased. The Court accepted that for most of their lives while the deceased was alive, both Joel and Alexander were dependent on the deceased and she provided them a substantial level of accommodation and financial support which for much of the time, largely eclipsed the support proved by their parents.

The third issue was whether Joel and Alexander were in a close personal relationship with the deceased at her death and the Court concluded they were as they were living together and providing each other with emotional support.

The fourth issue was whether there were factors warranting Joel and Alexander's application. The Court accepted there were as Joel and Alexander were both natural objects of the deceased's testamentary recognition at her death and the deceased had encouraged them to believe that on her death, they would each receive a share in a Rose Bay property that would provide them with a place to live independently.

The fifth issue was whether provision should be ordered for Joel and Alexander. The Court concluded that had the deceased succeeded in leaving a will that contained a gift of a property, the four grandchildren would have become entitled to a property worth $5,100,000 so that each would have received $1,275,000. The Court did not think it appropriate to make an order that would give Joel and Alexander the same outcome as if the deceased had succeeded in making a valid will to that effect and that a small discount was appropriate to allow for uncertainties and that provision of $1,000,000 should be ordered, representing 80 per cent of the gift Joel and Alexander might have received. However, the Court accepted that costs might need to be paid from the estate which would reduce the provision that should be ordered and the parties were invited to consider the Court's reasons and make submissions on what amount a final order should be.

The final issue was whether further provision should be ordered for Jeannette. The Court accepted that Jeannette received a gift of a real property worth approximately $4,000,000 in the December 1997 will and held that this was sufficiently large when measured against her essential needs, that there was no justification for making an order for further provision. The Court also accepted that as any further provision would be borne by Laurence's share of the estate, due weight should be given to the fact that the deceased's December 1997 will was admitted to probate and the provision the will contained. The Court was therefore not satisfied that Jeannette had established that adequate and proper provision was not made for her in the deceased's will.

The Court also recorded that Jeannette had failed to provide evidence about what her specific needs for future maintenance were and that her failure to lead evidence about how she would deploy her existing and future assets undermined her claim and meant that any judicial contemplation of what additional provision might be justified would have involved guesswork on the Court's part.

Order:

The parties were given time to conder the Court reasons and what final orders should be made, including as to costs.

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