Supreme Court
New South Wales

Case Title:	Kelly v Deluchi
Medium Neutral Citation:	[2012] NSWSC 841
Hearing Date(s):	23 & 24 July 2012
Decision Date:	26 July 2012
Jurisdiction:	Equity Division
Before:	Hallen AsJ
Decision:	Direct the parties to bring in short minutes of order to reflect the reasons and the proposed orders. Stand the matter over to a suitable date for counsel and the Court for the making of orders and for any argument as to costs.
Catchwords:	SUCCESSION - FAMILY PROVISION - NOTIONAL ESTATE - Two Plaintiffs, a son and a daughter of the deceased, seek a family provision order out of the estate and/or notional estate of the deceased under the Succession Act 2006 - Each Plaintiff received a general legacy out of the estate in the deceased's Will - Actual estate insufficient to satisfy all general legacies - The Defendants are the executors to whom Probate granted, the widow of the deceased and the Trustee of the Superannuation Fund of which the deceased was a member - Following the deceased's death, property in the Fund became held by the widow as a result of the resolution of the Trustee - Whether to make a family provision order and an order designating property as notional estate - If orders for provision made, how the burden of that provision and for the costs of the proceedings should be

borne

EVIDENCE - Production of prior wills and testamentary instruments and notes of instructions - Whether client legal privilege may be claimed - Whether would result in disclosure of a confidential communication or the confidential contents of a document

Legislation Cited:

Family Provision Act 1982
Probate and Administration Act 1898
Property (Relationships) Act 1984
Succession Act 2006
Succession Amendment (Family Provision) Act 2008
The Revised Professional Conduct and Practice Rules 1995

Cases Cited:

Alexander v Jansson [2010] NSWCA 176
Allardice v Allardice, In re Allardice, (1909) 29 NZLR 959
Barns v Barns [2003] HCA 9 [2005] SydLawRw 12; (2005) 27(2) Sydney Law Review 263
Bartlett v Coomber [2008] NSWCA 100
Blore v Lang (1960) 104 CLR 124
Bondelmonte v Blanckensee [1989] WAR 305
Bosch v Perpetual Trustee Co Ltd [1938] AC 463
Buckland Deceased, Re [1966] VR 404
Butcher v Craig [2009] WASC 164
Christie v Manera [2006] WASC 287
Collins v McGain [2003] NSWCA 190
Cooper v Dungan (1976) 50 ALJR 539
Cropley v Cropley [2002] NSWSC 349
Crossman v Riedel [2004] ACTSC 127
Devereaux-Warnes v Hall [No 3] [2007] WASCA 235; (2007) 35 WAR 127
Diver v Neal [2009] NSWCA 54
Edgar v Public Trustee for the Northern Territory [2011] NTSC 5
Foley v Ellis [2008] NSWCA 288
Galt v Compagnon (NSWSC, 24 February, 1998, unreported)
Gardiner v Gardiner (NSWSC, 28 May 1998, unreported)
Goodman v Windeyer (1980) 144 CLR 490
Gorton v Parks (1989) 17 NSWLR 1
Grant v Downs [1976] HCA 63; (1976) 135

CLR 674
Harris, Re (1936) 5 SASR 497
Hawkins v Prestage (1989) 1 WAR 37
Hawksford v Hawksford [2005] NSWSC 796
Hughes v National Trustees Executors and Agency Co. of Australasia Ltd (1979) 143 CLR 134
Hyland v Burbidge [2000] NSWSC 12
John v John [2010] NSWSC 937
Kavalee v Burbidge; Hyland v Burbidge (1998) 43 NSWLR 422
Kay v Archbold [2008] NSWSC 254
Kembrey v Cuskelly [2008] NSWSC 262
Kleinig v Neal (No 2) [1981] 2 NSWLR 532
Luciano v Rosenblum (1985) 2 NSWLR 65
McCosker v McCosker (1957) 97 CLR 566
McGrath v Eves [2005] NSWSC 1006
MacGregor v MacGregor [2003] WASC 169
Marks v Marks [2003] WASCA 297
Mayfield v Lloyd-Williams [2004] NSWSC 419
O'Loughlin v O'Loughlin [2003] NSWCA 99
Pontifical Society for the Propagation of the Faith v Scales [1962] HCA 19; (1962) 107 CLR 9
Puckridge, Deceased, In the Estate of (1978) 20 SASR 72
Russell v Scott [1936] HCA 34; (1936) 55 CLR 440
Singer v Berghouse [1994] HCA 40; (1994) 181 CLR 201
Smith v Woodward (NSWSC, 9 September 1994, unreported)
Stern v Sekers; Sekers v Sekers [2010] NSWSC 59
Stiles v Joseph (NSWSC, 16 December 1996, unreported)
Stott v Cook (1960) 33 ALJR 447
Taylor v Farrugia [2009] NSWSC 801
Vigolo v Bostin [2005] HCA 11; (2005) 221 CLR 191
Walker v Walker (NSWSC, 17 May 1996, unreported)
Worladge v Doddridge (1957) 97 CLR 1
Young & Grainger v Outtrim [2011] NSWSC 391

Texts Cited:

Rosalind Croucher "Contracts to Leave Property by Will and Family Provision after Barns v Barns" (2005) 27(2) Sydney Law

	Review 263 New South Wales Law Reform Commission Report 110 (2005) - Uniform Succession Laws: Family Provision
Category:	Principal judgment
Parties:	Mark Edward Kelly (first Plaintiff) Peter Roy Kelly (second Plaintiff) Michele Jacqueline Twa (third Plaintiff) Alexander Deluchi (first Defendant) Robyn Andreazza (second Defendant) Mary Kelly (third Defendant) R E Kelly Consulting Services Pty Limited (fourth Defendant)
Representation	
- Counsel:	Counsel: Mr J Armfield (Plaintiffs) Mr A Deluchi (solicitor) (first & second Defendants) Mr L Ellison SC (third & fourth Defendants)
- Solicitors:	Solicitors: Fox & Staniland Lawyers (Plaintiffs) ACDLegal (first & second Defendants) Northern Beaches Lawyers (third & fourth Defendants)
File number(s):	2010/410766
Publication Restriction:	

JUDGMENT

The Applications

1 **HIS HONOUR:** These reasons relate to proceedings, in which, originally, three different claims for a family provision order under Chapter 3 of the NSW *Succession Act* 2006 ("the Act") were made. The Act applies in respect of the estate of a person who died on, or after, 1 March 2009. The Act replaces the *Family Provision Act* 1982 ("the former Act"), which was

repealed, effective from 1 March 2009. A family provision order is an order made by the court, under Chapter 3, in relation to the estate, or notional estate, of a deceased person, to provide from that estate for the maintenance, education, or advancement in life, of an eligible person.

2 The deceased, whose estate and notional estate, is the subject of the claims, is Roy Edward Kelly ("the deceased"). (There is a question of notional estate raised in the proceedings to which I shall return.)

3 The Plaintiffs, Mark Edward Kelly, Peter Roy Kelly, and Michele Jacqueline Twa (nee Kelly), made their claims in one Summons filed on 10 December 2010. Each Plaintiff is a child of the deceased by his first marriage.

4 There were four Defendants named in the Summons, namely Alexander Deluchi, Robyn Andreazza, the two executors named in the Will of the deceased to whom Probate was granted; Mary Jean Kelly, the widow of the deceased; and R E Kelly Consulting Services Pty Limited, the trustee of the self managed superannuation fund known as the R E Kelly Consulting Services Pty Limited Superannuation Fund ("the Fund"), of which the deceased and his widow were members at the date of his death.

5 Without any undue familiarity, or disrespect intended, and for simplicity, hereafter, I shall refer to each of the Plaintiffs and the three natural Defendants by his, or her, given name, and the fourth Defendant as "the Trustee".

6 Whilst Alexander and Robyn have filed affidavits that were read in the proceedings, Mary has conducted the defence on behalf of all the Defendants pursuant to an order dated 19 January 2012, which order was filed in court at the commencement of the hearing. This, so it is said, has reduced the overall costs of the proceedings.

7 At the commencement of the hearing, an order was also made, by consent of all parties, that Mark's claim against the Defendants should be dismissed with no order as to costs to the intent that each party would bear his, her, or its, own costs of the proceedings so far as they related to him. However, Mark remained a witness in the proceedings; his affidavits were read as part of the remaining Plaintiffs' case; and he was cross-examined, albeit briefly.

8 I have published these reasons with some urgency as Peter and Michele are returning to Canada on 27 July 2012 and wished to know the result of the proceedings before they left.

Formal Matters

9 The following facts are uncontroversial and provide a useful background.

10 The deceased died on 11 December 2009. He was then aged 69 years, having been born in March 1940.

11 The deceased was married to Denise Eileen Wallace in May 1962. She predeceased him, having died in June 1981. Mark, Peter and Michele is each a child of the deceased and Denise.

12 The deceased married Loretto Pasion in January 1982. There were no children of their union, although Loretto had two daughters who lived in the same household with the deceased and Michele. About a year after they moved in, Loretto and her children left, and were not seen again. The marriage was annulled in February 1984, as Loretto had remained married to her husband in the Philippines.

13 Mary was born in August 1947. She and the deceased were married in September 1985 and remained married until the deceased's death, nearly 24 years later. In all, their relationship spanned more than 25 years.

14 Mary was previously married to Alan James Smith. There were three children of their marriage, namely Michael Alan Smith, who was born in November 1971, Kaylene Jean Smith, who was born in May 1973 and Jennifer May Smith, who was born in July 1974. Mary's marriage to Alan was dissolved in April 1983.

15 At the time of the deceased's marriage to Mary, he still had the care of Michele, whilst Mary had the care of her three children. They all seem to have lived together for some time although the detail of the family arrangements during this period is scant. (Michele says that only Mary and Michael moved in to the deceased's home.)

16 The deceased left a Will that he made on 16 July 2009, Probate of which was granted, on 16 August 2010, by this Court, to Alexander and Robyn.

17 The deceased's Will, relevantly, provided for:

(a) a pecuniary legacy of $50,000 to Mark:

(b) a pecuniary legacy of $75,000 to Peter:

(c) a pecuniary legacy of $75,000 to Michele :

(d) a pecuniary legacy of $10,000 to the deceased's friend, Errol Larbalestier.

18 It went on to leave:

"...

> (iv) Forty percent (40%) of my Life Insurance policy proceeds to be divided equally amongst my six (6) grandchildren being the children of my son Peter and my daughter Michele;
>
> (v) Sixty percent (60%) of my Life Insurance policy proceeds to be divided equally amongst my two (2) grandchildren, being the daughters of my son Mark; ...
> ...
>
> (vii) My Rollex (sic) watch (known as 'oyster perpetual - just date) to my son Peter Roy Kelly;
>
> (viii) My Toyota Landcruiser xxx-xxx and my Golf Caravan to my stepson Michael Smith; and
>
> (ix) The balance of my Residuary Estate to my Wife, Mary. ..."

19 The deceased then made a bequest of $2,000 to Alexander and Robyn for their time and effort required to distribute the estate.

20 Finally, in the Will, the deceased explained that he had left Mark less than he had left to Peter and Michele because his relationship with Mark "has not been constant".

21 In the Inventory of Property, a copy of which was placed inside, and attached to, the Probate document, the deceased's actual estate, at the date of death, was disclosed as having an estimated, or known, gross value of $281,117. The property owned solely by the deceased was an interest (2125/10000, or 21.25 per cent) as tenant in common, with Mary (who also has 2125/10000 or 21.25 percent), and with the Trustee (who has 5750/10000 or 57.5 per cent), of commercial real estate at Willoughby ("the Willoughby property") ($110,000), the proceeds of two policies of insurance ($43,046 and $32,071 respectively), a motor vehicle ($50,000), a caravan ($25,000), one share in the Trustee ($18,600) and 635 shares in IAG ($2,400).

22 In the Inventory of Property, the deceased was also shown as having an interest as a joint tenant, with Mary, in real estate, situated at Belrose ("the Belrose property") ($400,000), as well as being one of two members (the

other being Mary) of the Fund in which he had a member's benefit ($1,234,702).

23 No liabilities were disclosed in the Inventory of Property, but Mary claims to be a creditor of the estate ($29,849). Part of the amount said to be owing to her is $10,000, which she paid to Mr Larbalestier as his pecuniary legacy; funeral and some testamentary expenses ($10,203); an initial payment of Alexander's and Robyn's costs of obtaining Probate ($5,000); motor vehicle and caravan insurance, registration and associated expenses ($4,100); and various other estate expenses incurred as at, and shortly after, the date of the deceased's death. (I have omitted, and shall continue to omit, any reference to cents in setting out amounts referred to, but, if necessary, the cents may be included in totals.)

24 There is a question raised by the Plaintiffs whether the whole of the amount that Mary has paid to Mr Larbalestier should be repaid to her, as there appears to have been no reason for her to have paid the legacy, in priority to the other general legacies in the Will and in circumstances where she had been informed by Alexander and Robyn that there were insufficient funds in the deceased's estate to pay all of the general legacies in full.

25 There might also have been a question whether the motor vehicle and caravan expenses should be borne by the estate rather than by Michael, to whom they have been left. Because of the conclusion to which I have come, this question does not arise.

26 None of the estate of the deceased has been distributed, although Mary has paid the general legacy to Mr Larbalestier.

27 The parties agree that the gross value of the actual estate at the date of hearing is $262,667. That estate is made up of the deceased's interest in the Willoughby property ($90,000), cash in bank as at 1 July 2012

($107,797), made up of the proceeds of the two policies of insurance ($75,117) and the estate's share of rent distributed from the Willoughby property, interest and also dividends ($32,680), the deceased's car ($37,500) and the caravan ($25,000), the shares in IAG ($2,369) and the share in the Trustee ($1.00).

28 At the commencement of the hearing, there was a dispute as to the value of the whole of the Willoughby property, the range of values asserted being between $430,000 (by Mary) and $490,000 (by Alexander and Robyn). On the second day of the hearing, the parties agreed that the value should be estimated to be $460,000.

29 Alexander gave evidence that, recently, Mary has made an offer of $90,000, to purchase the deceased's interest in the Willoughby property and that he and Robyn are likely to accept the amount offered because it will provide to the estate, after taking into account the costs and expenses of sale, no less than it is likely to receive if it is sold by auction or by private treaty. Acceptance of the offer would also avoid delay in winding up the administration of the estate.

30 The Plaintiffs do not oppose the sale to Mary at the price offered, albeit that, based upon the agreed value of the Willoughby property ($460,000), the value of the deceased's interest would be $97,750.

31 In relation to the property that may be designated as notional estate, the parties were also able to agree that the value of a one half interest in the Belrose property at the date of hearing is $405,000. Mary, as the sole director of the Trustee, estimated that the current value of property held in the Fund is $805,143. That property comprises the interest in the Willoughby property ($264,500), shares in listed companies ($253,972), money on term deposit ($250,016) and various amounts held in banks ($36,655). (I shall, later, refer to a distribution out of the Fund of $488,000, made to Mary, since the death of the deceased.)

32 The Fund's current annual income currently consists of rent from its share of the Willoughby property ($14,163), dividends and franking credits ($22,000) and interest ($11,200). There are, of course, associated expenses.

33 Robyn, who is an accountant, estimates that if the deceased's interest in the Willoughby property is sold, there may be capital gains tax of $500, or $3,500, depending upon whether the Australian Taxation Office applies, or does not apply, the concession provisions. Because the amount of CGT that may be payable is not large, I was requested by the parties to ignore it in calculating the value of the actual estate and the property that may be designated as notional estate.

34 Thus, the parties agree that the estimate of the maximum value of the property that may be the subject of a notional estate order is $1,210,143 (being the deceased's interest as joint tenant in the Belrose property ($405,000) and the value of the property in the Fund, as at the date of hearing ($805,143)). However, the Plaintiffs accept that the Court should not make a notional estate order in respect of any part of the deceased's interest as a joint tenant with Mary, in the Belrose property, as that property is, and has been, Mary's home.

35 Taking into account the agreement of the parties and the concession of the Plaintiffs, the actual estate (after the payment of the amount found to be due to Mary) and that part of the value of property held in the Fund as at the date of hearing that is the subject of a notional estate order, is the only property from which any family provision order made in favour of the Plaintiffs and any orders for costs may be satisfied.

36 Turning then to the entitlement of the Plaintiffs under the Will of the deceased, counsel for the Plaintiffs estimated, taking into account the terms of the deceased's Will and excluding any costs of the proceedings,

that the gross amount available in the actual estate to satisfy the general legacies is $125,167 (made up of the deceased's interest in the Willoughby property ($90,000), IAG shares ($2,369), the share in the Trustee ($1.00) and the cash in bank ($32,797) (excluding the proceeds of the policies of insurance). Then, deducting from that gross sum, the amount of $19,849, being the amount claimed by Mary (excluding the legacy that she paid to Mr Larbalestier), a net amount of $105,318 remains. The general legacies, including the amount payable to Alexander and Robyn, total $212,000. Since the estate is insufficient to pay the general legacies in full, each legacy abates rateably, with the result that the amount that Peter and Michele would each receive is $37,146 (being 49.52 per cent of $75,000); Mark would receive $24,764 (being 49.52 per cent of $50,000); Mr Larbalestier would receive $4,952 (being 49.52 per cent of $10,000); and Alexander and Robyn would receive $990 (being 49.52 per cent of $2,000). (The percentage was calculated by counsel as 105/212.)

37 On that basis, Mary would have to be repaid an additional amount of $4,952 (since she has paid Mr Larbalestier), making her total claim upon the estate for liabilities that she has paid, and for which she should be reimbursed, $24,801.

38 Using these calculations, subject to the burden of the costs of the proceedings, the net value of the actual estate was agreed at $237,866 ($262,667 less $24,801) whilst the net value of the property of the Fund that may be designated as notional estate is $805,143. Thus, subject to the burden of the costs of the proceedings, the total maximum value of the actual estate and the property that may be designated as notional estate is $1,043,009.

39 In calculating the value of the estate and/or notional estate of the deceased, finally available for distribution, the costs of the present proceedings should also be considered, since the Plaintiffs, if successful,

normally, will be entitled to an order that his, and her, costs, calculated on the ordinary basis, be paid out of that estate, whilst Alexander and Robyn, irrespective of the outcome of the proceedings, normally, will be entitled to an order that their costs, calculated on the indemnity basis, be paid out of that estate. Mary's costs may fall into a different category because she is, in effect, joined in the proceedings since property passing to her is the subject of a claim for a notional estate order and she is defending the proceedings to protect her own interests. I shall refer to her costs in the calculations because of the evidence regarding the way in which the proceedings have been conducted.

40 The Plaintiffs' costs and disbursements, including their travelling and accommodation expenses since Peter and Michele both permanently live in Canada, have been estimated to be $115,334, if calculated on the ordinary basis, and $131,494, if calculated on the indemnity basis. Of the costs and disbursements, it has been estimated that about $18,000 was incurred on account of work done for Mark. Omitting a part of those expenses (since Mark's affidavits have been read), the estimate of the Plaintiffs' costs is $102,734, if calculated on the ordinary basis, and $116,194, if calculated on the indemnity basis. The estimates are inclusive of GST and are based on a two-day hearing.

41 The Plaintiffs' solicitor has sworn an affidavit explaining why the Plaintiffs' costs are "larger than usual". He was not cross-examined on his affidavit.

42 Although not specifically disclosed in his, or her, affidavits (other than by reference to a monthly expenditure in the case of Michele), and not disclosed at all in their solicitor's first affidavit as to costs, but disclosed in his affidavit filed and served on the second day of the hearing, Peter has paid approximately $21,572, whilst Michele has paid approximately $24,588, on account of his and her costs of the proceedings. This is relevant because it may be that if each obtains an order for costs, the whole, or a part, of the amount that he and she has paid will be refunded.

43 To date, part of Alexander's and Robyn's costs of obtaining Probate have been paid, by Mary ($5,000). Also, some costs of the proceedings ($5,504), have been paid from the estate. As at 11 December 2011, the balance of their unpaid costs was estimated to be $11,200. They have agreed, however, to have all of the unpaid costs, as well as any subsequent costs and disbursements, "capped" at $10,000. Thus, their costs up to, and including, the hearing, are estimated to be $15,504 (of which $5,504 have been paid). (The estimates are inclusive of GST.)

44 Mary's and the Trustee's costs and disbursements, calculated from 7 June 2011 until the conclusion of the hearing, are estimated to be $81,810, if calculated on the indemnity basis, and $71,983, if calculated on the ordinary basis. The estimates are inclusive of GST and are based on a two-day hearing.

45 The total amount of costs and disbursements, if the estimated costs of all parties are accurate, and if an order is made that the Plaintiffs' and Mary's and the Trustee's, costs and disbursements, calculated on the ordinary basis, and Alexander and Robyn's costs and disbursements, calculated on the indemnity basis, are to be paid out of the actual or notional estate of the deceased, is $190,221.

46 Using the estimated value of the actual estate and the value of the property that may be designated as notional estate agreed to by the parties ($1,043,009) and assuming that the costs are ordered to be paid out of the estate and/or the notional estate of the deceased, this will leave $852,788, potentially available from which family provision orders may be made.

47 Of course, depending upon the result of each case, and the order, or orders, for costs, if any, that is, or are, made, the costs and disbursements, if payable out of the estate will be able to be formally assessed, unless

otherwise agreed by the parties. The parties agreed that reasons for judgment should be published, after which the issue of the costs could be argued, if no agreement is reached. However, I was requested to identify from what source the burden of any costs orders I proposed should be met.

48 The persons described as eligible persons, within the meaning of the Act, are, principally, the Plaintiffs, Mark, and Mary. In addition, all of the grandchildren of the deceased have been identified as persons who are, or who may be, eligible. There is no specific evidence about the dependency of any of the grandchildren on the deceased. It seems likely that each grandchild was dependent upon his, or her, parents, rather than upon the deceased. In my view, on the evidence that I have read, none is an eligible person.

49 Also identified as persons who may be eligible, are Michael, Kaylene and Jennifer, Mary's children. However, the basis upon which each is, or may be, an eligible person, is not clear from the evidence. In any event, Kaylene was present in Court throughout the proceedings and there is evidence that Jennifer and Michael are both aware of the proceedings. In the circumstances, I am satisfied that the Court may disregard the interests of each (other than Michael's interest as a beneficiary).

50 In relation to Loretto Pasion and her two children, the relationships appear to have ended over 25 years before the deceased's death and there is no evidence of any continued contact with him. To the contrary, Michele says that after Loretto and her children left, the deceased did not mention her again.

51 An electoral roll search of all states carried out by Sydney Legal Agents in December 2011 "showed no known address for Loretto Pasion Kelly and three different addresses for Katherine Kelly". (Although the spelling of the given name "Loreto" is different to how it is spelt elsewhere in the

evidence, it is probable that the search would have revealed a person with a similar name.) A letter dated 19 December 2011, sent by Alexander, to each of those addresses has not prompted a response.

52 In all the circumstances, I am satisfied that the Court may disregard the interests of each of Loretto and her children, as a person by, or in respect of, whom, an application for a family provision order may be made but who has not made an application, even though notice of the application, and of the Court's power to disregard her interests, in the manner and form prescribed by the regulations or rules of court, has not been served. The service of any such notice is unnecessary (because the claim of each, bearing in mind the competing claims of the Plaintiffs and Mary, is so weak) and impracticable (because the whereabouts of each of them is unknown) in the circumstances of the case.

53 Only the three Plaintiffs have commenced proceedings, of which only Peter and Michele's claim is proceeding. Mark and Mary has each given evidence about his, and her, financial and material circumstances and advanced a case that he, and she, is a competing claimant, financially and otherwise, upon the bounty of the deceased. Michael, who is also a beneficiary named in the Will, has not put on any evidence at all.

Additional Background Facts

54 The following additional facts are also not the subject of any dispute between the parties.

55 The deceased, Mary and the Trustee purchased the Willoughby property in about 1991. The Trustee (at the time it was the vehicle through which the deceased conducted his engineering business) rented the property until about 1994, after which time the Willoughby property has been leased to different tenants.

56 The Willoughby property is part of a commercial strata building on three levels including street level parking. The subject strata suite appears as comprising about 140 square metres (including the car space) and it is said to be in good condition.

57 The Trustee (as the vehicle through which the deceased conducted his engineering business) established the Fund by Trust Deed dated 22 June 1988. Mary states that the Fund was established as it was considered to be "the most tax effective manner to provide for an income ... for the benefit of future retirement and not to be reliant upon social security and be comfortable in old age".

58 The deceased and Mary were appointed as the original trustees of the Fund. A Deed of Variation was executed on 26 January 2008 to enable the Fund to be a complying self-managed superannuation fund. Also, by Deed of Appointment and Retirement of Trustee, dated 26 January 2008, they retired and the Trustee was appointed. However, both the deceased and Mary were made directors of the Trustee. Since the death of the deceased, Mary has remained as the sole director of the Trustee. There was a further Deed of Amendment executed in September 2008.

59 Clause 32 of the Deed of Variation provided that:

> "...
> Subject to the Relevant Law, upon the death of a Member or Beneficiary who had Dependants, the Trustee shall:
>
> (i) if required by a Death Benefit Notice given by the Member or Beneficiary to the Trustee, pay or apply the Benefit in accordance with that Death Benefit Notice;
>
> (ii) otherwise, pay or apply the Benefit to or for the benefit of one or more of the Member's or Beneficiary's Dependants (including any Nominated Dependants) and legal personal representative in such proportions, form, manner and at such times as the Trustee shall from time to time in its discretion determine provided that the payment of the Benefit shall comply with the Relevant Law."

60 The existing members, former members and beneficiaries of the Fund were and are only the deceased and Mary. Neither of the Plaintiffs, nor Mark, was ever a member of the Fund, and, at the date of death, he and she was not a "dependant" of the deceased within the meaning of that term as defined in any of the relevant Deeds. However, as the spouse of the deceased, Mary was within the definition of that term.

61 The deceased was severely injured in a motor vehicle accident in March 1991. In about 1998, he received compensation for the injuries and disabilities that he suffered of about $1 million. It was from the amount he received by way of damages that he, subsequently, contributed to the Fund. (He also received an amount of $87,000, as reimbursement for medical expenses, and about $90,000 for his legal fees that had been paid.)

62 Before the contribution made by the deceased into the Fund, the benefits available to members in the Fund had been $264,243 (for the year ending 30 June 1998). For the year ending 30 June 1999, it was $1,310,490.

63 At an Extraordinary General Meeting, held at the Belrose property on 18 February 2010, it was noted that an application of Death Notice Benefit in respect of the deceased had been received from Mary and a resolution was passed "[T]o allocate death benefit of former member and reversionary pension to the widow. No other person is known to be financially dependant at the time of death on the former member ...".

64 The resolution was signed by Mary as "Chairperson for and on behalf of [the Trustee] ATF [the Fund].

65 As at 30 June 2009, the liability for accrued benefits in the Fund, for the deceased, was $1,234,702 and, for Mary, was $129,113. As at 30 June 2010, the liability for accrued benefits for Mary (the deceased having died in the 2010 financial year) was $1,386,019.

66 Mary purchased a property at Martinsville, NSW, in December 2010 for a purchase price of $636,500. The property has been described as "a modern four bedroom home set in 2 and a half acres in a very sought after valley in the lake Macquarie hinterland". (Mary's evidence is that it is a three-bedroom property.)

67 To enable her to pay the purchase price, Mary drew down from the Fund about $100,000. Initially, she was required to borrow about $400,000, the repayment of which debt was secured over the Belrose property. However, in December 2011 and January 2012, Mary drew down a total of about $488,000 from the Fund, which amount she used to discharge the mortgage on the Belrose property, to pay for renovations on the Martinsville property, and for her living expenses. She estimates that since its purchase, she has spent about $140,000 renovating the Martinsville property.

68 Mary states that she requires more funds to complete the renovations to the Martinsville property. The likely value of that property, after the renovations are completed, has not been disclosed.

The Statutory Scheme - The Act

69 Next, I shall discuss the statutory scheme that is relevant to the facts of the present case. Although I have set out some of what I state hereunder in other cases, in view of the importance of this case to the parties, I shall repeat the principles. It is important that they are able to follow the reasoning and for each to be satisfied that I have considered the evidence and the submissions in their application.

70 The former Act was repealed by s 5 of the *Succession Amendment (Family Provision) Act* 2008. A new Chapter 3 was added to the Act, which

dealt with the topic of family provision from deceased estates. The long title of the Act describes that new Chapter as one to ensure that adequate provision is made for the members of the family of a deceased person, and certain other persons, from the estate of the deceased person. Importantly, this should not be taken to mean that the Act confers upon those persons, a statutory entitlement to receive a certain portion of a deceased person's estate. Nor does it impose any limitation on the deceased's power of disposition by his, or her, will. It is only if the statutory conditions are satisfied, that the court is empowered, under the Act, to alter the deceased's disposition of his, or her, estate, to produce a result that is consistent with the purpose of the Act. Even then, the court's power to do so is discretionary.

71 The key provision is s 59 of the Act. The court must be satisfied, first, that each applicant is an eligible person within the meaning of s 57(1) (s 59(1)(a)). In New South Wales, it is a multi-category based eligibility system, rather than one with a general category of eligibility (as it is, for example, in Victoria). There are six categories of persons by, or on whose behalf, an application may be made. Relevantly, one category is "a child of the deceased" (s 57(1)(c) of the Act). Clearly, that language is expressive of the person's status, as well as his, or her, relationship to the deceased. There is no age limit placed on a child making an application.

72 The court, if satisfied of each applicant's eligibility, must, in this case, then determine whether adequate provision for the proper maintenance, education or advancement in life of that applicant has not been made by the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both (s 59(1)(c)). It is only if the court is satisfied of the inadequacy of provision, that consideration is given to whether to make a family provision order (s 59(2)). In this way, the court carries out a two-stage process. It may take into consideration, the matters referred to in s 60(2) of the Act at both stages.

73 Other than by reference to the provision made in the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both, s 59(1)(c) of the Act leaves undefined the norm by which the court must determine whether the provision, if any, is inadequate for each applicant's proper maintenance, education and advancement in life. The question would appear to be answered by an evaluation that takes the court to the provision actually made in the deceased's Will, or on intestacy, or both, on the one hand, and to the requirement for maintenance, education and advancement in life of the applicant on the other. No criteria are prescribed in the Act as to the circumstances that do, or do not, constitute inadequate provision for the proper maintenance, education and advancement in life of the applicant.

74 It was said in the Court of Appeal (per Basten JA) in *Foley v Ellis* [2008] NSWCA 288 at [3], that the state of satisfaction "depends upon a multi-faceted evaluative judgment". In *Kay v Archbold* [2008] NSWSC 254, at [126], White J said that the assessment of what provision is proper involved "an intuitive assessment".

75 Under s 59(1)(c) of the Act, the time at which the court gives its consideration to the question is the time when the court is considering the application. Under s 59(2), the Court has regard to the facts known to the court at the time the order is made.

76 "Provision" is not defined by the Act, but it was noted in *Diver v Neal* [2009] NSWCA 54 at [34], that the term "covers the many forms of support and assistance which one individual can give to another. That support and assistance will vary over the course of the person's lifetime".

77 Neither is the word "maintenance", or the phrase "advancement in life", defined in the Act. However, in *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191, Callinan and Heydon JJ, at 228-229, said, of the words "maintenance", "support" and "advancement":

> "'Maintenance' may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. 'Support' similarly may imply provision beyond bare need. The use of the two terms serves to amplify the powers conferred upon the court. And, furthermore, provision to secure or promote 'advancement' would ordinarily be provision beyond the necessities of life. It is not difficult to conceive of a case in which it appears that sufficient provision for support and maintenance has been made, but that in the circumstances, say, of a promise or an expectation reasonably held, further provision would be proper to enable a potential beneficiary to improve his or her prospects in life, or to undertake further education."

78 In *Alexander v Jansson* [2010] NSWCA 176, Brereton J (with whom Basten JA and Handley AJA agreed), at [18], stated:

> "Proper maintenance is not limited to the bare sustenance of a claimant [cf *Gorton v Parkes* (sic) [1989] 17 NSWLR 1], but requires consideration of the totality of the claimant's position in life including age, status, relationship with the deceased, financial circumstances, the environs to which he or she is accustomed, and mobility."

79 In *In the Estate of Puckridge, Deceased* (1978) 20 SASR 72, at 77 King CJ said:

> "The words 'advancement in life' have a wide meaning and application and there is nothing to confine the operation of the provision to an earlier period of life in the members of the family: *Blore v Lang* (1960) 104 CLR 124, per Dixon CJ at 128."

80 Master Macready (as his Honour then was) in *Stiles v Joseph* (NSWSC, 16 December 1996, unreported) said, at 14-16:

> "Apart from the High Court's statement that the words 'advancement in life' have a wide meaning and application ... there is little (if any) case law on the meaning of 'advancement' in the context of family provision applications. Zelling J in *In The Estate of Wardle* (1979) 22 SASR 139 at 144, had the same problem. However, commonly in decisions in which the Applicant's 'advancement in life' has been in issue, the Court has looked only at the material or financial situation of the Applicant, and there is nothing to suggest that provision for the Applicant's 'advancement in life' means anything more than material or financial advancement. For example, in *Kleinig v Neal (No 2)* [1981] 2 NSWLR 532, Holland J, discusses the financial assistance which an applicant may need for his or her maintenance and advancement in life in the following terms:- If the court is to make a judgment as to what a wise and just testator ought to have done in all the circumstances of the case, it could not be right to ignore that the

particular testator was a wealthy man in considering what he ought to have done for his widow or children in making provision for their maintenance, education or advancement in life. There are different levels of need for such things. In the case of maintenance and advancement in life they can range from bare subsistence up to anything short of sheer luxury. A desire to improve one's standard of living or a desire to fulfil one's ambition for a career or to make the fullest use of one's skills and abilities in a trade or business, if hindered or frustrated by the lack of financial means required for the fulfilment of such desire or ambition, presents a need for such assistance and it would seem to me that it is open to a court to say, in the case of a wealthy spouse or parent who could have but has failed to provide such financial assistance, that . . . [the deceased] has failed to make adequate provision for the proper maintenance and advancement in life of the spouse or children who had such need. (at 541)

In *Pilkington v Inland Revenue Commissioners* [1964] AC 612, Viscount Radcliffe defined 'advancement', in the context of a trustee's powers, as 'any use of ... money which will improve the material situation of the beneficiary' (at 635), and this definition was cited with approval by Pennycuick J in *Re Clore's Settlement Trust*; *Sainer v Clore* [1966] 2 All ER 272 at 274...

In Certoma, The Law of Succession In New South Wales (2nd Ed) at 208, it is said:

> 'Although 'maintenance' does not mean mere subsistence, in the context of the New South Wales Act, it probably does not extend to substantial capital investments such as the purchase of a business, an income-producing property or a home for the Applicant because these forms of provision are more likely to be within the power of the Court under 'advancement in life'. Maintenance is rather concerned with the discharge of the recurrent costs of daily living and not generally with substantial capital benefit.'

The Queensland Law Reform Commission, in its Working Paper on Uniform Succession Laws: Family Provision (Working Paper 47, 1995) ... notes ... that:

> 'Whereas support, maintenance and education are words traditionally associated with the expenditure of income, advancement has been associated with the expenditure of capital, such as setting a person up in business or upon marriage.'"

81 In *Mayfield v Lloyd-Williams* [2004] NSWSC 419, White J at [114] noted:

"In the context of the Act the expression advancement in life is not confined to an advancement of an applicant in his or her younger years. It is phrase of wide import. (*McCosker v McCosker* (1957) 97 CLR 566 at 575) The phrase "advancement in life" has expanded the concept used in the Victorian legislation which was considered in *Re Buckland* permitting provision to be made for the "maintenance and

> support" of an eligible applicant. However Adam J emphasised that in a large estate a more extravagant allowance for contingencies could be made than would be permissible in a small estate and still fall within the conception of maintenance and support."

82 In *Bartlett v Coomber* [2008] NSWCA 100, at [50], Mason P said:

> "The concept of advancement in life goes beyond the need for education and maintenance. In a proper case it will extend to a capital payment designed to set a person up in business or upon marriage (*McCosker v McCosker* (1957) 97 CLR 566 at 575; *Stiles v Joseph*, (NSW Supreme Court, Macready M, 16 December 1996); *Mayfield v Lloyd-Williams* [2004] NSWSC 419)."

83 The word 'adequate' connotes something different from the word 'proper'. 'Adequate' is concerned with the quantum, whereas 'proper' prescribes the standard, of the maintenance, education and advancement in life: *Devereaux-Warnes v Hall [No 3]* [2007] WASCA 235; (2007) 35 WAR 127 at [72] and at [77] per Buss JA.

84 Each of the words was considered by Lord Romer in delivering the advice of the Privy Council in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, at 476:

> "The use of the word 'proper' in this connection is of considerable importance. It connotes something different from the word 'adequate'. A small sum may be sufficient for the 'adequate' maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his 'proper' maintenance. So, too, a sum may be quite insufficient for the 'adequate' maintenance of a child and yet may be sufficient for his maintenance on a scale that is 'proper' in all the circumstances."

85 Dixon CJ and Williams J, in *McCosker v McCosker* (1957) 97 CLR 566 at 571-572, after citing *Bosch v Perpetual Trustee Co Ltd*, went on to say, of the word 'proper', that:

> "It means proper in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement if life must be considered in the light of the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a

> child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent."

86 In *Goodman v Windeyer* (1980) 144 CLR 490, Gibbs J said at 502:

> "[T]he words 'adequate' and 'proper' are always relative. There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards."

87 In *Vigolo v Bostin,* at 228, Callinan and Heydon JJ said:

> "[T]he use of the word "proper"...implies something beyond mere dollars and cents. Its use, it seems to us, invites consideration of all the relevant surrounding circumstances and would entitle a court to have regard to a promise of a kind which was made here...The use of the word "proper" means that attention may be given, in deciding whether adequate provision has been made, to such matters as what use to be called the "station in life" of the parties and the expectations to which that has given rise, in other words, reciprocal claims and duties based upon how the parties lived and might reasonably expect to have lived in the future."

88 Santow J pointed out in *Gardiner v Gardiner* (NSWSC, 28 May 1998, unreported), "adequate" and "proper" are independent concepts. He said at 12:

> "Adequate" relates to the needs of the applicant. It is determined by reference to events occurring up to the death of the deceased, but also encompassing what the deceased might reasonably have foreseen before death. "Proper" depends upon all the circumstances of the case. These include the applicant's station in life, the wealth of the deceased, the means and proper claims of all applicants, the relative urgency of the various claims on the deceased's bounty, the applicant's conduct in relation to the deceased, the applicant's contribution to building up the deceased's estate, the existence of dependents upon the applicant, the effects of inflation, the applicant's age and sex, and whether the applicant is able-bodied ..."

89 The first stage of the process provided for by s 59(1)(c) has been described as "the jurisdictional question": *Singer v Berghouse* [1994] HCA 40; (1994) 181 CLR 201 at 208-209. At this stage, the court will consider **whether it can** make an order for provision for the maintenance, education and advancement in life of a particular applicant.

90 Whether the applicant has a 'need' or 'needs' is a relevant factor at the first stage of the enquiry. It is an elusive concept to define, yet, it is an element in determining whether 'adequate' provision has been made for the 'proper' maintenance, education and advancement in life of the applicant in all of the circumstances: *Collins v McGain* [2003] NSWCA 190 (Tobias JA, with whom Beazley and Hodgson JJA agreed).

91 Tobias JA said, at [42] and [47]:

> "42. Further, there can be no question that, at least as part of the first stage of the process, the question of whether the eligible person has a relevant need of maintenance etc is a proper enquiry. This is so as the proper level of maintenance etc appropriate for an eligible person in all the circumstances clearly calls for a consideration of his or her needs. However, the question of needs must not be too narrowly focused. It must, in my view, take into account, depending upon the particular circumstances of the case, present and future needs including the need to guard against unforeseen contingencies.
> ...
>
> 47. As I have observed, the issue of need is not confined to whether or not an eligible person has, at the date of hearing, a then need for financial assistance with respect to his maintenance etc. It is a broader concept. This is so because the question of needs must be addressed in the context of the statutory requirement of what is "proper maintenance etc" of the eligible person. It is because of that context that, in the present case, the "proper maintenance etc" of the appellant required consideration of a need to guard against the contingency to which I have referred."

92 In *Devereaux-Warnes v Hall [No 3]* at [81] - [84], Buss JA said, in respect of the first stage of the process:

> "The term 'need' has been used to refer to the claimant's inability to satisfy his or her financial requirements from his or her own resources. See *Singer* per Gaudron J at 227.

> 'Need' has also been used in the context of a value judgment or conclusion, namely, that the claimant is 'in need' of maintenance, etc, because inadequate provision has been made for his or her proper maintenance, etc. See *Gorton v Parks* (1989) 17 NSWLR 1 per Bryson J at 10-11.
>
> The determination of whether the disposition of the deceased's estate was not such as to make adequate provision for the proper maintenance, etc, of the claimant will always, as a practical matter, involve an evaluation of the provision, if any, made for the claimant on the one hand, and the claimant's 'needs' that cannot be met from his or her own resources on the other. See *Hunter* per Kirby P at 575.
>
> Although the existence or absence of 'needs' which the claimant cannot meet from his or her own resources will always be highly relevant and, often, decisive, the statutory formulation, and therefore the issue in every case, is whether the disposition of the deceased's estate was not such as to make adequate provision for his or her proper maintenance, etc. See *Singer* per Gaudron J at 227. Compare *Gorton* per Bryson J at 6-11; *Collicoat v McMillan* [1999] 3 VR 803 per Ormiston J at 816 [38], 820 [47]."

93 In the event that the court is satisfied that the power to make an order is enlivened (i.e. it is satisfied that the applicant is an eligible person, and, where necessary, that factors warranting have been satisfied, and that adequate provision for the proper maintenance, education or advancement in life of the person has not been made), then, the court determines **whether it should** make an order, and if so, the nature of any such order, having regard to the facts known to the court at the time the order is made.

94 The second stage of the process arises under s 59(2) and s 60(1)(b) of the Act. Mason CJ, Deane and McHugh JJ, in *Singer v Berghouse*, at 211, affirmed that the decision made at the second stage involves an exercise of discretion in the accepted sense. The fact that the court has a discretion means that it may refuse to make an order even though the jurisdictional question has been answered in the applicant's favour.

95 Section 60 of the Act, at least in part, is new. It provides:

> "(1) The court may have regard to the matters set out in subsection (2) for the purpose of determining:
>
> (a) whether the person in whose favour the order is sought to be made (the "applicant") is an eligible person, and

(b) whether to make a family provision order and the nature of any such order.

(2) The following matters may be considered by the court:

(a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,

(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,

(c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,

(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,

(e) if the applicant is cohabiting with another person-the financial circumstances of the other person,

(f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,

(g) the age of the applicant when the application is being considered,

(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,

(i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,

(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,

(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the court considers it relevant, the extent to which and the basis on which the deceased person did so,

(l) whether any other person is liable to support the applicant,

(m) the character and conduct of the applicant before and after the date of the death of the deceased person,

(n) the conduct of any other person before and after the date of the death of the deceased person,

(o) any relevant Aboriginal or Torres Strait Islander customary law,

(p) any other matter the court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered."

96 It can be seen that s 60(2) enumerates 15 specific matters which the court may take into account, together with "any other matter the court considers relevant", for the purposes of determining eligibility, whether to make a family provision order, and, if so, the nature of any such order. The section does not prioritise the catalogue of matters that may be taken into account. No matter is more, or less, important than any other. The weight of such of the matters specified in the section, which may be taken into account, will depend upon the facts of the particular case. There is no mandatory command to take into account any of the matters enumerated. None of the matters listed is, necessarily, of decisive significance, and none differentiate, in their application, between classes of eligible person. Similarly, there is no distinction based on gender.

97 Considering each of the relevant matters does not prescribe a particular result, and whilst there is likely to be a substantial overlap in the matters that the court may take into account when determining the answers to what is posed in s 60(1), those matters are not identical. For example, when considering eligibility under sub-s (1)(a), many of the matters in sub-s (2) will be largely, if not wholly, irrelevant.

98 There is no definition in the Act of "financial resources" (which term is referred to in s 60(2)(d)). However, there is a definition of that term s 3 of the *Property (Relationships) Act* 1984, which I consider helpful:

"'financial resources' ... includes:

> (a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided,
>
> (b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the parties ...,
>
> (c) property, the alienation or disposition of which is wholly or partly under the control of the parties to the relationship or either of them and which is lawfully capable of being used or applied by or on behalf of the parties to the relationship or either of them in or towards their or his or her own purposes, and
>
> (d) any other valuable benefit."

99 Of course, sub-s (2)(d) refers also to "earning capacity", which means no more than the capacity to find employment to earn or derive income.

100 Furthermore, consideration of some of the matters in s 60(2) not only permits, but requires, a comparison to be made between the respective positions of each applicant and of other eligible persons as well as of the beneficiaries, whilst others do not. Importantly, also, many of the matters in sub-s (2), of themselves, are incapable of providing an answer to the questions posed in s 60(1).

101 Leaving aside the question of eligibility, the matters referred to in s 60(2) may be considered on "the discretionary question", namely whether to make an order and the nature of that order. Importantly, under s 60(2), attention is drawn to matters that may have existed at the deceased's death, or subsequently.

102 This does not mean, however, that some of the matters referred to in s 60(2) will not be relevant to the jurisdictional question to be determined at the first stage. I am comforted in reaching this conclusion by the following comments made in *Singer v Berghouse* (at 209-210):

> "... The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of

> maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
>
> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant."

103 And by the comments of Callinan and Heydon JJ in *Vigolo v Bostin* (at 230-231):

> "We do not therefore think that the questions which the court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

104 Section 61 of the Act permits the court to disregard the interests of any other person by, or in respect of whom, an application for a family provision order may be made (other than a beneficiary of the deceased person's estate), but who has not made an application. However, the court may disregard any such interests only if:

(a) notice of the application, and of the court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations or rules of court, or

(b) the court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case.

105 Section 65(1) of the Act requires the family provision order to specify:

(a) the person or persons for whom provision is to be made, and

(b) the amount and nature of the provision, and

(c) the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided, and

(d) any conditions, restrictions or limitations imposed by the court.

106 The order for provision out of the estate, or notional estate, of a deceased person may require the provision to be made in a variety of ways, including a lump sum, periodic sum, or "in any other manner the court thinks fit" (s 65(2) of the Act). If the provision is made by payment of an amount of money, the order may specify whether interest is payable on the whole, or any part, of the amount payable for the period, and, if so, the period during which interest is payable and the rate of interest (s 65(3) of the Act).

107 The order may be made, relevantly, in this case, in relation to the estate and/or notional estate of the deceased. As the deceased died leaving a Will, his estate includes all property that would, on a grant of probate of the Will, vest in the executor of the Will (s 63 of the Act).

108 Any family provision order under the Act will take effect, unless the court otherwise orders, as if the provision was made in a codicil to the will of the deceased, or in the case of intestacy, as in a will of the deceased (s 72(1) of the Act).

109 Section 66 of the Act sets out the consequential and ancillary orders that may be made.

110 The Court, also, may, at the time of distribution of an estate that is insufficient to give effect to a family provision order, make such orders concerning the abatement, or adjustment, of distributions from the estate, as between the person in whose favour the family provision order is made and the other beneficiaries of the estate as it considers to be just and equitable among the persons affected (s 72(2) of the Act).

111 Section 99 of the Act provides that the Court may order the costs of proceedings in relation to the estate, or notional estate, of the deceased (including costs in connection with mediation) to be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

Other Applicable Legal Principles - Substantive Application

112 Accepting that no two cases will be exactly alike, there are some general principles that may be stated. Whilst most of these principles were given in the context of the previous legislation, they are equally apt in a claim such as this one.

113 Bryson J noted in *Gorton v Parks* (1989) 17 NSWLR 1, at 6, that it is not appropriate, to endeavour to achieve a 'fair' disposition of the deceased's estate. It is not part of the Court's function to achieve some kind of equity between the various claimants. The Court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity. Nor is the purpose of the jurisdiction conferred by the Act the correction of the hurt feelings, or sense of wrong, felt by an applicant. Rather, the Court's role is of a specific type and goes no further than the making of 'adequate' provision in all the circumstances for the 'proper' maintenance, education and advancement in life of an applicant.

114 In *Cooper v Dungan* (1976) 50 ALJR 539, Stephen J, at 542, reminded the Court to be vigilant in guarding "against a natural tendency to reform the

testator's will according to what it regards as a proper total distribution of the estate rather than to restrict itself to its proper function of ensuring that adequate provision has been made for the proper maintenance and support of an applicant". Freedom of testamentary disposition is not to have "only a prima facie effect, the real dispositive power being vested in the court": *Pontifical Society for the Propagation of the Faith v Scales* [1962] HCA 19; (1962) 107 CLR 9, at 19.

115 In *Stott v Cook* (1960) 33 ALJR 447, Taylor J, although dissenting in his determination of the case, observed, at 453-4, that the Court did not have a mandate to rework a will according to its own notions of fairness. His Honour added:

> "There is, in my opinion, no reason for thinking that justice is better served by the application of abstract principles of fairness than by acceptance of the judgment of a competent testator whose knowledge of the virtues and failings of the members of his family equips him for the responsibility of disposing of his estate in far better measure than can be afforded to a Court by a few pages of affidavits sworn after his death and which only too frequently provide but an incomplete and shallow reflection of family relations and characteristics. All this is, of course, subject to the proviso that an order may be made if it appears that the testator has failed to discharge a duty to make provision for the maintenance, education or advancement of his widow or children. But it must appear, firstly, that such a duty existed and, secondly, that it has not been discharged."

116 Yet, in considering the question, the nature and content of what is adequate provision for the proper maintenance, education and advancement in life of an applicant, is not fixed or static. Rather, it is a flexible concept, the measure of which should be adapted to conform with what is considered to be right and proper according to contemporary accepted community standards: *Pontifical Society for the Propagation of the Faith v Scales* at 19; *Walker v Walker (*NSWSC, Young J, 17 May 1996, unreported); *Vigolo v Bostin* at 199 and 204; *Stern v Sekers; Sekers v Sekers* [2010] NSWSC 59.

117 In all cases under the Act, what is adequate and proper provision is necessarily fact specific.

118 The Act is not a "Destitute Persons Act", and it is not necessary, therefore, that the applicant should be destitute to succeed in obtaining an order: *In re Allardice, Allardice v Allardice* (1909) 29 NZLR 959 at 966.

119 Where the Court is satisfied that provision ought to be made, then it is no answer to a claim for provision under the Act that to make an order would be to defeat the intentions of the deceased identified in the Will. The Act requires, in such circumstances, for the deceased's intention in the Will to be displaced: *Kembrey v Cuskelly* [2008] NSWSC 262, per White J, at [45].

120 All of the financial needs of an applicant have to be taken into account and considered by reference to the other factors referred to in the Act and in *Singer v Berghouse*. What is proper provision is not arrived at by adding up all of the identified financial needs: *Hyland v Burbidge* [2000] NSWSC 12 at [56]. Nor does it follow that if the Court decides it is inappropriate to make a specific provision in respect of one identified head of claim that any identified financial need, even a contingent need, in relation to that claim becomes irrelevant to the final assessment: *Mayfield v Lloyd-Williams*).

121 What was said in *Edgar v Public Trustee for the Northern Territory* [2011] NTSC 5, per Kelly J at [46] should be remembered:

> "There is no onus on the ... residuary beneficiary under the will to show that she is entitled to be treated as such - or to prove what may be necessary for her proper maintenance and support. Rather the onus is on the plaintiff to show that proper provision is not available for him under the terms of the will. In determining whether this is the case the Court must have regard to all relevant circumstances including the size of the estate and the nature of the competing claim by the widow. In performing this task the Court must have due regard to the will of the testator and should interfere only to the minimum extent necessary to make adequate provision for the proper maintenance, education and advancement in life of an applicant who has passed the first jurisdictional hurdle. As Dixon CJ said in the passage from *Scales* quoted above, due regard must be had to "what

> the testator regarded as superior claims or preferable dispositions" as demonstrated by his will. (Omitting citations)

122 There are statements by the court to the effect that a widow who was married to the deceased for a long time is in a strong position either as an applicant or as a defendant in family provision cases. I described the duty owed to a widow in these terms in *Young & Grainger v Outtrim* [2011] NSWSC 391 at [112], citing *Luciano v Rosenblum* (1985) 2 NSWLR 65, at 69 and *O'Loughlin v O'Loughlin* [2003] NSWCA 99:

> "In relation to the duty owed by a deceased to his widow, generally, it is to ensure, to the extent to which his assets permit him to do so, that she is secure in the matrimonial home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies.

123 In *Cropley v Cropley* [2002] NSWSC 349 at [56] Barrett J said:

> "When it comes to claims by adult children, it can be said at once that, if there is a competing claim by the widow and all claims cannot be fully accommodated, the widow's claim should be afforded precedence in the sense that a demonstrated requirement for the allocation of resources in aid of the widow must be satisfied before any similarly demonstrated requirement for the allocation of resources in aid of an adult child. That a widow's claim to maintenance out of the estate of her deceased husband is a claim which is "paramount" and "of a high order" is borne out by the judgments of Sheller JA in Sayer v Sayer [1999] NSWCA 340 (Davies AJA concurring) and *Blackmore v Allen* [2000] NSWCA 162 (Priestley JA and Foster AJA concurring)."

124 Unlike each of those cases, Mary is not the applicant. She is the sole residuary beneficiary of the deceased's estate and the holder of property that may be the subject of a notional estate order.

125 In relation to a claim by an adult child, the following principles are useful to remember:

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

(b) It is impossible to describe in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life - such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set his or her children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation: *McGrath v Eves* [2005] NSWSC 1006; *Taylor v Farrugia* [2009] NSWSC 801.

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

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant (*Re Buckland Deceased* [1966] VR 404 at 411; *Hughes v National Trustees Executors and Agency Co. of Australasia Ltd* (1979) 143 CLR 134 at 148; *Goodman v Windeyer* at 498, 505). But the Act does not

permit orders to be made to provide for the support of third persons to whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons (*Re Buckland Deceased* at 411; *Kleinig v Neal (No 2)* [1981] 2 NSWLR 532 at 537; *Mayfield v Lloyd-Williams,* at [86]).

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

(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: *MacGregor v MacGregor* [2003] WASC 169 (28 August 2003) at [181] and [182]; *Crossman v Riedel* [2004] ACTSC 127 at [49]. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant: *Marks v Marks* [2003] WASCA 297 at [43]. In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: *Christie v Manera* [2006] WASC 287; *Butcher v Craig* [2009] WASC 164 at [17].

(g) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim: *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* at 149.

(h) Although some may hold the view that equality between children requires that "adequate provision" not discriminate between children according to gender, character, conduct or financial and material circumstances, the Act is not consistent with that view. To the contrary, the Act specifically identifies, as matters that may be taken into consideration, individual conduct, circumstances, financial resources, including earning

capacity, and financial needs, in the Court's determination of an applicant's case.

126 In *Blore v Lang* (1960) 104 CLR 124, Fullagar and Menzies JJ said (at 135):

> "The ... legislation [is] for remedying, within such limits as a wide discretion would set, breaches of a testator's moral duty to make adequate provision for the proper maintenance of his family - not for the making of ... a fair distribution of ... [the] estate ... Equality is not something to be achieved by the application of the Act, although in some cases equality may set a limit to the order to be made - for instances, where there is not enough to provide proper maintenance for all entitled to consideration whose need is the same."

127 Relevantly, in respect of Michele's claim, Menzies and Fullagar JJ in *Blore v Lang*, at 135, also commented in respect of "a married woman with a healthy husband in satisfactory employment who supports her in reasonable comfort" that, "her need is not for the bread and butter of life, but for a little of the cheese or jam that a wise and just parent would appreciate should be provided if circumstances permit". (Of course, in Michele's case as will be seen, she also works and provides for herself and her family.)

128 Even more vividly, but to similar effect, is the approach in *Worladge v Doddridge* (1957) 97 CLR 1 at 12, in which Williams and Fullagar JJ approved the following statement, from *In Re Harris* (1936) 5 SASR 497 at 501:

> "Proper maintenance is (if circumstances permit) something more than a provision to keep the wolf from the door - it should at least be sufficient to keep the wolf from pattering around the house or lurking in some outhouse in the backyard - it should be sufficient to free the mind from any reasonable fear of any insufficiency as age increases and health and strength gradually fail."

129 Because of Peter's financial and material circumstances, it is also necessary to consider whether making any provision for him will, ultimately, be of benefit.

130 In *Diver v Neal*, at [1], Allsop P, said:

> "One could envisage a particular predicament of an eligible person whereby it would be relevant to consider that any order in his or her favour would diminish the estate to meet the claims of others to no appreciable (financial or social) benefit to him or her in his or her debt-ridden condition. That is not to say, however, that relief from indebtedness may not be of significant benefit to an eligible person. A small bequest to someone with considerable debts may make the difference (as Mr Micawber said) between happiness and misery."

131 In that case, Basten JA said, at [69], that the fact that provision goes to paying off creditors, thereby saving the loss of an asset, or reducing ongoing liabilities, does not diminish the benefit to the applicant. Different considerations may apply where it has been shown that the applicant is insolvent at the date of the trial.

132 As in that case, in respect of Peter, it has not been submitted that he is insolvent.

133 I make clear that I do not intend what I have described as "applicable principles" or "general principles" to be elevated into rules of law. Nor do I wish to suggest that the jurisdiction should be unduly confined or the discretion at the second stage to be constrained by statements of principle found in dicta in other decisions. I identify them merely as providing useful assistance in considering the statutory provisions, the terms of which must remain firmly in mind.

Notional Estate

134 The notional estate provisions are dealt with in Part 3.3 of the Act. However, in s 3 of the Act, "notional estate" of a deceased person is defined as meaning "property designated by a notional estate order as

notional estate of the deceased person". "Notional estate order" means "an order made by the Court under Chapter 3 designating property specified in the order as notional estate of a deceased person".

135 It has been said, in respect of the notional estate provisions in the former Act, that an applicant for provision "may now apply in the same proceedings for orders for relief and designating property as notional estate thereby compelling the disponee of a prescribed transaction to provide money or property for the purpose of making financial provision for the applicant": *Kavalee v Burbidge; Hyland v Burbidge* (1998) 43 NSWLR 422 at 441. (Although the terminology in the Act is different, the same principle applies under the Act.)

136 Rosalind Croucher in "Contracts to Leave Property by Will and Family Provision after *Barns v Barns*" [2005] SydLawRw 12; (2005) 27(2) Sydney Law Review 263, at 278, has commented on the notional estate provisions of the former Act:

> "The introduction of the notional estate provisions brought to the forefront the distinction of 'estate versus notional estate' that had been implicit in the decisions on the legislation prior to the introduction of the *Family Provision Act* 1982 (NSW). It made explicit in the legislation that 'estate' and 'notional estate' were different. Things subject to contracts (like mutual wills) were not within the definition of 'estate'. To bring such property within the legislation required now the application of the complex procedures and definitions of 'notional estate'. This requires a particular kind of transaction, an absence of relevant consideration, a defined time frame in which the transaction took effect and a range of other matters to be considered before property can be designated as notional estate and made the subject of an order for family provision under the Act."

137 In New South Wales Law Reform Commission Report 110 (2005) - Uniform Succession Laws: Family Provision, at paragraph 3.1, "notional estate orders" are described as "orders issued by the Court which are intended to make available for family provision orders assets that are no longer part of the estate of a deceased person because they have been

distributed either before or after the deceased's death (either with or without the intention of defeating applications for family provision)".

138 In *Galt v Compagnon* (NSWSC, 24 February 1998, unreported) Einstein J, at 21, said that notional estate was "a complex concept" but shortly described it as "property which would have become part of the deceased's estate, had it not been dealt with, or had it been dealt with, by the deceased in a particular way and in particular circumstances, prior to his or her death".

139 Section 63(5) of the Act, relevantly, provides that a family provision order may be made in relation to property that is not part of the estate of a deceased person if it is designated as notional estate of the deceased person by an order under Part 3.3 of the Act.

140 Importantly, the power to make a notional estate order does not arise unless the Court is satisfied that (a) the deceased person left no estate, or (b) the deceased person's estate is insufficient for the making of the family provision order, or any order as to costs, that the Court is of the opinion should be made, or (c) provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances (s 88).

141 Furthermore, the Court must not designate as notional estate, property that exceeds what is necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate under s 99, to allow costs to be paid as ordered, or both (s 89(2)).

142 Section 74 of the Act provides that "relevant property transaction" means a transaction, or circumstance, affecting property and described in s 75 or s 76. "Property" includes "any valuable benefit": s 3.

143 Section 75 of the Act provides:

> "(1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:
> (a) held by another person (whether or not as trustee), or
> (b) subject to a trust,
> and full valuable consideration is not given to the person for doing or not doing the act.
> (2) The fact that a person has entered into a relevant property transaction affecting property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.
> (3) The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property that is not in the person's estate."

144 Section 76 of the Act then provides a description of some, but not all, of the circumstances that constitute the basis of a relevant property transaction for the purposes of s 75. Any such circumstance is "subject to full valuable consideration not being given". Importantly, a distinction must be drawn between "valuable consideration" and "full valuable consideration": see, for example, s 76(4) of the Act. Important, also, is the omission of the words "in money or moneys worth" after "full valuable consideration" which had appeared in s 22 of the former Act. Furthermore, the phrase "is not given" rather than "is not received" is also significant.

145 The expression "subject to full valuable consideration not being given", in my view, has the effect of imposing a requirement, wholly separate from the result, which is property being held by another person or subject to a trust.

146 One such circumstance identified in s 76(2)(e), is if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies, and property (immediately or at some later time) becomes held by another person (whether or not as

trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event.

147 Section 77(1) provides that for the purposes of Chapter 3 of the Act, a relevant property transaction is taken to have effect when the property concerned becomes held by another person, or subject to a trust, or as otherwise provided by the section. Sub-section (3) provides that a relevant property transaction consisting of circumstances described in s 76 (2) (b) or (e) is taken to have been entered into immediately before, and to take effect on, the person's death, or the occurrence of the other event referred to in those paragraphs.

148 Section 78 of the Act provides:

> "(1) The Court may make an order designating property as notional estate only:
> (a) for the purposes of a family provision order to be made under Part 3.2, or
> (b) for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.
> (2) The Court must not make an order under subsection (1) (b) for the purposes of an order that the whole or part of an applicant's costs be paid from the notional estate of the deceased person unless the Court makes or has made a family provision order in favour of the applicant."

149 Section 80(1) provides that the Court may, on application by an applicant for a family provision order, or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person, if the Court is satisfied that the deceased person entered into a relevant property transaction before his, or her, death and that the transaction is a transaction to which the section applies.

150 Section 80(2) provides for the section to apply to the following relevant property transactions:

(a) a transaction that took effect within 3 years before the date of the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order;

(b) a transaction that took effect within one year before the date of the death of the deceased person and was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction;

(c) a transaction that took effect or is to take effect on, or after, the deceased person's death.

151 It is not essential that the applicant be able to rely upon the provisions of more than one of the subparagraphs identified. It is sufficient if he or she is able to establish the matters in any of them.

152 Section 83 of the Act relevantly provides that the Court must not, merely because a relevant property transaction has been entered into, make an order under s 80, unless the Court is satisfied that the relevant property transaction, or the holding of property resulting from the relevant property transaction, directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).

153 The effect of a notional estate order is that "a person's rights are extinguished to the extent that they are affected by a notional estate order" (s 84).

154 The Court's power to make a notional estate order is also circumscribed by other sections. Section 87 provides:

> "The Court must not make a notional estate order unless it has considered the following:
> (a) the importance of not interfering with reasonable expectations in relation to property,
> (b) the substantial justice and merits involved in making or refusing to make the order,
> (c) any other matter it considers relevant in the circumstances."

155 In *John v John* [2010] NSWSC 937 at [118] - [120], Ward J said:

> "[118] What amounts to "reasonable expectations in relation to property" was considered in *Petschelt v Petschelt* [2002] NSWSC 706, at [68], by McLaughlin M (as the Associate Justice then was), who said:
>
> > That phrase does not, however, indicate the person by whom those reasonable expectations are held. Clearly the Court must consider the reasonable expectations of the First Defendant in relation to property. By the same token, however, the Court should also consider the reasonable expectations of the Deceased herself in relation to property, and also, possibly, the reasonable expectations of the Plaintiff.
>
> [119] In *D'Albora v D'Albora* [1999] NSWSC 468, at [53], Macready M (as the Associate Justice then was) gave examples of the circumstances which might give rise to reasonable expectations for the purposes of this section:
>
> > Under s 27(1)(a) the Court has to consider the importance of not interfering with the reasonable expectations in relation to the property. Such reasonable expectations may well occur in a number of circumstances. For example, a beneficiary who receives a property may have spent money on the property or worked on the property ... Another common area where one often sees in this matter is where there is a promise in relation to the property and the acting by an intended beneficiary on the fact of that promise.
>
> [120] Similarly, in *Wentworth v Wentworth* [1992] NSWCA 268, Priestley JA, with whom Samuels AP and Handley JA agreed, referring to the "more general precautionary provisions" in ss 26 and 27 of the Family Provision Act, said:
>
> > S 27(1) for example, says the Court shall not make an order designating property as notional estate unless it has considered, amongst other things, the importance of not interfering with reasonable expectations in relation to property.

> If someone is in possession of property, otherwise than by gift, after having given up something of equivalent value in order to obtain that property, it would be entirely reasonable for that person to expect to remain in possession of it."

156 The "substantial justice and merits" referred to in s 87(b) of the Act are linked to the making, or refusing to make, an order designating property as notional estate: *Smith v Woodward* (NSWSC, Macready M (as his Honour then was), 9 September 1994, unreported).

157 The position of the persons entitled to apply for a family provision order from the estate, as well as the persons involved in the relevant property transaction, should be considered in respect of s 87(b) and (c) of the Act.

158 Section 89(1) of the Act, relevantly, provides that in determining what property should be designated as notional estate of the deceased, the Court must have regard to (a) the value and nature of any property the subject of a relevant property transaction; (b) the value and nature of any consideration given in a relevant property transaction; (c) any changes in the value of property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), in the time since the relevant property transaction was entered into; (d) whether property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), could have been used to obtain income in the time since the relevant property transaction was entered into; and (e) any other matter it considers relevant in the circumstances.

159 If the Court has made, or proposes to make a notional estate order designating certain property as notional estate, s 92(2) of the Act enables the Court, on application by a person who offers other property in substitution ("the replacement property"), to vary the notional estate order by substituting the replacement property for the property designated as notional estate by the order, or make a notional estate order designating the replacement property as notional estate instead of the property

proposed to be designated as notional estate by such an order, as appropriate. However, s 92(30 permits such an order to be made only if the Court is satisfied that the replacement property can properly be substituted.

Consideration whether Notional Estate Order should be made

160 I have set out the above sections of the Act because they are relevant and because I have considered all of them.

161 However, senior counsel for Mary and the Trustee made no submissions, in writing, or orally, that the Court, for any reason other than that the claim of each of the Plaintiffs should be dismissed, should not make an order designating property as notional estate. To the contrary, it seemed to be accepted by him that such an order could be made to satisfy any family provision order in favour of one, or both, of the Plaintiffs and any costs ordered to be paid.

162 In any event, having considered the evidence, I am satisfied that a notional estate order may be made in the circumstances of this case. There is no evidence relied upon which would prevent such an order being made.

163 In particular, I am satisfied that:

(a) The basis of a relevant property transaction for the purposes of s 75 has been established and that it is taken to have been entered into immediately before, and to take effect on, the occurrence of the resolution of the Trustee, in February 2010, that is to say, after the deceased's death.

(b) The relevant property transaction directly disadvantaged each of the Plaintiffs, he and she being a person entitled to apply for a family provision order from the estate.

(c) The deceased's estate is insufficient for the making of the family provision order, and any order as to costs, that the Court is of the opinion should be made.

(d) The restriction referred to in s 87(a) of the Act (the importance of not interfering with reasonable expectations in relation to property) and in s 87(b) of the Act (the substantial justice and merits involved in making or refusing to make the order) does not prevent an order designating property being made.

164 In all the circumstances of this case, I propose to make an order designating part of the property held by the Trustee as notional estate.

Additional Facts

165 Next, I set out additional facts that I am satisfied are either not in dispute, or that, in my view, have been established by the evidence. I do so by reference to the matters in s 60(2) of the Act to which I may have regard.

(a) any family, or other, relationship between the applicant and the deceased person, including the nature and duration of the relationship

166 Peter is a child of the deceased. He remained living at home with his parents whilst his mother was alive. Generally, his relationship with the deceased, during this period, was close and loving, although when the

deceased married Loretto, he did so in secret, which imposed a strain on Peter's relationship with the deceased when Peter found out. He left the deceased's home at the age of 16 years (in about 1981) and went to live with his paternal grandparents. He moved back to the deceased's home, for a short time, after the marriage to Mary, but then returned to live with his grandparents.

167 In 1986, Peter met his wife to be, Lisa, and in 1987, they moved to Canada permanently.

168 Peter returned to Australia for Mark's wedding in 1988, but did not stay with the deceased. On two different occasions in 1990, the deceased, without Mary, visited Peter in Canada. In 1991, the deceased and Mary went to Canada for Michele's wedding to Jason. In 1997, Peter visited Australia with his family and they stayed with the deceased.

169 I set out later, other occasions when Peter and/or members of his family visited the deceased in Australia.

170 Whilst in Canada, Peter would keep in touch with the deceased by telephone, and later, by email. In the months before the deceased's death, Peter would speak with him about once a week.

171 Michele is also a child of the deceased. She lived with her parents, and then the deceased and Loretto, and then with the deceased and Mary until 1989, when she left home and moved in with her grandparents. She continued to see the deceased about once a week, and spoke to him by telephone, otherwise. Her relationship with the deceased was also close and loving.

172 In 1988, Michele met her husband to be, Jason (who is the brother of Lisa). She made several trips to Canada, but in November 1990, she moved there permanently. She admits that she did not visit the deceased

very often after she moved, but says that she kept in contact with him by telephone and then, more recently, by email. Her visits to the deceased occurred in 2002, 2005 and 2009.

173 I am satisfied that, even after they moved to Canada, each of Peter and Michele had a loving relationship with the deceased. Because of geography, the relationship of each was not as close as it otherwise might have been. Senior counsel described it as the "tyranny of distance" which kept them apart.

(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate

174 There is no definition of the "obligations" or "responsibilities" to which the sub-section refers in the Act. One might conclude, however, that what is to be considered is the nature and extent of any legal, or moral, obligations or responsibilities.

175 Leaving aside any obligation, or responsibility, arising as a result of their relationship as parent and child, the deceased did not have any legal obligation to Mark, Peter or Michele, imposed upon him by statute or common law. However, a moral obligation or responsibility, to make adequate provision for the proper maintenance or advancement in life is recognised in the case of a child. The fact that an applicant was financially independent for many years before the deceased's death is a relevant consideration in determining the extent of any obligation or responsibility owed.

176 By virtue of their relationship as husband and wife, the deceased owed both a legal, and a moral, obligation and responsibility, to Mary.

177 To the extent that there is any obligation, or responsibility, arising as a result of their relationship as grandparent and grandchild, the deceased did not have any legal, or financial, obligation to any of his grandchildren, imposed upon him by statute or common law. There is no suggestion that the deceased assumed any particular obligation, and responsibility, towards any of them. Of course, the grandchildren are identified as beneficiaries in the deceased's Will.

178 To the extent that there is any obligation, or responsibility, arising as a result of their relationship as step-parent and step-child, the deceased did not have any legal, or financial, obligation to Michael, imposed upon him by statute or common law. There is no suggestion that the deceased assumed any particular obligation, and responsibility, towards Michael. Of course, Michael is identified as a beneficiary in the deceased's Will.

179 There was no obligation, or responsibility, arising as a result of their relationship as friends imposed upon the deceased in respect of Mr Larbalestier. The same may be said in respect of Alexander and Robyn, although as executors, each might have made a claim for commission.

(c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered

180 I have dealt with these matters earlier in these reasons.

(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person

in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate

181 Each of the Plaintiffs sets out his, or her, financial resources in Canadian dollars. The Defendants took no objection to this course (although it appears that $1.00CAD is not equal to $1.00AUD). The parties agreed that the difference is relatively small and it varies depending upon when the rate of conversion is determined. In the circumstances, I was requested to treat the estimates as being the equivalent in Australian dollars and I shall do so.

182 Peter and his wife Lisa have assets with a total value of $295,000, most of which value relates to their home in Vernon, British Columbia ($291,000) and liabilities of $439,000. Those liabilities include a mortgage debt ($266,396), two lines of credit with debit balances ($128,584) and a debt due to Lisa's parents company ($28,617). Their liabilities exceed their assets by about $144,000.

183 Peter works as a District Manager in a retail convenience chain of stores. His income, in the 2011 financial year, was $69,268. Lisa works as an Assisted Living Coordinator and Hospitality Manager for the Good Samaritan Society. Her income, in the 2011 financial year, was $72,239. Peter estimates their joint monthly income (after tax) at $7,982. Their joint monthly expenditure is estimated to be $7,621.

184 Peter and Lisa have three children. Amanda is 22 (born in August 1989) and does not live with them. They contribute about $135 per month to her water, electricity, internet and mobile phone expenses. Megan is 19 (born in October 1992) and engaged to be married and is studying to be an ultrasound technician. Sonia is 17 (born in March 1995) and in her final year of high school. She is not employed but is seeking employment. She hopes to study law.

185 Peter claims that he has a need for a new car ($46,299), a fund to reduce the family's debts, an amount to assist with his children's education and a sum for investment for retirement. At the hearing, Peter's counsel submitted that Peter should receive, by way of provision, a lump sum $250,000.

186 Michele has assets with a total value of $399,366. She has liabilities of $97,378. Her husband, Jason, has assets which total $448,278 and liabilities of $106,971. Thus, the value of their combined assets exceeds their liabilities by $643,295.

187 Michele's share of debts includes a mortgage debt ($82,837), a line of credit with a debit balance ($7,667), and credit card debts ($7,473).

188 Michele works as a registered nurse at an acute care hospital. Her gross income is $52,135, but after tax and deductions, is $39,945. Deductions include pension deductions ($3,618). Jason is a Barrister and Solicitor for the City of Vancouver. His gross income, from this position, was $145,896 in 2011, plus $19,685, from evening and weekend work, making a total gross income of $165,582. However, his net income after deduction of tax ($43,545) and pension deductions ($12,185) is $109,852. It follows that their combined net income, after tax and deductions, is $149,797, or $12,483 per month.

189 Michele estimates their average monthly expenditure, in 2011, to be $12,055. However, that expenditure includes $1,178 per month for legal fees associated with these proceedings, which expenditure will cease once these proceedings are concluded. (I have earlier referred to the total amount that she has paid.) Currently, it also includes a voluntary contribution, by Jason, to a registered retirement savings plan ($400). On the basis of her current estimates, they still have a surplus of income over expenditure.

190 Michele and Jason have three sons, Nathaniel, who is aged 11 (born in January 2001), Owen who is aged 9 (born in February 2003), and Liam, who is aged 7 (born in February 2005). None of them have any assets. They live with, and are dependent upon, their parents.

191 If Michele changes her employment (as to which see later) to a Public Health Nurse and Clinical Instructor, she would be required to work weekday shifts as opposed to her present night shifts. This will mean that she will need to obtain, before and after, school care for Owen and Liam. This will cost about $350 per month per child making a total of $700. She estimates the additional cost will be about $7,000 per year.

192 Michele says that she has a need to reduce her debts, repay an amount to her parents-in-law, which they advanced for her education expenses, a lump sum for her future retirement, to purchase a new car for the family and to provide a fund for the education expenses for her children. Michele's counsel submitted that Michele should receive, by way of provision, a lump sum $125,000.

193 Mark's circumstances and those of his children are relevant in the context of their status as beneficiaries under the deceased's Will. He is aged 49 years and is married to Rebecca. He is employed as a Teacher/Consultant for Deaf/Hearing Impaired Students. Rebecca is the Chief Executive Officer of Community Care Northern Beaches. They are the sole directors of Synergy Pty Ltd, which is the holder of a half interest in Evolve Health and Personal Training Pty Ltd, a personal training business, which yielded a before tax profit of $41,143 in 2011.

194 Mark and Rebecca have assets with a total value of $2,777,705, excluding the value of their shares in Synergy Pty Limited but including combined superannuation of about $370,000. They have liabilities of $1,503,704, leaving a surplus value of assets over liabilities of $1,274,000. (It may be

that, at the date of hearing, the value of an investment property has increased.)

195 Mark's taxable income in 2011 was $71,148 and Rebecca's was $121,483. They own two investment properties that are negatively geared which is used to minimise their taxable income. Notwithstanding that the negatively geared properties are conducted at a loss, they are able to fund that loss out of their gross income. The purchase price of the business was exceeded by the profit made in the business in its first full year.

196 Mark and Rebecca have two daughters, Hannah and Georgia. Hannah is aged 15 (born in March 1997) and is currently in year 10. Georgia is aged 13 (born in February 1999) and is in year 8. Both attend a private school. They are entirely dependant upon their parents.

197 Mary is the deceased's widow. She was the deceased's third wife. She currently has assets with a value of about $1.565,000 (excluding any interest that she has in the Fund). Those assets include the Belrose property, which passed to her by survivorship ($810,000); the Martinsville property ($600,000 - $650,000); the interest in the Willoughby property ($97,750), shares in IAG ($1,848); a horse ($2,000); household and personal effects and jewellery ($15,500); a car ($11,750) and savings ($1,483). She has liabilities (being credit card debts of $5,007.)

198 Mary's taxable income for the year ended 30 June 2010 was $33,012. She estimates her current monthly expenditure at $4,849. She has used some savings and moneys distributed to her from the Fund to pay her living expenses.

199 Mary is the sole director of the Trustee and as such, she has determined and distributed to herself the deceased's entitlement in the Fund. She has used $488,000 (in late 20111 and early 2012) to discharge the mortgage over the Belrose property that she took out to purchase the Martinsville

property in December 2010, and to pay for renovations to that property and pay sundry expenses.

200 She states that she has significant needs including building maintenance repairs for the Belrose property ($35,000), further renovation and fencing for Martinsville ($50,000), dental work ($20,000), overseas travel ($30,000), a car ($101,000), and a horse float (18,000).

201 Michael has put on no evidence about his financial resources or otherwise about his relationship with the deceased. Whilst I am not entitled to disregard his interests as a beneficiary, I have taken into account that he has not advanced a competing financial claim on the bounty of the deceased. I also have regard to the fact that Mary is his mother.

(e) if the applicant is cohabiting with another person - the financial circumstances of the other person

202 I have set out the financial circumstances of the spouse of each of Peter and Michele. I have also set out the financial circumstances of the children with whom each lives.

(f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated

203 In May 2012, Michele suffered a workplace injury being lower back strain. Whilst she has recovered from this injury, she has decided to pursue a job as a Public Health Nurse and Clinical Instructor because these positions will not have the same physical demands.

204 Neither Peter, Mary, Mark, nor any of the other beneficiaries, alleges any physical, intellectual or mental disability.

(g) the age of the applicant when the application is being considered

205 Peter was born in May 1965 and is presently aged 47 years.

206 Michele was born in February 1972 and is presently aged 40 years.

(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant

207 Neither of the Plaintiffs asserts any financial contribution by him or by her to the acquisition, conservation and improvement of the estate of the deceased.

208 Michele gives evidence of her contributions to the deceased's welfare, particularly after he became unwell. She would talk to him about his medical conditions, on occasions, after she had carried out research based on what he had told her.

209 The deceased would express his joy at having his children with him when they visited.

(i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate

210 The deceased paid for Peter and his family to visit Australia in 2000 to celebrate his 60th birthday. He also paid for Amanda's visit in 2003, for Megan to visit, and for Peter and his family to visit, again, in 2004. In 2009, shortly before the deceased's death, the air fares of Peter and Lisa were paid for from the deceased's and Mary's joint bank account.

211 In 1990, the deceased gave Michele money to fly to Canada. Subsequently, he paid for Michele and her family to visit him at different times.

212 In 1991, the deceased contributed $5,000 towards the costs of Michele's wedding.

213 The likelihood is that neither Peter, nor Michele, would receive more than $37,146 out of the estate of the deceased pursuant to the deceased's Will unless a family provision order is made for provision (assuming no order for costs out of the actual estate is made).

(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person

214 Before dealing with the evidence on this topic, which became available at the hearing, it is necessary to refer to the claim for confidentiality and client professional privilege claimed on behalf of Alexander and Robyn, which claim I refused. The issue arose when the Plaintiffs' counsel called upon a notice to produce served on Alexander, who was the deceased's solicitor for at least 15 years before the deceased's death. Those documents

included both prior Wills and codicils executed by the deceased, which had been revoked, as well as instructions given to Alexander by the deceased. Documents were produced, but inspection by the Plaintiffs was opposed. A claim for client legal privilege and professional confidential relationship privilege was made in respect to both categories of documents.

215 Alexander relied upon The Revised Professional Conduct and Practice Rules 1995, rule 2 of which is in the following terms:

> "2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -
>
> 2.1.1 the client authorises disclosure;
>
> 2.1.2 the practitioner is permitted or compelled by law to disclose; or
>
> 2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.
>
> 2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client."

216 As it was clear that inspection of the documents was being sought for the purposes of adducing evidence in a proceeding, and not simply for access to the documents, I indicated that I would provide reasons for rejecting the claims by Alexander, permitting inspection of the documents, as part of the reasons for judgment.

217 Alexander gave no evidence that his notes recorded, or were connected with, any legal advice of a confidential nature given by him to the deceased, or any request made by the deceased to him for such confidential legal advice. Nor did he put forward any facts to establish that the production of, or the adducing of evidence about, the contents of the

documents, would result in the disclosure of confidential communications or the confidential contents of the documents.

218 Prior to determining the issue, I inspected the documents to determine the claim for privilege: *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at 689; *Hawksford v Hawksford* [2005] NSWSC 796, per Campbell J (as his Honour then was) at [21]. I could see no basis, in the documents, to infer from the terms of each document, and in the absence of any evidence from Alexander, that they were connected in any way with the seeking, or giving, of confidential legal advice concerning the disposition of the deceased's property on his death.

219 If that were not enough, the basis upon which at least some of the documents should be made available for inspection and for use in the proceedings, is s 54(1) of the Act, which provides that in the section a "will" relevantly includes a revoked will and a copy of a will. In s 3 of the Act, "will" includes a codicil and any other testamentary disposition. Section 54(2), relevantly, provides that a person who has possession, or control, of a will of a deceased person must allow persons within a number of different categories, including any person named, or referred to, in the will, whether as a beneficiary or not, any person named, or referred to, in an earlier will as a beneficiary of the deceased person, or issue of the deceased person, to inspect or be given copies of the will (at their own expense).

220 It follows that any revoked will, or codicil, executed by the deceased is to be made available for inspection by applicants and thus no basis of privilege or confidentiality arises.

221 In relation to the notes of instructions, it appears that the purpose of the notes was to record the deceased's instructions to his solicitor for the Will or codicil to be prepared, which instructions were reflected by the relevant Will or codicil that was subsequently prepared and executed. If legal

advice was given, it was not recorded in the notes. In those circumstances it did not seem to me that the instructions remained confidential.

222 In addition, statements made by the deceased are relevant and admissible. Section 100 of the Act provides, in subsection (2) that in any proceedings under Chapter 3, evidence of a statement made by a deceased person is, subject to this section, admissible as evidence of any fact stated in it of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.

223 Sections 100(5) and 100(6) provide:

> "(5) Where a statement made by a deceased person during the person's lifetime was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.
> (6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it."

224 Finally, I refer to what Gibbs J said in *Hughes v National Trustees Executors & Agency Company of Australasia Ltd*, at [18]:

> "Nevertheless in Australia for many years the courts have admitted evidence of statements made by a testatrix explaining why she made her will as she did. In taking this course the courts have no doubt been influenced by a desire to be informed of the reasons which actuated the testatrix to make the dispositions she had made, and by the consideration that in cases of this kind a claim is made against the estate of a person who is deceased and can no longer give evidence in support of what she has done. It is doubtful whether, in most cases, such evidence is relevant, but usage justifies its reception. The question is for what purpose it may be used, once admitted. The balance of authority clearly favours the view that it is admissible only to provide some evidence of the reason why the testatrix has disposed of her estate in a particular way, and that it is not admissible to prove that what the testatrix said or believed was true: *Re Jones* (1921) 21 SR (NSW) 693, at p 695; *In re Smith* (1928) SASR 30, at p 34; *In the Will of Joliffe* (1929) St R Qd 189, at p 193; *Re G. Hall, deceased* (1930) 30 SR (NSW) 165, at p 166; *In re Green, deceased*; *Zukerman v Public Trustee* (1951) NZLR 135, at pp 140-141 (a case

> decided before the amending legislation was enacted in New Zealand). This view was accepted as correct by Taylor J. in *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR, at p 24; Taylor J. dissented in the result in that case but there is nothing to suggest that his opinion on this point differed from that of the majority of the Court."

225 As anticipated, following inspection, various documents that had been produced were put to Alexander in cross-examination, identified by him as documents he had prepared, which documents were subsequently tendered, without objection.

226 The evidence of the testamentary intentions of the deceased, as revealed by the documents produced and tendered, other than the Will the subject of Probate, is:

(a) Will made by the deceased on 12 March 1999, in which he devised his interest in the Belrose property and in the Willoughby property to Mary absolutely, and gave all other assets and moneys held or invested by him to Mary and to Mark, Peter and Michele, as survived him, as tenants in common in equal shares.

(b) First Codicil to the March 1999 Will signed in December 1999, in which the deceased made a bequest of his motor vehicle, caravan and a Persian rug to Mark; in other respects, he confirmed the March 1999 Will.

(c) Will made by the deceased on 27 July 2005, in which, after payment of debts, funeral and testamentary expenses, and all duties payable in any place in respect of his estate, or in consequence of his death, he gave a general legacy of $200,000 to each of Mark, Peter and Michele, and gave the balance of his estate, including all his real property and money, to Mary absolutely.

(d) Will made by the deceased on 29 November 2008, in which, after payment of debts, funeral and testamentary expenses, and all duties payable in any place in respect of his estate or in consequence of his

death, he made a bequest of $50,000 to Mark; $100,000 to each of Peter and Michele; $5,000 to each of his six grandchildren, being the children of Peter and of Michele; $25,000 to each his two grandchildren, being the daughters of Mark; $10,000 to Mr Larbalestier; his Rollex (sic) watch (known as 'oyster perpetual - date just') to Peter; and the balance of his residuary estate to Mary. He also made a bequest of $2,000 "to my joint executors and Trustees for their time and efforts required to distribute my estate in accordance with this my Will".

In this Will, the deceased noted:

> "(iii) I have only left my son Mark half of the money I have bequeathed to Peter and Michele because I have not seen Mark for many months and my relationship with him has regrettably deteriorated."

227 Peter gives evidence of a conversation with the deceased, in 2000, in which the deceased said he wanted to look after each of his children and leave each of them $300,000.

228 Peter also gives evidence of another conversation, in 2009, in which the deceased told him that his solicitor had figured out a way for Mary to be looked after, so that the deceased could provide for each of his children. He was not cross-examined on either conversation.

229 Mark gives evidence that he had a conversation with the deceased, several times, when the deceased said that he wanted to provide for his children and Mary. Somewhat prophetically, the deceased also stated that he did not want "you and Mary and anyone else fighting over my property when I'm gone".

(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the court considers it relevant, the extent to which and the basis on which the deceased person did so

230 The deceased did not maintain either of the Plaintiffs, wholly or partly, before his death, other than during childhood.

(l) whether any other person is liable to support the applicant

231 There is no person with a liability to support Peter, apart from, perhaps, his wife.

232 There is no person with a liability to support Michele, apart from, perhaps, her husband.

(m) the character and conduct of the applicant before and after the date of the death of the deceased person

233 An evaluation of "character and conduct" may be necessary, not for the sake of criticism, but to enable consideration of what is "adequate and proper" in all the circumstances. Importantly, the Act does not limit the consideration of "conduct" to conduct towards the deceased.

234 I have dealt with the relationship of each Plaintiff and the deceased earlier in these reasons.

235 The Defendants do not assert any character or conduct which is relevant to the proceedings in the sense that it might "disentitle" either Peter or Michele to relief under the Act.

(n) the conduct of any other person before and after the date of the death of the deceased person

236 It is necessary to consider Mary's conduct. It cannot be forgotten that she and the deceased were married, or in a relationship, for 25 years.

237 I am satisfied that Mary was a loving spouse who made a contribution to the building up of the deceased's estate and also a significant contribution to his welfare. Because the Plaintiffs conceded that this was so, it is not necessary to set out all of Mary's evidence on this topic.

(o) any relevant Aboriginal or Torres Strait Islander customary law

238 This is not relevant in the present case.

(p) any other matter the court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered

239 There were three matters that I consider should be mentioned.

240 The first relates to whether or not the deceased had executed a Binding or Indicative Death Nomination in respect to his member's entitlement in the Fund.

241 Alexander was asked, but could not recall, specifically, whether he had discussions with the deceased on the topic. He said, when asked whether he knew of there ever having been any binding death nomination made by the deceased in relation to his superannuation fund, whether in relation to the legacies to the deceased's children or any other bequest that the deceased wanted to make, that he was not aware of one.

242 Robyn, who had acted as the accountant for the Fund until the end of the 2009 financial year, was shown an email sent to her by Mary on 2

February 2010 in which Mary requested her to send to her by facsimile transmission or email "copy of binding nomination which I understand Roy provided to you regarding his instructions with respect to payments/proceeds that go to specified persons from the super fund". She was also shown her response, being an email of the same date, in which she wrote that "the binding death nomination has expired, they only last for three years".

243 Her evidence then was:

> "Q. At that time were you making enquiries as to whether the late Mr Kelly had made any binding death nomination in relation to his interest in the superannuation fund that the company RE Kelly was trustee of?
> A. No. The conversation, the email arose because Mary was querying it. I had a conversation with Mary saying I had had a discussion with Roy regarding binding death nominations and she was, asked me did I have a copy of it and I said the conversation I had was 2004/2005, if it had it would have expired. I subsequently to this went through my files and I don't have any copies. I didn't prepare one, I never prepared one and I didn't have a copy of one."

244 Yet, the resolution passed by the Trustee at the Extraordinary General Meeting of the Trustee on 18 February 2010, to which I have earlier referred, reveals "No Binding or Indicative Death Nomination is held by the Trustee other than the Product Disclosure Statement dated 12 September 2004 signed by" the deceased (my emphasis).

245 Whilst counsel for the Plaintiffs asked Mary no questions concerning the contents of the Product Disclosure Statement, Mary had stated in her affidavit evidence that the Trustee did not hold a copy of a Binding Death Nomination of the deceased. She did not produce, or even refer to, the document referred to in the Trustee's Resolution (which she signed).

246 Whether the document referred to was a valid, or an effective, Binding Death Nomination (in light of Robyn's evidence), since there was a reference made to such a document by the Trustee (in February 2010),

Mary, as the sole director of the Trustee, might have produced it to the Court or explained its non-production.

247 One can speculate, of course, but I have nothing concrete that assists in determining the contents of the document referred to.

248 More importantly, Mary was cross-examined about a deposit of $165,750 into a bank account in her name and that of her daughter, Kaylene, on 9 October 2008. She gave evidence, only in cross-examination, that she had received an amount, as superannuation, paid to her by her employer upon her retirement, in 2008, from which source the deposit had been made. She described the money as "my money and ... I paid, the tax on it, the 15 per cent tax".

249 The evidence revealed that the deposit, with interest, had increased to $168,835 by 9 March 2009, when it was transferred into another bank account in the name of Mary and her daughter, Kaylene.

250 Other banking records tendered, without objection, demonstrated that various amounts had been withdrawn from the account into which the funds had been transferred, so that by 9 June 2009, the amount held had been reduced to $132,635. Then, an amount of $44,893 had been deposited showing as "Ryela Investment Ryela loan repayment", increasing the funds held in the joint account, after interest was added, to $177,529 as at 30 June 2009. Mary was unable to explain the withdrawals or the deposit.

251 When asked what had happened to these funds, Mary said that she did not know. Her evidence was that it was deposited into their joint names, initially, as "we were going to look into buying an investment property, a retail property, and it didn't go ahead". She also said that Kaylene "invested it in her property, in her investment", but when asked about the

nature of that investment, she said that she did not know how Kaylene had invested the money, that she did not care, and had not asked her.

252 In re-examination, an additional bank statement relating to the same account was tendered, which revealed that as at 29 June 2012, the account was in debit, by $3.00 (which confirmed her evidence in cross-examination).

253 Mary had given no evidence of the receipt of any amount by way of superannuation payment from an employer in any of her affidavits.

254 Mary also gave the following evidence in relation to the amount:

> "Q. Was it a gift made to [Kaylene]?
> Effectively yes it was.
>
> Q. When you say "effectively" what does that mean?
> A. Because it was a joint account if I died [she] got the money, if she died it came back to me because it was a joint account."

255 That evidence, in my view, does not suggest, an inter vivos gift. It suggests that the legal title to the account was in joint names; that both of the account holders were entitled to draw on the account and any money withdrawn would become her sole property; and that on the death of one account holder, the money in the account belonged to the other by survivorship. From the time that the arrangement was made, there was a beneficial interest vested in both account holders, including the one who could, in due course, take by survivorship. That beneficial interest, which may not have been a joint or identical one, would vest when the relevant arrangement was made: *Russell v Scott* [1936] HCA 34; (1936) 55 CLR 440. (I ignore the more accurate legal proposition that the account in question created the relationship of creditor (the account holders) and debtor (the bank) and the legally more accurate terminology that the account holders had the benefit of a chose in action, namely the benefit of the debt owed by the bank.)

256 In re-examination, senior counsel asked Mary:

> "Q. Do you have any assets that you have not disclosed to this Court in your affidavit?
> A. No."

257 I indicated to senior counsel that I may not be satisfied with the answer given, in the light of Mary's answers in cross-examination. I later ascertained, from Mary, that Kaylene was present in Court. Yet, no application, by Mary, was made to call Kaylene to give evidence as to these matters.

258 Neither party addressed the presumption of a resulting trust or the presumption of advancement by a mother in favour of a daughter.

259 I appreciate that the payment was made to Mary in about 2008, before the deceased's death, and that the amount, with interest, was transferred in 2009, well before any proceedings for a family provision order could have been, or was, made. However, where a party who is putting forward her financial and material circumstances as being relevant in defence to a claim for a family provision order, receives, and subsequently disposes, of such a large amount, shortly before the death of the deceased, that is something that should have been disclosed to the Court. I consider it is a relevant matter to which I may have regard.

260 The third matter to which I should refer relates to Mary's future intentions about which she gave the following evidence:

> "Q. Mr Armfield asked you some questions about your future intentions?
> A. Yes.
>
> Q. You said that at the moment, bearing in mind these proceedings you have not decided what you would do in the future in regard to the Belrose property and in regard to the Martinsville property?
> A. Correct.
>
> Q. The possibilities are, I suppose, that you will keep them both?

A. Well under the present circumstances of the market economy with property devaluations, I would lose a lot of money on the Martinsville property as such to recover what has been spent and to recover that.

Q. I think the question which I put to you is one of the alternatives is that you will keep both properties?
A. I will try and keep both properties, yes ...

Q. If you do keep both properties is it likely that one will be rented or do you not know at this point in time?
A. It is possible one property will be rented, yes.

Q. If you have the choice of the property that you are going to rent, which one do you think you are more likely to rent in the future?
A. Martinsville.

Q. And another alternative, I suppose, is that you will sell one of them in the future. That is an alternative?
A. It is a potential well, yes, I don't know. It depends on my circumstances and how I manage money.

Q. As an alternative, if you have a choice about selling one or the other, which one do you think you would be more likely to sell, Belrose or Martinsville?
A. Martinsville."

261 Her financial position should improve once the renovations to the Martinsville property are completed since, at the present time, she is not earning any income from this property. In the future, she will either sell that property, with the result that the proceeds of sale will provide both capital and income, or she might rent it, thereby increasing her income.

Determination

262 Claims for a family provision order present particular difficulties where the actual estate is small and where there are several competing claims upon the bounty of the deceased. Any provision made by the Court in favour of an applicant must, in this class of case, be made at the expense of the beneficiary who has, or beneficiaries who have, had to defend the claims and who is, or are, the chosen object of the deceased's bounty.

263 Being an "eligible person" is a necessary precondition to the court being empowered to make an order for the maintenance, education or

advancement in life of the eligible person. In this case, there is no dispute that Peter and Michele, each a child of the deceased, is an eligible person within the meaning of s 57(1)(c) of the Act.

264 There is also no dispute that the proceedings were commenced within the time prescribed by the Act.

265 Then, the first question for determination is whether, at the time when the court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made, has not been made, by the Will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both. (The operation of the intestacy rules is irrelevant in this case.)

266 Senior counsel for Mary and the Trustee accepted that each has "need", and that the "need" of Peter is greater than the need of Michele. 'Need' in the context of the Act is not determined by reference only to minimum standards of subsistence. He disputed, however, despite the possibility that each might receive nothing out of the estate (if costs are ordered to be paid out of the actual estate) or about $37,146 (if, for example, no costs are ordered to be paid out of the actual estate) that the jurisdictional threshold had been satisfied.

267 In considering the answer to the question posed at the first stage, judged by quantum and looked at through the prism of his, and her, financial and material circumstances, adequate provision for Peter's and Michele's proper maintenance or advancement in life was not made by the Will of the deceased.

268 Whilst a lump sum, by way of maintenance or advancement in life would be appropriate, that is not all that I am required to consider at the first stage. The totality of the relationship of each Plaintiff and the deceased,

the age and capacities of the other beneficiaries, and the claim of each on the bounty of the deceased, are very relevant factors in determining the answer at the first stage. In addition, I note that the deceased wished each Plaintiff to receive a legacy of $75,000 each (a wish, in greater amounts, he expressed in a number of earlier Wills made, or in conversations with Peter, in the last decade of his life).

269 All these considerations lead me to find that there was a failure, on the part of the deceased, to make adequate provision for the proper maintenance or advancement in life of each Plaintiff.

270 Having found that Peter and Michele is an eligible person and that the provision made for him and her in the Will of the deceased is inadequate, I turn to the second stage and next consider the nature and quantum of any provision that should be made.

271 I do not accept the submission as to quantum put on behalf of each Plaintiff. I am of the view that in calculating the provision each Plaintiff should receive I must bear in mind the position of Mary and the other beneficiaries. Nor do I accept senior counsel's submission for Mary and the Trustee that, as a matter of discretion, I should dismiss their claims.

272 In my view, having regard to all of the matters that I am required to consider, including amongst other things, the size and nature of the deceased's actual estate and property that is available to be designated as notional estate, the totality of the relationship between Peter and the deceased, the relationship between the deceased and other persons who have legitimate claims upon his bounty, most importantly, Mary, Peter should receive a legacy of $150,000, in lieu of the provision made for him in the Will of the deceased. Whilst this amount will not enable him to discharge all of the mortgage debt, it will allow him to discharge all of the credit line debts and almost all of the debt due to his parent's-in-law's

company. That will relieve some of the pressure on the use of the family's income ($1,104) per month.

273 In coming to the lump sum amount, I have also considered that he might have refunded to him part of his legal costs that he has already paid, which may provide a very modest capital sum which could be saved. In saying this, I intend to make an order for his costs to be paid.

274 In my view, having regard to all of the matters that I am required to consider, including amongst other things, the size and nature of the deceased's actual estate and property that is available to be designated as notional estate, the totality of the relationship between Michele and the deceased, the relationship between the deceased and other persons who have legitimate claims upon his bounty, most importantly, Mary, Michele should receive a legacy of $100,000, in lieu of the provision made for her in the Will of the deceased. This amount will enable her to discharge her share of all of the debts. That may increase the available family income.

275 In coming to the lump sum amount, I have also considered that she might have refunded to her part of her legal costs that she has already paid, which may provide a very modest capital sum which could be saved. In saying this, I intend to make an order for her costs to be paid.

276 I turn then to how the lump sum provision for each Plaintiff should be met.

277 Subject to precise calculations and any submissions by the parties which may provide a more convenient, or practical, method to achieve what I shall say hereunder, and upon which further submissions may be made, I propose the following in relation to how the burden of the provision for each Plaintiff and for their costs should be borne.

278 I look first to the actual estate. In my view, the cash in bank ($107,797) should be used to pay the specific legacies to the deceased's

grandchildren as set out in the Will ($75,117), the amount calculated as the abated legacy to Mark ($24,764), the amount calculated as the abated legacy to Mr Larbalestier ($4,952)(which should be paid to Mary because she has paid the whole of the legacy), and finally, the whole of the legacy for Alexander and Robyn ($2,000).

279 I have come to the view that the whole of the legacy (rather than the abated legacy) should be paid to Alexander and Robyn, particularly in light of Alexander's evidence as to the capping of his costs, and what appears to have been a difficult estate to administer. Furthermore, neither has suggested any claim for commission.

280 Any balance of cash in bank available thereafter should be divided rateably between Mark and Mr Larbalestier (which should be paid to Mary). Peter should receive the Rolex watch gifted to him.

281 Then, the amount received by the estate, from Mary, for the deceased's interest in the Willoughby property ($90,000) should be used to pay part of the lump sum to each of the Plaintiffs ($45,000 each).

282 Part of the balance of the lump sum for each Plaintiff should be borne out of the proceeds of sale of the car and caravan. However, before the amount of the proceeds of sale is distributed to the Plaintiffs, the balance of the debt payable to Mary ($19,849) should be paid to her.

283 Assuming that the car and caravan is sold for about $60,000, and then the payment is made to Mary, $40,000 will be available to be divided between Peter and Michele.

284 I have considered that this will mean that Michael will not receive the car and the caravan. However, he is Mary's son. Reducing his entitlement by ordering the car and caravan to be sold and the proceeds of sale to be used, in part, to satisfy the lump sum provision made for the Plaintiffs, will

effectively reduce the burden on Mary and the Trust to satisfy the balance of the provision made for each Plaintiff and their costs.

285 In addition, part of the proceeds of sale of the car and the caravan is to be used to reimburse Mary for the liabilities she has already paid.

286 The residue of the actual estate (the shares in IAG and the share in the Trustee) should be transferred in specie, to Mary, as the sole residuary beneficiary.

287 Of course, if Mary chooses to, she can use the amount she is to receive ($24,801) to reduce the amount to be designated as notional estate by causing it to be paid to the Plaintiffs as part of the lump sum provision made for each of the Plaintiffs, or on account of their costs.)

288 The balance of the amount necessary to satisfy the lump sum provision to Peter ($85,000) and to Michele ($35,000) should be paid out of property in the Fund, which amount should be designated as notional estate. In addition, the costs of Peter and Michele should be borne out of the Fund, and that amount should also be designated as notional estate.

289 No interest is to be paid on either lump sum if it is paid within 28 days of the making of orders; otherwise, interest calculated at the rate prescribed by s 84A(3) *Probate and Administration Act* 1898, on unpaid legacies, is to be paid from that date until the date of payment.

290 In coming to my conclusions, I note that Mary, after the orders for provision made for the Plaintiffs, will have the Belrose property ($810,000), the Martinsville property ($600,000 - $650,000), 42.5 percent of the Willoughby property ($195,500), and the balance of the Fund, which will be in the order of $395,000, after distributions of the balance of the lump sum provision made for the Plaintiffs (say $120,000), the Plaintiff's costs (say, $100,000), a distribution to Mary of the amount required to purchase the

deceased's interest in the Willoughby property ($90,000) and an amount to satisfy the remaining costs of the proceedings (say $100,000). (I have omitted in these calculations the shares, household and personal effects, and other assets owned by Mary previously referred to which are of modest value.)

291 It can be seen from the above, that the burden of provision made for each of the Plaintiffs is to be borne, partly, by the actual estate, and partly by property held by the Trustee, that will be the subject of a notional estate order. The Plaintiffs' costs of the proceedings are to be borne out of property that will also be the subject of the notional estate order.

292 The costs of Alexander and Robyn are to be borne by Mary and if necessary, the notional estate order should take into account those costs. Mary has indicated that she would meet the balance of Alexander and Robyn's costs ($10,000).

293 In submissions, senior counsel accepted that there was no practical utility in making an order for Mary's, or the Trustee's, costs and disbursements, since those costs, too, would be borne out of property that I would have to designate as notional estate. However, if after consideration of these reasons, a different position is reached, and provided their costs are to be borne in the manner I have indicated, I am prepared to make that order.

294 The orders should also deal with the return of the Exhibits.

295 I direct the parties to prepare Short Minutes that give effect to these reasons. As I have said, if they are able to reach agreement upon an alternative basis of satisfying the provision made for the Plaintiffs, and to the other beneficiaries to whom I have referred, I am prepared to consider the alternative.

296 I shall stand the matter over to a suitable date for counsel and the Court for the making of orders and for any argument as to costs.

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