

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : MILLER -v- TAYLOR [2018] WASC 75

**CORAM** : CURTHOYS J

**HEARD** : 4 - 6 OCTOBER 2017

**DELIVERED** : 14 MARCH 2018

**FILE NO/S** : CIV 1311 of 2014

**BETWEEN** : ANGELA MILLER  
Plaintiff

AND

ELIZABETH TAYLOR  
First Defendant

ELIZABETH DESIREE TAYLOR  
Second Defendant

ANDRE PHILIPPE TAYLOR  
Third Defendant

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*Catchwords:*

Family provision - De facto relationship - Gambling - Whether disentitling  
conduct

*Legislation:*

*Family Provision Act 1972 (WA), s 4(2), s 6, s 7(1)(a)*

*Interpretation Act 1984 (WA), s 13(2), s 13A, s 13A(1), s 13A(2), s 13A(2)(a)*

*Result:*

Order made for provision out of the estate of the deceased

*Category:* B

**Representation:**

*Counsel:*

Plaintiff : Ms R Lee  
First Defendant : Mr T Stephensen  
Second Defendant : Mr C Eastwood  
Third Defendant : Mr C Eastwood

*Solicitors:*

Plaintiff : Culshaw Miller Lawyers  
First Defendant : Armstrong Legal  
Second Defendant : Eastwood Sweeney Law  
Third Defendant : Eastwood Sweeney Law

**Case(s) referred to in judgment(s):**

Bevilacqua v Robinson [2008] NSWSC 463  
Carroll v Cowburn [2003] NSWSC 248  
Collett v Knox [2010] QSC 132  
De Angelis v De Angelis [2003] VSC 432  
Delacour v Waddington (1953) 89 CLR 117  
Devereaux-Warnes v Hall [No 3] [2007] WASCA 235  
Fulton v Fulton [2014] NSWSC 619  
Gill v Smith [2007] NSWSC 832  
H v P [2011] WASCA 78  
Hughes v National Trustees Executors & Agency Co of Australasia Ltd (1979)  
143 CLR 134  
In Re the Will of F B Gilbert (dec'd) (1946) 46 SR (NSW) 318  
Jackson v Riley (Unreported, NSWSC, 24 February 1989)  
Lathwell v Lathwell [2008] WASCA 256  
Luciano v Rosenblum (1985) 2 NSWLR 65  
Murphy v Stewart [2004] NSWSC 569

Sadiq v NSW Trustee & Guardian [2015] NSWSC 716  
Schmidt v Malcolm [2016] WASC 209  
Slack v Rogan; Palffy v Rogan [2013] NSWSC 522  
Vigolo v Bostin (2005) 221 CLR 191  
Waddingham v Burke [2015] WASC 65  
Young v Knight [2005] NSWSC 754

**CURTHOYS J:**

**The parties**

1 Andre Philippe Taylor (Andre) died on 28 July 2013. The plaintiff,  
Angela Miller (Angela) seeks provision from the estate of Andre under  
the *Family Provision Act 1972* (WA) (Family Provision Act). Angela was  
born on 2 April 1944. She is presently 73 years old. She said that she  
was in a de facto relationship with Andre at the time of his death.

2 Andre and his ex-wife Elizabeth Taylor, the first defendant  
(Mrs Taylor) had two children, Elizabeth Desiree Taylor, (the second  
defendant (Elizabeth)), and Andre Philippe Taylor (the third defendant  
(Philippe)).

**The will**

3 Andre made a will on 8 June 2006, some seven years before his  
death in July 2013 (exhibit A, page 20).

4 Andre made no provision in his will for Angela.

5 Mrs Taylor was appointed executor under Andre's will.

6 Andre left his whole estate in equal shares to Elizabeth and Philippe.

**Other financial provision**

7 The court notes that, although Angela was not provided for in the  
will, she received \$60,000 as a beneficiary of one of Andre's three  
superannuation policies (ts 12, 4 October 2017).

8 Elizabeth and Philippe were also beneficiaries of Andre's  
superannuation.

**The key issues**

9 The key issues for determination in these proceedings are:

- (1) Was Angela living as the de facto partner of Andre immediately before his death?;
- (2) Whether certain items form part of Andre's estate; and
- (3) If Angela was a de facto partner, should an order for provision from Andre's estate, pursuant to s 6 and s 7(1)(a) of the Family Provision Act, be made in her favour?

**The relevant legislation**

10 Section 7(1)(a) of the Family Provision Act provides:

An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons -

a person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person[.]

11 The statutory definition of a 'de facto' relationship is set out in s 13A of the *Interpretation Act 1984* (WA) (Interpretation Act) as follows:

- (1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage like relationship.
- (2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential -
  - (a) the length of the relationship between them;
  - (b) whether the 2 persons have resided together;
  - (c) the nature and extent of common residence;
  - (d) whether there is, or has been, a sexual relationship between them;
  - (e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  - (f) the ownership, use and acquisition of their property (including property they own individually);
  - (g) the degree of mutual commitment by them to a shared life;
  - (h) whether they care for and support children;
  - (i) the reputation, and public aspects, of the relationship between them[.]

**The authorities**

12 A 'marriage-like relationship' has no formality surrounding its creation or cessation.

13 The decision as to whether a de facto relationship existed is a judicial one having regard to the factors in s 13A(2) of the Interpretation Act. In this regard, Murphy JA in *H v P* [2011] WASC 78 (*H v P*) stated [53] - [58]:

53 Unlike a legal marriage, there is no formality surrounding the creation and cessation of a de facto relationship. It can thus often be difficult to determine whether or not such a relationship exists. The term 'marriage-like relationship' is not defined in the legislation, leaving the question to the judge who, whilst reflecting on the nature of marriage generally, is required by the legislation to have regard to the factors in s 13A(2) of the *Interpretation Act 1984*: see *T and C* [2010] FCWA 91 [347].

54 In *T and C*, Thackray CJ noted the observations of Gleeson CJ concerning the concept of de facto marriage in the case of *MW v The Department of Community Services* [2008] HCA 12; (2008) 244 ALR 205. In that case, Gleeson CJ made the following observations which provide some guidance as to the interpretation of the expression 'marriage-like relationship' (209 - 212):

'Finn J was correct to stress the difference between living together and living together "as a couple in a relationship in the nature of marriage or civil union". The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved.

...

Marriage, in Australia and New Zealand, involves legal requirements of formality, publicity and exclusivity. A person may be a party to only one marriage at a time. De facto relationships, on the other hand, do not involve these elements. They are entered into, and may be dissolved, informally. ... It goes without saying that there is no mandatory public registration of sexual relationships, even if they involve cohabitation. De facto relationships may co-exist with the marriage of one or both parties and, at least in some circumstances, people may be parties to multiple de facto relationships. Yet the law to be applied in this case acknowledges that some are, and some are not, in the nature of marriage. How is the difference to be determined? No single and comprehensive answer to that question can be given, but there is one test that is applicable to the present case.

In *Stack v Dowden*, Baroness Hale of Richmond said:

"Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage ... So many couples are cohabiting with a view to marriage at some later date - as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves 'as good as married' anyway: Law Commission, Consultation Paper No 179, Part 2, para 2.45."

There is no reason to doubt that the same is generally true of Australia and New Zealand. It may be added that, in Australia, what often prompts cohabiting couples to marry is a decision to have a child, and to do so within the context of a marriage. People often refer to this as "starting a family". The cohabiting parties to many relationships, especially first relationships of the "short-lived and childless" kind, may be surprised to be told that they are involved in a relationship in the nature of marriage or civil union. They may intend no such thing. The same may apply to some people in longer-term cohabitation who have chosen not to marry. It is the common intention of the parties as to what their relationship is to be, and to involve, and as to their respective roles and responsibilities, that primarily determines the nature of that relationship. The intention need not be formed in terms of legal status: to some people that is important; to others it is a matter of indifference ... The intention may be expressed, or it may be implied. What is relevant is their intention as to matters that are characteristic of a marriage or a civil union, but that do not depend upon the formal legal status thus acquired. To describe a relationship as being in the nature of marriage implies a view about the nature of marriage. The same applies to a civil union. It is unnecessary, for present purposes, to attempt a comprehensive account of the features of a relationship that might justify such a description. Plainly, 'living together' is not enough.

...

- 55 As Gleeson CJ's observations indicate, although there may be a number of factors which suggest that a relationship is 'in the nature of marriage' or 'marriage-like', in the end, what is required is an overall assessment of the facts and of all the relevant elements of the relationship. In the Federal Court case of *Lynam v The Director-General of Social Security*, the court considered whether a man and a woman were living together 'as husband and wife on a bona fide domestic basis'. Fitzgerald J said (131):

'Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test.'

See also *Corich v The Public Trustee* [2006] WASC 16 and *T and C* [353].

- 56 Just as it is difficult to discern when a relationship between two people can properly be said to be 'marriage-like', it can be equally difficult to determine when such a relationship comes to an end. In this respect, there is an important distinction to be drawn between a de facto relationship and a legal marriage. Unlike a legal marriage, which continues despite the absence of any 'marriage-like' characteristics in the relationship, until it is formally dissolved by legal process, a de facto relationship is inherently terminable at any time, and continues to exist only insofar as the indicia which give the relationship its 'marriage-like' character continue to exist. In *Hibberson v George* (1989) 12 Fam LR 725, 740, Mahoney JA spoke of the distinction between a legal marriage and a de facto relationship, where he said:

'There is, of course, more to the relevant relationship than living in the same house. But there is, I think, a significant distinction between the relationship of marriage and the instant relationship. The relationship of marriage, being based in law, continues notwithstanding that all of the things for which it was created have ceased. Parties will live in the relationship of marriage notwithstanding that they are separated, without children, and without the exchange of the



incidents which the relationship normally involves. The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this. But where one party determines not to "live together" with the other and in that sense keeps apart, the relationship ceases, even though it be merely, as it was suggested in the present case, to enable the one party or the other to decide whether it should continue.'

57 It follows that when a party to a de facto relationship determines that they no longer wish to live in a 'marriage-like' relationship and conducts their life on that basis, the de facto relationship comes to an end.

58 Unlike a legal marriage, which is presumed to continue until a party can prove that the marriage has broken down for the purpose of legally dissolving the marriage, in the case of a de facto relationship, it is the party asserting the continuance of the de facto relationship that must positively prove the existence of its defining characteristics, rather than being required to prove the negatives: *S v B* [2004] QCA 449; [2005] 1 Qd R 537 [48] - [50]. See also *M and G* [2006] FCWA 1 [10] - [15] and *T and C* [357] - [360].

14 De facto relationships are as diverse as marriages: *Schmidt v Malcolm* [2016] WASC 209 (Sanderson M) [9].

### **Onus and credibility**

15 Section 4(2) of the Family Provision Act requires that 'a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court'.

16 In *Sadiq v NSW Trustee & Guardian* [2015] NSWSC 716 [119] - [129] (*Sadiq*), the Court stated:

119 There was no dispute that the onus of satisfying the Court that a domestic partnership, and therefore, that a de facto relationship existed between the Plaintiff and the deceased for at least two years continuously before her death, rested with the Plaintiff.

120 Credit findings assume a greater significance in cases such as this one. Because of the position of the parties and the witnesses, the Court is required to determine on the balance of probabilities, taking into account s 140(2) of the *Evidence Act 1995* (NSW), which version is the more likely and plausible. It is also the case that a de facto relationship means a relationship which exists in fact and that is established by determining what the parties to the alleged relationship are doing.

121 The principal evidence about what the deceased and he were doing came from the Plaintiff himself. On the question whether I accept his evidence, I remember that in *Thomas v The Times Book Co* [1966] 2 All ER 241; [1966] 1 WLR 911, Plowman J, at 916, stated:

'... [N]ot only in this case is the onus of proof on the defendants, but I am enjoined by authority to approach their story with suspicion, having regard to the fact that the other actor in this story, the late Dylan Thomas, is dead and cannot therefore give his own version of what took place.'

122 (The Defendants in that case were in the position of the Plaintiff in this case, bearing the onus of proof.)

123 In *Richardson v Armistead* [2000] VSC 551, Hansen J, at [36], stated that:

'... [I]n such circumstances the self-interest of a claimant to give evidence favourable to his or her case is obvious... in such a case much caution is exercised before the evidence of the claimant is accepted.'

124 Also, I remember what Bryson AJ said in *Zahra v Francica* [2009] NSWSC 1206, at [1]:

'In these proceedings the plaintiff makes claims against the deceased's estate and the facts that he alleges depend for proof very largely upon his own evidence. In approaching his evidence and making findings on a matter he alleges, I bear in mind the need for careful scrutiny to which evidence in such a case should be subjected. This need is well established and was stated clearly by Isaacs J in *Plunkett v Bull* (1915) 19 CLR 544. Two more modern statements appear in the judgment of McLelland CJ in *Eq in Eyota Pty Limited v Hanave Pty Limited* (1994) 12 ACSR 785 at 789 in a passage which was cited with approval in the judgment of Sheller JA in *Eggins v Robinson* (2000) NSWCA 61 at [26]:

"... in a claim based on communications with a deceased person the Court will treat uncorroborated evidence of such communications with considerable caution, and will regard as of particular significance any failure of the claimant to bring forward corroborative evidence which was, or ought to have been, available."

125 Whelan J in *Webb v Ryan* [2012] VSC 377, at [22], referred to the difficulties in assessing evidence, in such circumstances, stating:

'An important matter which may arise in these kinds of cases is the difficulty of assessing evidence concerning things allegedly said by a person who is dead. The court can never be certain it knows all the circumstances, and more often than not one may be sure that the court knows few of them. It is impossible to hear what the other party to the conversation, the deceased, says about it. There is a significant risk of reconstruction. There are dangers in relying on evidence of what may have been a casual observation made to a person who at the time had no reason to remember the exact words used. In the light of these concerns, a substantial burden is placed upon an applicant whose case relies upon such evidence. Such evidence must be very carefully examined.'

126 Also see, *Ashton v Pratt (No. 2)* [2012] NSWSC 3, per Brereton J, at [18].

127 I also remember what was said by Emmett J (as his Honour then was) in *Warner v Hung, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (No 2)* [2011] FCA 1123; (2011) 297 ALR 56, at [48]:

'When proof of any fact is required, the court must feel an actual persuasion of the occurrence or existence of that fact before it can be found. Mere mechanical comparison of probabilities, independent of any belief in reality, cannot justify the finding of a fact. Actual persuasion is achieved where the affirmative of an allegation is made out to the reasonable satisfaction of the court. However, reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations that must affect whether the fact has been proved to the reasonable satisfaction of the court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2; [1938] ALR 334 at 342.'

128 The credibility of a witness and his, or her, veracity may also be tested by reference to the objective facts proved independently of the evidence given, in particular by reference to the documents in the case, by paying particular regard to his, or her, motives, and to the overall probabilities: *Armagas Ltd v Mundogas S.A. (The 'Ocean Frost')* [1985] 1 Lloyd's Rep 1, per Robert Goff LJ, at 57. Also see, *In the matter of Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547, per Black J, at [7].

- 129 What Kirby J, although in dissent, wrote in *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 77 ALJR 1598, at [119]-[120] must also be remembered:

'... Some judges in the past regarded untruthful evidence - even about peripheral or irrelevant matters - as fatal to a litigant. Most judges today understand that the evaluation of evidence involves a more complex function, requiring a more sophisticated analysis. Courts, after all, are not venues for the trial of the parties' morality or credibility, as such. As judges often explain to juries in criminal trials, people sometimes tell lies in court and elsewhere for extraneous and irrelevant reasons, having nothing to do with the legal issues in the trial. If this is true in criminal trials, it is equally true in civil trials. What is important is not the proof of untruthfulness, as such, but the significance (if any) of any demonstrated falsehoods for the issues at trial. That significance can only be judged when measured against the entirety of the relevant testimony. By its logical force, that testimony may well require that the falsehoods be ignored as irrelevant or immaterial to the decision-maker's ultimate conclusion. In particular cases, it may require the decision-maker, within the pleadings, to consider and decide a case different from - or even contrary to - that advanced by the party, because such is the legal entitlement of the person concerned.

Obligations of this kind recognise the ultimate duty of the decision-maker in an Australian court to decide a case according to law and the substantial justice of the matter proved in evidence, not as some kind of sport or contest wholly reliant on the way the case was presented by a party. Litigants are represented in our courts by advocates of differing skills. Litigants are sometimes people of limited knowledge and perception. Occasionally, they mistakenly attach excessive importance to considerations of not real importance. In consequence, they may sometimes tell lies, or withhold the entire truth, out of a feeling that they need to do so or that the matter is unimportant or of no business to the court. This is not to condone such conduct. It is simply to insist that, where it is found to have occurred, it should not deflect the decision-maker from the substance of the function assigned to a court by law.' (Footnotes omitted)

- 17 The observations in *Sadiq* are particularly pertinent in this case. Importantly, this Court is not a venue 'for the trial of the parties' morality or credibility'.

- 18 In assessing the evidence here it is also the case that the defendants are self-interested to the extent that they seek to preserve their own

entitlements under the will or the entitlements of those they are associated with.

19 Alleged utterances from the deceased need to be treated with caution whether those utterances are from the plaintiff or the defendants (see *Fulton v Fulton* [2014] NSWSC 619 [115] (*Fulton*)).

20 The Court also needs to bear in mind the bitterness between parties that disputes over deceased estates so often, and sadly, generate. What his Honour Hallen J stated in *Fulton* [1] applies equally to this case:

This is a sad and a regrettable case. It demonstrates, once again, that contentious proceedings involving an estate and family members, 'where the drama of the family rifts unfolds with all the ill-feelings, resentment and animosity between the protagonists climaxing on public display, are unavoidably destructive of what is left of the deceased's family. Win or lose, the family will most likely be torn further apart irretrievably': *Chiu Man Fu v Chiu Chung Kwan Ying* [2012] HKCFI 82, at [1].

### **The Court's approach to the evidence**

21 The Court has adopted the following approach in assessing the evidence before it. First, the Court has looked to contemporaneous documentary evidence. Secondly, the Court has looked to non-party evidence. Thirdly, the Court has looked to the evidence of the parties or their spouses.

22 For reasons explained below, the Court did not find any of the parties or their spouses to be particularly satisfactory witnesses. In general, the Court has assessed the reliability of the evidence in the above order, treating contemporaneous documentary evidence as the most reliable.

23 In discussing the evidence, there will necessarily be an interlink between these three types of evidence. For example, at times it has been useful to refer to oral evidence when dealing with documentary evidence.

***Was Angela living as the de facto partner of Andre immediately before his death?***

### **Contemporaneous documentary evidence**

#### **1. The death notices**

24 The death notice in the West Australian of 31 July 2013 was in the following terms:

**TAYLOR (Andre):**

Passed away peacefully at home 28.7.2013. Partner of Angela. Father of Andre and Elizabeth, father-in-law of Laura and Mick. Granddad of Andrew and Audrey. Formerly husband of Elizabeth.

Rest in Peace.

25 It is important to note that Angela is placed first in the death notice and is identified as 'Partner of Andre' (exhibit A, page 70).

26 The death notice was placed by the funeral directors Bowra & O'Dea. Mrs Taylor, Elizabeth and Philippe met at Bowra & O'Dea's offices and gave them instructions as to the contents of the death notice. Mrs Taylor's evidence is inconsistent as to whether Angela was present (ts 156 - 157; 5 October 2017). At page 156 of the transcript she appears to say that Angela was not present. However, at page 208, she states that Angela was present.

27 Mrs Taylor's evidence was that the family approved of 'Partner of Angela' in the death notice (ts 209; 5 October 2017). The fact that the death notice was placed as a result of a meeting at which by Mrs Taylor, Elizabeth and Philippe were present leads to a strong inference that Mrs Taylor, Elizabeth and Philippe regarded Angela as Andre's partner, not simply as his friend or his carer. Even if Angela was present, the evidence remains that 'the family approved' (ts 209; 5 October 2017).

28 A death notice was also placed on the same day by Harold Guy Peirce (Mr Peirce), a long-time friend of Andre's. The death notice relevantly stated (exhibit A, page 70):

Heartfelt condolences to Angela, Elizabeth (little) Andre and family[.]

29 Although Angela is not identified as Andre's partner, it is clear from the content that she ranked above Andre's children and the reasonable inference, in combination with Mr Peirce's affidavit evidence, is that she was regarded by Mr Peirce as Andre's partner.

30 The Court also notes that Angela placed a death notice which relevantly stated (exhibit A, page 71):

Passed away peacefully with his beloved partner Angela by his side[.]



39 On or shortly after 16 June 2002, correspondence was sent to Angela at 3/48 Rennie Crescent, Hilton WA 6163 (exhibit B, page 21).

40 On 25 January 2003, correspondence was sent to Angela at 15 Cox Court, Willagee WA 6156 (exhibit B, page 26). Further correspondence was sent to this address on 17 July 2003 concerning finance to purchase 7 Audley Place, Canning Vale (exhibit B, page 27). On 21 August 2003, correspondence was sent to Angela at 7 Audley Place, Canning Vale WA 6155 (exhibit B, page 28).

41 Angela purchased 7 Audley Place for \$257,000. She financed \$145,000. The balance of \$112,000 came from an inheritance from her father (ts 49 - 50; 4 October 2017).

42 Angela sold Audley Place for \$320,000 on 27 October 2004 (exhibit B, page 37). She received approximately \$170,000 net from the sale (ts 51; 4 October 2017).

43 A Bankwest Reward Plus statement dated for the period 5 July 2008 to 3 October 2008 show's Angela's address as 74 Spring Road, Kalamunda WA 6076 (exhibit B, page 293).

#### 4. The rings

44 Angela says that Andre purchased two rings for her, an engagement ring and a wedding ring, in August 2002. She relies on this to support her claim to have been in a de facto relationship.

45 On 17 August 2002, Andre bought a ring from Marjorie Young Galleries & London Court Antiques for \$7,700 (exhibit B, page 23). On 19 August he bought a further ring from them for \$1,850 (exhibit B, page 25).

46 Although there is a valuation certificate for the engagement ring at \$13,250 (exhibit B, page 24) the Court places no weight on the certificate as a measure of value. If that was its value, why was no one prepared to pay that amount?

#### 5. exhibit H

47 Exhibit H was a list of items said to have been prepared by Andre. Elizabeth's evidence is that the list identifies items in the house that were owned solely by him. Elizabeth gave evidence about the circumstances in which the list was prepared (ts 242; 6 October 2017). The Court does not accept Elizabeth's evidence concerning the list because the Court does not



accept Elizabeth as a credible witness for the reasons explained below. The list is incorrect as to the ownership of the Robert Hagan painting for the reasons explained below. Whilst the Court accepts that the list was prepared by Andre it could have been prepared for any number of reasons. It is of note that the list does not mention the engagement or wedding rings. This suggests that at some stage, between the purchase of the rings and the preparation of the list, Andre regarded ownership of the rings as passing to Angela.

**6. Pension records**

48 A response dated 11 September 2013 to an FOI enquiry by Angela was exhibited to an affidavit (exhibit A, pages 72 - 75). The response states that 'I note that you were the partner of Mr Taylor' (exhibit A, page 72). The response states that a copy of each document was enclosed. Unhelpfully, those documents were not exhibited to the affidavit.

49 A letter from Centrelink to Angela dated 21 February 2017 states (exhibit B, page 63):

I am writing this letter to confirm that you were in a de facto relationship with Mr Gregory Phillippe Andre Taylor from 20 September 2007 until 28 July 2013.

This is an information given under social security law.

50 Since the effect of a de facto relationship is to reduce or extinguish the right to a pension to which a single person might otherwise be entitled and that it is a statutory requirement to declare such a relationship in order to receive a pension, this is strong evidence that Angela was in a de facto relationship with Andre at least over the period stated in the letter.

**7. Hospital records**

51 A Discharge/Transfer Checklist from Sir Charles Gairdner Hospital for Andre, dated 9 May 2013, states (exhibit A, page 76):

Transport arranged (specify): Wife

Next of kin notified (state name): Angela

52 The document appears to have been signed by the ward nurse. No suggestion was made that it was Mrs Taylor, rather than Angela, who picked up Andre on this occasion.

53 It is a reasonable inference that the hospital regarded Angela as  
equivalent to Andre's 'wife', that is, in a de facto relationship.

54 This document is at least some support for Angela's claims, see  
below, that she was taking Andre to his hospital appointments (exhibit A,  
page 10).

**8. Birthday cards**

55 A birthday card from Andre to Angela dated 2 April 2012 was signed  
by Andre. He handwrote on the card: 'Lots of Love 2-04-2012 Andre X X  
X X' (exhibit A, page 78).

56 Elizabeth sent a card to Angela entitled: 'For you Grandma  
Happy Birthday'. The handwriting on the card read (exhibit A,  
pages 136 - 137):

Dear Angela

Thanks again for all your help with everything

Lots of love

Liz, Michael and Andrew

57 Other than that the card was sent after Andrew's birth, that is  
28 February 2009, there is no evidence as to when the card was sent.  
One assumes that it was at least Andrew's first birthday; that is,  
28 February 2010.

**9. Emails**

58 Numerous emails are in evidence relating to the babysitting of  
Elizabeth's children by Angela and/or Andre. Extracts from some of those  
are set out below (exhibit A, pages 79 - 136):

***1 September 2009***

Hi Dad and Angela

I know I'll see you this afternoon but I'll send you a copy of next week's  
times so you have them to compare to Sam's roster[.]

(exhibit A, page 82)

CURTHOYS J

**23 June 2010**

Hi everybody

..

My birthday:

Saturday 17th Mez Restaurant Northbridge 6.30 pm

Saturday the 10th - not sure; probably just lunch at Embers or something - get back to you on this one...

(exhibit A, page 86)

**20 February 2011**

Hi again; this is how we are looking so far:

...

My mum is waiting for Monday to see her new uni timetable; so maybe we can discuss Wednesday when we have dinner on Monday night.

I will book dinner for 7 pm; but if there's any change I will be in touch

(exhibit A, page 92-93)

**5 March 2011**

...

Thanks for a great dinner last night. We look like going to the river on Monday afternoon, but will let you know more details as soon as they come together...Talk to you all soon.

(exhibit A, page 94)

**7 March 2011**

Ok so here is the final version...

WEDNESDAY: Michael to airport about 2.20 pm and also sit with Andrew from same time til about 11.30 pm - DAD AND ANGELA

...

FRIDAY: 2.20 pm til about 12.30 am-DAD AND ANGELA

...

As per usual, dinner is on me

(exhibit A, page 95)

CURTHOYS J

**23 January 2012**

I will do Wednesday this week Elizabeth. I am looking after Sam on Thursday.

If you need any help at Pickering brook I can help you out Sat. If you need me at all, at home on Sat, I will have to come back here to the aircon as it is going to be 42 and I just can't cope without it in such temperatures.

Not sure about the other days yet. I have to go to see Wilf s mum tomorrow. Angela.

(exhibit A, page 103)

**21 February 2012**

I will do Tuesday if I am not needed for Sam. I also don't know how much care I will need to give Eupheme as Erica will probably feel grim after the op and not completely recovered. There is only me to help her. Pat and Gray in Taz Any chance your Mum can do some of Monday if she is not available on Tuesday? Dad said he will do Sunday and if I have Eupheme, I will bring her up to play with Andrew. I think your Dad will be able to pick up Mick on the Wed. Angela

(exhibit A, page 108)

**15 April 2012**

As far as I know, I can do Monday at present as I have another family coming on line and I don't yet have their- dates. I like to keep weekends for Eupheme as it is the only time I can see much of her and for instance this weekend I was needed twice. Your dad has a doctor's appointment coming up and he might be sent for some tests. I will let you know what else I can manage when I know timetables. Angela.

(exhibit A, page 113)

**29 May 2012**

... I can't do Friday as I am looking after Chase[.]

(exhibit A, page 114)

**28 June 2012**

Hi Liz, I can't commit to anything until I see how your dad is going after treatment tomorrow. We may well be told that we can't socialize for a while as treatment completely wipes out resistance to infection. I have already told Erica that I may not be able to babysit this Saturday because I want to see how your dad goes tomorrow. Treatment is often completely

CURTHOYS J

[debilitating]. Your dad may not be able to do anything and will need me to look after him. If your dad isn't too bad I will help when I can. Angela.

(exhibit A, page 116)

***9 July 2012 - 11:14 pm***

I will try to make sometime over the weekend to try to give your mum a rest. Your dad isn't eating much at present Liz. I think he is feeling grimmer than he admits to. Angela

(exhibit A, page 118)

***9 July 2012 - 8:45 am***

Hi Elizabeth, I didn't respond because we have so many appointments. We can't do this Friday hospital appointments. We can't do next Wednesday 18th Blood transfusion. We have a local doctors appointment Wednesday which will mean blood tests and injections this week sometime. My head is spinning with appointments.

Angela

(exhibit A, page 120)

***20 September 2012***

Hi there Elizabeth, I will do Monday night. Your dad will come with me and go home if he is tired. That is if the surgeon hasn't got him scheduled for next week. Angela.

(exhibit A, page 122)

***19 September 2012 - from Liz***

Hi Angela

Thanks for that, I will put you down for Thursday and Friday, it doesn't look like my Mum will be back til Friday night. ...

Thursday 20th: Collect from playschool and stay til Michael gets back from his course; should be between 5.30 and 6 pm\* ANGELA TO DO[.]

(exhibit A, page 123)

***21 October 2012***

Sorry Elizabeth but Erica did ask for me to baby sit tomorrow night so they could [celebrate] their wedding [anniversary]. I will pick Andrew up and stay with him until about 5.15 pm. I am sorry to let you down but I

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know that it is an important day for them. Your dad will come and join me and then I will drive in to Perth. Bye for now. Angela.

(exhibit A, page 125)

**29 October 2012**

Thursday, I can pick Andrew up when we return from the hospital and I can do the Monday, Angela

(exhibit A, page 126)

**12 November 2012 - from Liz**

...

Mum and Angela to do the Primary School thing with Andrew then Mum has to go away and Angela for the rest of the day•

(exhibit A, page 128)

**11 December 2012**

I have Chase this Friday from 7 am until about 4 pm and Sam tomorrow night Wed from 5pm until 9.30 pm. Your Dad has chemo on Thursday. He might not be feeling too well on Friday. I don't mind taking over late afternoon. Last time your dad had chemo, it made him feel really [nauseous] so a sleep over this weekend could be difficult. When Eupheme stays (only twice), I sleep with her. That way if she wakes up it doesn't disturb your dad. Don't know what is happening yet Saturday. Angela

(exhibit A, page 131)

**21 May 2011**

Not sure as we are often on grandchildren baby sitting duties but please decide and we will break our necks to make it. Andre's daughter is a manager in a tavern and her hubby is on fly in fly out routine so we are called on a lot. Will do our best to be there whatever dates are chosen. Angela.

(exhibit A, page 134)

59 It is evident from the exchange of emails that Angela and Andre frequently babysat Elizabeth's child. It is also evident that Angela and Andre were invited to family functions by Elizabeth (exhibit A, page 153).

60 The emails are strong evidence that Elizabeth regarded Angela and  
Andre as a couple.

61 The emails also provide evidence of an affectionate relationship  
between Angela and Elizabeth prior to Andre's death.

62 The Court can infer from Elizabeth's relationship with Angela that  
Michael did not feel adversely about Angela. It would be unusual for  
Elizabeth to have such a relationship with Angela if Michael strongly  
disapproved of her.

63 There are a large number of emails from Angela to various people  
informing them of Andre's health and treatment (exhibit A,  
pages 187 - 211).

64 In February 2013, Andre and Angela visited Philippe's home in  
Melbourne (exhibit A, page 214).

65 In June 2013, Philippe and his family visited Andre and Angela in  
Perth. It appears that Philippe was known in the family as 'Fleep'.

66 On 19 June 2013, Philippe sent the following email to Angela  
(exhibit A, page 216):

Sorry we didn't get to see you before we left yesterday. We dropped by in  
the morning but alas you were already gone.

I didn't get to talk to you aside but thank you for all you've done in helping  
look after Dad in this difficult time and I just hope you're bearing up okay.  
Please let me know what I can do for Dad, you or both of you whenever  
I can[.]

...

Fleep

67 The emails between Angela and Philippe provide evidence of an  
affectionate relationship between Angela and Philippe (for example,  
exhibit A, page 216).

68 Angela sent various emails to Philippe and Laura updating them on  
Andre's treatment (exhibit A, pages 219 - 221).

69 On 15 July 2013, shortly before Andre's death, Philippe sent the following email to Angela (exhibit A, page 220):

I am struggling to write this myself as I can barely find the words, but I thank you very much for caring for Dad in such tough circumstances.

70 These emails from Philippe provide strong evidence of Angela's care for Andre during his illness.

71 The contents of Philippe's evidence are supported by Mr Peirce's evidence. The Court notes that the contents of the emails are in stark and irreconcilable contrast to the contents of Philippe's affidavit which in effect stated that Angela care of Andre was poor. For example, in his affidavit, Philippe stated (exhibit A, pages 443 - 444, pars 45 - 47):

Angela was not around much during this time [Andre's final weeks], she would usually leave the house as soon as I arrived to be with Dad.

### **Photographic evidence**

72 There are various photographs which show Angela and Andre attending events with Elizabeth and/or Andre's families (exhibit A, pages 148 - 149, 156 - 157, 169).

73 There are photographs showing Andre and Angela visiting Andre's half-sister in Canberra (exhibit A, pages 174 - 175).

74 There are photographs showing Andre and Angela attending Elizabeth's family events (exhibit A, pages 158 - 159).

75 It is plain on Angela's evidence and that she and Andre frequently attended functions with each of their families (exhibit A, pages 48 - 51). Her evidence is supported by the photographs referred to in her affidavit

76 There are photographs of Angela and Andre on holiday together (exhibit A, pages 170, 173).

77 There are photographs of Andre and Angela together at various functions of their social group known as 'The Gang' from New Year's Eve 2003/2004 (exhibit A, pages 176 - 179).

78 Philippe, Laura, his wife and their daughter Audrey visited Perth in 2012. A series of images taken at the time are typical of proud 'grandparents' (exhibit A, pages 141 - 142).



79           The photographic evidence strongly supports Angela's evidence that there was a de facto relationship between her and Andre.

**Non-party evidence**

**Fiona Blake**

80           An affidavit was sworn by Fiona Helen Blake on 27 May 2016 on behalf of Angela. Fiona Blake had known Angela as a colleague and a friend for over 20 years (exhibit A, page 249).

81           Ms Blake's affidavit at pars 3 - 4 (exhibit A, page 249) stated:

I heard about Andre from Angela before I met him. This was around the same time I was going out with my now husband, Wayne, in the late 1990's.

I remember Angela telling me that she and Andre shared a love of music, books, classics, movies and had the same sense of humour, that they stimulated each other intellectually and I looked forward to meeting him. It sounded as though she had met her 'man', as I had in Wayne.

82           At pars 5 - 9 of her affidavit (exhibit A, page 250) Ms Blake stated:

Angela and Andre came to our wedding on 3 July 1999.

We have a group of friends, about sixteen in all, called the 'Gang' which was brought together by Wayne and me in 1999. Since then we have had many parties at each other's houses. There was usually a theme to these parties.

Angela and Andre rarely missed a party and joined in with everything we did. Angela was usually the one who thought up the fun themes.

Andre was well known for his phenomenal memory for funny stories and jokes and dressed up if the occasion called for it.

We are a very close gang. As well as our regular parties, we also meet for dinners and lunches when we can. Angela and Andre attended these social occasions together until Andre became too ill. It was usual for Angela and Andre to stay the night with friends after these get together, rather than drive home, as we often stayed up late to chat.

83           Paragraphs 17 and 19 of Ms Blake's affidavit (exhibit A, page 251) stated:

From my own observations of them, in every way Angela and Andre were a couple since the late 1990's. I am aware from conversations with them that Andre lived with Angela and then she lived with him until his death.

...

Often I would hear more about Andrew than Angela's granddaughter, Eupheme. There was no distinction between his and her grandchildren, they were all 'their' grandchildren.

84 Ms Blake's affidavit at pars 23 - 24 (exhibit A, page 251) stated:

Angela, along with our other friends, knew Andre was ill before he was diagnosed with cancer but none of us knew what was wrong.

Angela made every effort to get Andre to see a doctor and when he did go and found out that he had cancer it was devastating news, especially for Andre and Angela.

### **Michelle Fitzgerald**

85 Michelle Fitzgerald is Andre's half-sister (exhibit A, page 242). Michelle Fitzgerald's evidence was (exhibit A, page 243):

From 1991 up to the time of his death, Andre, my brother Paul and I kept in close contact, celebrating birthdays, Christmases and significantly, the anniversary of the day we first met. My extended family and I regarded Andre as a close family member from the day he came into our lives.

86 Michelle Fitzgerald's evidence was that Andre introduced Angela to her around 15 years ago, that is about 2001 (exhibit A, page 241).

87 At pars 12 - 15 Ms Fitzgerald's affidavit (exhibit A, page 243) stated:

I believe that Andre introduced me to Angela relatively early on in their relationship.

At the time Andre introduced me to Angela, I understood that they had become a couple. Later, Angela moved into Andre's house in Kalamunda.

On occasion, Andre and Angela visited me in Canberra. I also stayed with them at their Kalamunda residence.

A few months before Andre's death, Andre and Angela visited me in Canberra and they shared a bedroom in my house so I have had no reason not to regard them as a couple right to the end.

88 At pars 21 - 22 of her affidavit (exhibit A, page 244), Ms Fitzgerald stated:

When we talked or visited, I observed that Andre regarded himself as a member of Angela's extended family in that conversation would normally range across our full extended families and Andre was always very familiar with the latest news of Angela's own family members.

Andre and Angela appeared to accept each other's grandchildren as their own. When either of them welcomed a new grandchild, I felt comfortable in sending greeting cards that congratulated them both jointly as new grandparents.

89 At par 24 of her affidavit (exhibit A, page 245) Ms Fitzgerald stated:

At Andre's funeral service, little Andrew came over to Angela who was sitting close to me and cuddled up to her for the length of the service, I could not but conclude that Angela had a deep loving relationship with little Andrew. From my observations and conversations, I understood that Angela regularly babysat Andrew so that his mother could work and this continued after Andre became ill.

90 Paragraphs 27 - 35 of Ms Fitzgerald's affidavit (exhibit A, pages 245 - 247) stated:

I cannot comment directly on Angela's day-to-day care of Andre while he was ill with cancer because I was not living in Perth. I can however say the following:

- (a) Whenever I would phone to inquire about Andre I usually talked to both Andre and Angela and I was kept updated about the progress of Andre's illness.
- (b) I heard of the times that Angela accompanied Andre to medical appointments, the hospital and chemotherapy sessions.
- (c) From those discussions and my previous interaction with Angela and Andre, it seemed to me that they were in it together and mutually supporting each other.
- (d) On the occasions when I visited them and when they visited me, I would describe Angela's concern for Andre's wellbeing as caring, kind, attentive and considerate. After Andre became ill and when I talked to them both on the phone, I had the sense that Angela was her usual caring self and that she was ferrying Andre around to his treatments and generally looking after him.
- (e) I was grateful that Andre had Angela by his side and that Angela made it possible for him to pass on without leaving his beloved Kalamunda home.

...

From my observations, I regarded Angela and Andre as a couple in a permanent long-term relationship until Andre's death.

Andre never indicated to me in word or deed that they were not a couple and this extended right up to his death.

From my observations, and conversations with Andre, I believe that Angela had a very positive impact on Andre's life. With Angela, Andre was able to share, for example, a love of travel, opera, music, literature, history and the cinema. They also both shared a love of animals and the Australian bush. Andre would return from his trips with Angela and recount to me the memorable experiences. For example, Andre would touch on history, architecture and culture. On occasions the three of us would discuss literature, movies and music that we enjoyed as well as the faraway places that we visited.

In witnessing Angela's unstinting generosity in providing safe, regular, warm loving care for Andre's first grandchild, I felt that this provided Andre with the opportunity for a closer contact with this grandchild than he might have had otherwise.

I felt that with Angela; Andre had the stimulation of mutual interests with a loving, compatible partner.

- 91 It is probable that Ms Fitzgerald's primary loyalty was to her half-brother, Andre, rather than to Angela. It is therefore unlikely that her evidence would have been coloured by any friendship with Angela. Overall, her evidence reveals a continuing loving relationship between Andre and Angela.

### **Harold Peirce**

- 92 Mr Peirce (also known as Guy) swore an affidavit dated 2 June 2016 in support of Angela. Mr Peirce first met Andre in about 1960 (exhibit A, page 265).

- 93 Mr Peirce's affidavit at pars 18 - 22 (exhibit A, page 267) stated:

From my friendship with Andre and Angela and observations of them together, I believed that Andre and Angela planned a future together. From discussions that I had with both of them, I was aware that Angela had sold her house before she moved in with Andre.

Andre and I had many discussions about selling the Kalamunda property, the value of the house and when it would be a good time to sell. Andre told me that he intended winding down his electrical business in Kalamunda in anticipation of selling out and building a home in Denmark, Western Australia.

From about the 9th to the 13th of April 2004, Pim and I travelled to Denmark with Andre and Angela for a long weekend. We rented accommodation with Andre and Angela. We spent time together eating out, visiting wineries and generally sightseeing. Attached to my Affidavit and marked 'HJP4' is a copy of my diary entry for 13 April 2004 which states 'Coming back from Denmark'.

During that trip, Pim and I accompanied Andre and Angela to a block of land they were considering purchasing to build a home for their future. I recall Andre said he planned to have chickens and described in great detail the position of the chook shed. Attached to my Affidavit and marked 'HJP5' are copies of photographs taken of Andre, Angela, Pim and me during that holiday.

In later years, after their grandchildren were born, there was less talk about the Denmark block, however, Andre never expressed to me that this plan was abandoned.

94 Paragraphs 29 - 37 of Mr Peirce's affidavit (exhibit A, pages 269 - 270) stated:

From my own observations and from the time I met Angela until Andre's death, there was never a question of the relationship between them being anything other than a close personal loving relationship between partners. Andre doted on Angela and in turn, she on him. In my presence, Andre expressed this by his respect for Angela, his politeness in the way he spoke to her and about her and he always treated her like a lady.

From my experiences with Andre and Angela, they shared a quality of life together where they could travel together, loved and shared music, art and meals out at restaurants with friends. They never discussed their financial arrangements with me.

Andre never expressed to me any dissatisfaction with Angela or with their relationship.

There was never a question in my mind that there were any indications of difficulties in the relationship. Andre and Angela appeared to me to be making a life together and enjoying each other. They projected happiness as a couple. My view did not change over the course of the years I witnessed them together and it has not changed now.

After Andre became ill with cancer, I saw Angela's dedication to his care. Whenever Pim and I visited Andre in hospital, Angela was always there. When we came to the Kalamunda home to see Andre, Angela was there. Pim and I personally witnessed her care of Andre on several occasions.

When Andre was in the final days of his illness, Pim and I visited the Kalamunda home for the last time. Andre was very ill. We shook hands and he acknowledged that Pim and I were there.

Andre's son and his partner were also at the Kalamunda house. Pim and I sat with them and they both spoke glowingly to us of Angela's dedicated support of Andre. I particularly recall Andre's son expressing his gratitude for all that Angela had done for his Dad.

I saw no signs of animosity between Andre and Angela or between Angela and Andre's family.

Pim and I attended Andre's funeral and witnessed his grandson Andrew sit with Angela.

95 It is probable that Mr Peirce's primary loyalty was to his long-time friend rather than to Angela. It is unlikely that his evidence would be coloured by his friendship with Angela. Overall, her evidence reveals a continuing loving relationship between Andre and Angela.

### **Conclusion**

96 Each of Michelle Fitzgerald, Fiona Blake and Harold Peirce was close to Angela. However, none of them has any interest in a financial sense in the outcome of these proceedings. The only interest each of them had was as a friend or relative. The Court is satisfied that they gave their evidence honestly and that their evidence was substantially accurate. Their evidence reveals a continuing loving relationship between Andre and Angela.

### **Evidence of the parties or their spouses**

#### **Angela's evidence - gambling**

97 Angela had a clear self-interest in giving evidence.

98 Before turning to Angela's other evidence it is necessary to deal with her evidence relating to her gambling because her evidence in relation to gambling colours all of the other evidence that she gave.

99 Angela's evidence in her affidavit regarding her gambling was (exhibit A, pages 55 - 57):

120. I am part of a group of female friends of similar ages who socialise at the Casino, including Anne Caroll. We choose to go to the Casino for social outings for several reasons. Firstly, it is a relatively safe environment with security in place; secondly there are flexible hours available unlike cafes and shopping centres. We are able to arrange outings which accommodate our other commitments and it has places to eat and drink which are relatively cheap.

121. I did not keep my social visits to the Casino a 'secret' from Andre. He knew that I was going out to meet friends, I may not specifically have mentioned that I was going to the Casino for the same reason I would not specifically name a cafe if I was going meet friends there.

122. On at least two occasions I can remember Andre suggesting that we stop at the Casino and get a coffee together on the way back from a night out somewhere. Andre was also aware that I would visit the Casino with my sister Patricia and brother-in-law Grahame when they were visiting us.
123. I usually play the 20 cent slot machines but not the other games. Whilst I often attend with friends, sometimes I will go to the Casino on my own. I have in the past gone to the Casino if a thunderstorm has happened in Perth. I am afraid of storms and have sought out company and security in the Casino during storms after Andre's death.
124. The Casino also provides automatic teller machines. I do have a credit card but I also carry cash. I prefer to pay my bills with cash or my debit card.
125. Although I also use ATMs near my home for the sake of convenience, I feel vulnerable withdrawing funds from an ATM and prefer to withdraw cash from ATMs located in the Casino which are monitored by security. I carry cash in my purse for expenses and to have it available when needed.
126. During Andre's illness I stayed home to care for him, rather than socialising. I refer to Attachment 'EDT5' of Elizabeth's Affidavit and say that the 1997 bank statement was from a time before I met Andre. The bank statements from 1999 until 2003 reflect a period where I was working and able to afford to socialise more regularly. The statement beginning at page 35 of Elizabeth's Affidavit confirms that I attended the Casino once in the lead up to Andre's death on or about 1 July 2013.
127. Gambling is not a motivating factor in my attendance at the Casino. There are many facilities at the Casino which can be enjoyed with a social group. We did not always have to arrange times with each other as we knew each other's routines and knew which times to turn up each week in order to catch each other. Sometimes if I had not been to the casino for a while, friends would send me a text asking when I was going to be there next. We are a support network for each other.
128. Andre never expressed to me that he had an issue with gambling so there was no reason for my trips there to be secret. The Taylor family regularly spent money on Lotto tickets. For several years, we had a 'syndicate' of six including the First Defendant, Elizabeth, Michael, Philippe, Andre and me. Initially we all put in money for the tickets but it became too difficult to collect. A roster was developed so each person took it in turns to buy the tickets for the group.

129. I recall that we once won approximately \$6,000.00 and otherwise had small successes together. Attached to my Affidavit and marked 'AM34' is a copy of an email dated 2 April 2012 from Elizabeth to the family inviting us to provide our bank details for the transfer of winnings. Attached to my Affidavit and marked 'AM35' is a copy of an email from Philippe to the family advising that he had bought additional Lotto tickets for everyone. Attached to my Affidavit and marked 'AM36' is a copy of an email from the First Defendant dated 18 May 2013 attaching one of the family rosters to buy tickets.

130. On some weeks, Andre would spend around \$150.00 on Lotto tickets, in addition to the family syndicate. Andre would also regularly place bets at the TAB connected to the Rose and Crown pub whenever we went there for a meal. He particularly liked to play 'Favourite Numbers' through the TAB.

131. While a group of us will sit together and play the 20 cent slot machines for some of the time before going to a restaurant there or cafe, I view my trips to the Casino as purely social. These outings, which I still enjoy with my friends, were a time for female company in a secure environment.

100 Anne Lilly Carol swore an affidavit 27 May 2017 in support of Angela. Her evidence is that she had been friends with Angela for about 10 years and had come to know her more closely since the death of Andre. The tenor of that affidavit is that Angela only played the 20 cent machines and Angela's visits to the casino were more social visits than anything else.

101 As explained below, it is plain that Angela did not reveal the extent of her gambling problem to Anne Carol. Although I accept that Anne Carol's affidavit is true, so far as she knew, she was obviously unaware of the extent of Angela's gambling. No weight can be placed on her evidence.

102 A subpoena was issued to Crown Casino by Elizabeth and Philippe for it to provide its records of Angela's gambling. The documents provided in answer to the subpoena appear in exhibit B, pages 81 - 245. The evidence in exhibit B establishes that Angela had a gambling problem from 2012 and a significant gambling problem from 2013. The evidence in exhibit B completely discredits Angela's evidence as to her gambling.

103 A yearly table of Angela's gambling from 2006 to 2016 appears at exhibit B, page 81. The table shows that Angela is recorded as:



- (a) gambling only once prior to 2012;
- (b) losing \$8,302 in 2012;
- (c) losing \$25,165 in 2013;
- (d) losing \$32,933 in 2014;
- (e) losing \$34,411 in 2015;
- (f) losing \$14,026 in 2016;
- (g) attending between 130 and 261 days a year over the period peaking in 2014; and
- (h) attending on 145 days in 2012 and 157 days in 2013.

104 Elizabeth and Philippe tendered in evidence a calendar showing the days in which Angela attended Crown Casino in 2013 (exhibit D). The calendar shows a very marked increase in Angela's gambling after Andre's death.

105 The evidence in the yearly table is incomplete for the period prior to 2012. There were clearly occasions prior to 2012 when Angela withdrew money from ATMs to gamble at the Casino

106 There is evidence of Angela withdrawing money from her bank accounts at ATMs including at the Casino prior to 2012 (For example, exhibit B, page 295, 27 November 2008; page 296, 17 December 2008; page 298, 12 January 2009 and 14 January 2009; page 299, 28 January 2009 and 2 February 2009; page 302, 28 April 2009; and page 304, 8 July 2009). However, those occasions appear to be intermittent and nowhere near as sustained as from 2012 onwards. When Andre fell ill and particularly, subsequent to his death, Elizabeth annexed a large number of BankWest statements in Angela's name to her affidavit at exhibit EDT 5. The remainder of the accounts show some days on which up to \$700 was withdrawn at the Casino. However, there are not sufficient statements to form any view as to whether, during the period prior to March 2012, Angela was a problem gambler.

107 Angela was cross-examined extensively about her gambling (ts 59-78; 4 October 2017). The Court rejects Angela's explanations as to the level of her gambling. The documentary evidence is clear that she has an extensive gambling habit from 2012.

108 In closing, counsel for Elizabeth and Philippe concluded that  
Angela's gambling habits prior to 2012 are really unknown (ts 286;  
6 October 2017).

109 The area of Angela's evidence that is most problematic is that  
concerning what she describes under the heading 'Socialising at the  
Casino' (exhibit A, pages 55 - 57). Given the records in exhibit B, it is  
plain that Angela has not accurately described the gambling issues that  
she had at the Casino. Her gambling was plainly more than simply social  
gambling and the Court does not accept her evidence relating to her  
gambling. In particular, the Court does not accept that her trips to the  
Casino were purely 'social'.

110 Gambling can be addictive. It is clear that from 2012 to 2016,  
Angela's gambling is consistent with an addiction. In closing, counsel for  
Elizabeth and Philippe conceded that Angela was an addict (ts 280;  
6 October 2017). However, her gambling during this period should be  
seen as a health issue rather than a moral issue. Many addicts seek to hide  
their addiction. Many people seek to hide their problems from others. It  
is obvious that Angela sought to hide the extent of her problem from  
others, including the Court. That does not excuse her failure to admit to  
her gambling problems, or her addiction, but it does explain it.

111 It is convenient at this point to also note the errors in Angela's other  
evidence when compared to the documentary record. Some of these are  
detailed below as examples of errors. Overall, Angela's evidence in  
relation to these items was careless, rather than untrue.

112 Angela's evidence in relation to her gambling and gambling problem  
however was untrue. This has the consequence that the Court has treated  
Angela's evidence generally with caution unless it is corroborated by  
documentary evidence or other evidence or a reasonable inference can be  
drawn from the surrounding circumstances.

113 However, Angela's gambling has to be seen in the context of Andre's  
illness and his death which led to a very significant increase in her  
gambling.

114 Angela's significant gambling is recorded as starting on 10 March  
2012.

115 Angela gave evidence that she experienced high levels of stress in  
the year prior to Andre's death and the months following his death  
(exhibit A, page 17). That is to be expected.

116 The evidence of Ms Blake that they knew Andre had a health  
problem before his diagnosis is set out above (exhibit A, page 251). This  
is confirmed by Mrs Taylor whose evidence was that Andre had been off  
colour for some time and foolishly had not gone to the doctor (exhibit A,  
page 310).

117 Andre was diagnosed in June 2012, a day after he retired (exhibit A,  
page 10).

118 Andre died on 28 July 2013.

119 The Court notes that relations between Angela and the defendants  
deteriorated very quickly after his death. A week after his death, Angela  
commenced going to the Casino again. There is a substantial increase in  
her daily attendance at the Casino from 4 August 2013. Counsel for  
Elizabeth and Philippe conceded that there was a 'massive spike' after  
Andre's death (ts 286; 6 October 2017).

120 People cope with grief and the prospect of loss differently. Based on  
the correlation between Angela's attendances at the Casino and the onset  
of Andre's illness, it is a reasonable inference that Angela's increased  
gambling was a reaction to the onset of Andre's illness and his subsequent  
death.

### **Angela's evidence - other than gambling**

121 Angela's evidence is that at that time she met Andre, she was living  
in rental accommodation in Point Walter Road, Bicton and Andre was  
living in his home at 74 Spring Road, Kalamunda (exhibit A, page 6).

122 Angela's evidence was that she was the de facto partner of Andre  
from when they met and commenced their relationship in 1998 and until  
Andre's death on 28 July 2013 (exhibit A, page 5).

123 Angela's evidence is that Andre was living with her in her home or  
she was living with him at 74 Spring Road, Kalamunda in the early days  
of their relationship in 1998 (exhibit A, page 36).

124 Angela's evidence is that when she lived with Andre they slept in the  
main bedroom and they had a sexual relationship until Andre's health  
deteriorated (exhibit A, page 37).

125 At pars 14 - 17 of her affidavit (exhibit A, page 7), Angela stated:

Over time, we became a couple and we spent regular time at each other's houses and socialising together. Both of us were working fulltime. Andre ran an electrical business and I was employed as a childcare centre operator.

In early 2000, Andre and I travelled together to Hong Kong and China to meet my sister Patricia and then to the United Kingdom to meet my father who was then unwell. This was the first of many holidays together.

I had given up my rental unit in Bicton before the holiday and I remained in the United Kingdom for approximately 8 months to care for my father. Andre spent 7 weeks with me on holiday before returning to Australia. During my time in the United Kingdom, Andre and I spoke by telephone two or three times a week.

When I returned from the United Kingdom, I moved into the Kalamunda property with Andre. Our arrangement was that I would pay for our food and petrol and he would pay the other bills. After approximately six months, we had a discussion in which Andre said to me that 'I was costing him too much' and that he was considering ending the relationship. I was very hurt and shocked. I took time off from work and arranged to move to a rental unit in Hamilton Hill.

126 Angela left Australia in January 2000. Angela had negotiated up to a year off from her employer to care for her father in the United Kingdom.

127 The Court accepts Angela's evidence that she and Andre travelled together to Hong Kong and China to meet her sister Patricia and then to the United Kingdom to meet her father, who was then unwell.

128 The documentary evidence is consistent with Angela living in the United Kingdom in 2000 (exhibit B, page 19). Whilst living in the United Kingdom, in around the middle of 2000, Angela applied for a full time job in the United Kingdom (ts 20; 4 October 2017). Neither Angela nor Andre were sure when she would return (ts 21; 4 October 2017). Angela's evidence was that if she had been successful in her job application, Andre would have moved to the United Kingdom to join her (ts 116; 5 October 2017).

129 Angela returned to Australia from the United Kingdom on 10 August 2000 (ts 19; 4 October 2017).

130 Angela must have moved to Hilton in about 2001 if she lived in the United Kingdom for eight months in 2000. It would appear that the reference to Hamilton Hill in her affidavit is an error. The documentary

evidence is that Angela lived in Hilton in June 2002 during at least May to June 2002 (exhibit B, page 21).

131 At par 20 of her affidavit (exhibit A, pages 7 - 8), Angela stated:

When my lease at the Hamilton Hill unit was finished, I purchased a house in Randford Road, in Canning Vale for \$257,000.00. I lived there for approximately two years. Andre continued to stay with me seven nights a week. He would come straight from work and have a meal with me and stay overnight. We also stayed together in the Kalamunda property from time to time.

132 There is no evidence of Angela purchasing a house in Randford Road Canning Vale but she did purchase a house at 7 Audley Place, Canning Vale. The reference to Randford Road in her affidavit is an error.

133 In cross-examination, Angela gave evidence of the rings given to her by Andre at a party at Ms Blake's house in August 2002 (ts 36; 4 October 2017). Angela suggested that Ms Blake might have been doing something else when Andre mentioned it to everybody (ts 33; 4 October 2017). Ms Blake 'understood' that Andrew and Angela were engaged but she was unable to identify a particular occasion on which she was told of their engagement (ts 127 - 128; 5 October 2017).

134 The Court does not accept that if the engagement had been mentioned at a party at Ms Blake's house that Ms Blake would have been unaware of it. It defies logic. The Court does not accept Angela's evidence as to the announcement of her engagement at a party at Ms Blake's house.

135 At par 21 of her affidavit Angela stated:

As time went on, we made plans for our future together and discussed marriage. In 2002, Andre asked me to choose an engagement ring and wedding ring which he purchased for me.

136 The documentary evidence confirms the purchase of an engagement ring and a wedding ring in August 2002 (exhibit B, pages 23 - 25). Angela's evidence is that Andre bought the wedding ring at the same time as they chose her engagement ring from a jeweller in London Court (exhibit A, page 38). The purchase of the engagement ring and the wedding ring in August 2002 is consistent with the divorce between Andre and Mrs Taylor being finalised in May 2002 (exhibit A, page 307).

137 At par 22 of her affidavit Angela stated:

We discussed our intention to sell our respective properties and to purchase a joint property in Denmark, Western Australia, when we retired. At Andre's request, I placed the Canning Vale property on the market in December 2005 and it sold within a week. I received approximately \$150,000.00 from the proceeds of sale. I moved back in to the Kalamunda property with all my furniture, some of which we stored in Andre's large brick shed on the property.

138 The evidence is that Angela sold 7 Audley Place on 22 October 2004. Again, Angela has made an error in her affidavit - this time as to the date when Audley Place was sold.

139 Angela's evidence is that she and Andre planned to get married to coincide with their plans to retire to Denmark (exhibit A, page 38).

140 Angela's evidence is that it was Andre who encouraged her to sell her house in Canning Vale so they could jointly purchase and build a house in Denmark (exhibit A, page 38; see also exhibit A, page 10).

141 Angela's evidence of a planned move with Andre to Denmark is confirmed by Mr Peirce (exhibit A, page 267).

142 The Court accepts that Andre did buy Angela an engagement ring and a wedding ring and that they planned to become engaged when they moved to Denmark.

143 The Court notes that the list of assets prepared by Andre (exhibit H) does not include the engagement ring and the wedding ring. The Court has concluded that it is likely that Andre gave these to Angela at some point, probably in 2002. Hence, they were not included in the list of assets.

144 Angela's evidence is that given that she no longer an income from work, she had been supporting herself financially from savings. This makes logical sense to some extent.

145 Angela's evidence is that she told Andre that she would not be able to afford a house because she had put the proceeds of the sale of the Canning Vale property into her superannuation and was using her savings for living expenses (exhibit A, page 39).

146 If the plan was to use the proceeds from the sale of Audley Place so they could jointly purchase and build a house in Denmark, it is difficult to understand why that money was put into superannuation. While the Court

infers that Angela would not have sold her house unless she was confident that she would be moving in with Andre on a permanent basis, the Court does not accept that she sold the house to jointly purchase a house in Denmark.

147 After the sale of 7 Audley Place, Angela had \$170,000 and two 'superannuation/annuity', one of \$59,000 and one of \$44,000. It is not entirely clear but one of the amounts appears to an allocated pension (ts 85 - 86; 4 October 2017).

148 The documentary evidence is not inconsistent with Angela moving into 74 Spring Road in late 2004 as a result of selling 7 Audley Place. Angela's oral evidence was that she moved into 74 Spring Road before Christmas in 2004 (ts 86; 4 October 2017).

149 Angela's evidence is that she and Andre's plans to move to Denmark changed as a result of them both having grandchildren (exhibit A, page 39).

150 Philippe confirms that Andre at least had plans to move to Denmark from about late 2006 and that that idea dissipated when his grandson Andrew was born (exhibit A, page 451).

151 At par 14 of her affidavit (exhibit A, page 251), Fiona Blake stated:

Andre often spoke about wanting to relocate to Denmark with Angela and to buy or build a house on a few acres where he could raise chickens and write children's books.

152 Elizabeth gave evidence that (exhibit A, page 344, par 73(b)):

I refer to paragraphs 22 and 35 of [Angela's] Affidavit in which Angela states that she and Dad had intended to move to Denmark together. Dad never mentioned moving to Denmark to me. In 2008, I told Dad I was pregnant. During this conversation, Dad insisted he wanted to be an active grandfather and remain close to spend time with Andrew. For this reason I believe Dad had no intention of moving to Denmark.

153 The Court does not accept Elizabeth's evidence that her father had no intention of moving to Denmark. The evidence is clearly to the contrary.

154 The decision not to move to Denmark is consistent with the changes that occurred once Andre and Angela had grandchildren.

155 Angela gave evidence that between 2006 and 2008 she worked on a casual basis as a paid babysitter for several families (exhibit A, page 9).

156 The defendants sought to make something of the fact that Angela had been babysitting and was receiving income for doing so (ts 54 - 58; 4 October 2017). There is a series of emails which record that Angela was babysitting. Angela disclosed in her affidavit that she had an income from babysitting. The amount earned is not clear nor was any evidence led from the defendants as to the impact any income may have had on her pension. The Court is not satisfied that Angela failed to appropriately declare any income and that an adverse inference should be drawn against her in relation to their issue.

157 Angela's granddaughter Eupheme was born in the United States on Christmas Day 2008, Andre's grandson Andrew was born on 28 February 2009.

158 Angela spent some time in the United States after Eupheme's birth looking after her and then returned to Spring Road. She left Australia on 9 February 2009 and returned on about 23 April 2009 (ts 52; 4 October 2017).

159 In her affidavit (exhibit A, page 45, pars 59 - 63) Angela stated:

I spent a lot of time with Andrew and was heavily involved in his care, including taking him to playgroup, picking him up, having him at our home in Kalamunda and taking him and my granddaughter Eupheme on outings. When the family socialised together Andrew would often ask for me to change his nappy or to hold him.

Some of the babysitting shifts for Andrew were for extended hours and late at night. If I had been elsewhere during the day, I would meet Andre at Michael and Elizabeth's home and care for Andrew. Andre and I would often share the longer babysitting shifts rather than both of us being there for the whole time. This allowed Andre to go home earlier if he had had a long day at work and I would follow when Elizabeth returned home from her job,

As Andrew grew older, I picked him up from day care, spent time in the park with him, took him home, fed and bathed him and put him to bed. Andre would often be with me in Michael and Elizabeth's home, however, as he became more and more unwell, I encouraged him to go home and rest while I attended to Andrew. It was a pleasure for me to do this as I regarded Andrew as my grandson and he and I had a close bond.

Andre and I loved spending time with Eupheme and Andrew. Andre shared my love and affection for both grandchildren. Andre would collect and share his knowledge of the wildlife around our home and his love of music with Eupheme as well as Andrew. Attached to my Affidavit and marked 'AM7' is a pair of emails in which I describe our babysitting



experiences to friends and family and I confirm the content of those emails. Attached to my Affidavit and is a copy of my email to my friend Maureen Rewi dated 21 May 2011 and attached to my Affidavit and marked 'AM7(b)' is a copy of my email to my niece Hannah Abbotts dated 8 September 2012.

Andrew called me 'Grandma' from a very early age. The First Defendant chose to be called 'NanT' and I said I would be called 'Grandma'. Andre was called 'Grandad'. Attached to my Affidavit and marked 'AM8' is a copy of a birthday card I received from Elizabeth, Michael and Andrew which was addressed to 'Grandma'.

160 In her affidavit at par 64 on page 46 of exhibit A, Angela stated:

In paragraph 25 of his Affidavit Michael refers to a conversation with Andre in 'October or November 2008' about my failure to look after Andrew. This could not be correct as Andrew was not born until February 2009.

161 In her affidavit at par 69 on page 46 of exhibit A, Angela stated:

Andre and I had planned a trip to Melbourne in September 2012 to meet Audrey but at that stage Andre was too unwell to travel. Philippe and Laura brought Audrey to Perth in October 2012 as a surprise for Andre's 70th birthday. They stayed with the First Defendant and would come to the Kalamunda house to visit us. We would also go to the First Defendant's house for coffee. I offered Philippe and Laura accommodation and suggested that they invite their friends to the Kalamunda property if they wished to do this.

162 In her affidavit at par 84 on page 49 of exhibit A, Angela stated:

Andrew and Eupheme, being of a similar age, were good play mates. I arranged play dates with them when I babysat for Andrew. Attached to my Affidavit and marked 'AM20' are four photographs of Andrew's third birthday celebrations on 3 March 2012 at Elizabeth and Michael's home with Michael, Elizabeth, the First Defendant, Andre, Andrew, Eupheme and me.

163 The relationship between Angela and Andre and their grandchildren is confirmed by the evidence of Ms Blake (exhibit A, page 251) and Ms Fitzgerald (exhibit A, page 244). Andrew was Andre's grandchildren, although both grandchildren Andrew and Eupheme were treated as both their own grandchildren.

164 Angela's evidence is that at Andre's funeral, Andrew moved away from his parents, Elizabeth and Michael, and came and sat with Angela (exhibit A, page 64).

165 Mr Peirce confirms that Andrew sat with Angela at Andre's funeral  
(exhibit A, page 270). Neither Michael, nor Elizabeth, nor any of the  
defendants disputes that Andrew sat with Angela during the funeral.

166 The probable inference is that there must have been a close  
relationship between Angela and Andrew.

167 Andre and Angela assisted in looking after Andrew following her  
return to Australia from the United States. There is considerable  
contemporaneous documentary evidence (in the form of emails, some of  
which are set out above) of Angela babysitting Andrew with or without  
Andre. Both Andre and Angela appear to have treated each other's  
grandchildren as their own. There is evidence to that effect from  
Ms Fitzgerald (exhibit A, page 244).

168 The financial arrangements between Angela and Andre are described  
at pars 99 - 113 on pages 52 - 53 of exhibit A:

Andre and I chose to keep our bank accounts separate, but shared the usual  
things that couples share.

When Andre lived with me at Hilton, Willagee and Canning Vale, I paid  
for all household expenses as well as the food.

When I first moved in with Andre, I saw that he bought cheaper food for  
himself. I paid for better quality food and did all the cooking for both of  
us. Andre complimented me on my cooking. I also paid for my own  
petrol and maintaining my car. When we went out together, we always  
used my car as the family car.

I also bought most of Andre's clothes.

As I have described at paragraph 11 of my previous Affidavit, after  
approximately 18 years of working at South Lakes, I had a heart scare and  
retired from my paid employment.

As I have described in my previous Affidavit, in the years prior to me  
being eligible to receive the pension and during the period I received a  
reduced pension, it was difficult for me to contribute much to the  
household expenses. This may well have frustrated Andre however,  
I cannot recall having any serious arguments with him about the household  
expenses.

Following my retirement from South Lakes, I set up my own babysitting  
service. I arranged my insurance, police checks and a 'Working with  
Children' permit. By the time I paid for those outgoings, I hardly received  
an income from babysitting and what I did receive would affect my  
entitlement to a pension.

It was not financially viable for me to continue working on a casual basis. I occasionally did one-off cash babysitting jobs for certain families, which would have been no more than \$40.00 or \$60.00 at a time. This never amounted to a regular income, I was never paid for babysitting Andrew, except for the gift I received which is mentioned in paragraph 66.

After the birth of our grandchildren, more and more of my time was devoted to assisting in looking after Andrew and my granddaughter Eupheme to allow Elizabeth and my daughter Erica to return to work. Erica and Dominic had no other family available to support them.

In 2012, Communicare contacted me and asked me to work for 3 months from Easter to July, at their multi-cultural care centre in Beckenham. This was 3 hours, 4 days a week. Otherwise, I was available to families to babysit for emergency situations.

I continued to pay for the household food and to cook the meals for both of us and to pay for the petrol for my car. Andre continued to pay the day to day house expenses. As Andre became ill, he had cravings for certain foods such as oysters, which I made an effort to buy for him. I encouraged him to eat as the chemotherapy made him very sick.

Although Elizabeth had to drive past the Kalamunda property on her way to work, she very rarely spent time with us there. We spent most of our time at her home with Andrew.

I confirm that I did contribute to the household as I have described at paragraphs 17 and 18 of my previous Affidavit and in this Affidavit. I cannot recall a time when Elizabeth would have seen a contribution from me to our living expenses. This arrangement was between Andre and me and was never discussed with anyone else in front of me.

At paragraph 32 of her Affidavit Elizabeth suggests that my daughter and son-in-law paid my airfares for a holiday to the United Kingdom. I confirm that I paid my own way. Andre did not pay me any spending money. We did not have to pay for accommodation or travel in the United Kingdom as this was provided by my family over there. When we stayed with Patricia and Grahame I paid for Andre, and my share of the utilities and we again had a kitty for food.

I did and do like to have regular manicures which cost me approximately \$30.00 per month. I did not spend \$100 per week on my nails.

169        The financial arrangements between Angela and Andre are also set out at par 29 in exhibit A, page 9:

I purchased the groceries, petrol, bedding, most of Andre's clothes and household supplies for Andre and me. I also attended to the cleaning and cooked meals us. Andre continued to pay the household bills. I supported myself from my pension and my savings.

170 The Court does not accept Angela's evidence as to her financial  
contributions because it is not corroborated. The Court is simply unable  
to conclude what contribution she made to household expenses.

171 Angela's evidence is that, except for a brief period, she and Andre  
each had their own vehicles and did things independently, as well as  
together (exhibit A, page 37).

172 Angela gave evidence that she and Andre lived and socialised as a  
couple and that they holidayed together (exhibit A, page 9, pars 31 - 32).  
The contemporaneous documentary evidence supports this statement.

173 It is also clear from third party and documentary evidence that Andre  
and Angela socialised as a couple over many years with their group of  
friends known as 'The Gang' (exhibit A, page 54, pars 114 - 119).

174 Angela's evidence is that she, Andre, Elizabeth and Michael Fasanini  
(Michael) often socialised together at the Last Drop Tavern (exhibit A,  
page 43).

175 In her affidavit at pars 37 - 40 (exhibit A, page 10), Angela stated:

Following the diagnosis of his cancer, I took Andre to Canberra to see his  
sister and to Melbourne to see Philippe and to meet Philippe's daughter.

I was Andre's primary carer. I drove him everywhere for his treatments  
which included his chemotherapy in hospital, medical appointments and  
appointments with alternative health practitioners. Andre was very sick as  
a result of the chemotherapy-treatment. During this time I only saw my  
grandson CHASE twice, on Christmas Day and on his birthday as I was  
busy caring for Andre. I made phone calls to my son to hear how Chase  
was going.

I drove Andre to Elizabeth's home every day until he became too sick.

In May 2013, the doctors advised Andre and I that there was nothing more  
they could do to treat the cancer. I cared for Andre at home on my own  
with brief respite twice a week from his sister, Janet Elliot. This enabled  
me to collect my granddaughter from kindergarten. Andre wanted to stay  
at home and two weeks before his death we received palliative care and  
Silver Chain support to enable Andre to remain at home. He died in our  
bedroom on 28th July 2013 with me holding his hand.

176 Angela's further evidence as to her care of Andre is set out at  
exhibit A, pars 132 - 135, pages 47 - 61. Angela stated that (exhibit A,  
pages 59 - 61):

I transported Andre from the car to his appointments by physically assisting him to walk and towards the end of his life, I arranged a wheelchair for him. ...

As Andre's illness progressed, I continued to do all the shopping and kept the house clean as best I could. My focus was not so much on the housework because looking after Andre increasingly required most of my time and effort.

I also took over any of the few babysitting duties for Andrew that Andre had volunteered for because he began to tire easily. Previously Andre would only have the patience to look after Andrew for short spells and I avoided leaving him with Andrew for too long as Andrew had explained to me that 'Grandad got grumpy.'

...

When it became difficult for Andre to leave the house, I paid bills for him when he asked me to, and he gave me his PIN to allow me to complete financial transactions on his behalf. I was not aware that Andre asked the [Mrs Taylor] or his sister Janet to assist with paying bills.

In response to the allegation in paragraph 52 of Elizabeth's Affidavit that I was out of the house three days a week for 10 hours per day and that Andre's sister Janet cared for him on those days, I confirm that this is not correct.

As Andre became effectively housebound because of his illness, I cared for him exclusively, relieved only when Janet would come round or Philippe would visit, however, Philippe never stayed the night at our house when he was in Perth.

Andre's sister Janet came to the house twice a week to relieve me and to allow me to spend time with my granddaughter Eupheme. I picked up Eupheme from day care in Highgate and took her back to her home before one of her parents returned from work. I would then drive straight back to Kalamunda.

I would estimate that I was away from Andre for no more than three to four hours at a time on these two days. It was the only time I spent with my granddaughter and I was very grateful to Janet for her help.

If someone else came to spend time with Andre I used those opportunities to go to the shops, or to collect Andre's medication from the chemist and to allow him to spend time with other family members without me.

As Andre became more ill, I tried to accommodate his family spending time with him as much as I could.

Andre eventually required around the clock care. I was concerned only about making him comfortable, not about keeping the house clean. I was

giving him bed baths, stayed up at night talking to him, helped him walk to the toilet and attended to his needs as best I could. No other members of the family offered to help me with this or to assist with the housework.

...

I arranged for Silver Chain to provide Andre with additional care in the last weeks of his life. Silver Chain came twice a day to assist with bathing and toileting Andre. The Silver Chain staff brought a commode and put a hospital bed for Andre in our bedroom. I slept in our bed beside Andre's hospital bed each night.

177 Angela's care for Andre is confirmed by:

- (a) the discharge/transfer checklist (exhibit A, page 76);
- (b) Philippe's emails of 19 June 2013 (exhibit A, page 216) and 15 July 2013 (exhibit A, page 220);
- (c) Philippe's affidavit evidence (exhibit A, page 443);
- (d) Ms Fitzgerald's evidence (exhibit A pages 245 - 247);
- (e) Mr Peirce's evidence (exhibit A, page 269); and
- (f) the exchange of emails.

178 The Court does not accept Angela's evidence that during Andre's illness she stayed at home to care for him to the exclusion of her gambling habit. The Court finds that Angela has overstated the care that she provided to Andre during his illness. However, even though Angela has overstated the extent of her care, it is also clear from the evidence that Angela did spend large amounts of time and effort caring for Andre.

179 The Court notes that is not a condition of provision being made to a claimant that he or she should spend every minute with a person prior to their death. It is inevitable that a period during which someone is dying, particularly in Andre's situation where he was dying of cancer would be extremely stressful and that a person might seek some relief from constantly being by their side.

### **The defendants' evidence**

180 For reasons explained below it is difficult to comprehend the evidence given on behalf of the defendants when it is compared to their own contemporaneous documentary evidence. The defendants' evidence is not supported by the contemporaneous documentary evidence or by

third party evidence. Indeed, the evidence given on behalf of the defendants stands in stark contrast to that evidence. Although the defendants witnesses corroborated each other, the contemporaneous documentary evidence did not corroborate their evidence, save for the evidence of Angela's gambling. The evidence of Angela's gambling was obtained after Andre's death.

181 In closing, counsel for Elizabeth and Philippe was unable to offer any explanation for the death notice and death certificate (ts 270; 6 October 2017). Later in closing, he submitted that 'it may be the case that they didn't know some of the issues that occurred as between the plaintiff and the deceased' (ts 279; 6 October 2017). However, the only issue that Mrs Taylor, Elizabeth and Philippe were unaware of was the serious gambling which occurred after Andre was diagnosed and particularly after his death. The documentary evidence strongly supports that they were a de facto couple and is consistent with the evidence revealed by the death notice and the death certificate. The fact that Andre was unaware of Angela's gambling prior to his death does not impact on an assessment of whether or not they were a de facto couple.

### **Mrs Taylor's evidence**

182 Although Mrs Taylor was not a beneficiary under Andre's will, she had a clear interest in her children's entitlements under the will. This has inevitably coloured her evidence.

183 Mrs Taylor gave evidence (exhibit A, page 307) that, although in 1997 Andre and she had finalised a property settlement, they were not formally divorced until May 2002.

184 Mrs Taylor's evidence is that:

I recall that sometime around February 2002, Andre first mentioned Angela to me. Andre told me that he had met a woman who was 'old-fashioned' and that she would not be 'friends' with him until she saw the divorce papers. At the time I thought he was referring to a woman named Wilma, whom he had introduced to his half-sister, Janet Elliott some time while we were separated.

185 This is an odd paragraph. Mrs Taylor states that in February 2002, Andre first introduced Angela to her. Mrs Taylor then surmises that Andre is referring to a woman named Wilma. It is difficult to see how Mrs Taylor could have thought Andre was referring to a woman named Wilma, rather than Angela, when the paragraph is considered as a whole (exhibit A, page 491).

186 The request for a divorce before marriage is far more likely to have  
come from Angela.

187 Ms Fitzgerald's evidence was that Andre's relationship with Wilma  
occurred before his relationship with Angela (ts 122; 5 October 2017).

188 Elizabeth gave evidence that Andre was in a relationship for a time  
with a woman named Wilma. However, she was unable to give further  
details. At par 16 (exhibit A, page 330) Elizabeth states.

Sometime in 2002, while I was working at the Karalee Tavern in Como,  
Dad came in to see me. When I asked him what brought him to the area,  
he said he was on his way to visit a 'lady friend' who lived in Hilton.  
Angela lived in Hamilton Hill.

189 It is clear that Angela lived in Hilton. There was an error in her  
affidavit, as explained above. Elizabeth's evidence is unwittingly  
consistent with Andre's relationship with Angela.

190 Although there may have been a 'Wilma' whom Andre was involved  
with on some basis, it cannot have been a particularly significant  
involvement because no one recalls her surname or anything about her  
other than her first name. The Tribunal does not accept the proposition  
that the rings were bought for a woman named 'Wilma'.

191 Mrs Taylor's evidence is that (exhibit A, pages 308 - 309):

When Andrew was born in February 2009 ... As Andre and I were sharing  
the child minding duties during this period, we saw more and more of each  
other. Andre told me that he was constantly having arguments with  
Angela which were raucous, loud and long. The arguments were mostly  
about Angela spending her money and not sharing the costs of living and  
he was paying for everything, which was not part of the agreement they  
had.

... Andre told me that as a result of those arguments, he spent many meal  
times at Elizabeth's house. Andre said Angela was staying out to all hours  
of the night not saying what she was doing, or where she was going.  
Angela had, in his words, made the excuse that she was 'child minding' for  
a couple of friends. Andre told me that she had argued with her about this  
and he said Centrelink would find out about her 'cashies' and reduce her  
pension.

192 The evidence of Ms Fitzgerald, as set out above (exhibit A,  
pages 245 - 247), and that of Mr Peirce, as set out above (exhibit A,  
pages 269 - 270), is of a continuing happy relationship, contrary to  
Mrs Taylor's evidence.



193 In addition, there is ample documentary evidence, (for example, the  
birthday card of 2 April 2012 (exhibit A, page 78) and the photographs  
referred to above), that they remained a couple throughout this period.

194 In Mrs Taylor's subsequent affidavit, on 1 September 2016, she  
asserts that Andre and she would discuss many things, including their  
common faith as Jehovah's Witnesses (exhibit A, page 488). The  
evidence of Mr Peirce, Andre's life-long friend, was that Andre had  
ceased to be a Jehovah's Witness when Mr Peirce was aged around 25;  
that is, many years before (ts 109; 4 October 2017). It is unlikely,  
therefore, that they discussed their common faith as Jehovah's witnesses.

195 Despite Mrs Taylor's assertions as to the quality of the relationship  
between Andre and Angela she deposes that Andre went to the United  
Kingdom in 2011 to meet Angela (exhibit A, page 494).

196 Mrs Taylor deposed the fact that she was not aware that Andre and  
Angela ever bought an engagement or wedding rings or had any plans to  
be married. She goes on to say (exhibit A, pages 498 - 499):

Given the frequency with which I saw and spoke to Andre in the 4 years  
prior to his death, and the closeness of our relationship, I verily believe  
that he would have told me if had planned on marrying Angela

197 Given that Andre bought engagement and wedding rings, Andre's  
failure to inform Mrs Taylor reflects more on Andre's relationship with  
Mrs Taylor than with Angela.

198 Andre was obviously very private about the specific nature of his  
relationship with Angela, not only with Mrs Taylor but with Elizabeth and  
Philippe. Nevertheless, it is obvious from the documentary evidence that  
they frequently attended family functions together and babysat Andrew.

199 Mrs Taylor seeks to corroborate her relationship with Andre by  
reference to her diary entries in 2011 (exhibit A, page 489, ET4).  
However, there are only six relevant entries.

200 The Court is also concerned about the spreadsheets attached to  
Mrs Taylor's various affidavits. It is plain that she attached the  
spreadsheets with little or no knowledge as to the contents or as to their  
accuracy. Mrs Taylor stated that in relation to the contents of her  
affidavit, she just did what she was told (ts 161, 5 October 2017; see also  
ts 166, 5 October 2017; ts 202, 5 October 2017; and ts 207, 5 October  
2017). Mrs Taylor does not appear to have understood her obligations

when swearing an affidavit. Her willingness to swear as to the contents of the spreadsheets reflects adversely on her overall evidence.

201 The Court does not find that Mrs Taylor was a reliable witness.

202 The Court does not accept Mrs Taylor's evidence where it is not corroborated by documentary evidence. There is virtually no corroborating documentary evidence. There is little or no corroboration of her evidence other than that of Elizabeth, Michael and Philippe, all of whom have a clear self-interest in denying or understating the relationship between Angela and Andre.

### **Elizabeth's evidence**

203 Elizabeth's evidence was clearly self-interested as she understandably wished to preserve her entitlement under the will and this coloured her evidence.

204 The Court notes that Elizabeth seemed affronted that counsel for Angela had the temerity to ask her questions. The Court notes that both Elizabeth and her husband Michael's manner of giving evidence were such that they seemed resentful that they should have been asked any questions.

205 Elizabeth's evidence is that she first met Angela in around April 2004. Elizabeth says:

I remember thinking Angela was nice and I was happy that Dad had found someone to keep him company.

206 This is consistent with a qualitative difference in Andre and Angela's relationship in 2004.

207 Elizabeth then goes on to say in par 18 (exhibit A, page 330):

In around 2006, I visited Dad at the Kalamunda Property. During this visit, I saw Angela's belongings throughout the house. On the basis of that observation, I believed they were living together. However, Dad never specifically told me that Angela had moved in with him.

208 Andre would hardly have needed to say that Angela had moved in with him. It was plainly self-evident.

209 Elizabeth disputed that Andre and Angela were 'either in a de facto relationship at the date of Dad's death or in a de facto relationship at all' (exhibit A, pages 329 - 330).

210 The documentary evidence as to the death notice and the death  
certificate shows that these statements, certainly in so far as they relate to  
a de facto relationship at the time of Andre's death, are inconsistent with  
the contemporaneous documentary evidence.

211 Elizabeth goes on to say in paragraph 19 (exhibit A, page 331):

From the time I met Angela in 2004, until we moved to Gooseberry Hill  
[2008], Dad rarely spoke to me about their relationship.

212 There is clear documentary and third party evidence consistent with a  
de facto relationship, as set out above.

213 Andre's failure to communicate with Elizabeth about his relationship  
with Angela says more about Andre's relationship with Elizabeth than his  
relationship with Angela.

214 Overall, Andre kept his social life private from Elizabeth (ts 229;  
6 October 2017).

215 Elizabeth gave evidence that Andre said that he had no intention of  
ever remarrying (exhibit A, page 343 - 344, par 73(a)). She stated:

I refer to paragraphs 21 and 34 of the [Angela's] Affidavit in which Angela  
maintains that Dad had intended to marry her. From my conversations  
with Dad, I verily believe he had no intention of ever re-marrying. He said  
to me on a number of occasions that he never wanted to get married again.  
He said this to me on a number of occasions, both prior to and after I had  
become aware that he and Angela were in a relationship. For instance, he  
regularly joked about marriage and on one occasion in 2011 we discussed  
marriage and he said to me words to the effect 'if a dog bites you, you don't  
go back and pat it again'. Dad never told me that he intended to or had any  
thought about marrying Angela. He never spoke to me about purchasing  
an engagement ring or wedding ring for Angela. I never saw Angela  
wearing an engagement or wedding ring and Dad never mentioned to me  
that he was engaged or had plans to be married in the future. On the basis  
of that observation, I verily believe that Dad and Angela were not engaged.

216 Elizabeth's evidence as to Andre's attitude to marriage is inconsistent  
with the purchase of the engagement ring and the wedding ring. It is at  
least impliedly inconsistent with Andre's divorce from Mrs Taylor in  
2002.

217 The fact that Andre may not have discussed any plans with Elizabeth  
is consistent with the fact that he said very little or nothing about his  
relationship with Angela.

218 Elizabeth's further evidence was (exhibit A, page 331) that:

... From the time Andrew was born in February 2009 Dad visited nearly everyday ...

Whenever Dad was at my house, he began to complain about Angela and their relationship to me on a regular basis. Most often he would complain about the way she kept the house, the way she spent money and her unreliability.

219 Elizabeth gave similar evidence (exhibit A, pages 336 - 337):

From approximately 2009, I formed the impression that Dad was unhappy in his relationship with Angela because he was frequently complaining about her.

Dad never told me that he loved Angela.

I said to Dad, on a number of occasions, that if he was so unhappy, why didn't he end the relationship? He responded by saying that he was too old, did not want to be alone and could not be bothered to find someone else at his age.

Between 2010 and 2013, I continued to occasionally mention to Dad that if he was unhappy, he could end his relationship with Angela. However, Dad continued to refuse. He did not usually elaborate on why he did not want to end the relationship. However, on one occasion in 2012 I recall that Dad told me about an argument he had with Angela where she had said to him words to the effect 'if you ever leave me I will stitch you up like I did my first husband.'

220 The only evidence that corroborates Elizabeth's evidence is Mrs Taylor's evidence. As explained in relation to Mrs Taylor's evidence, the Court does not accept this evidence when regard is had to the contemporaneous documentary evidence and third party evidence. The photographic evidence of Andre and Angela together, particularly of their attendance at Elizabeth's family functions, is inconsistent with Elizabeth's evidence.

221 Angela's sister and husband came from the United Kingdom to visit Andre and Angela in 2011 (exhibit A, page 332). Whilst there, they visited Elizabeth and Michael with Andre and Angela.

222 Elizabeth gave evidence that Andre said to her that he paid all of the household bills (exhibit A, pages 332 - 333). The Court does not accept that evidence. It is simply unable to form a view on the evidence. Angela did struggle to pay those bills prior to receiving her pension on her own evidence (see above).

223 Elizabeth's evidence was that Andre refused to take a six week trip to the United Kingdom because he was still working and did not want to spend so much money. However, he did join Angela for the final two weeks of her trip to the United Kingdom before returning to Australia with her (exhibit A, page 333).

224 Elizabeth gave evidence that (exhibit A, page 334):

Dad told me that this resulted in several arguments and that at some point, he told Angela to go to her 'shoe-box' and get the money for herself. He then explained to me that she kept 'hundreds of thousands' of dollars in cash at her son Nathan's house. He said he thought she was 'hiding it from Centrelink'. I asked Dad where Angela got the money from and he explained that it was the proceeds from the sale of her house in Canning Vale as well as an inheritance she received from her father,

During this conversation, he was very angry and said to words to the effect 'that bloody bitch has got more money than I do'.

I recall another conversation in 2011 where Dad told me that sometime between 2002 and 2003, he and Angela ended their relationship for a period of time due to financial issues. During that conversation, Dad told me that he had ended the relationship because Angela was giving money to her son who had a drug problem. He told me that, at the time, he was angry that she was 'not paying her own way' and so he had 'thrown her out'. Dad said he had become upset because Angela expected him to financially support her.

225 Later in her evidence, Elizabeth asserted that Andre said 'not to worry about Angela' because she had 'bundles of money' and her son 'Nathan had bought a house with a granny flat for her' (exhibit A, page 343). There is no evidence that Nathan ever bought a house with a granny flat for Angela. Nor is there any evidence of Angela having 'bundles of money'.

226 The Court simply does not accept the evidence as to the shoe-box and Angela's son's drug problems. There is no corroborating evidence. Andre never mentioned this, or anything like this to Mr Peirce, his long-time friend. The evidence seems calculated only to impugn Angela's character. Having regard to the clearly misleading evidence earlier in Elizabeth's affidavit, the Court does not accept this evidence.

227 Elizabeth's affidavit stated (exhibit A, page 336, pars 40 - 41):

I noticed on several occasions that Dad phoned Angela and she did not answer. Annexed hereto and marked EDT 1 is a true and correct copy of a

tax invoice from Southern Cross Telco dated 16 August 2013, bearing handwritten annotations.

Having inspected the document annexed at 'EDT 1', I note that 18 telephone calls were made by Dad to Angela from 9 July 2013 to 24 July 2013. I knew the phone calls were to Angela because I recognised her number. The calls ranged from 00:03 seconds to 00:23 seconds in duration. On the basis of the foregoing, and my own observations regarding his attempts to call Angela, I verily believe that Angela rarely answered the telephone when Dad attempted to call.

228 Angela's evidence is that the mobile phone reception at 74 Spring Road was patchy and it was not uncommon for either of them to use the home landline to call each other's mobiles. If Andre was in bed and Angela was in another part of the house he would call her mobile and those calls would not have lasted for more than a few seconds (exhibit A, page 42). That is a reasonably logical explanation.

229 Whatever the explanation for the phone not being answered and Andre's reaction to that in Elizabeth's affidavit at exhibit A, page 335, the Court does not accept that that is relevant to a finding of whether or not there was a de facto relationship.

230 Elizabeth's evidence was (exhibit A, page 338, pars 51 - 52):

I visited Dad on average threat times a week during 2013. On these visits, would often ask him if he needed anything - medical or financial or otherwise. He would tell me that the bills were being paid either by Mum, Andre or his half-sister (Aunty Jan).

Dad would tell me to come visit him on the days that Angela was out. Angela was usually out of the house three days a week, for approximately 10 hours at a time. On those days, Aunty Jan cared for Dad. Dad told me that Angela was babysitting her granddaughter on these days. I rarely saw Angela at Dad's house. If I did see Angela, she would usually leave the house once someone else arrived to be with Dad.

231 While the Court accepts that Angela was absent from the house at the Casino on numerous occasions, the Court does not otherwise accept Elizabeth's evidence in so far as it implies that Angela did not provide any care for Andre during the period of his illness (exhibit A, pages 337 - 338). There is ample evidence to the contrary, as set out above.

232 The Court notes that Aunty Jan did not give evidence.

233 Elizabeth gave evidence of a conversation with Andre on 27 June 2013 concerning various documents (exhibit A, page 339). The Court does not accept that any other part of the conversation took place, save that Andre may well have given documents to Elizabeth for safekeeping. There are any number of possible explanations for that.

234 The events following Andre's death which are deposed to by Elizabeth at exhibit A page 340 are irrelevant. It is clear that after Andre's death, matters between the children and Angela deteriorated rapidly for reasons which are not apparent.

235 The Court notes that exhibit EDT 6 to Elizabeth's affidavit (pages 397 - 400) is a surveillance report on Angela for Elizabeth. The surveillance report evidences that at that stage she was living at a Highgate address. It says something about the depth of animosity on Elizabeth's part that she would have had a surveillance report prepared.

236 It is appropriate at this point to refer to the contradiction in relation to the purchase price of the Last Drop Tavern by Elizabeth's and Michael's superannuation fund. This reflects adversely on both Elizabeth's and Michael's credibility.

237 The documentation in relation to the purchase was attached to Elizabeth's affidavit. It showed vendor finance of \$200,000 relating to the purchase. Settlement of the purchase took place on 29 September 2017 (ts 224 - 252; 6 October 2017). In her supplementary affidavit of 3 October 2017, Elizabeth swore that the total purchase price was \$500,000 (see also Michael's evidence at ts 193; 5 October 2017).

238 Paragraphs 4 - 6 of Elizabeth's affidavit state:

The main change to my financial circumstances, as they were at the date of swearing the Previous Affidavit, is that in February 2017, my husband and I, through our superannuation fund, decided to buy the Last Drop Tavern in Kalamunda. The total purchase price for the Tavern is \$500,000, being for the leasehold interest, and \$50,000 for the stock in trade and goodwill of the business. Annexed here to and marked 'EDT1' is true and correct copy of the Contract of Sale in that regard.

The Contract of Sale notes the purchase price as being \$300,000 for the leasehold interest, however I have agreed a separate vendor finance arrangement, with Russell Gianoli the owner of the tavern, on behalf of the superannuation fund to pay an additional \$200,000 of which \$107,450 is to

be paid in instalments over the next 2 years with the balance of \$106,350 to be paid at the expiry of 2 years.

The first payment to be made under that arrangement will be 25 September 2017. These payments in the Schedule together with the balance will have to be funded by some other means given that the whole of our superannuation will be put into the purchase of the business. Annexed hereto and marked 'EDT2' is a copy of an email from Russell Gianoli to me dated 6 January 2017 together with the attached spreadsheet.

239 The amount of \$300,000 stated in the contract was paid at settlement from the superannuation fund (ts 225 - 226; 6 October 2017). The contract states that the purchase price is \$300,000. No suitable explanation was offered as to why the contract did not accurately state the purchase price as \$500,000.

240 Although the schedule of payment of vendor finance was produced, the adjustment to pay an additional \$200,000 was not reduced to writing (ts 226; 6 October 2017). The Court asked for a stamped copy of the contract to be produced on two occasions (ts 226 - 227; 6 October 2017). No stamped copy has been produced to this Court.

241 As at 6 April 2017, the duty payable on a transfer of \$300,000 was \$7,790 plus \$4.75 per \$100 above \$250,000 which is \$2,375; that is, \$10,165. The duty payable on \$500,000 is \$19,665 - a difference of \$9,500.

242 The Transaction is extremely suspicious. The Court does not accept that there was a legitimate reason for structuring the transaction in this way.

**Elizabeth's husband's evidence**

243 Elizabeth's husband, Michael, swore an affidavit on 19 February 2016 (exhibit A, page 521 onwards).

244 Since Michael is in a de facto relationship with Elizabeth the Court does not regard him as a disinterested third party. His evidence was clearly self-interested as he wished to preserve Elizabeth's entitlement under the will.

245 Michael's affidavit evidence is replete with adverse comments as to the quality of the relationship between Andre and Angela.

246 For example, Michael gave evidence that Andre told him that he was going to see if Mrs Taylor would take him back, and that, if she was open



to the idea of reconciling, he intended to cancel his upcoming trip to the United Kingdom and tell Angela their relationship was over. Plainly, Andre did go on that trip and his relationship with Angela lasted (exhibit A, page 531).

247 Michael also gave evidence that (exhibit B, page 531, par 36):

In or around October 2011, following Angela going on holiday to the United Kingdom, Andre was at our house complaining about Angela again. While I don't recall precisely what he said, I recall him going on about her more than usual. Because of this, I said to him that he should leave Angela if he was so unhappy and if 'she's giving you so much grief' then 'why don't you throw the bitch out?' Andre replied 'it's not as simple as it seems' and also said words to the effect 'I don't want to alone at this time in my life'.

248 This evidence simply does not sit with the documentary evidence - for example, the birthday card of 2 April 2012 (exhibit A, page 78) and the third party evidence.

249 Michael describes Angela as babysitting Andrew for only brief periods, (for example, exhibit A, page 530). Michael deposes that (exhibit A, page 524):

On average, 8 out of 10 times Andre babysat Andrew without Angela. By the time Andrew was going to playgroup at age 2, Angela would occasionally pick him up from playgroup. When she did so, she would drop him off and leave shortly after to do her own things. Angela never had Andrew with her for long periods of time.

250 It is very difficult to believe that Andrew would have sat with Angela at his grandfather's funeral if the time Angela spent with Andrew was as limited as Michael suggests.

251 Michael admitted that his family bought Angela birthday cards addressed to 'Grandma' from Andrew (ts 181; 5 October 2017; see also Elizabeth's evidence at ts 229; 6 October 2017). It is difficult to understand why they sent cards on Andrew's behalf unless they regarded Angela as occupying a position as a grandmother in Andrew's life .

252 It is clear from Michael's evidence that Andre told him little, if anything, of his friends and his social life (ts 182 - 185; 5 October 2017).

253 Under cross-examination, Michael did not have a good word to say about the relationship between Andre and Angela.

254 The Court does not accept Michael's evidence as to the relationship between Andre and Angela having regard to the fact that he Elizabeth's de facto/husband. The Court does not accept his description of the relationship between Angela and Andrew.

255 In giving his oral evidence, Michael, very similarly to Elizabeth, made it plain that he felt he should not have been questioned about anything.

256 The Court also notes that Michael was a party to the agreement for the purchase of the Last Drop Tavern and that the purchase price and the vendor finance are inconsistent and suspicious. Although both Elizabeth and Michael denied that the transactions were structured to avoid duty, there was no satisfactory evidence to explain the structure.

### **Philippe's evidence**

257 Philippe swore an affidavit on 18 February 2016 (exhibit A, pages 433 - 478) and a supplementary affidavit on 22 September 2017 (exhibit A, pages 479 - 483).

258 Between 1998 and 2001, Philippe did not have any contact with Andre and is therefore unable to give any evidence as to the relationship between Andre and Angela during this period. Thereafter he had contact with Andre every two or three months. In March 2002, Philippe only visited Perth and spent time with Andre (exhibit A, page 435). He notes that Andre told him that he was seeing someone at this time. In 2006, Andre visited Philippe in Melbourne. Following that trip, they spoke on the phone every three or four weeks and would 'spend quality time when I visited Perth every year'. From 2012 to 2013, Philippe visited Andre on approximately five occasions (exhibit A, page 436).

259 Philippe states that Andre never spoke to him about purchasing engagement or wedding rings for Angela. However, it is plain that engagement and wedding rings were purchased (exhibit A, page 451). The Court does not attach any significance to the fact that Andre did not tell his children or his ex-wife that he and Angela intended to marry.

260 Philippe claims he met Angela for the first time on about 15 June 2004. He states that Andre 'had mentioned he was in a relationship with Angela but did not elaborate' (exhibit A, page 436). Philippe states that they went to the movies and that they picked up Angela from her house in Bibra Lake.

261 Andre otherwise kept his social life private from Philippe  
(ts 255 - 256; 6 October 2017).

262 Philippe's affidavit disputed that Andre and Angela were either in a  
de facto relationship at the date of Andre's death or in a de facto  
relationship at all (exhibit A, page 436, par 15). This assertion is  
completely at odds with the contemporaneous documentary evidence of  
the death notice and the death certificate. Philippe's assertion is plainly  
misleading. That misleading assertion colours all of his evidence.

263 Philippe's evidence is that sometime in 2005, he learnt from  
conversations with Mrs Taylor and Elizabeth that Angela and Andre were  
living together at the Kalamunda property. He states that his first direct  
knowledge of this arrangement came in 2006 when he visited Perth  
(exhibit A, page 437).

264 Philippe's evidence in exhibit A, pages 438 - 439, pars 22 - 25 stated  
that:

Dad came to visit me in Melbourne on or about the evening of  
25 December 2006. The trip lasted 9-10 days in total. We attended the  
cricket for 3 days and spent quality time together. During this trip, we  
became closer than we had ever been before and were able to speak with  
each other candidly.

Dad and I spoke about his new interest in cooking. He told me that he was  
doing his own cooking for the first time in his life and was deriving  
enjoyment from learning how to cook.

Dad and I also spoke about a new relationship I had with a woman named  
Melissa at the time. He and I went to see a movie with Melissa during the  
trip, in the course of asking about my relationship with Melissa, Dad  
started to reminisce about his time with Mum.[No one other than Philippe  
mentions Melissa]. I recall him telling me about his sex life with Mum  
and saying that it was the 'best he had ever had'. Dad talked about this  
candidly for a period of time afterwards and said that Mum was very wild,  
passionate and into it'.

Dad rarely spoke to me about Angela during this trip. I don't recall Dad  
ever telling me that he was happy in his relationship with Angela.  
When Dad talked about Angela, he spoke in a matter-of-fact way rather  
than in a manner that suggested any genuine fondness. For instance, he  
would simply mention that they had done something together, like go out  
for meal or watch a movie. He did not speak to me about the emotional or  
romantic aspects of their relationship. However, I recall one conversation  
where Dad said to me that he was having problems with Angela.  
During this conversation, Dad made general statements about Angela and  
I prompted further explanation by saying words to the effect of 'what is

going on?' Although Dad was generally very reserved about discussing these kinds of matters, I specifically recall that on this occasion he seemed to want to discuss this with me. I recall that Dad explained that when Angela moved into the Kalamunda Property, they had an arrangement that Dad would pay for anything related to the house such as bills and groceries, in return, they agreed that Angela would cook, clean and maintain the house. Dad told me that he was upset that Angela was not living up to her end of the agreement. He told me that 'she had not come to the party'. I take it that Dad was referring to the arrangement described in paragraphs 17 and 29 of the [Angela's] Affidavit.

265 Philippe confirms that in February 2013 Andre and Angela visited Melbourne for Philippe's and Laura's, his now wife, engagement party.

266 Andre told Philippe that Angela had been taking him to his appointments (exhibit A, page 443).

267 Philippe's evidence in exhibit A, pages 444 - 445, par 45 was that:

I stayed in Perth and spent every day with Dad until he passed away. I stayed at Mum's house but spent most of my time with Dad at the Kalamunda Property. I noticed that Angela was not often in the house. She would go out at least once each day and not return for at least a few hours. Dad's half-sister (Aunty Jan) looked after Dad every other day. Aunty Jan said to me that she was disappointed with how often Angela went out. She said that Angela would say she was going out for 3 or 4 hours but be gone until late that night. I also noticed that Angela was not around much during this time, she would usually leave the house as soon as I arrived to be with Dad.

268 This evidence is in stark contrast to Philippe's contemporaneous emails set out above, particularly when Philippe remained with his father until he passed away.

269 Given Philippe's evidence or assertion that there was no de facto relationship at the time of Andre's death or at all, the Court finds that what Philippe said about Andre's relationship with Angela is of no value.

270 Conclusion as to de facto relationship between Andre and Angela

271 Although not all of them are essential, the indicators of whether or not a de facto relationship exists between two persons are as follows:

- (a) the length of the relationship between them;
- (b) whether the two persons have resided together;
- (c) the nature and extent of common residence;

- (d) whether there is, or has been, a sexual relationship between them;
- (e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (f) the ownership, use and acquisition of their property (including property they own individually);
- (g) the degree of mutual commitment by them to a shared life;
- (h) whether they care for and support children;
- (i) the length of the relationship between them; and
- (j) the reputation, and public aspects, of the relationship between them.

272 Angela submitted that the relationship lasted from September 1998 until Andre's death on 28 July 2014, a period of 14 years and 10 months (Angela's opening submissions, pa 18).

273 Elizabeth and Phillippe submit that the relationship did not begin until sometime in the early 2000's and that a stable relationship did not commence until 2004 when Andre introduced Angela to them (defendants' submissions, pars 9 - 10).

### **Conclusion as to whether there was a de facto relationship between Angela and Andre**

#### **The length of the relationship between them**

274 The Court accepts that a relationship between Angela and Andre did commence sometime in about September 1998. In particular, the Court notes that Angela and Andre attended Ms Blake's wedding on 3 July 1999. The evidence is corroborated by that of Ms Blake, whom the Court found to be a credible witness.

275 Given the privacy with which Andre conducted his personal life, it is not surprising that Andre failed to advise Mrs Taylor, Elizabeth or Philippe of the relationship at that time.

276 The Court does not accept that Andre was living with Angela in her home or that she was living at 74 Spring Road, Kalamunda in the early days of their relationship from 1998. The Court accepts that a sexual relationship commenced at that time and that Angela and Andre spent nights at each other's house, but not every night. The relationship waxed

and waned over the period from 1998 to 2004. The Court finds that Angela overstated the extent of the relationship in the early days. Her evidence that they were effectively living together is not corroborated.

277 The purchase of a house in Randford Road, Canning Vale by Angela in mid-2003 is incompatible with an existing de facto relationship. The Court does accept that Angela moved into 74 Spring Road, Kalamunda shortly before Christmas 2004. It appears that at that point, there was a significant change in the relationship between Andre and Angela. It was shortly prior to this point that she sold her property at 7 Audley Place and it is from that point that they commenced living together.

278 The de facto relationship between Angela and Andre that developed from Christmas 2004 lasted until the date of Andre's death.

### **Whether the two persons have resided together**

279 The Court finds Angela and Andre resided together from shortly before Christmas 2004 until the date of Andre's death in July 2013. Effectively, the Court accepts the defendants' submissions on this point and rejects Angela's contention that they resided together and lived together most of the approximately 15 years they were together. Accordingly, the Court finds they cohabited for about eight and a half years.

### **The nature and extent of common residence**

280 The nature and extent of the common residence was that Angela cohabited with Andre from shortly before Christmas 2004 until his death. They shared a bedroom throughout this period until Andre became too ill to do so.

281 There is evidence to suggest that Angela was probably not a particularly good housekeeper. However, despite that, the relationship continued until Andre's death and there is no evidence from any of the third parties that Andre was in any way critical of Angela's housekeeping abilities. The Court rejects the defendants' submissions that Angela's housekeeping skills were such that she and Andre could not be regarded as being in a common residence.

### **Whether there is or has been a sexual relationship between Angela and Andre**

282 The Court accepts that there was a sexual relationship from the commencement of Angela and Andre's relationship in 1998 until Andre's

health deteriorated. It is plain that Angela and Andre slept in the same bed for most of their relationship following Angela moving in with Andre in 2004. The Court, in particular, notes Ms Fitzgerald's evidence that when Andre and Angela visited her in Canberra a few months before Andre's death that they shared a bedroom in her house (exhibit A, page 243). Similarly, Mr Peirce gave evidence that on the last occasion he and his wife stayed at 74 Spring Road, Angela and Andre slept in the same bedroom (exhibit A, page 268). The Court rejects the evidence of the defendants that Angela and Andre were sleeping in separate bedrooms for a period (exhibit A, page 440).

**The degree of financial dependence or interdependence and any arrangements for financial support between Angela and Andre**

283 It is plain that the parties kept their financial affairs quite separate, apart from household bills. The Court also accepts that Andre was unaware of Angela's gambling, both prior to the onset of his illness and thereafter and that Angela and Andre maintained separate bank accounts.

284 The Court does not accept that Angela made no contribution to the costs of running the household as submitted by the defendants. The Court rejects the defendants' evidence as to alleged statements made by Andre as to Angela's contribution to the household. The evidence in this area is too vague to form any firm views as to exactly what the relative contributions were. The Court does, however, note that Angela was financially dependent on Andre for her accommodation.

**The ownership, use and acquisition of Angela's and Andre's property (including property owned individually)**

285 Andre had paid off 74 Spring Road seemingly long before he met Angela. There is no suggestion that Angela contributed to the acquisition of 74 Spring Road. It remained in Andre's sole name. There is no evidence before the Court that Angela made any significant contribution to improvements to the property.

**The degree of mutual commitment by Angela and Andre to a shared life.**

286 Andre and Angela remained a couple cohabitating together from late 2004 until Andre's death. The evidence is that they both regarded all the grandchildren as their own. They plainly saw each other as a couple.

287 The Court also rejects the alleged statements made by Andre regarding Angela. Similarly, the Court rejects the defendants' evidence as to Andre's expressions of frustration and criticism since none of this is

corroborated by the evidence of the third parties, which is to the contrary. That evidence suggests a continuing loving relationship.

**The reputation and public aspects of the relationship between Angela and Andre**

288 The defendants submitted:

The evidence advanced on behalf of the second and third defendants demonstrated that, at least, from the time that the second defendant's son Andrew was born (28 February 2009), [Andre] exhibited no commitment to a shared life with [Angela]. That lack of commitment is illustrated by the:

- 28.1. lack of trust [Andre] showed towards [Angela];
- 28.2. frustration expressed by [Andre] regarding [Angela's] unreliability;
- 28.3. [Andre's] concerns regarding [Angela's] moral conduct, particularly his perception that [Angela] had failed to declare income to Centrelink and [Angela] giving money to her son to buy drugs;
- 28.4. limited amount of time [Andre] spent with [Angela], particularly after the second defendant's son was born;
- 28.5. [Andre's] general animosity towards [Angela];
- 28.6. the closeness of the relationship [Andre] enjoyed with the first defendant, and his desire to achieve a reconciliation with her.

289 Andre and Angela lived together for a long period of time. The Court accepts that Andre told Angela that he would be prepared to marry her and purchased an engagement ring and a wedding ring. They had plans to get married on their retirement to Denmark until events supervened.

290 There is overwhelming evidence in the form of documentary evidence that Andre and Angela lived together, socialised together and travelled together as a couple. The evidence of the third parties and the documentary evidence clearly establish both a reputation as a couple and the public aspects of the relationship between them.

291 The defendants had no corroborating evidence, other than each other, that the relationship was at an end or had ended at any time.

292 The Court rejects the evidence of the second and third defendants that Andre repeatedly told them that he never intended to get married again.



293 The Court also rejects the assertion in the submissions that Andre  
had a close relationship with Mrs Taylor, Elizabeth or Philippe.

294 The Court does not accept the submissions that Andre had a lack of  
trust towards Angela, that he expressed frustration about Angela's  
unreliability, that he was concerned about her moral conduct or that there  
was any evidence, other than from the defendants, of a perception that the  
Angela had failed to declare income to Centrelink or gave money to her  
son to buy drugs.

295 The Court does not accept that Angela spent a limited time with  
Andre following the birth of Elizabeth's son.

296 The Court does not accept that there was any general animosity  
towards Angela by Andre. Indeed, to the contrary, the evidence  
establishes that it was a close relationship.

297 The Court does not accept that Andre wished to end the relationship  
with Angela.

298 Nor does it accept that there was a close relationship between Andre  
and the defendants.

299 The notion that Andre wished to reconcile with Mrs Taylor is  
completely inconsistent with the documentary evidence and with the  
evidence of the third parties.

300 In particular, the Court notes that both the death notice and the death  
certificate are evidence of the defendants' belief that Angela, at the time of  
Andre's death, was in a de facto relationship with Andre. Their  
subsequent statements that there was no such relationship are pure  
expediency on their part.

301 Angela did not disclose her gambling habits to Andre. However, it is  
not a necessary condition of a de facto relationship that the parties be  
completely open with each other. Other than the lack of honesty of  
Angela to Andre in relation to her gambling habit, the contemporary  
documentary evidence and the third party evidence clearly establishes that  
there was and continued to be a de facto relationship between Andre and  
Angela from shortly before Christmas 2004 until Andre's death in July  
2013.

302 The Court does not accept the defendants' submission that at the time  
of Andre's death the de facto relationship had ceased. The Court finds

that Angela was living as the de facto partner of Andre immediately after his death.

**The schedule of evidence**

303           The second and third defendants filed a schedule of evidence dated 6 October 2017 which essentially sets out the evidence of Angela Miller compared to the evidence of the defendants. For the reasons that have been stated above, the Court does not accept that the defendants are reliable witnesses. In particular, their evidence is not supported by any third party or by any contemporary documentary evidence except the evidence as to Angela's gambling, which, although it establishes Angela overstated the degree of her care and understated the seriousness of her gambling. However, that does not lessen the weight of the contemporary documentary evidence or the evidence of third parties as to the existence of the de facto relationship. Accordingly, the Court has not found it necessary to go through the second and third defendants' schedule of evidence.

304           Neither has the Court found it necessary to go through the various parties' objections to the evidence of the other parties since the Court has formed a view as to the existence of a de facto relationship on the basis of the evidence set out above - evidence that is clearly admissible.

**Ownership of personal possessions and collectable items**

305           In closing, Mrs Taylor's counsel stated that the estate sought to assert ownership of only three items: the Robert Hagan painting, the Spode ware and the wedding ring/engagement ring that was purchased in 2002 (ts 259; 6 October 2017). Counsel for Mrs Taylor stated that other items that may have been removed from the house were not of any significant value (ts 259; 6 October 2017).

**The Spode ware**

306           In par 47 of her affidavit (exhibit A, pages 12 - 13) Angela stated:

[The miniature spodes and antiques] were purchased by Andre and I during our holiday together. We bought spode miniatures and items of china porcelain as a memento of our holidays. The spode miniatures were purchased in York in the United Kingdom in 2000. The other items were purchased in Hong Kong and China as part of the same trip. These items were jointly owned and do not form part of the estate[.]

307 Counsel for Mrs Taylor submitted that because Andre purchased the Spode ware that it belonged it him.

308 Angela's evidence about the Spode ware was:

Did you take the Spode - - -? - - - *Yes. I took - - - - purchases? - - - the Spode. We - - -*

Now, let me talk about that if I may briefly say that? - - - *Certainly.*

You said in your affidavit that that had been acquired during your holidays? - - - *Yes.*

Who's money was used to purchase it? - - - *Well, it was Andre's money, but he had bought them because I liked them.*

Then - you didn't say that in your affidavit material, that they were purchased because you liked them? - - - *Most probably, yes. There were things that Andre taught me about music and I taught him things about art and porcelain and things like that. We - that's how we were and they were part of my memories of sharing a lovely holiday with Andre. They weren't part of the family memories.*

All right. But do I understand that it's not expressed that they were supposed to be a gift for you? - - - *No. It isn't probably written down, but I feel they're part of my memories with Andre and I like to look at them and think about the wonderful times we had together.*

Does - that really the same with the painting that you would like to think is of a memory that you have times together and that's why you've decided to claim it as your own? - - - *No. Absolutely not.*

309 It is probable that neither party gave much thought as to who owned the Spode ware. The evidence does not establish anything beyond Andre's purchase of the Spode ware.

310 The Court finds that the Spode ware was an asset of the estate on the basis that Andre paid for the purchases.

311 Since no details of exactly what precise items were said to constitute the Spode ware, the Court is unable to identify it sufficiently so as to make an enforceable order.

### **The engagement ring**

312 Counsel for Mrs Taylor accepted that the wedding ring could not be located (ts 263; 6 October 2017).

313 The Court has dealt with the witnesses concerning the rings above. As noted above, the Court does not accept that Wilma was of any significance in Andre's life such that he would have purchased an engagement and wedding ring for her. As stated above, the Court finds that at some time subsequent to their purchase, Andre gifted the rings to Angela. In particular, the Court relies on exhibit H. The Court finds that neither the engagement ring nor wedding ring was an asset of the estate. Rather, the engagement ring and the wedding ring belonged to Angela.

### **The Robert Hagan painting**

314 In par 47 of her affidavit (exhibit A, pages 12 - 13), Angela stated:

There are items that have been included in the Rule 9B(1) statement that are not assets of the estate:

(a) The Robert Hagan painting

Prior to going to the United Kingdom, Andre and I had seen an oil painting by Robert Hagen in the Jahroc Gallery in York (Western Australia). We went back to York on six or seven occasions to see it and both of us greatly admired the piece. Andre purchased the painting while I was in the United Kingdom in 2000, as a surprise for me.

Andre's sister Michelle Fitzgerald has advised me and I that she was with Andre when he purchased the painting and that from their discussions, it was clear to her that painting was purchased as a gift for me and was intended to be enjoyed by Andre and me.

On the evening I returned from the United Kingdom, 10th August 2000, Andre presented the painting to me as a surprise gift. He had had the painting framed and hung on our bedroom wall opposite our bed. I recall this evening very clearly as, in addition to the painting, Andre gave me two tickets to see Andrea Bocelli at the Burswood Dome and told me that he had booked a table at the Blue Duck Restaurant in Cottesloe. The painting hung in our bedroom from 2002 and is in my possession[.]

315 The Robert Hagan painting was purchased by Andre while Angela was in the United Kingdom. Angela's evidence was that when she returned, the painting was hanging in 'our bedroom' (ts 21; 4 October 2017).

316 Mr Peirce in his affidavit (exhibit A, pages 266 - 267, pars 16 - 17) stated:

I am aware from visiting Andre and Angela's home in Kalamunda that Andre purchased a painting for Angela while she was in the United Kingdom. I do not recall the name of the painting or the artist, however during a dinner with Angela and Andre at their home, Pim and I were shown the painting and were told by them about its history.

Angela took great pains to show us the painting which was hanging in their bedroom. Angela described how she and Andre had seen the painting in a country town which I recall was York. They both loved the painting but when they returned to the gallery to make the purchase, it was gone. I was told by Andre that while Angela was in the United Kingdom seeing family, he located the painting in Nedlands and that he had it in their home for Angela on her return. It was clear to me from this discussion that the painting was of importance to both of them and that it was a gift for Angela.

317 Mr Peirce was cross-examined as to his evidence concerning the gift of the Robert Hagan painting (ts 105 - 108; 4 October 2017). The cross-examination only supported the weight of Mr Peirce's evidence. Even though Angela may have 'done most of the talking' it was clear that Andre was present and he agreed to what Angela was saying. Mr Peirce concluded that it was purchased by Andre as a gift for Angela.

318 The Court does not draw any adverse inference against Angela, as was suggested by the defendants, from her failure to mention Mr Peirce's evidence in her affidavit.

319 Angela's evidence in cross-examination was (ts 22; 4 October 2017):

And in fact, do you have any reason to doubt the version that was put forward by his daughter that he handed her the certificate and told her certain things in the time shortly prior to his death about the painting which indicated that he did not believe it belonged to you? - - - *Well, it's very difficult to say. I believed it belonged to me. It was in front of our bed. He said to me, 'Look at this lovely painting.' We had seen it several times in York and gone to see it specifically. I found it and called him to look at it and then one day, it was not there and we went to say, 'You sold that lovely Robert Hagan painting?' and she said, 'No. It has gone back to the Gadfly Gallery.*

The important point about it though is that you just said, I think, that you believed it belonged to you? - - - *He - he said to me, 'Look, this is yours' and he gave me also two other surprises on that day.*

If you remember those - - -? They - it's, 'Look what I've bought for you.'

320 The language of gifting is inevitably much more informal than that  
of contract.

321 Mrs Taylor submitted that because Angela was overseas for an  
indefinite time, at the time of the purchase of the Robert Hagan painting  
by Andre, it was not a gift to Angela. The Court does not accept that  
submission. Buying a gift for someone as a surprise is not unusual. Since  
a painting is a one-off item, it is not something that will remain available  
indefinitely.

322 The fact that the Robert Hagan painting remained in Andre's  
possession is not inconsistent with a gift. Angela appears to have  
regarded the relationship as ongoing at all times although the level of the  
relationship varied until late 2004.

323 Ms Blake also gave oral evidence of the Robert Hagan painting  
being a gift from Andre to Angela. However, her evidence was hearsay.

324 The defendants' explanation that Andre purchased the painting as a  
family heirloom is not corroborated. The circumstances in which the  
Robert Hagan painting was purchased are far more consistent with a gift  
to Angela than a family heirloom. Although Andre seemingly claimed  
ownership of the Robert Hagan painting in exhibit H, the Court has  
concluded that he was not in a position to make that claim because he had  
already gifted it to Angela.

325 The Court accepts that the Robert Hagan painting was a gift from  
Andre to Angela. In particular, the Court has relied on the evidence of  
Mr Peirce. Accordingly, the Robert Hagan painting is not an asset of the  
estate. Rather, the Robert Hagan painting was a gift belonging to Angela.

**The assets and liabilities stated**

326 The Form 9B Statement of Assets and Liabilities of Andre's estate  
filed for probate purposes disclosed a net value of the estate of  
\$767,522.35 (exhibit A, page 22). The major asset of the estate listed in  
the 9B statement was the house that Angela and Andre shared at  
74 Spring Road, Kalamunda. This was valued at \$650,000. The house  
was registered in Andre's sole name. There was no supporting  
documentation for the valuation of the house.

327 The Form 9B also included in the assets of the estate, personal  
possessions (\$57,000) and collectable items (\$25,000), the ownership of  
which was in dispute (exhibit A, pages 22 - 23). The affidavit of the

executor sworn on 9 May 2014 stated the value of Andre's estate as at the date of his death at \$689,026.24. This excluded the value of personal possessions (\$57,000) and collectables (\$25,000), the ownership of which was disputed (exhibit A, pages 292 - 298). 74 Spring Road was valued at \$650,000. Again there was no supporting documentation for the valuation of the house.

328 Angela's affidavit of 4 March 2014 attached an appraisal of 74 Spring Road carried out by Ray White, which appraised 74 Spring Road at \$709,000 to \$739,000 as at 22 January 2014 (exhibit A, page 24).

329 An affidavit sworn by Mrs Taylor on 9 May 2014 stated that the value of Andre's estate as at the date of death was \$689,026.24. The funeral expenses were \$8,795.55. Andre provided money to Elizabeth for payment of his funeral expenses shortly before his death. Estate expenses had already reached \$19,336.59, of which legal expenses were \$17,059.37. The Court notes that those expenses had reached nearly \$20,000 in little over a year (exhibit A, pages 296 - 299).

330 Mrs Taylor swore a further affidavit on 10 December 2015. The affidavit attached a schedule of transactions. Mrs Taylor also deposed that (exhibit A, page 301):

5. The Kalamunda property [74 Spring Road] will be shortly listed for sale. In order to prepare the property for sale, the following works are required to be done. The estate presently had no cash and the following works will be paid for personally by me or my family, at the present time, the costs of which will be reimbursed from the proceeds of sale of the Kalamunda property:
  - a. RCD's;
  - b. Smoke Alarms;
  - c. Guttering and eaves;
  - d. Plumbing works to bathroom;
  - e. Repair leaking roof/replacement of roofing tiles;
  - f. Interior wall maintenance and repaint;
  - g. Exterior cleaning, waste removal and gardening[.]

331 The Court does not draw any adverse inference from the fact that work had to be undertaken on the property.

332 The Court finds that the value of the estate as at the date of death was  
\$675,000.

333 Regrettably, the property was never listed for sale and remained  
empty and unsold as at the date of the hearing.

334 In a further affidavit, undated but filed on 29 September 2017,  
Mrs Taylor stated the value of Andre's estate, as at the date of death, to be  
\$767,522.35. 74 Spring Road was valued at \$650,000.

335 The assets and liabilities of the estate, as at the time of the affidavit,  
(that is, about 29 September 2017), were stated to be approximately  
\$629,000 and \$102,000 respectively. 74 Spring Road was valued at  
\$600,000 (exhibit A, page 318). Again, a list of transactions was attached  
to the affidavit. The net value of the estate was stated to be approximately  
\$527,000 (exhibit A, page 324).

336 The valuation noted that:

The subject property is undergoing significant renovations with no floor  
coverings throughout, internal walls are not painted and bathroom and wet  
areas are incomplete and require fixtures and fittings.

(Affidavit of Elizabeth Taylor sworn 5 October 2017)

337 There are no other valuations of the property. Given that the value of  
74 Spring Road was agreed and that no one sought to obtain a valuation  
until shortly before trial, it appears that there was no real issue about the  
value of 74 Spring Road.

338 Various vehicles, bank accounts and shares stated to be part of the  
estate in earlier affidavits had dissipated by September 2017. No useful  
purpose is served by tracking what became of those items or the proceeds  
thereof.

339 As noted above in closing, it was submitted that the items, other than  
the Robert Hagan painting, the Spode ware and the engagement and  
wedding rings, were of no significant value. The certificate of  
Authenticity dated 20 April 2000 valued the Robert Hagan painting at  
\$6,940 (exhibit A, page 354).

340 No basis is stated for the value of \$25,000 ascribed to it in the  
9B statement or for the values stated by Andre in exhibit H. The value of  
paintings is notoriously fickle.



341 The engagement ring was purchased for \$7,700 (exhibit B, page 24).  
Again, the value of jewellery is notoriously fickle.

342 In short, the only assets of the estate other than 74 Spring Road that  
were, on Mrs Taylor's case, of any value were the Robert Hagan painting  
(\$6,940) and the engagement ring (\$7,700), a total of \$14,640.

343 The money in the bank accounts of about \$20,000 and the Telstra  
shares of \$4,880 were dissipated in estate expenses.

344 In effect, the estate has taken part in these proceedings to dispute  
items worth about \$15,000. Even using a value of \$25,000 for the Robert  
Hagan painting and \$13,000 for the rings, the total value is at best, about  
\$40,000 (see ts 282; 6 October 2017).

345 Mrs Taylor attached an excel spreadsheet to her affidavit detailing  
the transactions involved in administering the estate as at 23 October  
2015. It was clear from examination and cross-examination that she had  
little knowledge of the contents of the listed transactions, nor of the  
preparation of the spreadsheet.

346 The parties agreed that a valuation report dated 4 October 2017, filed  
by Mrs Taylor on 5 October 2017, which valued 74 Spring Road at  
\$600,000 accurately reflected the value of the property as at the date of  
trial.

347 Although no supporting documentation was provided for  
Mrs Taylor's statement of the value of Spring Road until 5 October 2017,  
having regard to the valuation of \$600,000 dated 4 October 2016, the  
Court accepts Mrs Taylor's valuation of 74 Spring Road as at the date of  
death as \$650,000.

348 For the purposes of assessing Angela's entitlement to provision from  
the estate, the Court has valued the estate at \$650,000. On any view it  
was a small estate. There is simply insufficient evidence to form any  
view as to the value of the personal possessions and collectibles.

349 The Court accepts that the value of 74 Spring Road as at the date of  
trial was \$600,000 and that by September 2017 that was the only  
significant asset of the estate. The liabilities are more problematic. Again  
on any view it was a small estate. This impacts on the provision that can  
be made.

**Angela's claim for provision**

350 As at the date of death, Angela's evidence is that she had assets of approximately \$155,000 and as at the time of swearing the affidavit, on 4 March 2014, she had assets of approximately \$204,000 net. Her income, which is verified by exhibit A, page 355, was, as at the date of death, \$1,073 and \$1,235 as at the date of swearing the affidavit. Her expenses for the week were \$1,418 according to her evidence.

351 Angela continued to live at the Kalamunda property until the end of January 2014. The defendants refused to permit Angela to remain in the property until it was sold and she moved out under threat of eviction proceedings.

352 On leaving Spring Road, Angela rented a room from a private home owner and subsequently moved into rental accommodation (exhibit A, page 65).

353 The provision that Angela seeks from the estate is to purchase a unit or an apartment in North Perth, Mount Lawley, Highgate, Mount Hawthorne or Maylands. As at June 2016, Angela's evidence is that she had assets of approximately \$102,000 and liabilities of approximately \$60,000 including legal fees of \$55,000 (exhibit A, page 66). Her income per fortnight is approximately \$1,300 and her expenses are approximately \$1,000 (exhibit A, page 67).

354 Angela's evidence is that during Andre's illness she was supporting herself from a carer's pension. That would have terminated upon Andre's death (exhibit A, page 68).

355 On 1 February 2017, Angela moved out of the boarding accommodation and into a rental unit in Mount Lawley.

356 Angela filed an affidavit updating her position as at 29 May 2014. Her assets and liabilities are set out page 238 of exhibit A:

**Angela's financial position as at 27 May 2014****Assets**

2005 Toyota Rav 4 motor vehicle (estimate)	\$5,000.00
Bankwest bank account	\$786.82
Robert Hagan oil painting	\$25,000.00

Furniture and contents (estimate)	\$5,000.00
Allocated pension (estimate)	\$50,000
<u>Total</u>	<u>\$85,786.86</u>

**Liabilities**

Legal fees (Culshaw Miller) (estimate)	\$45,000.00
Legal fees (Counsel) (estimate)	\$46,000.00
Loan from Dominic and Erica	\$9,870.00
Loan from Bruce Hawthornethwaite	\$1,100.00
<u>Total</u>	<u>\$101,970.00</u>

**Income****(Per fortnight)**

Centrelink	\$925.00
New Zealand pension	\$68.33
United Kingdom pension	\$195.65
Colonial allocated Pension	\$165.00
<u>Total</u>	<u>\$1,353.98</u>

**Expenses****(Per fortnight)**

Rent	\$500.00
Electricity	\$17.49
Furniture storage (advanced by DOMINIC and ERICA)	\$235.00
Food	\$200.00
Mobile telephone	\$35.00
Medical costs	\$45.00
Podiatry	\$20.00
Dental costs	\$15.50
Petrol	\$70.00
Car registration, maintenance and servicing and insurance	\$80.00
Clothes and shoes	\$30.00
Gifts and social outings with grandchildren	\$60.00
<u>Total</u>	<u>\$1,357.99</u>

357 At the time of Andre's death, Angela's life expectancy was approximately 16 years (exhibit A, pages 65 - 66). The Association of Superannuation Funds of Australia Retirement Standard for the June quarter 2017 for a single female living with a modest lifestyle was \$24,270 per annum, (that is, \$950 per fortnight in addition to the aged person for a retiree aged 65 to 85) (exhibit B, page 70D). It would appear that the figure of \$24,270 per annum is based on a person owing their own home since there is no allowance for mortgage repayments or rental. Angela's rent is \$500 per fortnight.

358 Angela was cross-examined as to her income and expenditure (see ts 87 - 92; 4 October 2017) but ultimately there was no real challenge to these figures in the defendants' closing.

359 Angela's financial position is very modest. Her car is more than 10 years old. She has very few assets. The valuation of \$25,000 from the Robert Hagan painting probably overstates its value considerably.

360 If anything, Angela has overstated her assets.

361 The defendants filed a schedule of her 'income' (exhibit E). In closing, counsel for Angela explained that exhibit E prepared by the defendants did not accurately reflect her income (ts 291 - 293, 303 - 305; 6 October 2017). The Court is satisfied on the basis of counsel's explanation in closing that Angela correctly stated her income. Exhibit E treated one-off payments which were in fact assets as income.

### **Elizabeth's financial circumstances**

362 Elizabeth's financial circumstances as at the date of Andre's death are set out in exhibit A at pages 345 - 347. Her total estimated income per month was \$4,400 and her total estimated expenditure per month was \$3,650. The total estimated value of Elizabeth's assets was \$354,000 and the total estimated value of her liabilities was \$242,000.

363 Elizabeth noted that the summary was prepared on the basis of her financial position alone and that where necessary, she has estimated the value of her share of an asset or liability jointly held. Taking Michael's share of assets and liabilities into account makes little difference to Elizabeth's net position as at the date of death (exhibit A, pages 345 - 347).

364 Elizabeth swore a supplementary affidavit on 3 October 2017.

365 She deposes the main change in her financial circumstances was that she and her husband, Michael, through their superannuation fund, decided to buy the Last Drop Tavern in Kalamunda.

366 In her affidavit, she states that the total purchase price of the Tavern was \$500,000 for the leasehold and \$50,000 for the stock and trade and goodwill of the business (exhibit A, page 403). However, the contract of sale refers to a purchase price of \$300,000. There is nothing in the purchase agreement to suggest that vendor finance is being provided. If there is a vendor finance arrangement for a further \$200,000, as Elizabeth deposes to, then the purchase price of the Tavern is inconsistent with the amount set out in the purchase agreement. EDT 2 to that affidavit refers to vendor finance agreement. There is an email dated Friday 6 January 2017 which refers to a vendor finance proposal for \$200,000 commencing on 27 February. If in fact it is a vendor finance proposal then one would expect that the vendor finance would form part of the \$300,000 purchase price. Otherwise, the purchase price has been misstated. It is not clear why that would have been done, although it may be that there are stamp duty implications. The explanation offered by Elizabeth was unsatisfactory.

367 There was no evidence as to the income and expenditure of the Last Drop Tavern.

368 Elizabeth and Michael were in a sufficiently sound financial position to have purchased another property at 3 Cunnold Close, Pickering Brook in January 2016.

369 Elizabeth estimated that her income per month was \$5,265 and her expenditure was \$5,231. Her assets were listed as \$775,500 and her liabilities as \$490,900, a net position of \$284,600, an improvement from a net position of about \$112,000 at the date of Andre's death.

370 Elizabeth neglected to include the fact that her husband, Michael, was earning \$195,000 per year, inclusive of tax and superannuation (ts 181; 5 October 2017). Given that there is no suggestion that the relationship is in any way at risk, the fact that her husband was earning \$195,000 per annum is an extremely relevant matter in relation to the assessment of her financial position. That should have been included in her affidavit.

371 Michael was an underground supervisor and then became an underground foreman with BHP from 2010 to 2014 (ts 181; 5 October 2017).

372 We do not know what Michael's income was at the date of Andre's  
death. Given that he was working in the same sort of occupation, it is  
reasonable to assume that, at the very least, it was in the mid-\$100,000s.

373 Although Michael was made redundant by BHP in 2014, he does not  
state that he was unemployed for any period of time (ts 181; 5 October  
2017).

374 Both at the time of Andre's death and at the date of trial, Michael and  
Elizabeth were high income earners. They obviously have a significant  
capacity to acquire assets. They are also relatively young and have the  
opportunity to continue to earn a substantial income.

### **Philippe's financial position**

375 Philippe's estimated position as of the date of Andre's death was an  
income per month is \$4,250. His estimated expenses were \$3,018 per  
month. This generated a surplus of approximately \$1,200 per month  
(exhibit A, pages 452 - 453). His assets comprised slightly over \$90,000.  
His liabilities were \$2,000 (exhibit A, page 453).

376 Philippe swore a supplementary affidavit on 22 September 2017 in  
which he deposed to his updated income and expenses and assets and  
liabilities. His estimated income is \$3,620 per month and his estimated  
expenses are \$3,579 (exhibit A, page 482); that is, he is barely breaking  
even. His assets total \$113,400. His liabilities are \$60,269.70 including a  
crushing \$56,069.70 in legal fees, those legal fees being a 50% share of  
the Eastwood Sweeney legal fees as at that date (exhibit A,  
pages 482 - 483).

377 Philippe was plainly in a tight financial position at the date of  
Andre's death and as at the date of trial.

### **Is Angela entitled to provision?**

378 The authorities relating to the requirements under the Family  
Provision Act are well known and were most recently set out by the High  
Court in *Vigolo v Bostin* (2005) 221 CLR 191 (see also  
*Devereaux-Warnes v Hall [No 3]* [2007] WASCA 235; *Waddingham v  
Burke* [2015] WASC 65 [56] - [78]). From these authorities, there are  
two issues which fell for determination:

whether the Deceased left the plaintiff 'without adequate provision for his  
or her proper maintenance, support, education or advance in life' (the First  
Stage); and

if (a) is answered in the affirmative, whether the Court should exercise its discretion in favour of the plaintiff and order adequate provision for their proper maintenance, support, education and advancement in life (the Second Stage).

379 In *Delacour v Waddington* (1953) 89 CLR 117 at 127, the High Court said:

... the 'character or conduct' ... must be taken to refer to character or conduct of such a nature as to entitle the court to say that the applicant has forfeited or abandoned his or her moral claims on the testator.

380 In *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 156, Gibbs J said:

The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also, to some extent, on the strength of his need or claim to provision from the estate of the testatrix. The stronger the applicant's case for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision.

381 Similarly in *De Angelis v De Angelis* [2003] VSC 432 [76], Justice Dodds-Streton cited Justice Ormiston who said:

... it is primarily to the testator's moral obligations that the court has been required to look, rather than the virtues and vices of those who seek provision.

382 Angela was in a de facto relationship with Andre from shortly before Christmas 2004 to his death in July 2013 - a period of eight and a half years. During that period Angela was reliant on Andre for her income. By reason of her de facto relationship, she received a lesser pension than she would otherwise have been entitled to.

383 Andre's testamentary intention which may have been appropriate for a relatively short-term de facto relationship does not reflect the testamentary obligations that arise from a de facto relationship that has lasted eight and a half years.

384 Elizabeth and Philippe submitted that considerable weight should be given to Andre's testamentary will citing *Slack v Rogan; Palfy v Rogan* [2013] NSWSC 522 [127] (*Slack*).

385 There is a specific requirement under s 60(1)(j) of the New South Wales *Family Provision Act 1982* (NSW Act) to have regard to the testator's intentions. There is no such provision under the Family

Provision Act (WA). The eligibility provisions under the NSW Act are much wider and to some extent s 60(1)(j) should be seen as a limiting factor on the width of the eligibility factors.

386 It is often the case that a testator will be absolutely clear about his/her testamentary intention but in clear breach of his/her testamentary obligations. What the Court said in *Slack* (at [127]) was 'respect should be given to a capable testator's judgment as to who should benefit from the estate if it can be seen that the testator has duly considered the claims on the estate'.

387 Andre's will was made in June 2006, some seven years before his death and when the de facto relationship was only of 18 months duration. The legal presumption that a will speaks as at the date of death which applies in probate proceedings has no place in Family Provision proceedings. Wills are often made and never updated despite the birth of children and other changed circumstances.

388 The Court rejects the defendants' evidence generally and accordingly it rejects the evidence relating to Andre's testamentary intentions given by the defendants except in so far as they are expressed in his will.

389 The second and third defendant submitted that:

51. The nature and quality of the relationship between an applicant and the deceased is always a relevant consideration. However, there may be particular instances where there is an unusual factor that bears upon the quality of the relationship such as hostility, estrangement or conduct on the part of the applicant that is hurtful to the deceased.

390 Since Andre was not aware of Angela's gambling, it cannot be found that there was hostility, estrangement or conduct on the part of Angela that was hurtful to Andre. For this factor to be relevant, the deceased must be aware of the conduct (see for example, *Murphy v Stewart* [2004] NSWSC 569)

391 The second and third defendants further submitted that:

52. Quite apart from the fact the low quality of the relationship between [Angela] and [Andre] by the date of his death and the fact that they had led separate lives as at the date of the death, the evidence bears out that [Angela] had engaged in a sustained deception in keeping the nature of her significant gambling activities from [Andre]. The fact of that deception is apparent on the face of the [Angela's] own evidence in light of the records



obtained from the Burswood Casino and the corresponding transactions from [Angela's] bank account statements.

392 The Court has not accepted the defendants' evidence as to the alleged 'low quality' of the relationship between Angela and Andre. The Court does accept that Angela gambled and that she hid it from Andre. The Court also notes the circumstances set out above in which the gambling occurred. The Court also notes that much of Angela's serious gambling occurred after Andre's death. The Court also notes that it is doubtless often the case that married couples are not completely frank with each other.

393 The second and third defendants also submitted that:

54. As noted by Hallen J, in *Fulton v Fulton* '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'. His Honour then went on to observe that the Act does not limit the consideration of 'conduct' to conduct towards the deceased, referring to a decision of Jordan J in *In re the Will of F B Gilbert (dec'd)* in which the learned Judge said of an equivalent section:

'the Court may refuse to make an order in favour of any person whose character or conduct is such as to disentitle him to the benefit of such an order. I think that this means character or conduct relevant to the purposes which the Act is intended to serve, for example, misconduct towards the testator or character or conduct which shows that any need which an applicant may have for maintenance is due to his or her own default.'

55. On an overall assessment, the Court may draw the inference on the basis of the second and third defendants' evidence that [Andre] disapproved of gambling.

56. [Angela's] present position is otherwise entirely attributable to her. In 2005 [Angela] sold her house and chose to spend the proceeds at the casino. [Angela] leads no evidence that she suffers from any addiction. She has also chosen to spend the proceeds of the [Andre's] superannuation on gambling activities.

394 The Court does not accept the defendants' evidence that Andre disapproved of gambling. Anyone would see Angela's level of gambling during Andre's illness and thereafter as a problem. Whether they would disapprove in a moral sense is a different question.

395 Angela did not lead evidence that she suffered from an addiction. She did not need to. Counsel for the second and third defendants concluded that Angela was an addict (see ts 280; 6 October 2017). It is obvious that she has a problem. To speak of choice in those circumstances assumes that there is a choice.

396 The Court accepts that Angela has squandered a large amount of money by gambling (see generally the analysis of counsel for the second and third defendants at ts 275 - 276; 6 October 2017). However, the proceeds of the sale of her house went into an allocated pension (ts 296; 6 October 2017). It is of at least some significance that it was Angela's own funds she dissipated, save for the \$60,000 she received from Andre's superannuation; and even that \$60,000 was gambled after it was gifted to her. She did not take from Andre's assets in his life time.

397 These circumstances are vastly different to the case of *Fulton* (at [412]) where the claimants had transferred \$495,000 prior to death, without the informed consent of the deceased before he died.

398 The case of *In Re the Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 (referred to at [396] of *Fulton*), is to be considered with that immediately following at [397]. The Court also notes what was said at [398]:

397 More recently, in *Collicoat v McMillan* [1999] 3 VR 803, at 817, Ormiston J wrote in relation to the manner in which an applicant's behaviour towards the deceased is to be considered:

'... Ordinarily each of the persons who have a statutory right to make application are entitled to have their position considered by a testator but their behaviour (right or wrong) towards the testator may only provide a basis for measuring appropriately the testator's obligation to make provision for each of those applicants. Their sins are irrelevant except insofar as a testator might properly take exception to their behaviour.'

398 In *Hampson v Hampson* [2010] NSWCA 359, Campbell JA (with whom Giles JA and Handley AJA agreed) recently noted, at [80]:

'The requirement to have regard to the totality of the relationship can in many cases be satisfied by considering the overall quality of the relationship assessed in an overall and fairly broad-brush way, not minutely. Consideration of the detail of the relationship is ordinarily not called for except where there is an unusual factor that bears on the quality of the relationship, such as hostility, estrangement, conduct on

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

399           The Court does not accept that Angela's gambling constitutes disentitling conduct. She has a problem that needs to be addressed. That is as far as it goes.

400           The second and third defendants further submitted that:

57.       Overall, the circumstances which militate against the Court making any award in favour of [Angela] (noting the second and third defendants' position that [Angela] and [Andre] were not in a de facto relationship as at the date of death) are as follows;

57.1.     [Angela] benefited significantly from [Andre's] generosity during their relationship;

57.2.     During the period they lived together, [Andre] provided [Angela] with accommodation, meals and, often, housekeeping ([Angela] rarely doing housework) without [Angela] providing any benefit in kind;

57.3.     [Angela] made no material or indirect contribution to the acquisition, conservation or improvement of the property of [Andre];

57.4.     While [Angela] provided some level of companionship and care (for which she was rewarded in the form of the gift of [Andre's] superannuation entitlements), she had full use of [Andre's] house as well as its contents[.]

401           The Court does not accept that the accommodation that a de facto or a de jure spouse receives during such a relationship can be characterised as 'generous'. That might be applicable to a lodger. It does not apply to someone in a marriage-like relationship. To suggest otherwise is both socially and legally myopic.

402 The second and third defendants also submitted:

57.5. On [Angela's] case, she has, in addition to [Andre's] superannuation entitlements, received other substantial benefits including

a ring valued at \$13,250.00 on 17 August 2002, a television bought by Michael Fasanini for [Andre] valued at \$1,085.00 on 15 July 2013 and a painting valued between \$25,000 and \$40,000[.]

403 The Court does not regard these benefits (other than the superannuation) as in any way substantial. The ring and the Robert Hagan painting were overvalued and both the ring and the painting have considerable sentimental value for Angela. They were not in any realistic sense realisable assets.

404 The second and third defendants further submitted:

57.6. For some period prior to his death, [Angela] conducted her life on an almost entirely separate basis[.]

405 The Court does not accept this contention.

406 The second and third defendants also submitted:

57.7. A substantial amount of the time spent apart from [Andre] was time spent on gambling activities, a fact which she deliberately kept hidden from [Andre] and which [Andre] almost certainly would have disapproved, given the views he expressed regarding gambling;

407 The Court had dealt with this above.

408 The second and third defendants further submitted:

57.8. The size of the estate is not large and, relatively, the benefits already received by [Angela] represent a significant amount compared to the size of the estate;

409 The Court does not accept that Angela has received a significant amount. The Court does accept that the estate is not large.

410 The second and third defendants also submitted:

57.9. Each of the second and third defendants have legitimate calls upon [Andre's] bounty and were properly the object of [Andre's] consideration.

- (a) the second defendant is aged 49, has a young child and has recently purchased a business in the hospitality industry. Accordingly, she has a significant debt to repay and faces the uncertainties of running a business;
- (b) the third defendant is aged 42, has a young child and is expecting another soon, he has stable full-time employment, but no significant assets.

57.10. Each of the second and third defendants' financial circumstances are such that they have 'an immediate or foreseeable need for access to realisable capital.

411 The Court accepts that Philippe has a claim on Andre's bounty but it does not accept that Elizabeth has such a claim.

412 The second and third defendants further submitted:

58. The above assessment bears significant resemblance to that undertaken by the court in *Bevilacqua v Robinson*, a case in which the Court found that a de facto partner failed to meet the jurisdictional threshold of the First Stage. The second and third defendants commend this Court to take a similar approach and reach the same conclusion

413 The Court does not accept that submission. In *Bevilacqua v Robinson* [2008] NSWSC 463, the Court found that the plaintiff was not a credible witness and accepted the evidence of the defendants. The case is fact specific.

### **Angela's health**

414 Angela's has significant health issues. Those issues are set out in a report from Dr Suzanne Bicker dated 3 June 2016 (exhibit A, pages 205 - 206). Some provision needs to be allowed to provide for contingencies.

### **What is the appropriate provision for Angela?**

415 In *Slack*, White J stated at [134]:

Minds could legitimately differ as to whether any provision out of the estate is required for Mr Palffy's proper maintenance and advancement in life. I have concluded that the governing factor is Mr Palffy's precarious financial position arising from his debts. In my view this need is the dominant consideration in determining whether adequate provision was made for Mr Palffy's maintenance and advancement in life and what provision ought to be made for him from the estate. However, the countervailing factors 'restrain [the] amplitude' of the provision to be

ordered (*Wheatley v Wheatley* [2006] NSWCA 262 at [37]). I have concluded that the provision that would be adequate for the proper maintenance and advancement in life of Mr Palffy is a sum that is sufficient to discharge his debts and to provide a buffer for contingencies. I conclude that a legacy of \$90,000 is adequate for that purpose.

416 Angela is now 73 years old. Her gambling problems, and particularly her gambling after Andre's death, means that she is now in a precarious financial position. As White J stated in *Slack*, the dominant consideration is Angela's precarious financial position. Angela has health problems. She does not have her own accommodation and she has no funds to fall back on to provide for contingencies.

417 Whilst her financial position is to some extent self-inflicted, the fact remains that she is in a precarious financial position.

418 This is a small estate that has been ravaged by legal costs.

419 Angela has the primary call on Andre's testamentary obligations. Angela's counsel cited *Luciano v Rosenblum* (1985) 2 NSWLR 65 as authority for the nature of the provision that should be made for her: to be secure in her own accommodation and to have a fund for contingencies. Taking into consideration the size of the estate that is simply unrealistic because the estate is too small.

420 Appropriate provision is a lump sum to provide for an income to support Angela in rental accommodation and in time, a bond for aged care. It should also provide for health contingencies which may arise as Angela ages.

421 The Court accepts that there is no evidence from which a precise figure can be determined and that the figure chosen has a degree of speculation about it. However, the Court has determined that an appropriate sum is \$220,000. That provision should be subject to a protective trust.

422 Provision of \$220,000 for Angela will leave approximately \$300,000 to provide for Philippe and costs. If the balance of \$280,000 was allocated equally between Elizabeth and Philippe it would be \$140,000 each. However, since Philippe's needs are plainly greater than Elizabeth's, any costs should firstly come from Elizabeth's portion of Andre's estate and then from Philippe's portion of the estate.

**The costs of these proceedings**

423           Ultimately I have found that the value of the estate at the date of death was \$675,000. The value of the estate as at the date of the trial was \$600,000 (exclusive of costs).

424           The costs expended on a matter should be proportional to the value of the matter in issue (see Practice Direction 9.2.2, O 1, r 4B of the *State Administrative Rules 2004* (WA)).

425           I was unsettled upon entering Court on the first day to see six persons seated at the bar table. Given the value of the estate at trial, that represented one person at the bar table for every \$100,000 of the estate. On no possible basis could the size of the estate and the complexity of the matter justify six persons.

426           In an estate of this size and in any estate under \$2 million, unless there are unusually complex issues arising, counsel should be able to do the matter on her or his own without an instructing solicitor. If they cannot, they should not accept the brief or take instruction.

427           It is also the case that when the executor is, as was the case here, in the camp of the beneficiaries, there is no justification for the executor and the beneficiary to be separately represented. Archaic rules relating to potential conflict need to recognise the realities of modern litigation and the need for proportionality. In a case such as this, there should have been only two lawyers present - counsel for Angela and counsel for Mrs Taylor, Elizabeth and Philippe.

428           The Court also notes that the estate engaged in the action which, on the Executor's case was for assets that were at best, worth \$40,000. The Executor has spent nearly twice that amount on legal fees. This is not a sensible economic proposition.

429           On 6 October 2017, the Court ordered (ts 266):

- (1)    By 4 pm, Friday 13 October 2017, the parties are to file and serve a schedule of the legal expenses incurred by each of the parties with copies of the accounts or fee notes.
- (2)    In filing the schedule of legal expenses, the first defendant is to differentiate between costs incurred in the administration of the estate and the costs of these proceedings.

The information provided is summarised below:

PLAINTIFF'S COSTS	LAWYER			PLAINTIFF'S TOTAL	
Angela (Affidavit of Sarah Jane Nicholls sworn 26 October 2017; plaintiff's preliminary submissions on costs par 3)	<b>Culshaw Miller Lawyers</b>			<b>\$140,859.69</b>	
1 <sup>st</sup> DEFENDANT'S COSTS	LAWYER		1 <sup>st</sup> DEFENDANT'S SUBTOTAL	DEFENDANTS' SUBTOTAL	DEFENDANTS' TOTAL
Mrs Taylor (Affidavit of Paul Traianedes 6 October 2017; email 2 November 2017)	<b>CGL</b>	\$12,296.50	\$76,805.34		
	<b>Armstrong Legal</b>	\$64,508.84			
2 <sup>nd</sup> and 3 <sup>rd</sup> DEFENDANTS' COSTS	LAWYER		2 <sup>nd</sup> and 3 <sup>rd</sup> DEFENDANTS SUBTOTALS		
Elizabeth & Philippe (Affidavit of Cameron Victor)	<b>CGL</b>	\$15,450.50 (par 5)		\$201,908,89 (exclusive of WIP)	<b>\$342,768.</b> (exclusive of WIP)



Eastwood 12 October 2017)	<b>Eastwood Sweeney Law</b> (up to 6.9.16)	\$109,653.05 (par 7)	\$125,103.55 (exclusive of WIP)		
	<b>Eastwood Sweeney Law (WIP)</b>	\$159,506.06 (pages 37-46; para 10)	\$284,609.61 (inclusive of WIP)	\$361, 414.95	<b>\$502,227</b> (inclusive of WIP)

431 It is difficult to see why a solicitor from Victoria attended at trial when the property that was the subject of the dispute was of such disproportionate value compared to the costs.

432 The effect of failing to realise the need for proportionality is that the costs of this matter amount to at least \$342,000 and potentially \$500,000, if all of the second and third defendants' 'work in progress (WIP)' is included.

433 It is also the case that although no party wished to retain the residential property which formed the only substantial asset of Andre, as at the date of trial, it remains unsold. Doubtless, further costs will be incurred in selling it.

434 After Angela left the property at Spring Road, it was never occupied and estate fees of \$29,420 were incurred in paying for rates, insurance and other items. Mrs Taylor's evidence was that it was uninhabitable because certain works needed to be undertaken on it. The Court does not understand how those works could have prevented the sale of the property. There was no evidence those works were a bar to sale.

435 If the money to spend on lawyers could be found without difficulty, it could have been spent on the necessary repairs to the house to make it habitable. It could have and should have been sold at a much earlier date with consequent benefits to the estate.

436 Mrs Taylor's stated reason for not selling the property was the advice she had then received from her then solicitors. Her evidence was, 'I sought advice from CGL. Once they said I couldn't do anything with it, I couldn't live in it. I had to wait for the court to make a decision' (ts 151; 5 October 2017). If such advice was given, it was plainly wrong. If such advice was not given then whatever advice was given was not clear (see also Elizabeth's evidence ts 248; 6 October 2017). It is the duty of lawyers to give advice to clients that is readily understandable. Clearly the advice was not given with sufficient clarity to bring home to Mrs Taylor her right to and the need to sell the property.

437 What is even more perplexing is that in August 2003 Mrs Taylor caused her solicitors to send a letter to Angela's solicitors stating that she proposed to sell the property (exhibit G). Elizabeth's evidence was that there was always an intention to sell the property (ts 239; 6 October 2017).

438 Common sense would have dictated that the property be sold within a reasonable time, certainly within the executor's year. Instead, additional costs have been incurred.

439 It is also the case that matters are far easier to settle when there is money in the bank and that amount can be divided rather than the uncertainties that arise from the need to sell a property and uncertainty as to the net amount that the estate will receive.

440 The amount of costs incurred in the administration of the estate as distinct from the costs of these proceedings incurred with CGL is not entirely clear. CGL, who originally acted for all the defendants, made no clear distinction between the costs incurred in administering the estate and those incurred in the Family Provision proceedings. They were obliged to do so. CGL were not cooperative in providing that evidence to Mr Traianedes. CGL's obligations did not cease when they had been paid and the file transferred to Mr Traianedes' firm.

441 The costs on this matter are not, as counsel for the executor described them, 'unfortunate'. They are a scandal to the administration of justice and bring the legal profession into disrepute in the eyes of the public.

442 Estates are not there to be feasted upon by lawyers but to go to the beneficiaries and those who might be entitled either under the will, the Administration Act or the Family Provision Act (see *Gill v Smith* [2007] NSWSC 832 [323]; see also *Young v Knight* [2005] NSWSC 754 citing

*Jackson v Riley* (Unreported, NSWSC, 24 February 1989) (Cohen J) ; and *Collett v Knox* [2010] QSC 132).

443 No citizen of this community being informed of the costs incurred relevant to the amount of the estate could be other than horrified. Family provision matters are generally not complex and costs of this magnitude relative to the value of the estate are inexcusable.

444 Angela's failure to disclose her gambling led to a massive degree of distrust and additional costs.

445 However, the vast proportion of unnecessary costs was incurred in contesting the existence of the de facto relationship. It should have been obvious from the documentary evidence that there was a de facto relationship from at least Christmas 2004 and from the affidavits filed on behalf of Angela from non-parties that the very high probability was that a de facto relationship would be established. If the defendants wish to put in issue the existence of a de facto relationship in such circumstances, particularly when they have admitted to a de facto relationship in the death notice and the death certificate, than they should not expect the estate to reimburse them.

446 If Angela had properly disclosed her gambling and the defendants had properly conceded the existence of a de facto relationship from late 2004 until Andre's death, this matter could have been heard in a day. This had not only led to relatively enormous legal costs but a waste of this Court's hearing time.

447 Mr Stephensen, counsel for the executor at least attended only when estate matters were in issue so far as possible. He at least recognised that unnecessary costs were being incurred.

448 Given the value of what was in issue, incurring legal fees for the estate of about \$77,000 is indefensible.

449 Further, the value of the property as at the date of hearing, which was ultimately agreed at the hearing should have been a non-issue from a much earlier period of time.

450 The length of time this matter has taken to reach a hearing is inexcusable. Andre Taylor died on 28 July 2013. Four years later, this matter came to trial. It is no great secret that the longer a matter continues, the greater the lawyers' fees. Lawyers have an obligation to bring matters to hearing as soon as possible.

CURTHOYS J

451 The reality is that 'all are punished'.

452 I will hear from the parties as to costs.

453 The executor should be prepared to deal with why she should receive costs from the estate (see *Lathwell v Lathwell* [2008] WASC 256).

454 All parties should be prepared to address why costs should not be capped (see for example, *Carroll v Cowburn* [2003] NSWSC 248 [26]).

455 Council for the plaintiff should also be prepared to address the Court as to the precise terms of the protective trust and the trustee. In this case, given Angela's gambling, it is appropriate that any provision be placed in a protective trust.

### **Orders**

456 This Court being of the opinion that the disposition of the deceased's estate effected by his will is not such as to make proper provision for the proper maintenance, support, education or advancement in life of the plaintiff it is ordered that:

1. The sum of \$220,000 be paid to the plaintiff from the estate of the deceased. The sum is to bear interest from 90 days after the date of this order at 5% per annum.
2. The residue of the estate is to be divided equally between Elizabeth Desiree Taylor and Andre Philippe Taylor in equal shares.
3. A certified copy of this order be included in the probate and that the first defendant do produce the grant to the Court for that purpose.
4. Costs be reserved to a further hearing.