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Presenter Paper

Family Provision

This is an excellent session with Rodney Brender presenting and Senior Counsel Kevin Connor questioning Rodney. Rodney's experience in family provision cases is considerable. The session is entertaining and insightful – we should all watch.

Discussion Includes

- Who can make a family provision application?
- What factors does the Court take into account?
- How is the Court informed as to the expectations of the community?
- How important is freedom of testation in modern Australian laws?
- How strong are the claims of widows and widowers in modern Australian law?
- What principles apply to costs orders in family provision applications?
- How does the Court deal with the deceased's "notional estate"?
- What lessons are there for solicitors drafting wills for clients?

Family Provision cases- A few recent developments

1. The division of the Succession Act dealing with family provision orders was preceded in NSW by the Testators Family Maintenance Act and then the Family Provision Act.

2. The principles are well known. The key provision is s 59 of the Act. The court must be satisfied, first, that the applicant is an eligible person within the meaning of s 57(1) (s 59(1)(a)). In New South Wales, it is a multi-category based eligibility system

3. There are six categories of persons by, or on whose behalf, an application may be made.

4. It is only if eligibility is found, that the court must determine whether adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made by the Will of the deceased. It is this mandatory legislative imperative that drives the ultimate result, and it is only if the court is satisfied of the inadequacy of provision, that consideration is given to whether to make a family provision order (s 59(2)). Only then may "the Court ... make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made".

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

6. There is no single provision of which it may be said that that is the provision that a wise and just testator would have made. There is instead a range of appropriate provisions, in much the same way as there is a range of awards for pain and suffering or a range of available sentences. Minds may legitimately differ as to the provision that should be made.

7. It was said in the Court of Appeal (by Basten JA) in *Foley v Ellis* [2008] NSWCA 288, at [3], that the state of satisfaction "depends upon a multi-faceted evaluative judgment". In *Kay v Archbold* [2008] NSWSC 254, at [126], White J said that the assessment of what provision is proper involved "an intuitive assessment". Stevenson J has described it as "an evaluative determination of a discretionary nature, not susceptible of complete exposition" and one

which is "inexact, non-scientific, not narrow or purely mathematical, and fact and circumstance specific": *Szypica v O'Beirne* [2013] NSWSC 297, at [40].

8. Neither is the word "maintenance", nor the phrase "advancement in life", defined in the Act.

9. The factors in 60(2) are multiple - 15 items. So, really after all the words and judicial formulations about the meaning of words like proper or adequate provision, you really need to read lots of decisions to try to get a flavour of what the judges might do. Hallen J said recently they are getting 15 new filings a week. The majority settle. The profession need to hep that process. We do that by being in a position to forecast what might happen, at least within a reasonable range.

10. Below I deal with a few recent cases. These are heavily fact based decisions, so we need to look at the facts reasonably closely, and then the judge's reasoning

Vanderloo v Milne [2014] NSWSC 1932

11. The deceased was married, but divorced in 1984. There were two sons of that marriage, aged 40 and 42 years old at trial. Later she remarried - to Mr Vanderloo

12. The sons were the executors of the will of Mrs Vanderloo, which she executed on 1 November 2010. The two brothers, together with Mr Vanderloo, were the principal relevant beneficiaries under the will.

13. Mr Vanderloo met Mrs Vanderloo in January 1995. The couple began seeing each other and in January 1996 Mr Vanderloo moved into the Property with Mrs Vanderloo. The couple were married on 16 March 1996. So approximately a 16 year marriage.

14. At the time of the marriage Mr Vanderloo had minimal assets. Mrs Vanderloo was working as a maths teacher. She already owned a Property.

15. The principal asset in Mrs Vanderloo's estate was her house property at Hornsby Heights. Mrs Vanderloo left the Property as to 50% to Mr Vanderloo, and as to 25% to each of her two sons.

16. Mrs Vanderloo directed the Property to go to her sons, if she was predeceased by her second husband, rather than for 50% of the Property to go to Mr Vanderloo's estate.

17. The executors sold the Property on 22 February 2013 for $730,000, and the net receipt on completion on 24 April 2013 was $710,373. Of that sum the executors distributed $255,186 to

Mr Vanderloo, and half of that amount to each of David and Christopher Milne. The executors retained **$200,000** to cover the costs and any judgement

18. If Mr Vanderloo had not instituted these proceedings, he would have received a total amount of $403,569.39, which included about $50k in super. David and Christopher Milne would **each** have received $241,630.85 in total.

19. After probate was granted, David and Christopher Milne learned that Mrs Vanderloo gave a guarantee. The estate's share of that liability was $50,000.

20. The executors' legal costs of these proceedings were estimated at $124,127.28, Mr Vanderloo's own costs on the ordinary basis totalled $65,000. This meant that the amount available of $25,872.76 (after interim distributions of the $200,000) would not be sufficient and David and Christopher Milne would have had to make up the shortfall .

21. Mr Vanderloo lived in the Property without paying rent for about 12 months. He then worked for a short while and was retrenched . From this time he began living on his superannuation.

22. In September 2012 he qualified as a teacher of English as a second language after completing a four-week course. Mr Vanderloo obtained a position teaching English in China. His role was to teach English to middle-class students.

23. Mr Vanderloo then settled in Belgium where he had family nearby. He rented a two-bedroom apartment. But meanwhile in September 2013 Mr Vanderloo formed a relationship with a Chinese woman 50 years of age. The couple married. Jiang worked as a housemaid before the marriage. She owned a home.

24. Mr Vanderloo gave his wife $17,000, when he left China to go to Belgium, and told her to stop work and live off that money until she could join him.

25. Mr Vanderloo made an application for further provision. It was a little out of time.

26. The application was dismissed by Robb J. The case put forward by Mr Vanderloo was that his present capital needs involved a total sum of $430,000, which would permit him to buy a two-bedroom apartment in Belgium; a reliable motor vehicle; furniture and fittings; and retain an amount for contingencies.

27. The amount of $430,000 was only $26,430.61 more than Mr Vanderloo would have had, if he had not prosecuted the proceedings.

28. The claim was made that as a widower he should receive some primacy. In this case the two adult sons were not in strong financial circumstances. One more so than the other. The judge said - "It is natural that the Court should recognise the social and moral significance of the matrimonial (or other relationship) bond which, even in the modern world, will often involve a long-term relationship ...There will be many cases where the surviving partner has a call on the deceased partner's estate that is ascendant over the competing claims of other eligible persons. In appropriate circumstances that may be as true for widowers as it is for widows, or other partners to relationships. However, it would be wrong for the Court routinely to equate the survivor of all relationships to the archetypal situation of the dependent widow of a long-term marriage."

29. A further factor that was of particular significance in the present case concerned the evidence of the steps taken by Mrs Vanderloo during the final stage of her illness to make a will that made a carefully considered division of her assets between her husband and her two sons.

30. In this respect White J in *Slack v Rogan; Palffry v Rogan* [2013] NSWSC 522: (2013) 85 NSWLR 253 said at [127]:

> **[127]** In my view, 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. .....The deceased will have been in a better position to determine what provision for a claimant's maintenance and advancement in life is proper than will be a Court called on to determine that question months or years after the deceased's death when the person best able to give evidence on that question is no longer alive. *Accordingly, if the deceased was capable of giving due consideration to that question and did so, considerable weight should be given to the testator's testamentary wishes in recognition of the better position in which the deceased was placed (emphasis added):* Stott *v Cook* (1960) 33 ALJR 447 per Taylor J at 453–454 cited in *Nowak v Beska* [2013] NSWSC 166 at [136]. This is subject to the qualification that the Court's determination under s 59(1)(c) and s 59(2) is to be made having regard to the circumstances at the time the Court is considering the application, rather than at the time of the deceased's death or will.

31. Another consideration that was important to the determination of whether Mrs Vanderloo had failed to make adequate provision for the proper maintenance and advancement in life of Mr Vanderloo was the size of her estate, and the competing claims on her bounty by her husband and her two sons.

32. Ultimately His Honour decided that he would not interfere. He reiterated the point that Mrs Vanderloo made a considered judgment as to the fair and just distribution of her estate

between her husband and her two sons. Her will was made relatively shortly before her death, in the probable apprehension that her remaining time might be limited, and it provides a true record of her final testamentary intentions. ..... She was entitled to have regard to the circumstances of her sons, and to give the balance of her estate to them, so that it would inure for the benefit of her children and grandchildren. Given Mr Vanderloo's age, any greater gift to him would in due course go to the beneficiaries of his will, and not to her descendants.

33. He also stressed that the case put forward was that Mr Vanderloo's present capital need was a sum of $430,000. That amount was only $26,430.61 more than Mr Vanderloo would have had, had he not commenced the proceedings.

34. The lesson is that close attention must be paid to the relativities, the prospect of where further inheritance would go, and the freedom of testation where a considered division had occurred. This last point was critical - the bona fide attempt the deceased had made to divide the estate between her family - old and new.

35. An extension of time application was rejected, but mainly on the basis, after the decision was known, that the underlying case was not strong.

Henderson v Lees [2014] NSWSC 1948.

36. In this case the plaintiff was also unsuccessful. The estate was a similar size and the family makeup and will were not dissimilar.

37. The deceased Heather Joyce Henderson died aged 85 years, leaving a will dividing the deceased's estate, which amounted to approximately $727,000 in net distributable terms, in two equal shares to the plaintiff Mr Henderson, who was her sole child, and to the second defendant Mr Munro, who was her partner for about 18 years. The plaintiff son claimed further provision out of the estate.

38. The deceased's first husband died in 1992. They had one child. Following her husband's death, the deceased, in about 1995, commenced a relationship with Mr Munro. Initially, he seems to have stayed at the Pittwater Road property over weekends. Following his retirement in 1999, the relationship intensified somewhat and he typically spent Fridays through to Mondays at the deceased's Pittwater Road home. However, except for some periods when the deceased was convalescing and needed intensive care and support, they never cohabited on a full time basis, and each continued to maintain their own separate households. There was no need to determine if he was a "de facto".

39. Mr Henderson, the plaintiff, received some significant help during his mother's lifetime.

40. On 10 June 2005, a number of transactions were completed which gave effect to the partition of the property at Pittwater Road into two lots: the front lot (lot 1), was transferred into the name of the deceased alone, and the rear lot (lot 2), into the name of the plaintiff – nominally for a consideration of $385,000, but in fact as a gift. The plaintiff's family – which, by then, also included a child – lived with the deceased for between six and nine months while a home was built on lot 2. Thereafter, the plaintiff's family occupied lot 2.

41. In late 2010, the plaintiff sold lot 2 for $810,000 and, after discharge of a mortgage which had funded the building and completion of the house on lot 2, received $447,000 net. With his family, he moved to Queensland. Brereton J thought his mother would not have been happy with that turn of events.

42. The move to Queensland proved unsuccessful for a number of reasons. The plaintiff and his family returned to Sydney in December 2011 and rented premises in the same general vicinity; their children, now two of them, attended school very close to the deceased's home.

43. In early 2012, the plaintiff, using the power of attorney he held, lodged with the relevant council a development application for the building of two attic rooms on top of the deceased's home. There was controversy as to whether this was discussed with the deceased, and whether she was aware of what was proposed, an argument that went to the Guardianship Tribunal. A fortnight after that hearing, the deceased made her last will on 29 October 2012.

44. The judge again upheld the 50 50 split between second partner and kid or kids from the first relationship, despite the fact that the plaintiff had no net assets.

45. The judge recorded that Mr Henderson's claim was based on the relationship of maternity; the fact that he did not inherit from his father (presumably, his mother inherited from his father); that he was the sole child of his parents; that he lived with his mother until the age of 35 and no doubt was partly dependent on her throughout that period, at least for accommodation, which she provided in her home; and that he was made contributions to her welfare, particularly during the period that he was living at home with her.

46. He took into account Mr Monroe's position, being 83 years of age and in good health for his age. He resided in a small one-bedroom unit rented from the Ryde Hunters Hill Housing Co-operative of some 45 square metres. It had insufficient room for a double bed. Guests when visiting slept on a mattress on the floor in the living space. It had a small kitchenette only. His rent was subsidised to some extent by the housing co-operative. He had no superannuation, but had savings of $104,000 and a share portfolio of $123,000. He wished to be able to

acquire a larger and more comfortable two bedroom unit in much the same area, around Gladesville or thereabouts, which the evidence suggested would cost in the order of $500,000 to $600,000.

47. Mr Munro was in a close personal relationship with the deceased for close to 20 years. The evidence established that he accompanied her to her medical appointments, took her to hospital when she needed to go to hospital, visited her in hospital, attended on her at home and stayed over at the home for lengthy periods when she was convalescing and that, as her health deteriorated in later years, she became increasingly dependent on him. They shopped together and frequently went to clubs for lunches and dinners together.

48. Mr Munro did not have to establish a claim because he was not a plaintiff . It is plain however that the nature and quality of his relationship with the deceased was such as to make him a most important person in the deceased's life for close on the last 20 years of it.

49. His Honour cited *Taylor v Farrugia* [2009] NSWSC 801 (at [57]), to the effect that it is impossible to describe in terms of universal application the moral obligation or community expectation of a parent in respect of an adult child. His Honour held, however, it can be said that ordinarily, the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education where that is feasible; and, where funds allow, to provide them with a start in life, such as a deposit on a home, although it might well take a different form. The community does not ordinarily expect a parent to provide an unencumbered house or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation. Generally speaking, the community does not expect a parent to look after his or her children for the rest of their lives and into retirement, especially where there is someone else, such as a spouse, who has a prime obligation to do so. It will be otherwise if the adult child remains dependent on the parent, in which case the community will usually expect the parent to make provision to support that ongoing dependency after death. If the child, even an adult child, falls on hard times, then if there are assets available, and depending on what competing claims there are, the community may expect parents to provide a buffer against contingencies.

50. A striking feature of this case was that the plaintiff had already received very substantial provision during his lifetime in the form of, effectively, a half interest in the Pittwater Road property. Essentially, the deceased was faced with having to weigh and balance the claim of her only child – an independent adult, albeit with dependants, and who was in circumstances where he did not have resources to meet all of his reasonable needs, but for whom she had already made fairly significant provision – with that of her partner of nearly 20 years, who had

been continually by her side, supportive and attentive, and contributed in marked ways to her welfare and happiness.

51. Brereton J's conclusion was that the deceased was affronted by the circumstance that the plaintiff brought proceedings in the Guardianship Tribunal to challenge her wishes, but even then, she did not, in spite, cut him out of her will, but reached a decision that the estate should be divided equally between the two claims.

52. She would not have failed in her duty to Mr Munro had she made greater provision for Mr Henderson than she did. Likewise she would not have failed in her duty to Mr Henderson had she made greater provision for Mr Munro than she did. But His Honour held that, as a broad brush attempt at achieving a fair recognition of both the significant claims on her testamentary bounty, her discretion as a testator did not miscarry when she decided that treating them equally was appropriate.

53. The lesson again was that there was a bona fide attempt of the testator to divide the estate in a way that struck the judge as not obviously unfair or intemperate. In this case, the judge thought there was provocation by the child that could have led to less or nothing. It is also interesting to note his comment that there were different outcomes that she could have decided upon, in relation to which the court would not have intervened. I think that has parallels in the appeals area - the court will not decide a decision is wrong, if it's within the broad discretion a judge has in this area. Similarly, a testator also has a potentially broad area of discretion where a court will not intervene, even if a judge would or may have come to a different result.

Sung v Malaxos [2015] NSWSC 186

54. This is a third case where a plaintiff has failed, in circumstances where a division between child or children and subsequent partners was involved.

55. The plaintiff was a woman who met the testator when he was aged 56 years and she was 37 years. They had a relationship accepted as a de facto one, but with some possibly unusual aspects. They kept their financial affairs quite separate. When the testator died aged 83 years, he left a will that provided for the division of his estate between his daughter and the plaintiff, 2/3 : 1/3.

56. The principal asset of the estate was a property with an estimated value between $1.25 million to $1.45 million. The value of the gross distributable estate was likely to be between $1 million and $1.25 million. By his will, the testator directed that his Lilyfield property, which the plaintiff had come to share with him as her residence, be sold within six months of his

death and that the net proceeds of sale be apportioned as to one-third to the plaintiff and two-thirds to his daughter.

57. Throughout their relationship the plaintiff and the testator each maintained their own separate financial arrangements. Each usually took their vacations separately both overseas and within Australia.

58. The plaintiff was 65 years of age at trial and remained in full employment as a social worker. She hoped to retire in a few years' time. Her updated summary of assets and liabilities revealed assets of between $690,727 and $710,727 including superannuation of $233,016.99. Her liabilities were said to be $146,632.25. In addition, the value of her one third entitlement pursuant to the will of the testator was approximately $400,000. And she continued to earn $95,050 per annum.

59. The daughter who inherited 2/3 was in a poor financial position.

60. Pembroke J held himself satisfied that the manner in which the testator divided his estate was carefully considered and appropriate. It was adequate for her proper maintenance in all the circumstances. He made two wills, each of which reflected his appreciation of the competing demands of his daughter and the plaintiff, and his assessment of what he thought was a reasonable response to those demands. He recognised that he had a moral obligation to both his daughter and the plaintiff but concluded that his daughter and her husband had a greater need for financial assistance than the plaintiff.

61. The testamentary disposition that the testator prescribed was held to be soundly based. It was supported by the facts and not undermined by the financial circumstances of the daughter and the plaintiff that were revealed in the evidence. The totality of the evidentiary picture supported the "wisdom and justice" of the testator's apportionment. His Honour could see no reason to depart from it.

62. The plaintiff was financially secure. After she received her share of the testator's estate she would have assets of in excess of $1 million for her living and personal expenses. She would have to adjust to smaller accommodation, which on the evidence she would be able to afford, or rent.

63. His Honour also emphasised that in his view "needs" means "basic needs":

"If the court finds that a deceased person has failed in his or her moral duty and makes an order that interferes with the testamentary disposition disclosed in the will, *any such order*

should only satisfy the applicant's basic needs, and not his or her wants or desires. In addition, the order must unfairly prejudice the other named beneficiaries of the deceased's will."

Henry v Hancock [2016] NSWSC 71.

64. This was an application by an adult daughter, who had not been left anything by her mother. There was substantially no estate, but at the time of death there was notional estate in the form of jointly held properties, held with the plaintiff's step father, being a matrimonial home worth $960,000 and land and a holiday park business worth a similar amount.

65. The plaintiff commenced 6 years out of time, and by then a lot had happened. The claim had to be determined under the Family Provision Act. Brereton J held that sufficient cause existed for not having brought the claim within the 18 months required, but further delay was not adequately explained. The required extension was thus not granted under s16. The factual key was failure to act promptly after learning of the deadline, coupled with a deliberate decision not to then proceed, made on legal advice, which was calculated to advance her position.

66. In addition, His Honour held that the special circumstances required by s28, for the designation of notional property in circumstances where an extension under s16 is required, were also not present. His Honour rehearsed the requirements for 'special circumstances" at para [60] - [61] as follows

60. The use of the formula "special circumstances" reflects an intention that judicial discretion not be confined by a list of relevant factors, by capturing circumstances of potential relevance which are so various as to defy precise definition.[4] Circumstances are special if they are unusual, uncommon or exceptional in character, quality or degree; if they differ from the ordinary or the usual; or if they are particular or individual; but they need not be unique.[5] Circumstances may be special by reason of their weight as well as their quality, and because of a combination of factors.[6] The terms of s 28(5) indicate that property not vesting in interest, incapacity, and circumstances analogous thereto, may constitute special circumstances; but special circumstances are not limited to those suggested by the terms of the section or closely analogous to them.[7] Factors that contribute to a decision to extend time under s 16 can also contribute to a finding of "special circumstances";[8] however, more is required to establish special circumstances under s 28(5)(d) than to justify an extension of time under s 16.[9]

61. Factors that have contributed to findings of special circumstances have included incapacity as a result of infancy,[10] the fact that it was no fault of the applicant that application was not made within time,[11] the strength on the merits of an applicant's claim,[12] the absence of prejudice (such as the fact that there has been no significant dealing with the notional estate in

the meantime),[13] *and the belated falsification, after time for bringing an application under the Act had expired, of a reasonable expectation that if fulfilled would have made an application unnecessary.*[14]

67. What is interesting is the additional finding that even had the extension, and special circumstances have been found, this plaintiff had not demonstrated a good case for provision. The plaintiff was 50, had a husband and 2 children, and had net assets of just $42,000, leaving aside a child care business that was in administration and unlikely to return any surplus to the plaintiff.

68. The defendant was the step-father of the plaintiff and had been living or married to the deceased for 31 years. By the time of trial he had remarried a woman with few assets. He had net assets of over $2m.

69. The court found that any provision would probably be used to pay creditors of the failed business, not her own creditors (and she was unlikely to be personally liable for those). Her house, while fully mortgaged, was in her husband's name and thus not in jeopardy. She had received significant benefits from the deceased and the defendant, including a guarantee of the business' secured debt, which might yet be called on, and a large loan which became a gift, with which she bought her first home.

70. The width of the discretion may be seen in the multiple considerations discussed in the evaluation - including the defendant's new obligation to his second spouse, the fact that the present need arose from a failed business venture started after the deceased's death, and including the failure to honour taxation obligations relating to it, the defendant's needs arising from his failing health, the deceased's primary obligation to her husband, and his contribution to the acquisition of the assets in the first place (at [119]).

71. This is another warning that plaintiff's, even those in need, need to carefully weigh the possible reasons which a judge might consider justify refusing an application to interfere with a testator's decision to provide for an eligible person, particularly a spouse.

72. The claim was dismissed with costs.

73. There are many cases being decided. examples of success, and failure are plentiful.

More recent failures by plaintiffs

74. Recently, in *Stollery v Stollery* [2016] NSWSC 54 Stevenson J dismissed a claim by an adult son, focussing on estrangement and lack of adequate disclosure, despite receiving only $10,000 from an estate of over $3m

75. In *Manning v Matsen* [2015] NSWSC 1801 Slattery J dismissed an application by a plaintiff on the basis that the only available estate would have been notional estate and he was not prepared to designate the asset sought because, inter alia, it would have upset reasonable expectations of a third party.

76. In *Marino Zugan v Angela Zugan (aka Koppel)* [2015] NSWSC 1821 Rein J declined to interfere with an equal division between 2 adult children, despite one being better off than the other.

77. In *Anwaryar v Amanudin* [2015] NSWSC 1763 Pembroke J invoked freedom of testation, and lack of proper disclosure in declining a first wife's claim for provision at the expense of a younger second widow, with young children.

78. In *Chu v Ngar* [2015] NSWSC 1505 Hallen J dismissed an application by an adult daughter for provision, where the only available estate would have been notional estate constituted by the deceased's failure to sever the joint tenancy over the matrimonial home co-owned with his widow

79. In *D H Singh & Anor v G K Singh & Ors* [2015] NSWSC 1457 Black J refused an application for provision, largely on the basis of lack of adequate financial disclosure.

80. In *Smith v Johnson* [2015] NSWCA 297 the Court of Appeal overturned an order for provision and dismissed a summons on the basis that " *an assessment of needs, particularly where it is directed to such an important matter as the nature and cost of accommodation required by an applicant, must have a sound evidentiary foundation. In my view, the evidence in the present case does not support his Honour's finding that Andrew required a two bedroom unit. The evidence established that Andrew* ***desired*** *a two bedroom unit, not that he* ***needed*** *anything larger than a one bedroom unit. His Honour therefore made a material error of fact which vitiated both his determination that the Will did not make adequate provision for Andrew's maintenance or advancement in life and his decision to award Andrew $500,000 "in hand"* (emphasis in original)

81. In *Sedgwick v Varzonek* [2015] NSWSC 1275 the plaintiff failed to satisfy the court he was a de facto partner or living in a close personal relationship. The same occurred in *Sadiq v NSW Trustee & Guardian* [2015] NSWSC 716.

82. In *Gary Alan Wright v Kerri Lyn Wright as Executor of the Estate of Leslie Richard Wright* [2015] NSWSC 1333, Rein J dismissed an application based on estrangement better described as extreme hostility - stating with admirable understatement - *" I am not persuaded that the approach to be taken to the testator's testamentary decision making should be measured by a standard of conduct that borders on the saintly. I think that when a son threatens to kill his father (and his sister) the very natural reaction would be to exclude that person from his bounty whatever the reason for those threats- even more so when contact has long since ceased. The testator's wish to exclude his son was a very natural response to the son's behaviour particularly having regard to his threats and menacing conduct … There is every reason to believe that Leslie was fully aware of Gary's straitened circumstances, in forming the view that Gary's financial position did not provide a reason to overlook the estrangement and hostility."*

83. *In Beatrice McCleary v Metlik Investments Pty Limited Beatrice McCleary v Benedict Chan; Clement Chan v Benedict Chan* [2015] NSWSC 1043 claims by adult children were dismissed, chiefly on the basis they were reasonably well off.

Costs

84. Finally, it is worth looking at some recent costs judgements, including some flowing from the decisions above.

85. In **Sung v Malaxos (No 2) [2015] NSWSC 290**, Pembroke J set out the principles including as follows (with apologies for the length of the extract):

> *4. The usual order in litigation in this court is that costs follow the event, namely that the unsuccessful party pays the costs of the successful party: Section 98(1) of the Civil Procedure Act 2005; Rule 42.1 of the UCPRs.*
>
> *5. It is however well accepted that family provision cases stand apart from ordinary cases and that different considerations sometimes apply. Section 99 of the Succession Act 2006 provides:*
>
> *(1) The Court may order that the costs of proceedings under this Chapter in relation to the estate or notional estate of a deceased person (including costs in connection with mediation) be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.*
>
> *6. For that reason, it is not uncommon in the case of unsuccessful applicants in family provision claims for no order to be made as to costs, with the result that the plaintiff bears the burden of his or her own costs: Singer v Berghouse [1994] HCA 40; 181 CLR 201 at [6] (per Gaudron J). In some cases, the plaintiff will be ordered to pay the defendant's costs, with the result that the estate of the testator is not required to bear the burden of the costs incurred in defending the claim.*

7. *In proceedings where the claim is meritorious, reasonable or borderline the court may often allow an unsuccessful plaintiff his or her costs out of the estate: McDougall v Rogers (Estate of James Rogers) [2006] NSWSC 484; Re Bodman [1972] QD R 281; Harkness v Harkness (No 2) [2012] NSWSC 35; Bowditch v NSW Trustee and Guardian [2012] NSWSC 702.*
8. *In Harkness v Harkness (No 2) Hallen AsJ (as he then was) summarised the relevant principles.*
9. *A couple of matters are worth mentioning here*

   (c) The view of some practitioners advising a potential applicant contemplating a claim for a family provision order, that there is little risk, and probably much to be gained, in making a claim, however tenuous, because even if the claim fails the applicant will, very likely, get his, or her, costs out of the estate and that he, or she, will not be significantly out of pocket, and the legal practitioner will receive his, or her, costs and disbursements in any event, has been thoroughly discredited. (emphasis added)

   (d) Parties should not assume that this type of litigation can be pursued, safe in the belief that costs will be paid out of the estate: Carey v Robson (No 2) [2009] NSWSC 1199; Forsyth v Sinclair (No 2) [2010] VSCA 195 . It is now much more common than it previously was for an unsuccessful applicant to be ordered to pay the Defendant's costs of the proceedings (Lillis v [2010] NSWSC 359 at [23]) and be disallowed his, or her, own costs. (emphasis added)

   (e) .... in the absence of some good reason to the contrary, there should be an order that the costs of the successful Defendant be paid by the unsuccessful Plaintiff: Moussa v Moussa [2006] NSWSC 509 at [5].

   (f) An unsuccessful Plaintiff will, usually, be ordered to pay costs where the claim was frivolous, vexatious, made with no reasonable prospects of success, or where she, or he, has been guilty of some improper conduct in the course of the proceedings: Re Sitch (No 2) [2005] VSC 383.

   (g) In small estates particularly, the court should be careful not to foster the proposition that obstinacy and unreasonableness will not result in an order for costs: Dobb v Hacket (1993) 10 WAR 532, at 540.

   (j) As proceedings for a family provision order are essentially for maintenance, a court may properly decide to make no order for costs, even though it were otherwise justified, against an unsuccessful applicant, if it would adversely affect the financial position which had been taken into account in dismissing the application: Morse v Morse (No 2) [2003] TASSC 145; McDougall v Rogers; Estate of James Rogers [2006] NSWSC 484; McCusker v Rutter [2010] NSWCA 318 at [34].

   (k) There are also other circumstances that may lead the court to order payment out of the estate of the costs of an unsuccessful Plaintiff. The court may allow an unsuccessful Plaintiff costs out of the estate, if in all the circumstances the case was meritorious, reasonable or 'borderline': McDougall v Rogers; Estate of James

Rogers; Re Bodman [1972] Qd R 281; Shearer v The Public Trustee (NSWSC, Young J, 21 April 1998, unreported).

86. So, in **Sung v Malaxos (No 2) [2015] NSWSC 290** the result was that there was an order that the unsuccessful party pay the defendants costs, and that it be on the indemnity basis from the date of an offer that was not accepted.

87. His Honour held that the only potentially relevant factor against making this order was that it would adversely affect the plaintiff's financial position. However, this was held not a case where the plaintiff would become impecunious or have to sell assets to pay costs. The plaintiff's provision out of the estate was said to be sufficient to pay the costs of the defendant and her own costs.

88. In **Vanderloo v Milne (No 2) [2015] NSWSC 555** the court ordered the unsuccessful Plaintiff to pay the executors' costs from the date the initial distribution was made, saying:

This is a case, upon which the Court should act upon the prima facie principle referred to by Barrett JA in Chapple v Wilcox *[2014] NSWCA 392 at [139] that where an application for a family provision order is dismissed the unsuccessful plaintiff should pay the executors' costs. I acknowledge that there is a discretion to depart from this prima facie principle for good reason, even to the extent of ordering that the unsuccessful plaintiff's costs be paid out of the estate, but this is not an appropriate case for that departure to be made*

89. A Calderbank offer did not result in an indemnity costs order because, first, there was no real element of compromise, and second, because it had an extraneous term in it concerning an appeal from a decision concerning superannuation.

90. **Henderson** was resolved between the parties, after the judge indicated in the judgement that the summons would be dismissed with costs, but if either party sought a different costs order, such application was to be made by within seven days.

91. In **Hancock** the claim was dismissed with costs, with liberty to apply if a different order was sought. This is usually done to preserve an opportunity to seek indemnity costs based on any Calderbank letters or Offers of Compromise.

92. Accordingly, it does appear that costs orders against unsuccessful plaintiffs are getting more prevalent. We need to bear in mind the risks and note what was said in Sung (No 2), which bears repeating:

The view of some practitioners advising a potential applicant contemplating a claim for a family provision order, that there is little risk, and probably much to be gained, in making a claim,

however tenuous, because even if the claim fails the applicant will, very likely, get his, or her, costs out of the estate and that he, or she, will not be significantly out of pocket, and the legal practitioner will receive his, or her, costs and disbursements in any event, has been thoroughly discredited.

Parties should not assume that this type of litigation can be pursued, safe in the belief that costs will be paid out of the estate.

93. Costs do remain a highly discretionary area, and the usual costs consequences of failing to better Offers Of Compromise or Calderbank offers are not automatic. This was recently highlighted in *Estate of May Berry, deceased* [2016] NSWSC 130, in which Lindsay J gave 2 adult daughters an additional $50,000 each. Offers had been made, in one case, equalling the outcome, and in another, bettering it. His Honour declined to deprive the plaintiffs of their costs, stating:

69. I am mindful of the policy reasons for encouraging parties to settle, and of the importance of the application of that policy in all areas of the Court's jurisdiction, including family provision cases.

70. Nevertheless, it seems to me, one needs to bear in mind the particular circumstances of the particular case, the course of the proceedings and the object of making orders under chapter 3 of the Succession Act. Were I to make the orders for costs urged upon me by the defendant, the effect of my doing so would be, I apprehend, to derogate from the purpose of making a family provision order in the first place.

71. I am mindful that, although not an "a person under legal incapacity" for the purpose of those provisions of the Uniform Civil Procedure Rules that govern tutors (UCPR Pt 7 Div 4), and, although not incapable of managing her affairs to such an extent as requiring an exercise of the court's protective jurisdiction, Sandra does suffer from mental health problems which, in my view, should be taken into account in deciding whether or not she has acted reasonably in her pursuit of the proceedings to the point of a final judgment.

72. I am mindful also that Diane has had to make decisions in the context of proceedings which could be determined, in practical reality, only in conjunction with, or after, a determination of Sandra's claim for relief.

94. In *McCarthy v Tye* [2015] NSWSC 1947 Young AJA gave a plaintiff a legacy of $85,000 and capped the costs at that figure, in accordance with what he said was a "usual" policy that the costs ought not exceed the legacy. That has not been the universal practice by all judges in the Supreme Court of NSW to date.

95. Solicitors may be at risk if they overlook advising on relevant matters - see eg Calvert v Badenach [2015] TASFC 8 , in which the court held that a solicitor's duty to an intended

beneficiary extends to loss of a chance to receive a benefit suffered by reason of the failure to advise the testator about ways to circumvent the operation of family provision legislation. It should be noted that the Tasmanian legislation does not have the same concept of "notional estate" as in NSW and the use of a joint tenancy would have protected the testator's wishes against the successful provision claim of a family member.

96. A final thought. This is not a jurisdiction where everyone gets a prize. There are big risks for marginal plaintiffs. While high house prices, demographics and divorce and blended family rates might be spurring this area on, its a jurisdiction where some serious cost benefit analysis and thought needs to go into the decision to litigate. And you cant assume it will get easier in the Court of Appeal when the judge gets it wrong.

R J Brender
Maurice Byers Chambers
April 2016