Simonetto & Simonetto v Dick [2013] NTSC 77

PARTIES:	SIMONETTO, Craig Paul AND SIMONETTO, Louise Jane v DICK, Mary Julienne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	11/2011 (21128762)
DELIVERED:	14 November 2013
HEARING DATES:	24 -27 June, 11 July 2013
JUDGMENT OF:	HILEY J

CATCHWORDS:

SUCCESSION – Family provision - Application by adult grandchildren of testator - Plaintiffs' deceased father had made substantial contribution to testator's family building business - Relationship between plaintiffs and deceased broke down – Family members entered into Deed to rearrange family affairs including ownership of various properties - Deceased's will made no provision for the plaintiffs - Jurisdictional question – Plaintiffs not left without adequate provision for their proper maintenance, education or advancement in life - Estrangement - Moral duty – *Family Provision Act* (NT) s 8(1).

Andrew v Andrew (2012) 81 NSWLR 656; *Andrew v Andrew* [2011] NSWSC 115; *Blore v Lang* [1960] 104 CLR 124; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463; *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275; *Brennan v Mansfield* [2013] SASC 83; *Coates v National Trustee Executors and Agency Co Ltd* (1956) 95 CLR 494; *Cooper v Dungan* (1976) 9 ALR 93; *Edgar v Public Trustee for the Northern Territory* [2011] NTSC 5; *Goodman v Windeyer* (1980) 144 CLR 490; *Hughes v National Trustee & Executor Agency of Australia* (1979) 143 CLR 134; *Lieberman v Morris* (1944) 69 CLR 69; *McCosker v McCosker* (1957) 97 CLR 566; *Re Allen (Dec'd); Allen v Manchester* [1922] NZLR 218; *Singer v Berghouse* (1994) 181 CLR 201; *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9; *Vigolo v Bostin* (2005) 221 CLR 191; *White v Barron* (1980) 144 CLR 431, applied.

Anasson v Phillips (unreported, Supreme Court of New South Wales, 4 March 1988, Young J); *Bennett v Bennett* [2001] NSWSC 987 at [23]; *Ernst v Ryf* [2001] NSWSC 1167 at [37]; *In re Sinnott* (1948) VLR 279; *Mann v Starkey* [2008] NSWSC 263; *Nicholas v Nicholas* [2013] NSWSC 697; *Pellissier v Melville & Ors* [2006] NTSC 93; *Re Anderson (Dec'd)* (1975) 11 SASR 276; *Ross & Anor v Public Trustee for the Northern Territory* [1996] NTSC 31, referred to.

Family Provision Act (NT) s 7(1)(e), s 7(3), s 8(1), s 8(3), s 8(4), s 22(1), s 22(2), s 22(3)

REPRESENTATION:

Counsel:

First and Second Plaintiffs:	P A Haywood-Smith QC
Defendant:	S D Ower

Solicitors:

First and Second Plaintiffs:	Cridlands MB
Defendant:	Gardiner & Associates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Simonetto & Simonetto v Dick [2013] NTSC 77
No. 11/2011 (21128762)

BETWEEN:

CRAIG PAUL SIMONETTO
First Plaintiff

AND:

LOUISE JANE SIMONETTO
Second Plaintiff

AND:

MARY JULIENNE DICK
Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 14 November 2013)

Introduction

[1] The plaintiffs, Craig Paul Simonetto ("Craig")[1] and Louise Jane Simonetto ("Louise") have applied under s 7 of the *Family Provision Act* (NT) ("the Act") for provision out of the estate of their grandfather, the late Bruno Secondo Simonetto ("the testator" or "Bruno"), who died on 3 July 2010 at

[1] For convenience, I propose to refer to people by their first name, with no disrespect or undue familiarity intended.

the age of 95.[2] Section 8(1) of the Act permits the Court to order that such provision as the Court thinks fit be made out of the testator's estate if it is "satisfied that adequate provision is not available under the terms of" the testator's will from his estate "for the proper maintenance, education and advancement in life of" the plaintiffs.

[2] The testator was born in Italy on 15 September 1914. He married Ida Simonetto ("Ida") in 1943 and they remained together until her death in 2005. They had two children, Paul Giancarlo Simonetto born 4 August 1946 ("Paul") and Mary Julienne Dick (nee Simonetto) born 4 June 1950 ("Mary"). Bruno, Ida and Paul moved to Australia from Italy in about 1948 and settled in Alice Springs, in the Northern Territory.

[3] Paul Simonetto died on 28 July 1995. He was survived by his widow, Margaret Diane Simonetto born 30 January 1947 ("Margaret") and their two children, Craig born 20 January 1977 and Louise born 27 September 1978. Neither Craig nor Louise have children. Louise has been married and has since divorced.

[4] The testator's other child, Mary, married Gregory Francis Dick in July 1970. They separated in 2002. They have three children, Kim Anthony Dick born 8 July 1972 ("Kim"), Benjamin Gregory Dick born 29 August 1973 ("Benjamin"), and Daniel John Dick born 14 February 1977 ("Daniel").

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[2] The plaintiffs originally sought an order pursuant to s 26 of the *Administration and Probate Act 1891* revoking the grant of probate, and seeking relief under s 7 of the Family Provision Act in the alternative. However the claim for revocation of probate was abandoned and an Amended Statement of Claim was filed on 5 October 2012.

Each of those three children has married and has children (Kim and Benjamin have three each and Daniel two).

[5] By his will dated 18 May 2007 (the "Will")[3] the testator disposed of his entire estate to his daughter Mary. He appointed Mary executor of his estate. He also appointed Mary's children, Kim, Benjamin and Daniel, as substitute executors in the event that Mary was unable or unwilling to act as his executor or died before proving his will. The Will provided that if Mary did not survive him his estate was to go to those three grandchildren in equal shares.

[6] The testator made no provision for the plaintiffs or their mother Margaret in his will. The Will contained a statement as to why he was making no provision in his will for his other grandchildren, Craig and Louise.

[7] Probate was granted to Mary Dick, the Defendant, on 6 September 2010. At that time the Estate was valued at $1,367,995.41 but the value was later acknowledged to be $2,129,662.08.

[8] The plaintiffs seek an order that the terms of the Will "be varied to provide proper provision for the plaintiffs out of the Estate of Bruno Secondo Simonetto, deceased, as is just in the circumstances" and that their costs be paid out of the estate on a solicitor and client basis.

[3] Exhibit P4 #7.

Family Provision Act

[9] The plaintiffs are entitled to apply to the Court under s 7 of the Act as they are each "a grandchild of the deceased person" and "the parent of the grandchild who was a child of the deceased person died before the deceased person died".[4]

[10] Accordingly, pursuant to s 8(1) of the Act:

> "… if the Court is satisfied that adequate provision is not available, under the terms of a will of a deceased person … from the estate of the deceased person for the proper maintenance, education and advancement in life of the person by whom, or on whose behalf the application is made, the Court may, in its discretion and having regard to all the circumstances of the case, order such provision as the Court thinks fit be made out of the estate of the deceased person."

[11] These provisions are similar to those in legislation elsewhere in Australia and New Zealand and decisions relating to such legislation have been applied by this Court in considering applications under the Act.[5]

[12] The following passage of Salmond J in *In re Allen (deceased), Allen v Manchester*[6] is frequently cited[7] as stating the basic principle underlying such legislation:

> "The Act is … designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and

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4 Section 7(1)(e) & (3)(a) of the Act.

5 See for example *Ross & Anor v Public Trustee for the Northern Territory* [1996] NTSC 31; *Pellissier v Melville & Ors* [2006] NTSC 93; *Edgar v Public Trustee for the Northern Territory* [2011] NTSC 5 ("*Edgar v Public Trustee*").

6 *In re Allen (deceased), Allen v Manchester* [1922] NZLR 218 ("*Allen*") at 220-221.

7 See for example in *Singer v Berghouse* (1994) 181 CLR 201 ("*Singer v Berghouse*") at 209; *Vigolo v Bostin* (2005) 221 CLR 191 ("*Vigolo v Bostin"*) at [15] and [118].

> children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

[13] The principle of freedom of testamentary disposition is qualified only by the statutory rights of particular family members to bring an application under the Act.[8] While the Act confers a discretion to make provision from the estate in some cases it does not entitle a Court to re-write the will of a testator in accordance with its own ideas of fairness or justice.[9]

[14] In *Pontifical Society for the Propagation of the Faith v Scales*[10], Dixon CJ stated:

> "The Court is given not only a discretion as to the nature and amount of the provision it directs but, what is even more important, a discretion as to making a provision at all. All authorities agree that it was never meant that the Court should re-write the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court."

[15] To similar effect, Stephen J stated in *Cooper v Dungan*[11]:

> "… courts must be vigilant in guarding against a natural tendency to reform the testator's will according to what it regards as a proper total distribution of the estate rather than to restrict itself to its

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8 *Vigolo v Bostin* at [10].

9 *Hughes v National Trustee & Executor Agency of Australia* (1979) 143 CLR 134 ("*Hughes*") at 146-147.

10 *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 ("*Scales*") at 19, quoted by Kelly J in *Edgar v Public Trustee* at [33].

11 *Cooper v Dungan* (1976) 9 ALR 93 at 98.

> proper function of ensuring that adequate provision has been made for the proper maintenance and support of an applicant."

[16] Claims under the Act involve two stages:[12]

(a) The first stage requires the Court to determine whether or not there has been adequate provision made under the terms of the will for the proper maintenance, education and advancement in life of an applicant.

(b) If the Court is satisfied that adequate provision has not been made the Court would need to consider what provision ought to be made.[13]

[17] The first question requires examination of relevant circumstances at the date of the testator's death. If the Court reaches the second stage of deciding what provision ought to be made, it will also consider the circumstances as they exist at the date of the order.[14]

[18] In *Scales*[15], Dixon CJ identified some of the main factors to be considered in relation to applications under similar legislation, including the function, meaning and scope of the words "adequate provision" and "proper maintenance and support".

> "It has often been pointed out that very important words in the statute are 'adequate provision for the proper maintenance and support' and that each of these words must be given its value. 'Adequate' and 'proper' in particular must be considered as words

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[12] *Singer v Berghouse* at 208-209; *Vigolo v Bostin* at 201-204, 218-219, 227-230.
[13] *Singer v Berghouse* at 208-211.
[14] *Coates v National Trustee Executors and Agency Co Ltd* (1956) 95 CLR 494 ("*Coates*") at 508-509; *White v Barron* (1980) 144 CLR 431 at 437 and 441; *Goodman v Windeyer* (1980) 144 CLR 490 at 499.
[15] *Scales* at 19-20. See too *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 ("*Bosch*") at 476 and 478.

which must always be relative. The 'proper' maintenance and support of a son claiming a statutory provision must be relative to his age, sex, condition and mode of life and situation generally. What is 'adequate' must be relative not only to his needs but to his own capacity and resources for meeting them. There is then a relation to be considered between these matters on the one hand, and on the other, the nature, extent and character of the estate and the other demands upon it, and also what the testator regarded as superior claims or preferable dispositions. The words 'proper maintenance and support', although they must be treated as elastic, cannot be pressed beyond their fair meaning.

…

In the present case the application for a provision for maintenance and support is by an adult son. In *In re Sinnott*[16] in the course of what is perhaps the soundest and most illuminating of all the discussions of the statutory provisions, Fullagar J. remarked: 'No special principle is to be applied in the case of an adult son. But the approach of the Court must be different. In the case of a widow or an infant child, the Court is dealing with one who is prima facie dependant on the testator and prima facie has a claim to be maintained and supported. But an adult son is, I think, prima facie able to "maintain and support" himself, and some special need or some special claim must, generally speaking, be shown to justify intervention by the Court under the Act.'

…

'Duty' no doubt does not afford an exclusive test, indeed it is not right to treat it strictly as a test at all. It is but an element, however important an element, that is to be taken into account in weighing all the considerations. One consideration here is that the son has made his way in life and though, like most people, he would find more money an advantage, he is not in need. If one really considers the situation of this old man in the closing stages of a long life in which his son has played no part at all, a son to whom his father has meant nothing and who did not even know him, it is hard to see why the testator, in the interest of his son, should be deprived of his complete freedom of testamentary disposition."

[16] *In re Sinnott* (1948) VLR 279 at 280.

[19] See too Dixon CJ and Williams J in *McCosker v McCosker*[17]:

> "The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life. As the Privy Council said in *Bosch v Perpetual Trustee Co (Ltd)* the word 'proper' in this collocation of words is of considerable importance. It means 'proper' in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune." (Footnote omitted)

[20] What may be considered to be adequate provision for the proper maintenance, education and advancement in life of an applicant will vary according to all the relevant circumstances, including circumstances not known to the testator. These circumstances will invariably involve consideration of the applicant's need and moral claim on the estate. Per Gibbs CJ in *Hughes*[18]:

> "[T]he question whether adequate provision has been made for the proper maintenance and support of the adult son must depend on all the circumstances – that is, on all the facts that existed at the date of the death of the testator, whether the testator knew of them or not, and all the eventualities that might at that date reasonably have been foreseen by a testator who knew the facts."

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[17] *McCosker v McCosker* (1957) 97 CLR 566 ("*McCosker*") at 571-572 quoted in *Vigolo v Bostin* at 202 [22] .

[18] *Hughes* at 147 – 148. See too pp 159-160. See too *Coates* at 508, 526-528, and commentary and cases noted in de Groot & Nickel, *Family Provision in Australia,* LexisNexis Butterworths, 4th ed. 2012 ("De Groote") at [2.3] – [2.6].

[21] See too *Singer v Berghouse*[19], where Mason CJ, Deane and McHugh JJ identified the process as requiring:

> "… an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty."

[22] This last factor was further explained by Callinan and Heydon JJ in *Vigolo v Bostin*[20]:

> "Adequacy or otherwise will depend upon all of the relevant circumstances, … the age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

[23] That the interests of other potential beneficiaries should be taken into account is also reflected in s 8(4) of the Act which permits the Court to regard an application "by one person as an application made on behalf of all the persons entitled to make applications" under the Act.

[24] What are "adequate" and "proper" are questions of fact but involve value judgments and the formation of opinions based on the court's general

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[19] *Singer v Berghouse* at 209-210.

[20] *Vigolo v Bostin* at [122].

knowledge and experience of contemporary community standards concerning the behaviour of a judicious testator.[21]

[25] "The words 'advancement in life' have a wide meaning and there is nothing to confine the operation of the provision to an early period of life in the members of the family".[22] In *McCosker,* Dixon CJ and Williams J noted at 575:

> "(t)he presence of the words 'advancement in life' in the … Act in addition to the words 'maintenance and education' is not unimportant. … 'Advancement' is a word of wide import."

[26] In *Goodman v Windeyer,* Murphy J noted, at 505:

> "Provision for advancement may, for example, extend to retraining or the gaining of a qualification which could advance and perhaps enable an applicant to maintain himself or herself."

[27] The size of the deceased's estate may be a material consideration.[23] In the case of a large estate it is has been held that proper provision should include not only provision to meet the applicant's basic necessities of life but also something extra.[24]

[28] Per Young J in *Anasson v Phillips*[25]:

> "With a very large estate … there is great temptation on a Court to be overgenerous with other people's money. This is especially so when the Court can see that Plaintiffs have been very hardly done by

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[21] *Goodman v Windeyer* (1980) 144 CLR 502; *Singer v Berghouse* at 208-209; and *Vigolo v Bostin* at [20].
[22] *Blore v Lang* at 128, citing *McCosker*.
[23] *Bosch* at 478.
[24] *Blore v Lang* [1960] 104 CLR 124, 135 ("*Blore v Lang*").
[25] *Anasson v Phillips* (unreported, Supreme Court of New South Wales, 4 March 1988, Young J).

> at the hands of a domineering testatrix. However, the case should not be approached in this way, as the application has to be determined in accordance with the legal principles. …
>
> Further, there may be a more liberal assessment of the moral duty owed, to be reflected in what is proper provision for the Plaintiffs. In particular, the lifestyle that has been enjoyed by the Plaintiffs, because they have been associated with a wealthy testatrix, is a relevant factor."

[29] See too *Bowyer v Wood*[26] where Debelle J, with whom Nyland and Anderson JJ agreed, said:

> "In the case of large estates, provision can be made for the well-to-do but that consideration is subordinated to the dominant purpose of determining what provision would be made by a just testator making proper provision for the maintenance, education and advancement of his family: *Lieberman v Morris* [1944] HCA 13; (1944) 69 CLR 69 at 91-92 per Williams J."

[30] Consideration of an applicant's need will often involve moral obligations arising from a familial relationship, the classic relationship being that between the widow and children of a deceased person who was their breadwinner and sole source of support.[27] The courts often consider the existence of a 'moral duty' of a testator to provide for his or her family, and corresponding 'moral claims' on the part of family members.[28]

[31] The appropriateness of 'moral duty' or 'moral claim' to considerations of whether proper and adequate provision has been made was re-affirmed by Gleeson CJ, Callinan and Heydon JJ in *Vigolo v Bostin* at [25] and [113]. In

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[26] *Bowyer v Wood* [2007] SASC 327; (2007) 99 SASR 190 at 201 – 204 [40] – [42].
[27] See for example the passage quoted above from *Allen's* case and its endorsement in *Vigolo v Bostin*.
[28] See for example *Hughes* at 159-160.

Brennan v Mansfield[29], Stanley J said that moral duty is "a consideration which connects the general but value-laden language of the Act to the community standards which inform its practical application."

[32] The standard of morality is that of the community at large, and not the subjective view of the testator; in other words it is an objective view of the prevailing community standards: *White v Barron*[30].

[33] While a promise to make a provision can be material in giving rise to a moral duty to make a provision,[31] it is only one of the circumstances to be taken into account in determining whether proper provision has been made. So, in *Vigolo v Bostin*, where the testator's promises had been made repeatedly over many years, and relied upon, those promises were not enough to characterise what was otherwise proper adequate provision for the adult son as inadequate for his proper maintenance.

[34] An applicant who is an adult and not in dire need may nonetheless have a special claim on the testator's bounty if he or she has contributed to the building up of the testator's estate or has helped the deceased in other ways.[32]

[35] All jurisdictions except Tasmania allow applications by grandchildren. However, except for South Australia, the right to apply is restricted. In broad terms, in New South Wales and Queensland the applicant must have

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29 *Brennan v Mansfield* [2013] SASC 83 at [44] – [48].
30 *White v Barron* (1980) 144 CLR 431, 440.
31 *Re Anderson (Dec'd)* (1975) 11 SASR 276 at 284.
32 *Edgar v Public Trustee* at [38] citing *Hughes*. See too *Goodman v Windeyer* at 497.

been wholly or substantially maintained or supported by the deceased. A similar requirement exists in Western Australia, but a claim can also be brought by a person whose parent was a child of the deceased but died before the deceased. In the Northern Territory, and in the Australian Capital Territory, a grandchild can only make an application if that person's parent was a child of the deceased and died before the deceased, or if one or both of the person's parents were alive at the time when the deceased died and the grandchild was not maintained by his parents immediately before the death of the deceased.

[36] These limitations are all consistent with a presumption that a grandchild would normally be provided with the necessities of life by his parents, and therefore requires no further provision out of the grandparent's estate.

[37] In South Australia, where any grandchild can make an application (under the *Inheritance (Family Provision) Act 1972* SA) successful claims on the estate of a grandparent will usually depend upon the inability of the grandchild's parent to provide for the child and upon the relationship between the grandchild and the deceased. Per White J in *Wall v Crane*[33]:

> "Courts will often find in IFP claims that the grandchild of a testator has not been left without adequate provision. That is in part because the parents of the grandchild can be expected to provide the

[33] *Wall v Crane* [2009] SASC 382 at [133] – [134]. In *Wall v Crane* a provision was made for a 3 year old grandson (Andrew) because his father (David) , a child of the deceased, had abandoned his son and his other children and was unlikely to contribute in any way to his upbringing . At [139] White J said: "In my opinion, a "just and wise" testator in the position of the deceased would have recognised that some specific provision should be made for Andrew because David could not be relied upon to provide adequately for his proper maintenance, education or advancement in life. This distinguished Andrew's position from the testator's other grandchildren."

necessary support and in part because of the relative remoteness of the relationship between the grandchild and the deceased.

However, in particular circumstances the blood relationship can give rise to a valid moral claim by a grandchild on the bounty of the deceased. This was the view taken by King CJ in *The Estate of Puckridge*. That moral claim may be less than that of the deceased's own children, but it may nevertheless be a valid moral claim."

[38] A useful summary of general principles regarding claims by grandchildren under the New South Wales legislation is contained in the judgement of Hallen AsJ in *Bowditch v NSW Trustee and Guardian.* [34] Although claims in New South Wales can only be brought by an grandchild who was wholly or substantially maintained or supported by the deceased all but that stated in sub-paragraph (e) below are apposite to claims made under legislation elsewhere including the Northern Territory because they apply to the adequate provision for the proper maintenance education and advancement in life stage of the process. At [113]:

"In relation to a claim by a grandchild, the following general principles are, in my view, relevant and should be remembered:

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

(b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes *in loco parentis*, these factors would, prima facie, give rise to a claim by a

[34] See *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [113]. His Honour relied upon a number of other decisions in New South Wales and Victoria in preparing the summary. See [114].

grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.

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

(d) Generosity by the grandparent to the grandchild, including contribution to the education of the child, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent. It has been said that a pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.

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

(f) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents."

[39] Also relevant to the present matter are examples given by Parker J in *Kitson v Franks*[35] at [67]:

[35] *Kitson v Franks* [2001] WASCA 134.

> "For example an orphaned, young grandchild left without any substantial means of support is likely to be able to satisfy the jurisdictional test whereas an adult child established in a profession may not. On the other hand an adult child with a mental deficiency is more likely to be able to satisfy the jurisdictional test than a healthy adult grandchild."

[40] Estrangement between an applicant and a testator is a factor that may be taken into account, particularly in assessing the existence and extent of any moral duty owed by the testator. Indeed there have been some cases where the estrangement has been considered so grave that the claim was dismissed.[36] However a testator's freedom of testamentary disposition does not entitle the testator to make no provision for an applicant just because of their estrangement in circumstances where adequate provision of the kind referred to in s 8(1) of the Act is not available (unless the conduct underlying the estrangement was so reprehensible as to amount to disentitlement under s 8(3) of the Act).[37] In other cases the estrangement has played a role in the second stage, namely where the court is assessing what amount should be allowed in favour of the applicant being already satisfied that adequate provision has not been made. In both situations, and particularly where the estrangement is relied upon as conduct disentitling the applicant to relief (for example under the equivalent of s 8(3) of the Act), it is relevant to consider whether the estrangement was caused by the applicant or by the testator. In many cases however the circumstances of estrangement and the reasons therefore are so complex and historic that the

[36] See for example *Scales'* case; *Shearer v Public Trustee* [1998] NSWSC 1007; *Hogan v Clarke* [2002] NSWSC 386; *Monaco v Keegan* [2006] NSWSC 825; *Ford v Simes* [2008] NSWSC 386.

[37] See for example *Andrew v Andrew* (2012) 81 NSWLR 656 at [18] – [19] and [46] – [57] overruling *Andrew v Andrew* [2011] NSWSC 115 on that point (at [149] – [152]).

court is not in a position to make a finding that is useful or relevant.[38] Most of the cases concern estrangement between the testator and his or her spouse or child, sometimes an adult child.

[41] Section 22 of the Act requires the Court to have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by the will or for not making provision for a person who is entitled to make an application under the Act. However the testator's reasons for not providing for a family member cannot supplant the court's inquiry into whether they have been adequately provided for. Per Hallen AsJ in *Andrew v Andrew*[39]:

> "While a court will consider any explanations given by the deceased in the will, or elsewhere, for excluding a particular person as a beneficiary, such explanations do not relieve the court from engaging in the enquiry required by the Act: *Slack-Smith v Slack-Smith* [2010] NSWSC 625 at [27]. What an explanation may do is cast light on the relationship between the deceased and that person, at least from the deceased's perspective."

[42] The Court may refuse to make an order for provision if it is of the opinion that an eligible applicant's conduct or character is such as to disentitle him or her to the benefit of the order: s 8(3) of the Act. Conduct may be disentitling because it was directed towards the testator, or because the applicant's need for adequate provision arises because of his or her own poor conduct. Although the reasons given by a testator in his will or other statement may include assertions of some conduct on the part of the

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[38] See the cases noted by De Groote at [2.9] at p 17.
[39] *Andrew v Andrew* [2011] NSWSC 115 at [25].

applicant that might be thought to disentitle him or her, those assertions by the testator "are not evidence of the truth of the facts or circumstances complained of and are not admissible to prove disentitling matters stated in [s 8(3)], but may explain the dispositions. … If it is intended to show character or conduct disentitling an applicant under [s 8(3)], the onus is on those who assert it to prove it."[40]

Facts

Early days – 1948 to 1995

[43] When Bruno, Ida and Paul came to Australia in about 1948 and settled in Alice Springs Bruno began working as a builder, sometimes as a subcontractor to others and sometimes on his own. He had previously worked as a builder and draftsman, having completed his apprenticeship prior to 1939.

[44] He built a house at McMinn Street where the family lived until 1959, when they moved into a new home he had built at 21 Stuart Highway. The family moved again in 1963 when Bruno sold the house at 21 Stuart Highway and they moved into another house that Bruno had built at 23 Stuart Highway. They moved again in 1966 into another house that Bruno had built at 24 Stuart Highway. When he was not doing building work for others he built houses which he resold. He re-invested the profits of his building work in properties around Alice Springs, and built on the properties, and sold most of them. The business became quite profitable.

[40] *Hughes* at 159.

[45] Paul left school when he was 15 years old and began to work full time in about 1962 or 1963 with Bruno in his building and property investment business. The business was called B Simonetto and Son. The business continued until 1995 when Paul died.

[46] In the early days Bruno trained Paul and supervised him in the business. From about the 1970s and as Bruno grew older, Paul was responsible for an increasing amount of the work of the business. Bruno's active involvement in the business decreased from the early 1980s and he "formally" retired from the business in 1989.

[47] While Paul was alive the family assets were intermingled or held jointly, and the business and its investments provided salary drawings for Bruno and Paul and other income and benefits for Bruno, Paul and Mary and their respective families. In the years before Paul's death:

(a) Bruno and Paul drew equal salaries from the business until it ceased in 1995 on Paul's death;

(b) the income from the business was invested in various assets, including in term deposit accounts, but mainly in real property which was placed in the names of different family members;

(c) Bruno, Paul and Mary were entitled to the rents received for properties in the same proportions as they owned the properties;

(d) the business and other income were used to provide some advancement and maintenance to various members of the family.

[48] A considerable amount of evidence was adduced at the hearing about the respective contributions, roles and work performed by Bruno and Paul at various times until Paul's death. However this was not complete. In order to assess the respective contributions of Bruno and Paul throughout the whole period of their partnership one would need to be provided with much more information, a lot of which would no longer be available. This would include evidence of the value of Bruno's contributions from the time he commenced work in Alice Springs in 1948, the nature and value of Paul's contributions from the time he commenced work, the financial benefits received by Paul and his family during his lifetime and by Margaret and Bruno after his death. Understandably, the Court was not provided with much of this kind of evidence or complete evidence of the respective earnings attributable to Paul and Bruno, the gross rental income attributable to the various properties, expenses of the business and distributions made throughout the 35 or so years of the partnership. For example Margaret agreed in her evidence that some of the $296,000 held in the joint accounts of Bruno, Ida, Paul and or Margaret at the time of Paul's death could have been held in term deposits taken out from the 1960s. I do not consider it necessary or practicable to set out the evidence about these matters in any detail, not just because of its incompleteness but also because I consider that this would have been taken into account in the process of negotiating and

performing the Deed (to which I refer later). Further, the evidence such as it is does not enable me to make a finding that the respective contributions of Paul and Bruno were not adequately reflected in the Deed and recognised in performance of its terms.

[49] Bruno acquired his first property in Alice Springs in 1951. He sold that in 1959. He bought two other properties, one in 1951 and one in 1959, each of which he sold less than nine months after buying them, presumably as a result of building on those lots and on-selling them with houses attached. He purchased another two properties (Lots 1065 and 1131) in 1959 and another (Lot 553 - 26 Stuart Highway, Ciccone) in 1962. Lots 1065 and 1131 were sold in or before the end of 1963.

[50] In 1964 Lot 1104 was bought in the name of Paul and was sold by Bruno in 1965. In 1967 and 1968 a number of properties were purchased in the joint names of Bruno and Paul. These included Lot 2410 (24A Stuart Highway Ciccone), Lot 1757 (1 Milner Road, Ciccone) and Lot 1954 (20 Bloomfield St, Gillen).

[51] Over the next 20 years or so another 15 or so properties around Alice Springs were acquired, many of them in the joint names of Bruno and Paul but some also in the names of Ida, Margaret and Mary.

[52] Prior to Paul's death in 1995, the plaintiffs lived with their parents, Paul and Margaret, at Lot 3372 10 Bromley Street, Gillen ("the Bromley Street property"). That property was purchased in 1975 in the names of Bruno, Ida

and their son Paul as joint tenants. The plaintiffs said that their father built the house and it was their family home where they grew up. The joint tenancy between Paul and his parents was severed in 1989. When Paul died in 1995, his one third share passed to Margaret, his sole beneficiary.

[53] Mary and Greg Dick and their three sons lived at Lot 3610, 3 Nichols Street, Gillen ("the Nichols Street property"). That land was vacant when it was purchased in 1973 and a house was built on it by Bruno and Paul. The purchasers were listed as Greg Dick, Mary Dick and Paul Simonetto as joint tenants. That joint tenancy was severed in 1989 following which Paul, and after his death, Mary, as the executor of Paul's estate, continued to hold a one third interest.

[54] At the date of his death in 1995, Paul was a co-owner of six properties, including the house that he and his family lived in (the Bromley Street property) and the house that Mary and her family lived in (Nichols Street property). Paul's estate also included a half share of the rental properties at 24 Stuart Highway and 26 Stuart Highway, a one third share in the property at 1 Milner Road and a one quarter share in the property at 24 Woods Terrace.

[55] A significant part of Paul's estate was made up of money in joint bank accounts. At the date of his death in 1995, there were 11 bank accounts, all held jointly by Paul and others.

(a) There were two accounts which received the rental income of various properties. It appears that the family members considered themselves entitled to the rent-derived monies in those bank accounts in the same proportions as they owned the respective rental properties.

(b) There were five accounts in the joint names of Paul and Margaret. The first account was a transaction account that Margaret's salary was paid into when she undertook work as a relief teacher - it held $8,812.00 at the time of Paul's death. The other four accounts contained money held on trust for the first and second plaintiff - they held about $35,000 at the time of Paul's death.

(c) There was also a business cheque account for the partnership B Simonetto and Son, from which both Paul and Bruno drew their salaries of $500.00 per week.

(d) There were four term deposit accounts which held money received from the sale of jointly owned properties.

[56] In addition to Paul's share of those accounts, his one quarter share in 24 Woods Terrace passed by survivorship to Margaret on his death. This property was purchased in 1991 in the names of Margaret, Paul, Bruno and Ida, as joint tenants, and the joint tenancy was never severed. Eventually, all the other joint owners predeceased Margaret, and she became sole owner of this property on Bruno's death in 2010.

[57] Before Paul's death, the family assets were jointly owned and money was kept in joint bank accounts. Payments for rates and house expenses, university fees and school fees, insurance and living expenses were made from particular joint accounts by agreement between Bruno, Paul and Mary, and each of their spouses. Margaret assisted the family business by bookkeeping and managing bank accounts. She also paid bills from whatever bank account was relevant to a particular expense.

1995 to 2000

[58] After Paul's death, and for about the next five years, Margaret continued to operate the bank accounts that were held jointly with Bruno and Ida in much the same way as before. Margaret was added as a signatory to the joint accounts. The accounts were used to pay the rates on the rental properties and on the houses that Bruno and Ida, Margaret and Mary lived in. The rental income continued to be paid into the joint accounts. Bruno continued to draw a salary from the business income, and Margaret continued to draw what Paul had been withdrawing as wages before his death.

[59] It seems that Margaret had never had a very good relationship with Bruno. Margaret says that Bruno disliked her from the early days of her courtship with Paul in 1974 and this continued to the time of Bruno's death in 2010. She felt that he was always critical of her and favoured Mary's side of the family. By way of example, see said that Bruno and Ida "wouldn't come to the church for the Craig and Louise's confirmation services as it was 'too cold and too long', but they had no problems coming to our house for lunch

afterwards". She said that Bruno and Ida took no interest in the children or her. She said that Bruno nagged Paul about things that she was supposedly doing wrong, such as not bringing the children to Bruno's house each day.[41]

[60] The relationship between Margaret and her children on the one hand and Bruno and Ida on the other soured following Paul's death. Because the bank accounts and the real estate were all in joint names, there was much debate about who was entitled to what part of what assets.

[61] When Paul had been alive, the family and business assets were intermixed, and expenses and acquisition of further assets were funded from joint accounts. This included arrangements under which school and university fees for all of Bruno's grandchildren were paid from joint bank accounts.

[62] One particular issue which appeared to be ongoing, at least from the perspective of Margaret and the plaintiffs, was due to the fact that Bruno and Ida each owned a one third share in the property where Paul and Margaret lived (the Bromley Street property). In December 1994 Bruno and Ida had each made codicils to their wills (of 16 May 1989) leaving their interests in that property to Margaret.[42] Bruno did not make such a provision when he made a new will on 28 May 1997, leaving the whole of his estate to Ida and, in the event of her predeceasing him, to Mary and her descendants.[43]

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41 Exhibit P1.3 [1] – [3].
42 Exhibit P4 Tab 3.
43 Exhibit P4 Tab 4.

[63] A similar situation existed in relation to the property where Mary and Greg Dick lived (the Nichols Street property) in that a one third share was held by Paul and after his death by Margaret. (However no provision was ever made in relation to that property by way of will or codicil, as had occurred in respect of the Bromley Street property.)

[64] The properties had been purchased in 1975 and 1973 respectively. In both cases the joint tenancy (by the three people originally shown as owners) was severed in May 1989, and Paul's share of each was transferred to Margaret in 1996 following his death. That situation pertained until August 2000 when it was regularised by Lot 3372 (the Bromley Street property) being transferred into Margaret's name solely and Lot 3610 (the Nichols Street property) being transferred into the names of Mary (as to two thirds) and Gregory (as to one third).

[65] These issues in relation to the legal title and co-ownership of those two properties had been subject of discussion since at least October 1988 and continued until April 2000 and the execution of the deed shortly to be referred to. In a detailed letter of 21 July 1994 Mr Cloke, a partner of law firm Pannell Kerr Forster, wrote to Paul about regularising and simplifying the title to the properties and provided advice regarding possible income tax, capital gains tax and stamp duty ramifications that might flow from the transfer of interests in them.

[66] Margaret said that after Paul died his parents seemed to have forgotten all about the codicils that they had made 7 months earlier. She said that aboult 2 weeks after Paul's death Bruno said, in relation to the Bromley Street property: "Paul gone, everything different, I tear up the piece of paper. ' She said he later said to her: "If you want the house you can buy it. ' She said: "Then began 5 years of legal negotiations as I fought to retain our family home. Bruno and Ida and Mary and Greg all acquired their homes through Paul's years of working in the partnership, but as soon as he died, I was expected to buy my home."

[67] The winding up of Paul's estate was extremely complex and took some five years, culminating in the execution of the Deed in April 2000. Unfortunately the poor relationship between Bruno and Margaret resulted in a number of other disputes between them, and each of them engaged solicitors. Both parties had originally been advised by Mr Max Horton a partner in Martin & Partners but following Mr Horton's concerns about a possible conflict of interests because the parties were not in agreement, Bruno engaged another solicitor, Murray Preston.

[68] The other disputes and discussions included regularising the ownership of some of the other properties such as the properties at Woods Lane and Stuart Highway and the ongoing sharing of rents from co-owned properties. There was also a dispute about whether or not Bruno and Ida's names could be on Paul's gravestone. Correspondence from Mr Horton to Bruno in 1996 and 1997 shows that from 3 January 1996 Bruno was pressing to have matters

regarding Paul's estate resolved and that delays occurred for various reasons, including the need for the executors of Paul's estate to locate and assemble necessary information.

[69] Mr Horton's letter of 9 September 1996 summarised Bruno's position, which included (in paragraph numbered 1) that the respective residences of Paul and Mary "are to be disregarded in the financial calculations relating to the split up of the properties" and "are to become the sole property of the persons concerned, without monetary adjustments relative to present proprietorship interests."

[70] An interim report was obtained from Messrs Deloitte Touche Thomatsu in December 1996 following which Mr Horton had conversations with the executors of Paul's estate, Margaret and Mr Webber. On 7 April 1997 Mr Horton wrote a detailed letter to Bruno setting out what he understood to be Bruno's position and making additional observations.

[71] Paragraph 7 of that letter differed from paragraph 1 of the September 1996 letter. It repeated that the residences of Paul and Mary were to be disregarded in the financial calculations relating to the split up of real estate interests, but added the words: "except that, if required by you, Mary pay to you the estate's share of the value of the property." (I assume that the reference to Mary was an error and was intended to refer to Margaret.)

[72] Another paragraph (paragraph 10) of that letter of 7 April 1997 referred to the property at Woods Terrace (Lot 1062, 24 Woods Terrace, Braitling)

which had been purchased in February 1991 and was held by Bruno, Ida, Paul and Margaret as joint owners. That paragraph says:

> "In relation to the Woods Terrace property, the proprietorship remain in the present proportions as joint tenants. This is proposed upon the basis that the information which we have in relation to the property is firstly, that this form of proprietorship was specifically requested upon the property's acquisition on the understanding that, in a normal succession, it would lead to the property vesting in Paul and his wife, and secondly, arrangements are already in place whereby contributions to the tertiary education of Craig are to be provided from the property income and the same situation is intended for Louise."

That is followed by what I assume to be Mr Horton's comment:

> "This position is based upon, on the one hand, what appears to have been the parties intent from the outset and, on the other hand, giving effect to arrangements for the grandchildren's tertiary education which seemed to be settled."

Following the deaths of Paul, Ida and Bruno, Margaret became the sole owner of the Woods Terrace property in October 2010. She sold it in May 2011 for $450,000.

[73] On 3 June 1997 Mr Horton wrote to Bruno following discussions between Bruno and Margaret. Mr Horton wrote: "This initiative on your part in seeking to progress issues, and your apparent willingness to accommodate compromise, is most encouraging." Mr Horton went on to say that this should result in an agreed outcome which would be recorded by way of deed. He noted two points of variation from the position summarised in the 7 April letter. One related to paragraph 7 and stated:

> "In relation to point 7 in our previous letter, your preference is that you and your wife do not relinquish your interest in the two house properties until your deaths. The executors would be prepared to accept this as an element of an overall settlement."

The letter went on to seek Bruno's confirmation of his position in relation to each point raised in the previous letter as varied by this one, and advised him to seek independent advice.

[74] I infer from this that the "discussions" between Bruno and Margaret included Bruno withdrawing the suggestion in the letter of 7 April that Margaret would have to pay anything for the Bromley Street property if he so required, but that Bruno and Ida would retain their interests in both properties until their deaths. This is consistent with their position which they had formalised in 1994 when they made codicils to their earlier wills.

[75] Then followed some delay before Bruno's new solicitor, Mr Preston, responded by letter dated 12 December 1997. Amongst other things that letter proposed that the Bromley Street property "be transferred into Margaret's name or into the name of her children if she so desires", that the Nichols Street property "be transferred into Mary's name or into the name of her children if she so desires", that the interest of Bruno and Ida in the Woods Terrace property be transferred to Margaret, and that Bruno and Ida be permitted to place their names on Paul's gravestone.

[76] By letter of 16 February 1998 Mr Horton indicated that the proposals regarding the transfers of interests in Margaret's house, Mary's house and

the Woods Terrace property were agreed to, and referred to a number of other issues which would appear to be less important in the scheme of things. The letter then referred to "two overriding issues which need to be addressed" the first of which was that:

> "… A settlement along the foregoing lines presupposes that Mr and Mrs Bruno Simonetto would deal in an even-handed and fair manner in their testamentary arrangements relative to the entitlements of the grandchildren. The executors need to know what assurances might be given in this regard."

[77] Mr Preston replied by letter of 5 March 1998. In relation to points 1 to 7 in the previous correspondence (which included Margaret's and Mary's properties and the Woods Terrace property) he said that "agreement appears to be reached". In relation to the reference to the grandchildren he said:

> "With respect to your comments regarding the grandchildren we advise that both of our clients intend to deal with the varying claims fairly and even-handedly taking into account the benefits which may have been provided to the various children. Our clients have great affection for all the grandchildren and do not intend that Paul's children should be prejudiced. They of course reserve the right to make testamentary provisions as they see fit but always having regard to matters which a fair testator would have regard to."

[78] Then followed some further correspondence and further delays. There was also ongoing discussion about payment of legal costs in the order of $6000 out of the estate. By a letter dated 5 March 1999 Mr Horton repeated the key terms of the settlement following a further discussion between Bruno and Margaret. Mr Preston replied by letter dated 2 June 1999 outlining 17

points of agreement, and requesting "an agreement for perusal within the next 21 days with a view to final settlement in a further 14 days".

[79] By letter 14 October 1999 Mr Horton enclosed a draft deed of settlement and referred to a number of other points. The letter stressed that the deed was a document of compromise, that there was no room for further negotiations and that "our instructions are to brook no further endeavour on your client's part to diminish a proper inheritance for Paul's wife, and thus his children."

[80] On 2 December 1999 Mr Preston wrote to Mr Horton and expressed general agreement with the draft and raised a number of matters that required further explanation or attention. Mr Preston questioned why Craig and Louise were to be named as parties in the deed, and suggested that a clause could be inserted in the agreement which would not require the children being made parties. It could say:

> "The parents note their grandchildren take no direct beneficial interest in the estate (save for payments of education expenses pursuant to clause 2) and acknowledge that they intend to deal with their assets in a fair and proper manner as between their grandchildren and, if appropriate, taking into account any benefits previously provided to them directly or indirectly and with the intention that the children of the Testator will not be prejudiced in this context."

[81] Following a meeting with Margaret Mr Cloke wrote to Mr Horton on 17 December 1999 in relation to a number of outstanding financial issues. That information was passed on to Mr Preston by Mr Horton who indicated that he would communicate further when additional information was available.

[82] Mr Preston wrote back on 29 February 2000 and indicated that Bruno's accountant has examined the draft accounts and identified some irregularities. He said that Margaret had apparently received cash payments of $70,000 from the joint accounts between 1995 and December 1997. Mr Preston's letter also said:

> "The statements show that my clients have contributed to both children where in fact there was never at any time such agreement. The agreement was between Bruno Simonetto and his son, the late Paul Simonetto, and as far as my clients are concerned there was no obligation after the death of their son. The mother, Mrs Margaret Simonetto, had absolute control of the funds and used them as she saw fit."

The letter went on to say that although his clients "are not happy with this situation, they are prepared to accept this situation if the matter can be finalised in the shortest possible time."

[83] On 21 March 2000 Mr Preston returned to Mr Horton the documentation executed by Bruno, Ida, Mary and Gregory Dick.

The Deed (2000)

[84] A document titled "Deed of Settlement" (the "Deed") was dated 13 April 2000 and was expressed to be between Margaret ("the beneficiary") and Terence Webber ("the executors"), Bruno and Ida ("the parents"), Gregory and Mary, and Craig and Louise ("the children").

[85] The Deed contained 8 recitals. Amongst other things the recitals record the death of Paul, the fact that he devised the whole of his estate to Margaret, the fact that at the date of his death Paul carried on the businesses of builder

and property investor in partnership with Bruno, Ida, Margaret and Mary, and the desirability of clarifying the situation regarding the businesses and the proprietorship of assets in relation to them.

[86] Recital H recorded that the parties had agreed on 17 "arrangements". For the most part they reflected the various points that had been discussed in the correspondence, including the transfer of Lot 3372 Bromley Street to Margaret and the transfer of Lot 3610 Nichols Street to Mary. However nothing was said there, or elsewhere in the Deed, about placing an inscription on Paul's gravestone.

[87] By the Deed, the parties agreed to those "arrangements", accepted such arrangements "in full and final settlement satisfaction and discharge and in redemption of any entitlement of all claim … for or in any way related to [Paul's] will or estate or the said businesses", released and discharged each other from liability relating to those matters, and agreed on the implementation of those arrangements within 6 weeks or such extended time as may be agreed or necessary.

[88] The Deed contained 2 references to Craig and Louise. They were in recital D and recital H.

[89] Recital H(2) recorded that the Woods Terrace property would continue in the proprietorship of Bruno, Ida and Margaret as joint tenants and that "the net rental income from the property subject (until 31 December 1999) to the prior payment therefrom of the tertiary education expenses of [Craig and

Louise] (in accordance with the arrangements agreed in that respect between [Bruno and Ida] and [Margaret] subsequent to [Paul's] death) will be shared equally between the proprietors until they agree otherwise."

[90] Recital D was as follows:

> "[Craig and Louise] are parties to this deed for the purpose of firstly signifying their agreement to and acceptance of that which is proposed pursuant hereto noting that they receive no direct beneficial interest in the estate as a consequence of the provisions hereof and secondly for the purpose of acknowledging the expressed intention of [Bruno and Ida] in the context of this agreement that they intend to deal with their assets in a fair and even-handed manner as between their grandchildren (taking into account benefits previously provided hereto) and with the intention that [Craig and Louise] not be prejudiced in this context."

[91] The plaintiffs rely upon the second part of recital D as the main basis of their moral claim to part of Bruno's estate.

[92] The defendant submits that:

(a) the provision is not expressed to be a covenant or a promise - it is merely a recital;

(b) the recital records a fact - namely Bruno's intention in 2000 to deal with his assets in a "fair and even-handed manner" between his grandchildren but "taking into account benefits previously provided hereto";

(c) Bruno's stated intention is of limited relevance in that it does not give rise to a moral obligation on its own any more than would a statement "I will look after you in my will";

(d) another 10 years passed before Bruno died, during which the circumstances of all parties changed, Craig had no contact Bruno, and Louise had practically no contact;

(e) the intention was expressed to be "taking into account benefits previously provided hereto" and took account of the benefits which Margaret was to receive under the Deed.

[93] Putting aside the Recital for the moment, I consider that the overall intent and effect of the Deed was to resolve the issues regarding ownership of and title to the various assets and any ongoing issues regarding the businesses and the respective contributions of Paul and Bruno. Much of the evidence at the hearing concerned those issues, but they are of limited relevance to my task which is to determine whether or not at the time of his death, ten years later, Bruno made adequate provision for the proper maintenance education and advancement in life of Craig and Louise.

2000 – July 2010

[94] Following the execution of the Deed in April 2000 Margaret received property and cash. She also retained the following interests in jointly held properties:

(f) a one third interest in Lot 1062 (24 Woods Terrace) as joint tenant with Bruno and Ida;

(g) a one half interest in Lot 553 (26 Stuart Highway) as tenant in common with Bruno; and

(h) a one third interest in Lot 1757 (1 Milner Road) as tenant in common with Bruno and Mary.

[95] The relationship such as it was between Margaret and the plaintiffs on the one hand and Bruno, Ida and Mary's family deteriorated. Craig had no contact with his grandparents at all, Louise had very limited contact and Margaret only saw Bruno when their ongoing involvement in the rental properties so required.

[96] On the other hand, Mary and her children (and grandchildren) continued to spend a considerable amount of their time with Bruno and Ida and provided necessities and comforts to them as they got older and more frail. Ida Simonetto died in 2005.

[97] As already noted Bruno made the Will on 18 May 2007 leaving his entire estate to Mary and appointing her executor of his estate. The Will included a statement as to why he was not providing for the plaintiffs in his will. However it did not include any statement as to why he was not providing for his other grandchildren in his will. Presumably he thought that Mary would provide for those grandchildren both during her life and in her will.

Craig Simonetto

[98] Much of what follows is derived from Craig's witness statement. Craig was born on 20 January 1977 and grew up in the family home at 10 Bromley Street Alice Springs. He attended OLSH Primary School between 1982 and

1988, Catholic High School from 1989 to 1992 and completed years 11 and 12 at Centralian College in 1993 and 1994.

[99] He and Louise used to visit their grandparents' home once a week after school, for Sunday lunches and for extended stays during the school holidays. When he got his driver's licence in 1993 he was given a car and he spent a considerable amount of time at his grandparents' home during years 11 and 12 for meals and study time. He said that he continued to enjoy a cordial relationship with the Dick family during that period.

[100] He left Alice Springs in January 1995 and commenced studies at ANU Canberra. He said that he attempted to maintain a close relationship with his grandparents "out of respect for his [father's] memory." He said that he continued to correspond with them while he was away at university and would visit on a regular basis during term breaks when he was at home.

[101] During his evidence Craig produced and identified five letters that he had received in the period 1996 to 1998, three from Bruno and Ida and two from Louise. (Exhibit P2). The first referred to him being in Melbourne and campaigning for his "cousin's Council elections", told him of the recent marriage of Ben and Christine and said that they are "looking forward to seeing and hearing from you". The second letter dated 21 July thanked him for a postcard and birthday card, said they are happy to know that he would have his bachelor's degree at the end of the year and that he was doing so well, and said that they were looking forward to hearing from him again.

The third letter was written by Louise from her grandparents' home and informed him that Nonno (Bruno) was still sick. The fourth letter was also written by Louise from her grandparents' home and said that Nonna (Ida) and Nonno are "whingeing because I haven't been here for one month." It said that Nonna was sending photos "because you must remember the family", and that "Nonno wants to see you soon." The fifth letter, dated 5 October 1997, thanked Craig for the birthday card, asked him how his studies were going, said that "it's good to hear that you have found a good job" and that "we're just waiting for you to come home, we can't wait to see you. … Love you very much."

[102] These letters suggest that during that period Bruno and Ida were interested in Craig and his progress with his studies and work, and were keen to hear from him. The letters and the sentiments expressed in them gainsay any suggestion of bitterness on the part of Bruno and Ida following the conversations regarding Margaret's house that were said to have begun soon after Paul's death.

[103] Craig said that his last communication with his grandparents occurred in January 1999. He said that he approached them to discuss what he "believed was Bruno's disrespect of our family by his decision to deny Mum access to the title of our family home." He says that Bruno, supported by Ida, told him "that his stance was a matter of principle because their names were not included on the headstone of my father's grave." He said that during that conversation Bruno stated that he loved Louise and him, and treated them

equally with his other grandchildren, but that he needed acknowledgement on Paul's headstone.

[104] He said: "[I] was not in contact with my grandparents subsequent to that conversation. I found their consideration that Mum was not entitled to her own independence by having ownership of Bromley Street reprehensible." He said that at no time afterwards did his grandparents seek to reconcile with him.

[105] Craig said in his witness statement that at the time of his final communication with his grandparents in 1999 Bruno "would have known of my very modest financial circumstances, given that was my final year of university. I was supported during my tertiary studies with a living allowance from my mother and by undertaking part-time employment." He said that his mother had very limited capacity to support Louise and him following Paul's death (in 1995) necessitating their mother's return to full-time work. He said that Bruno was aware of those circumstances.

[106] Craig did not mention in his witness statement that contributions were being made towards his tertiary education (and that the same was intended for Louise) from the income derived from the Woods Terrace property (which remained jointly owned until Bruno's death following which it was owned by Margaret and sold in 2011) and that the fees for his undergraduate degrees were paid out of the joint bank accounts of Margaret and his grandparents. When this was put to him during cross-examination he

acknowledged that he did not incur a HECS debt in relation to these degrees "because my university education was facilitated through rent from the property of 24 Woods Terrace which my parents and my grandparents held" and that he was "not familiar with where the funding came from." The evidence shows amounts paid out of the joint accounts for Craig's University fees and expenses of approximately $16,300 between July 1995 and 31 December 1996, $12,400 during 1997 and $12,000 during 1999, and for Louise's University expenses for 1999 approximately $11,300.

[107] Similarly Craig seems to have been unaware of, or chose to ignore, the codicils made in 1994 and the correspondence since 3 January 1996 that suggests that at all times, apart from a few months in 1997, Bruno had agreed that the Bromley Street property would be transferred to Margaret without charge (and the Nichols Street property would be transferred to Mary). During re-examination he stated that he was not involved in the instruction of Mr Horton and was not privy to the correspondence at the time.

[108] It was put to Craig during cross-examination that there was correspondence from as early as September 1996 indicating that Bruno had agreed to the transfer of the Bromley Street property. In response he said that would be "highly surprising" and that "I'd imagine if, in fact, he'd suggested that was to occur it would have had a number of conditions on it which would have been at best unpalatable." When he was shown some of that correspondence he referred back to his understanding of what his mother had told him and

he surmised as to what would have been said and done in relation to that issue. He was reminded of his earlier evidence that his mother kept him apart from the negotiations about these matters and did not include him in them because she did not wish to prejudice his relationship with his grandfather. In response to that he said that "it was only towards the final part of the negotiations where anything specific would have been raised with me, but the general tone was set in our household … around my grandfather's attitude towards my mother and our family home in particular." At various points he was critical of Bruno for his "lack of consistency or thoughtfulness towards our family when it came to the arrangements of the property settlement" and said that Bruno "was wayward of thinking well before January 1999". I consider that Craig's actual knowledge of the dealings between Bruno and his mother regarding these matters was very limited and his perceptions of what happened were coloured by his understandable loyalty to his mother.

[109] When asked about his relationship with Bruno between 1995 and 1999 Craig said that it was a cordial relationship and "was one based on respect for my grandfather because of the circumstances overall, which he provided to my father and in turn, which allowed my father to provide an adequate upbringing for my sister and I."

[110] Despite the "cordial relationship" Craig did not invite his grandparents to his 21st birthday celebration in January 1998. He said that the relationship

"had disintegrated to a point that I was not comfortable with them attending my family home which is where my 21st was held."

[111] He was asked why he did not resume contact with his grandparents after the Deed had been executed (in 2000) and the Bromley Street property was transferred to his mother. He said that "I took the view that the relationship between my grandparents had disintegrated to the point that no further contact was required. And … there never was an approach from my grandparents to me in return."

[112] Craig did not attend the funeral of either of his grandparents. In his witness statement he said he was overseas at the time of Ida's passing and was interstate (in Canberra) at the time of Bruno's passing. When asked by counsel for the defendant why he did not attend Bruno's funeral, despite having travelled to Alice Springs on another occasion that year to attend the funeral of a friend of his mother, he said that by that time he "had not had a conversation with him for over 11 years and I was always of the view that funerals are an event that you attend to pay respect to the deceased and I was not comfortable in that instance in attending my grandfather's funeral."

[113] In his witness statement Craig said that he joined the workforce full-time in 1999 and that since that time he had purchased a car and a home and he had "self-funded" a Master's degree.

[114] He says that his financial position in 2010 comprised assets of $10,000 cash in the bank, shares worth $420,000, a "home property" worth $500,000 and

a car worth $25,000, and that he had a home loan of $404,000 and a margin loan (which enables him to trade in shares) of $120,000. So, according to his witness statement, his net assets were approximately $431,000.

[115] He said that his net assets in June 2013 were worth approximately $800,000. He was questioned about how the value of his net assets increased to $800,000 since 2010. He said: "that is entirely feasible based on the returns of the stock market since the lows of the GFC in 2010 and remembering I earn a reasonable amount which has led to some significant savings."

[116] He was asked why documentation had not been provided to substantiate these figures, and his estimate of his net assets position of $800,000 at the time of trial. He said that he "would have" provided some documents to his lawyers and would be able to provide other documentation if required.

[117] During re-examination Craig produced a two-page document summarising the assets of both he and Louise (Exhibit P6) which he said he made in October 2012. He said that he assisted Louise "in doing a similar exercise for her in respect of her assets" "for the purpose of consistency in terms of our presentation to our legal team". He said that the summary was accurate as far as his assets were concerned as at October 2012 and that there had been no material change since then. Louise said that the information at the top of the page correctly identified her assets as at 2010 (not 2012) and that she provided that information to her lawyer, not to Craig.

[118] That document (Exhibit P6) shows Craig having (as at October 2012) gross assets worth approximately $1.5M (which includes $500,000 for the home unit, $200,000 in superannuation, $207,000 in cash, $455,000 worth of shares and $145,000 worth of units in managed funds) and liabilities of $704,000 (being the $404,000 ANZ loan and a $300,000 margin loan).

[119] Craig's tax returns indicate that during the financial year 2008-9 his gross income was about $184,000 and his taxable income about $161,000, during the financial year 2009-2010 his gross income was about $214,000 (comprising his salary of about $197,000 and dividends of about $9,500) and his taxable income about $165,000 (after an interest deduction of about $34,000 presumably the interest on the margin loan) and during the financial year 2010-11 his gross income was about $208,000 and his taxable income about $158,000 (after an interest deduction of about $38,000).

[120] Counsel for the defendant was critical of the plaintiffs for not providing full and frank disclosure of their financial circumstances, including their outgoings.[44] I accept the contention made by the defendant's counsel that:

> "There was no evidence as to their expenses or expenditure.[45] They both have accommodation, which they are both buying and not renting. There was no evidence (or even suggestion) that they were unable to meet those expenses, or that they would want to improve their position by increasing such expenses. To the contrary, Craig was engaged in the speculative activity of using margin loans to purchase shares."

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[44] *Bennett v Bennett* [2001] NSWSC 987 at [23]; *Ernst v Ryf* [2001] NSWSC 1167 at [37]; *Mann v Starkey* [2008] NSWSC 263 at [25].

[45] Contrast, by way of example, the evidence in *Nicholas v Nicholas* [2013] NSWSC 697 at [182] ff.

[121] In summary, at the time of Bruno's death Craig had three university degrees, a Bachelor of Economics, a Bachelor of Arts, and a Master's degree in Management. He was employed by Private Health Care Australia in Canberra (and was still employed there at the time of the hearing, 3 years later.) He said that he had been considering undertaking an MBA course in the United States and had also made the final round of offers for studies at the London Business School but he could not progress that "simply because of the opportunity costs associated with 2 years of full-time study". He said that participation in his grandfather's estate would have enabled him to undertake that sort of study "because it would accommodate my lack of income for two years and the expense of not only the study but the living expenses associated undertaking those studies overseas." He said that would have played a significant part in any further career advancement opportunities. He indicated that he was about to take up a management job at Qantas Airways with a salary of around $200,000.

[122] Counsel for the plaintiffs made the following submission in relation to Craig:

> "Craig had a need for advancement in life at the time of the testator's death consequent upon his relative youth, his desire to commence a family, and his need for mobility in his chosen career. He is about to take (has just taken) up a senior executive management position in Qantas Airways. Craig has always harboured the desire to do an MBA and assistance from his grandparents' estate would have and would still enable that to occur. Craig aspires to the top of his profession. He would ideally like to take two years to pursue an MBA at Harvard or similar institution. It is unconscionable that that has been denied him. As Craig's future work and potential study will occur in Sydney a higher cost of living is anticipated."

[123] I do not consider that Craig's requirement for financial assistance of this kind leads to the conclusion that his needs were such as to satisfy the Court that adequate provision was not available for his proper maintenance, education and advancement in life. Nor do I consider that it is unconscionable that he has been denied such assistance out of Bruno's estate. I do not consider that contemporary community standards would expect a testator with Bruno's means to fund such an endeavour.

Louise Simonetto

[124] Louise was born on 27 September 1978. She went to school in Alice Springs and attended the Catholic High School and Centralian Senior College completing her education in 1997.

[125] She said that during her primary school years she and Craig used to spend one afternoon a week and Sunday lunch at Bruno and Ida's house but that their after school visits stopped "when we became too busy at high school". She said that all regular visits stopped after her father's death and that she then visited on an ad hoc basis only, but "this effort was not reciprocated".

[126] Louise said that she had a good relationship with Mary and her children during her primary school years but that she visited them less frequently after her father's death. She said that she attempted to continue a relationship with Mary and her cousins but that was not reciprocated either. She said that she ceased visiting them "after seeing the hurt they were

causing my mother." She did not indicate what "hurt" Mary and her children were causing Margaret or how that was relevant to this matter.

[127] Louise went to Brisbane in 1998 and attended Griffith University for 6 months. She returned to Alice Springs and went to TAFE, studying Business and Tourism. Her relationship with her mother grew closer over the years as they were the only two people occupying the family household. She started working part time when she was 19 and full time with the Northern Territory Government from April 2000. She continued living with her mother and attending TAFE until December 2002 when she went to live in Darwin.

[128] Louise said that she continued to visit Bruno and Ida until she moved to Darwin, "out of respect for my father". After that she did not keep in contact until she took her fiancé to meet Ida in 2004. She last saw Bruno in 2004 when she went to visit her grandmother at the Old Timers Home in Alice Springs. During cross-examination she said that she visited her grandparents "on an ad hoc basis around once or twice a week" until she moved to Darwin. However she later conceded that from about 1999 onwards she had very little contact with either her grandfather or her grandmother.

[129] When asked why she did not see Bruno after 2004 Louise said that the relationship was not being reciprocated and that it was "because of the strain that he has caused by mother" and that she was not willing to go and sit in

the same room with him. She said that she "then started to realise what was actually going on. I wasn't aware of a lot of the property issues that were happening because my mum shielded me from that." She said that "there was [sic] still ongoing issues with the property settlement" and that "nothing had actually been finalised by then." When challenged on those assertions she said that she did not know the exact date (when "nothing had been finalised") and was "not aware of where the property settlement was at." She agreed that neither her mother nor Craig had spoken to Bruno for five years up to 2004. When pressed as to what strain Bruno was causing her mother she again referred to the "property settlements that were happening … over that extended period." In fact the relevant property settlements were all completed in 2000 following the execution of the Deed.

[130] In her witness statement Louise said that she did not attend the funerals of either Bruno or Ida because she "was concerned of the reception I would receive from the Dick family, given the family strain, if I did attend." However during cross-examination she said that she did not attend Bruno's funeral because she was in Darwin and could not afford to attend although she had $60,000 in the bank at the time.

[131] In 2003 she purchased a unit in Darwin that was rented out and she moved into it in December. She married in 2005 but separated from her husband in 2008. She paid out $50,000 to her ex-husband by way of property settlement. She went overseas for 6 months in 2006.

[132] She continued working full-time with the Northern Territory Government until she resigned in April 2013. She now does sales and marketing work for the Mantra Hotel Group earning $65,000 per year and earns about $2000 a year as a part time gym instructor. She said that she would like to study hospitality in order to further her career.

[133] Louise said that she would like to have a family. She also said, and I accept, that she has a heart murmur, a congenital condition that she was born with, and she will eventually need to have an operation for that which would take her out of the workforce for 3 to 6 months. This had not been raised earlier in the proceedings. There was no evidence that Bruno or the defendant had any knowledge of her heart condition.

[134] In her witness statement Louise estimated that in February 2011 she had net assets of $380,000, comprising a unit worth $400,000, $40,000 cash and a car worth $15,000 and a home loan debt of $75,000. She also estimated that in May 2007 her net assets were $220,000.

[135] Exhibit P6, which Craig said reflects his and Louise's assets as at October 2012, showed Louise as having net assets of $526,000. Her gross assets were worth approximately $567,000, comprising the home unit worth $430,000, $60,000 cash, $69,000 in superannuation and a car worth $8000. Her liabilities were $41,000 being a home loan of $36,000 and a credit card debt of $5000.

[136] However when Louise was asked about this in cross-examination she said that the information at the top of the page identified her assets as at 2010, not 2012. She said that there have been changes in her expenditure and superannuation over the 3 years since then. She agreed that she had been paying off the home loan since then and that her employer had been making regular superannuation contributions since then. She said that she now has about $50,000 in her savings account. She was unable to estimate the value of her home unit or to provide detailed information about her present financial situation.

[137] The confusion about her asset position shown on the top part of Exhibit P6 continued until after re-examination when she agreed with the Court that those assets and values did relate to late 2012, not 2010 as she had said during her cross-examination.

[138] Consequently there is no clear evidence about the value of Louise's assets at the time of Bruno's death. The best evidence, assuming it is accurate, is that contained in her witness statement, namely net assets of approximately $380,000 in February 2011. It appears that apart from copies of her tax returns, the defendant did not have any documents or other evidence regarding Louise's assets, liabilities, earnings or expenses and therefore did not have the opportunity to check Louise's assertions.

[139] Louise's tax returns indicate that during the financial year 2008-9 her gross income was about $66,000 and her taxable income about $64,000, during the

financial year 2009-2010 her gross income was about $72,000 and her taxable income about $70,000, and during the financial year 2010-11 her gross income was about $84,000 and her taxable income about $80,000.

[140] During her cross-examination Louise was taken to a number of important passages in her witness statement which were in some cases identical and in other cases very similar to passages in Craig's witness statement. Those passages concerned their respective understandings of the so-called promise made by Bruno and Ida in the Deed. She denied any collusion with Craig in this regard and agreed that "it is a coincidence" that she and Craig had said "exactly the same thing, exactly the same way." She agreed that Craig has been "the principal vehicle by which [she gave] instructions to [her] lawyer" and denied that Craig prepared a draft of her statement for her to approve.

[141] Regrettably I found her evidence unsatisfactory in some respects, particularly in relation to her conclusions about Bruno's conduct in relation to the property issues and the reasons for her estrangement.

[142] Counsel for the plaintiffs made the following submission in relation to Louise:

> "Louise has net assets of approximately $515,000. At the testator's death it was $380K. Louise is in employment with a modest wage in the order of $65,000 per annum pre-tax. Louise had a need for advancement at the time of the testator's death consequent upon her relative youth, the failure of her marriage, the need to make her own way in life, including the need for retraining into a new career path, increased cost of living in Darwin, the need for heart surgery in the near future, and the hope of retirement from the workforce to commence a family."

[143] Although her yearly salary was somewhat lower than Craig's her net assets were not insubstantial and her prospects of a normal lifestyle were strong, subject to her heart condition about which Bruno was unaware. Whilst her desire to embark upon and train for a new career path is understandable I do not consider that she did not have the means to afford this, or that Bruno had any duty to provide for this kind of advancement.

Assets of at the time of Bruno's death

[144] The Court was provided with an agreed schedule summarising the respective assets of Margaret Simonetto, Mary Dick and Greg Dick and their values as at 25 June 2013 in the case of Margaret, 1 October 2012 in the case of Mary and Greg and 8 November 2011 in relation to the Estate (Exhibit P10). That document does not record the values as at the date of Bruno's death. Annexed to the affidavit of Mary Julienne Dick sworn 24 May 2013 and marked as Annexure MJD3 is a "Further Amended Summary of Assets and Liabilities" which sets out the assets and liabilities of Bruno's estate at the date of his death. The values of the interests in the properties at 1 Milner Road and 26 Stuart Highway (as at the date of Bruno's death) are different from those shown in Exhibit P10. I rely upon Annexure MJD3 for the purposes of assessing the values of the properties referred to in it as at the time of Bruno's death.

<u>Bruno's assets at the time of his death</u>

[145] When probate was granted Bruno's estate was thought to be worth $1,367,995.41 as at the date of his death. However errors were discovered,

mainly in relation to Bruno's ownership of Lots 2410 and 5770 (at 24 and 24A Stuart Highway). According to Annexure MJD3, which I accept as the best evidence, Bruno's estate was worth $2,129,662.08 comprising Lot 2410 at 24 Stuart Highway (worth $1,000,000), Lot 5770 at 24A Stuart Highway (worth $335,000), his one third share in 1 Milner Road (worth $266,666), his one half share in 26 Stuart Highway (worth $400,000), miscellaneous personal and household effects worth $20,000 and $107,995.41 cash in his bank accounts.[46] (Although Bruno's joint tenancy in Lot 1062 at 24 Woods Terrace was noted, no value was attributed to that property, presumably because Bruno's interest passed straight to Margaret upon Bruno's death.)

Assets of Margaret Simonetto

[146] Immediately following Bruno's death Margaret owned the Bromley Street property (which Margaret estimated to be worth $500,000), the Woods Terrace property (which she sold in May 2011 for $450,000), a one half interest in the property at 26 Stuart Highway (worth $400,000 according to Annexure MJD3), a one third interest in the property at 1 Milner Road (worth $266,666.67 according to Annexure MJD3) and an unknown amount of cash following her receipt of proceeds from Paul's estate.

[147] According to Exhibit P10, as at 25 June 2013, Margaret had assets worth about $1,858,500 which included real estate worth $1,274,000, annuities worth $380,000, superannuation worth $144,000 and about $55,000 in cash.

[46] See Further Amended Summary of Assets and Liabilities annexed and marked MJD3 of Mary Julienne Dick sworn 24 May 2013.

(These assets included her one third share in 1 Milner Road which according to Annexure MJD3 was worth $266,666.67, not the $324,000 shown on Exhibit P10, and her one half share in 26 Stuart Highway which according to Annexure MJD3 was worth $400,000, not the $450,000 shown on Exhibit P10.)

[148] There was no evidence to suggest that Craig and Louise will not share the assets of their mother Margaret, or that she would not be able to assist them if they require financial help.

Assets of Mary Dick

[149] According to Exhibit P10, as at 1 October 2012, Mary had assets worth $803,184 which included property interests worth $670,666 (being a 2/3 share in the Nichols Street property and a one third share in 1 Milner Road), superannuation worth about $132,000 and about $600 in cash. Greg Dick, who had separated from Mary in 2002, had assets worth approximately $1,580,000 as at 1 October 2012. (These assets included a one third share in 1 Milner Road which according to Annexure MJD3 was worth $266,666.67 at the time of Bruno's death, not the $324,000 shown on Exhibit P10.)

[150] Mary suffers from a number of medical conditions including osteoarthritis and asthma and has limited use of her right arm which she broke in 2012. She has not worked for some years and does not feel able to return to work because of her ill health and her age. She receives a pension of $96,000 per annum.

Summary of assets

[151] Unfortunately there is little direct evidence about the value of all of the assets held by Craig, Louise, Margaret and Mary at the time of Bruno's death.

[152] In broad terms it seems to me, and I find, that at the time of Bruno's death:

(a) Craig (then 33 years old) had net assets in the order of $430,000 and income of about $214,000 per annum (gross);

(b) Louise (then almost 32 years old) had net assets of about $380,000 and income of about $72,000 per annum (gross);

(c) Margaret had net assets of about $1,700,000;

(d) Mary had net assets of about $750,000;

(e) the Estate was worth $2,129,662.08.

Reasons for Bruno not providing for the plaintiffs in his will

[153] As noted above in paragraph [41] s 22(1) of the *Family Provision Act* requires the Court to "have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Act."

[154] An indication of a testator's reasons will sometimes be found in the will or in some other written statement made admissible by s 22(2) of the Act.

However there may well be other evidence from which the testator's reasons may be discerned.

[155] The evidence demonstrates a close and loving relationship between Bruno and Mary and her children and grandchildren which continued until his death on the one hand, and significant estrangement between Bruno and Margaret and the plaintiffs for at least 11 years before Bruno's death on the other. This suggests that one reason why Bruno made the dispositions in favour of Mary (and her children if Mary predeceased him) and did not make provision for Margaret and the plaintiffs was because of that close and continuing relationship.

[156] Another possible indication of Bruno's reasons for excluding the plaintiffs from his estate is the "Declaration" in clause 22 of the Will, which provided as follows:

> "I declare that I am making no provision in my Will for my grandchildren Craig and Louise (the children of my late son Paul Simonetto) because during my life time I made substantial gifts of real estate to my son. On the death of my son the real estate passed to his wife Margaret and it is my expectation that these assets will pass to Craig and Louise. I also own real estate in joint names with Margaret which will pass to her on my death."

[157] Section 22(3) of the Act requires the Court, "in determining what weight, if any, ought to be attached to [such a] statement, [to] have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement."

[158] The plaintiffs contend that the statement in clause 22 of the Will contains a number of significant factual errors and accordingly does not reflect Bruno's real reasons for excluding the plaintiffs. They contend that the interests in real property that ultimately passed to Margaret were not "gifts" from Bruno to Paul but were the fruits of Paul's labour, that the relevant real estate did not pass to Margaret upon Paul's death and did not pass to her until after the execution of the Deed, and that it "appears probable" that Bruno's own interest in some of the properties in question was effectively a "gift" from Paul to Bruno following Bruno's reduced involvement in the business. They also point out that the statement makes no reference to the "gifts" made by Bruno to Mary and her family or to Paul's contributions to the business some of which included the building of Mary's house. They also point out that the statement does not refer to or reflect the terms of the recital in the Deed regarding the intention of Bruno and Ida to deal with their assets in a fair and even handed manner, or correspondence from the late 1980s and their 1989 wills under which they left their respective estates to each other and then to Paul and Mary in equal shares.

[159] The plaintiffs also contend that Bruno seemingly held a mistaken view of the benefits that Craig and Louise received from the business carried on by Bruno and Paul. They contend that that is borne out by the history of Bruno's earlier wills including his 1989 will, the codicils made in 1994 expressly recognising the interest of Paul and Margaret in the Bromley Street property, and his will in 1997 when for the first time he made no

provision for Paul's side of the family and left everything to Mary in the event that Ida predeceased him.

[160] The plaintiffs submitted:

> "Accordingly, contrary to the assertions made in the declaration, when he first excluded Craig and Louise in 1997 no 'gift' or transfer of Bruno's property to Paul had occurred. Bruno by his declaration does not explain this cutting off of Craig and Louise (in 1997). Margaret's evidence establishes that Bruno wrongly regarded her interest in various pieces of real property as 'gifts', and that Bruno expressly acknowledged that he had changed his attitude to her and the children because of Paul's death."

[161] The defendant contends that these submissions on behalf of the plaintiffs attempt to "freeze" time by asking the Court to concentrate on Bruno's subjective state of mind at the time of his making his previous will on 28 May 1997 and to consider the position as at the date of the execution of the Deed in April 2000.

[162] As I have already indicated, despite the considerable amount of evidence that was adduced about contributions made by Bruno and by Paul on various occasions before and during their 35 year business relationship, it is not possible to make findings about the main factual errors asserted above, in particular the assertion that Bruno had not made "gifts" to Paul. Nor can I find that Bruno held a mistaken view of the benefits that Craig and Louise received from the business. Indeed the evidence is that they both received benefits in the form of assistance with their education expenses, a fact that was recognised in Recital H(2) of the Deed.

[163] Further, not all of the so-called factual errors are relevant to the statements made in clause 22 of the Will. For example, whilst the evidence does show the making of inter-vivos gifts to Mary and her children and payment of school fees for her grandchildren, this does not gainsay any of the statements made in clause 22.

[164] Of the four statements made in clause 22 of the Will:

- Although the evidence demonstrates that after Paul began working with Bruno he contributed to the business and consequently to the real estate interests held by them and their respective families, and that his contributions exceeded Bruno's for the last 10 years or so of their partnership, I consider it likely that the real estate acquired and reinvested from Bruno's contributions before Paul joined him and in the early years of their business together could well have been, and were justifiably regarded by Bruno as, gifts to Paul and his family.

- Following Paul's death Margaret inherited Paul's interests in the real estate assets derived from their continued reinvestment of real property held by them and their families.

- It is reasonable to assume that Margaret will pass on her assets to Craig and Louise, her only children.

- It is true that Bruno owned real estate in joint names with Margaret which would pass to her on his death. The obvious example is the Woods Terrace property.

[165] The plaintiffs also point out that the statement in clause 22 of the Will does not allude to any estrangement with Craig and Louise. The absence of such a statement does not gainsay the fact, which I find to be the case, that there was estrangement between Bruno on the one hand and the plaintiffs (and their mother Margaret) on the other.

[166] The plaintiffs also contend that responsibility for the estrangement falls totally upon Bruno. That contention appears to be based upon Margaret's evidence to the effect that Bruno had never liked her and that he wrongly insisted that she pay for her one third interest in the Bromley Street property after Paul's death and upon evidence of Craig and Louise about the latter issue and their perceptions of how Bruno treated their mother during the 5 years or so following Paul's death (and until 2004 according to Louise). As I have already observed their perceptions were based on inadequate knowledge on their part as to Bruno's true position in relation to the Bromley Street property and in relation to the other dealings between their mother and Bruno. Just as Bruno could probably have made efforts to contact and engage Craig and Louise after they ceased communicating with him, so too could they have contacted him from time to time. I am not in a position to find that the estrangement was due to the fault of Bruno.

[167] The plaintiffs also note that the statement in clause 22 of the Will does not allude to any particular service or consideration by Mary or her children, and that neither did Bruno's earlier wills in 1997 and 2005. They submit that despite the love and affection apparently showered on the testator by the Dick family, there must be "at least limits on how far a court should go in"[47] rewarding Mary with such largesse and giving the plaintiffs nothing. They submit that Mary's reward "must be balanced against what Bruno's other child, Paul, did for him in his lifetime." In relation to this submission I repeat that I am unable to conclude that Paul's contributions were not fully taken into account in the course of negotiating and entering into the Deed. I consider that the absence of any express statement in the Will as to why Bruno left the whole of his estate to Mary is of little relevance in the present matter, where the main issues concern the plaintiffs' needs and moral rights if any.

Disentitlement – s 8(3)

[168] Counsel for the defendant drew the Court's attention to s 8(3) of the Act which provides as follows:

> "The Court may refuse to make an order in favour of a person whose character is such, or whose conduct is or has been such, as in the opinion of the Court, disentitles him to the benefit of an order."

[169] Counsel submitted that the failure of Craig and Louise to have any contact with Bruno during the 11 years prior to his death in the case of Craig, and

[47] Quoting Basten JA in *Andrews v Andrews* (2012) 81 NSWLR 656 at [53].

during the 6 years prior to his death in the case of Louise and her very limited contact during the 5 years before that, could be described as disentitling conduct. They note that *de Groot and Nickel* include as examples of disentitling conduct:

> "Failure to communicate with the deceased over a long period, not assisting in meeting the needs of the deceased (for example, through the deceased's ill health) …"[48]

[170] The authors note that it is an unresolved question as to whether such conduct is an independent ground for refusing an application or whether it goes to negating the existence of any moral claim by an applicant.[49]

[171] This question does not need to be resolved in the present matter because I do not consider that the conduct of either plaintiff disentitles him or her to the benefit of an order.

Conclusions

[172] I do not consider that either plaintiff had a relevant need.

[173] At the time of Bruno's death Craig was a 33 year old intelligent and capable man with three university degrees, net assets of about $430,000 which included a home and shares, a stable job in Canberra which he had held for several years and an income of about $214,000 per annum. He had effectively been living independently and without any need for support since

[48] *De Groot* at [2.41].
[49] *De Groot* at [2.33].

he joined the workforce in 1999. His future prospects were extremely good, as has in fact proved to be the case.

[174] Similarly Louise was a 31 year old intelligent and capable woman with business and tourism qualifications and experience, net assets of about $380,000 which included a home with relatively little debt and about $40,000 cash, a stable job with the Northern Territory government which she had held since April 2000 and income of about $72,000 per annum. She had effectively been self-sufficient since she joined the workforce in 2000 and living independently since she moved to Darwin in late 2002. Her future prospects were also good at the time of Bruno's death.

[175] The plaintiffs contend that Bruno had a moral obligation to provide for them in his will. Their main contention is based upon Paul's hard work and contributions to the building business and ultimately to Bruno's estate. They also rely on the second part of recital D in the Deed of 2000 as constituting a promise to leave them something in his will.

[176] Unlike the situation in *Vigolo v Bostin* where it was the testator's son who had contributed to the testator's business and was therefore owed a moral duty, the present matter involves a duty said to be owed to the testator's grandchildren by reason of the contributions of the father.

[177] When she was asked about the Deed Louise said that she understood that Bruno was promising that Craig and she "would be looked after fairly". She

agreed that she was not promising anything in return and that "it stemmed from my father's work all those years ago."

[178] I have already concluded that the evidence does not enable me to make a finding that the respective contributions of Paul and Bruno were not adequately reflected in the Deed and its performance [48]. Even if I was wrong about this and Bruno did still owe something to Paul or Paul's estate notwithstanding and following the Deed I do not consider that this would give rise to a moral duty to provide for his adult grandchildren more than 10 years after Paul's death.

[179] The plaintiffs contend that Bruno was aware that their father, who had been the primary income earner for the family, was dead and therefore unable to provide for them or assist them financially in their lives. Whilst Bruno would have been so aware, the circumstances of the plaintiffs changed significantly by 2007 when Bruno made the Will and during the next 3 years before he died.

[180] The plaintiffs have also criticised Bruno for not honouring what they say was an obligation to provide for them in his will following the acknowledgement of Bruno and Ida in Recital D of the Deed that "they intend to deal with their assets in a fair and even-handed manner as between their grandchildren (taking into account benefits previously provided hereto) and with the intention that [Craig and Louise] not be prejudiced in this context." They submit that "Bruno clearly had no intention of honouring the

obligation. He took no steps to revoke his will of 1997, and when 5 years after the 2000 deed he did re-do his will, these intentions were confirmed."

[181] Even if, contrary to those serious allegations against Bruno, Bruno did not intend to deal with his assets in the manner set out in Recital D, I am not satisfied that this amounted to a binding or other promise that gave rise to a moral duty in the circumstances. The circumstances include the estrangement between Bruno and the plaintiffs which continued until his death in 2010 and Bruno's apparent belief that benefits had been provided previously to Paul, Margaret and the plaintiffs (for example by payment of their education expenses). The plaintiffs acknowledge that they did not provide anything in return for such a promise, and they do not submit that any form of estoppel applies. As noted in [33] above even where promises have been made and relied upon such promises would not be sufficient to characterise what was otherwise proper and adequate provision for the adult son as inadequate for his proper maintenance.

[182] Moreover I consider that the obvious and unfortunate estrangement between Bruno and Ida and the plaintiffs also negates the existence of a moral duty on the part of Bruno to provide for them in his will.

[183] Although Bruno's estate was worth over $2.1 million and thus was larger than some, I do not consider it was so large as to require Bruno to make provisions of the kinds requested by the plaintiffs. In the scheme of things it was not worth much more than the value of the assets of their mother, who

might reasonably be expected to provide for their needs. Moreover, even if the size of the estate was such as to require some provision for needs over and above basic necessities, both plaintiffs in the present matter have ample means to meet such needs.

[184] Counsel for the plaintiffs contended that Mary had "no special need for provision" out of Bruno's estate "over and above the half share that she would have assumed was her entitlement". Whilst it is relevant to consider what claims Mary and other potential beneficiaries would be entitled to make under the Act, this does not relieve the plaintiffs of their obligation to prove that adequate provision is not available for their proper maintenance education and advancement in life. At the time of Bruno's death Mary's assets were worth about $750,000, whereas Margaret had assets worth about $1,700,000 and Craig and Louise had assets worth another $800,000.

[185] Having regard to the financial positions of the plaintiffs, the size and nature of Bruno's estate, the totality of the relationships between the plaintiffs and Bruno, the relationship between Bruno and other persons such as Mary who have legitimate claims upon Bruno's bounty, and contemporary community standards and expectations, I am not satisfied that adequate provision is not available for the proper maintenance, education and advancement in life of either plaintiff.

[186] Accordingly the application is dismissed.

[187] I reserve the question of costs and invite written submissions on costs if agreement cannot be reached in relation to costs.

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