

Supreme Court
New South Wales

Case Name: Shymko v Lach

Medium Neutral Citation: [2022] NSWSC 1096

Hearing Date(s): 1 – 3 August 2022

Decision Date: 18 August 2022

Jurisdiction: Equity

Before: Meek J

Decision: Proceedings dismissed. Parties to address on costs.

Catchwords: CONTRACTS – Testamentary promise – claimed general and specific statements of inheritance – whether statements certain and enforceable – General statements vague and uncertain based on equality and fairness – No form of exchange of promises nor request of action – No intention to give rise to legal relations – Claimed historic specific statements not established – Frailty of memory

ESTOPPEL – Equitable estoppel – Requirements – No clear and unequivocal representation – requirements of reliance – no evidence deceased aware of intended reliance or purported reliance – requirement of detrimental reliance – no substantial material disadvantage

SUCCESSION – wills, probate and administration – validity of a will – whether undue influence – no evidence amounting to coercion

SUCCESSION – family provision – structure of statutory scheme – requirements of dependency – requirements of factors warranting – reference point for assessing inadequacy of provision

SUCCESSION – family provision – claim by granddaughters – strength of financial resources of granddaughters – strong competing claim of daughter who lived with deceased entire life – substantial care for deceased particularly in later years.

Legislation Cited:

Conveyancing Act 1919 (NSW), s 54A
Family Provision Act 1982 (NSW), s 9
Interpretation Act 1987 (NSW), s 33
Succession Act 2006 (NSW), ss 57, 59, 60, Ch 3
Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW)
Trustee Act 1925 (NSW)

Cases Cited:

Andrew v Andrew (2012) 81 NSWLR 656; [2012] NSWCA 308
Ashton v Pratt (2015) 88 NSWLR 281; [2015] NSWCA 12
Ashton v Pratt (No. 2) [2012] NSWSC 3
Ball v Newey (1988) 13 NSWLR 489
Baltimore and Ohio RR Co v US 261 US 592 (1923)
Bartlett v Coomber [2008] NSWCA 100
Bates v Cooke [2015] NSWCA 278
Blendell v Byrne [2019] NSWSC 583
Bosch v Perpetual Trustee Co Ltd [1938] AC 463
Bowditch v NSW Trustee and Guardian [2012] NSWSC 275
Boyce v Bunce [2015] NSWSC 1924
Brown v Faggoter [1998] NSWCA 44
Budden v The Public Trustee (Supreme Court (NSW), Needham J, 4 November 1986, unrep)
Chan v Chan [2016] NSWCA 222; (2016) 15 ASTLR 317
Chapple v Wilcox (2014) 87 NSWLR 646; [2014] NSWCA 392
Chisak v Presot [2022] NSWCA 100
Churton v Christian (1988) 13 NSWLR 241
Clinch v Swift (Supreme Court (NSW), Young J, 13 October 1986, unrep)
Commissioner of Taxation (Cth) v Spotless Services Ltd (1996) 186 CLR 404; [1996] HCA 34
Corcoran v Bizannes (Supreme Court (NSW), Needham J, 4 June 1985, unrep)

Dijkhuijs (formerly Coney) v Barclay (1988) 13 NSWLR 639
Dillwyn v Llewelyn (1862) 4 De GF&J 517; 45 ER 1285
Diver v Neal [2009] NSWCA 54; (2009) 2 ASTLR 89
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523
Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95; [2002] HCA 8
Federal Commissioner of Taxation v Visy Industries USA Pty Ltd (2012) 205 FCR 317; [2012] FCAFC 106
Fincke v US 675 F 2d 289 (1982)
Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1985) 3 NSWLR 475
Georgopoulos v Tsiokanis [2022] NSWSC 563
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16
Horton v Jones (1935) 53 CLR 475; [1935] HCA 7
Hurst v Public Trustee [2000] NSWSC 1109
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110
Kauri Timber Co (Tas) Pty Ltd v Reeman (1973) 128 CLR 177; [1973] HCA 8
Lodin v Lodin [2017] NSWCA 327; (2017) 16 ASTLR 576
Mallitt v Gow [2022] NSWSC 1012
Maloney v Goodwin (Supreme Court (NSW), Needham J, 1 August 1989, unrep)
Maxwell v Maxwell [2022] NSWSC 1028
McKenzie v Baddeley [1991] NSWCA 197
Moore v Aubusson [2020] NSWSC 1466
Morgan v Bohm [2013] NSWSC 145
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35
Palmer v Bank of New South Wales (1975) 133 CLR 150; [1975] HCA 51
Petrohilos v Hunter (1991) 25 NSWLR 343
Pitkin v Henderson [2001] NSWSC 207
Placer Development Ltd v Commonwealth of Australia (1969) 121 CLR 353; [1969] HCA 29
Poletti v Jones [2015] NSWCA 107; (2015) 13 ASTLR 113
Porthouse v Bridge [2007] NSWSC 686
Ramsden v Dyson (1866) LR 1 HL 129

Re Fulop (deceased) (1987) 8 NSWLR 679 at 681D
Samsley v Barnes [1990] NSWCA 161
Sgro v Thompson [2017] NSWCA 326
Shaw v Lambert (Supreme Court (NSW), Young J, 9
October 1987, unrep)
Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19
Simons v Permanent Trustee Co Ltd; Estate D Hakim
[2005] NSWSC 223
Singer v Berghouse (No 2) (1994) 181 CLR 201; [1994]
HCA 40
Spata v Tumino (2018) 95 NSWLR 706; [2018] NSWCA
17
Steiner v Strang [2016] NSWSC 395
Strang v Steiner [2019] NSWCA 143
Sun v Chapman [2022] NSWCA 132
Van Dyke v Sidhu [2013] NSWCA 198; (2013) 301 ALR
769
Vigolo v Bostin (2005) 221 CLR 191; [2005] HCA 11
Vukic v Grbin [2006] NSWSC 41
Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (In
Liq) [2022] HCA 3; (2022) 399 ALR 1
Waltons Stores (Interstate) Ltd v Maher (1988) 164
CLR 387; [1988] HCA 7
Watson v Foxman (1995) 49 NSWLR 315
Williams v Legg (Court of Appeal (NSW), 16 March
1993, unrep)
Winter v Crichton (1991) 23 NSWLR 116

Texts Cited:

Anna Lawson, "The things we do for love: detrimental
reliance in the family home" (1996) 16 Legal Studies
218
JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in
Australia* (8th ed, 2016, LexisNexis)
JD Heydon, MJ Leeming and PG Turner, *Meagher,
Gummow and Lehane's Equity Doctrine & Remedies*
(5th ed, 2014, LexisNexis)

Category:

Principal judgment

Parties:

Natalie Shymko (First Plaintiff)
Katherine Vella (Second Plaintiff)
Mary Lach (Defendant)

Representation:

Counsel:
M Pringle (Plaintiffs)

K Morrissey (Defendant)
Solicitors:
CMM Quay Legal Group (Plaintiffs)
Warren F. Ball & Co (Defendant)

File Number(s): 2021/217653

JUDGMENT

- 1 **HIS HONOUR:** These are proceedings relating to the estate of the late Teofilia Shymko (**the deceased/"Baba"**) brought by two of her grandchildren, the first plaintiff (**Natalie**) and the second plaintiff (**Kathy**) being the daughters of the deceased's son Myron who died in January 2002.
- 2 Without intending any disrespect, it is convenient to refer to the parties and the immediate family members, as the parties themselves have done in the proceedings, by reference to their given or familiar family names.
- 3 The defendant to the proceedings (**Mary**) is the deceased's other child.

Relief sought

- 4 The proceedings were commenced by summons filed on 30 July 2021 seeking family provision relief.
- 5 By statement of claim filed on 13 September 2021, additional relief apart from family provision relief was sought.
- 6 The further relief in fact has become the primary relief sought, with the family provision relief (**family provision claims**) now sought in the alternative.
- 7 The further relief is essentially relief that the deceased's estate is bound by alleged statements made by the deceased and purportedly relied upon by the plaintiffs as general inheritance promises.
- 8 The first alleged statements were said to be made in or about early 2002 shortly after Myron's death by the deceased purportedly to make provision of an amount equal to one half of the net distributable estate for the plaintiffs as tenants-in-common. Although the statements are disputed in the proceedings for convenience purposes, in addressing the claims, I will simply refer to the statements or claims regarding the statements as being the '**general inheritance promises**'.

- 9 The plaintiffs claim that the deceased's estate is bound by a testamentary contract regarding the general inheritance promises or alternatively estopped from denying the general inheritance promises.
- 10 Further particular relief is sought in the nature of a testamentary contract or alternatively estoppel relating to sums of \$50,000 said to have been offered by the deceased in or about 2005 (in the context of Natalie's separation from her then husband) to Natalie as assistance to purchase property but also on the plaintiffs' case as a promise of inheritance. Likewise, although the statements are disputed in the proceedings for convenience purposes I will simply refer to the statements or claims regarding the statements as being the '**\$50,000 promises**'.
- 11 Additional further and alternative relief is sought that the deceased's Will, dated 13 March 2010 (**2010 Will**) and any Wills made between January 2002 and 23 March 2010, be set aside for undue influence (**undue influence claim**): CB 7.
- 12 Whilst the relief sought in particular in relation to the general inheritance promises, \$50,000 promises and family provision claims is relevantly disputed, many of the facts pleaded in relation to the claim have been admitted pursuant to a defence filed on 24 September 2021: CB 19.
- 13 The family provision claims are opposed. In particular, the eligibility of the plaintiffs is disputed (T207) as is whether there are factors warranting the making of their claims: T223.
- 14 Mary is Natalie's godmother and Natalie described the family a "small, tightknit family": CB 25[10].
- 15 Each of Natalie and Kathy speak fondly of their relationship with Mary prior to the events leading up to these proceedings (CB 35[80], 47[60]). In cross-examination Kathy stated (in reference to the time up to May 2019) "Mary treated me very, very well": T113.
- 16 This case is a desperately sad one, as Ms Pringle acknowledged (T2) at the outset of the hearing.

17 The disputes over the deceased's 2010 Will and general inheritance promises and \$50,000 promises have fractured what appear to have been generally harmonious and loving relationships between the plaintiffs and Mary.

18 Mediation between the parties failed to resolve their issues: T2.

19 In the circumstances, the Court has been asked to determine the claims. The judicial duty is to hear the case according to law: T3.

Summary of outcome

20 For the reasons that I have outlined below, I dismiss all the plaintiffs' claims for relief, namely claims (a) based upon the general inheritance promises and the \$50,000 promises; (b) that the 2010 Will was affected by undue influence; and (c) for family provision.

Family details

The deceased

21 The deceased was born in August 1926 in the Ukraine and died on 3 August 2020, aged 94.

22 The deceased married Dymtro Shymko (**Dido or Did**) in 1946.

23 Dido was born in October 1913 and died in September 1976, aged 62.

24 The deceased was a devout Christian attending the St Athanasius Ukrainian Orthodox Church at Granville: T 25.

25 The deceased worked as a process worker with Smiths Industries at Granville: T 29.

26 She never drove and during her working life got to work from Guildford to Granville by train: T 29.

27 I refer in more detail below regarding the deceased and family events.

28 The deceased was described in the evidence by Natalie as being was fiercely independent even until her eighties: CB 33[67]. Kathy agreed: CB 46[48], 47[50].

29 However, in the last decade of her life the deceased had health issues which I refer to below.

30 In April 2020, the deceased had a massive stroke and went into full-time care: CB 53[113]. She passed away within four months of that stroke.

Myron and Mary

31 There are two children of the deceased's marriage to Dido, namely Myron who was born in September 1947 and died in January 2002, aged 54.

32 Mary the other child was born in March 1950 and is aged 72.

33 Myron married Olga in October 1968.

34 Olga was born in the Ukraine in February 1943 and came to Australia with her parents in 1949: CB 63[6]. She is aged 79.

35 On January 2002, Myron died from kidney cancer having been diagnosed barely six months before his death: CB 29[41].

36 It is uncontested that the deceased loved Myron very much, that they had a close relationship and she was heartbroken when Myron died: CB 29[39]; 154[49]–[50]. Kathy describes Myron's relationship with the deceased as very strong and loving: CB 45[43].

37 In 1972, Mary gave birth to Alise and in October 1972 adopted her out as a child. Alise is currently aged about 30: CB 48[69], [72].

38 There was some conflicting evidence in the proceedings regarding Alise, mainly relating to whether the deceased had forced or insisted upon Mary adopting Alise out: e.g. CB 28[36]–[38]. Natalie says that Mary told her that she felt guilty for adopting out Alise. Mary denies that and says that she was the one who made the decision and never felt guilty about it: CB 163[65.11]. It is unnecessary to resolve that dispute.

39 In 1982, Mary married Stanislaw Lach (**Stan**) who was born in October 1950 and is aged 71. Stan although born in Australia has Polish heritage: T189.

40 Stan had previously married Robyn in 1970 and they have one child, Troy, aged 51. Troy is married and has three children: CB 191–192.

Natalie

41 Natalie was born in November 1969 and is currently aged 52.

- 42 Natalie married Taras Mercinsky (**Taras**) in January 1992.
- 43 There are two children of that marriage, namely Tomas (referred to in evidence as Tom) who was born in January 1996 and is aged 26 and Alex who was born in May 1998 and is aged 24.
- 44 Natalie's marriage to Taras ended in or about 2005 and they divorced by Court order in July 2006 which became effective in August 2006: exhibit D4.
- 45 The divorce was somewhat messy. Natalie indicates that Taras was an abusive alcoholic who had caused a lot of damage to the property in Amiens Street, Gladesville in which they were living in at the time: T 46.
- 46 Natalie later formed a relationship with Malcolm Jones (**Malcolm**) and they have been living together in a de facto relationship since 2011: CB 129[1], [6]. Malcolm was born in August 1946 and is currently aged 75.
- 47 Malcolm has three adult children from his first marriage.

Kathy

- 48 Kathy was born in October 1970 and is currently aged 51. She married Christopher Vella (**Chris**) in March 2006. Chris was born in September 1976 and is currently aged 45. They have a daughter Zoey who was born in May 2014 and is currently aged 8.

The deceased's estate

- 49 On 30 June 2022, the Court directed the parties to provide an agreed schedule as to assets and liabilities and costs. The parties in compliance with the direction prepared a joint schedule which was marked without objection as Ex JP2.

Net estate

- 50 As at the date of the deceased's death, the deceased held an interest in the following property:
- (a) Real estate at Guildford Road, Guildford - \$825,000
 - (b) Cash accounts CBA and St George Bank - \$32,660.47
 - (c) Jewellery - (no value indicated)
- Total: \$857,660.47.

- 51 There were liabilities for funeral expenses and home care expenses totalling \$14,797.85 leaving a net estate of \$842,862.62 (and in addition the value of the jewellery).
- 52 The deceased's property at Guildford Road, Guildford (**Guildford property**) has been transmitted into the name of Mary as executor: exhibit P2.
- 53 Since the date of death there have been other expenses, including legal expenses and PEXA fees on the transmission application.
- 54 In late March 2021, an interim distribution was made to Mary of \$10,022.28: CB 138[3], 313, 314; exhibit P2.
- 55 It is agreed that the property of the deceased effectively as the date of the hearing comprises the Guildford property estimated at \$975,000, the interim distribution to Mary (approximately \$10,022) and the jewellery of the deceased.
- 56 The estimate of \$975,000 is supported by an L.J. Hooker appraisal that suggests the Guildford property has a value between \$950,000 and \$1 million as at 24 June 2022: CB 382.
- 57 There is some indication that Mary will have to pay capital gains tax on the sale of the Guildford property which, on a sale price of \$975,000 (if that be achieved), is estimated to be in the order of \$5,000: CB 217[4(d)]. Prima facie that would appear to be a liability of the estate.

Costs

- 58 Mary has funded legal fees in relation to the proceedings to date in the sum of \$35,000.
- 59 Mary's costs of the proceedings, which are currently outstanding are in the sum of \$75,000. Thus, her costs of the proceedings on the indemnity basis are in the sum of \$110,000.
- 60 The net estate, having regard to the estimate of legal fees is in the sum of approximately \$875,022.
- 61 The Guildford property, it is agreed, will be sold: e.g. T 226. Further costs that may be incurred on the sale will include legal fees and disbursements on sale

(\$2,500), marketing fees (\$4,000) and real estate agents commission (\$19,500) totalling \$26,000.

62 The plaintiffs' costs of the proceedings estimated on the indemnity basis are \$146,700 of which the plaintiffs have paid \$138,701.65.

63 Their costs estimated on the ordinary basis are \$118,500.

The deceased's wills

64 The deceased made a number of Wills prior to her last Will in 2010.

Prior Wills

65 The evidence discloses Wills made on 29 June 1977 (**1977 Will**), 22 August 2002 (**2002 Will**) and 13 July 2006 (**2006 Will**): CB 42[10].

2010 Will

66 Probate of the 2010 Will was granted to Mary on 18 November 2020: CB 281.

67 The 2010 Will appoints Mary as executor and after payment of funeral, testamentary, duty and other expenses and debts leaves the residue of the estate to Mary absolutely: CB 282.

68 In the event that Mary predeceased the deceased the Will made provision for the balance of the estate to be distributed as follows:

- (a) 40% to Stan;
- (b) 20% to Natalie;
- (c) 20% to Kathy; and
- (d) 20% to Alise.

(CB 282–283)

69 Significantly, whilst there is reference to the 1977 Will and the 2002 Will (made approximately seven months after Myron's death), there is no detail in the evidence of the terms of those Wills.

70 There is in evidence a draft copy of the 2006 Will, by which the deceased appointed Mary as executor and gave gifts of \$30,000 to each of Natalie and Kathy, and \$10,000 to the deceased's brother Bogdan: CB 226–227.

- 71 The balance of the deceased estate under draft of the 2006 Will after payment of funeral and testamentary expenses, duties and debts is given to Mary: CB 227.
- 72 The event of Mary predeceasing the deceased, the draft discloses there was a gift over of the residue to such of Natalie, Kathy and Alise as survived the deceased and if more than one of them in equal shares: CB 227.
- 73 It is not agreed that the draft document which appears in the court books (CB 226–228) of the 2006 Will reflects what was in the Will as signed. The plaintiffs say that it is simply not known: T184-185.
- 74 There is a letter from Mary's solicitors dated 13 May 2021 which shows that the firm Warren F Ball & Co had acted for the deceased since 2002. The letter indicates that during this time the deceased made two Wills. The letter (exhibit P2) relevantly indicates

“Our client has advised that she could not locate a copy or the original of the 2006 Will at home. Our records show that we do not appear to hold in safe custody the original 2006 Will but we are still completing our enquiries. It is the firm's policy that when a client signs a new Will that they are advised to destroy any old Wills they have made and we do likewise re. any copies held in our files. We only have a computer copy of the 2006 Will but if there were any ink changes made to that Will they would not be shown. We will advise you as soon as we have completed our further enquiries.”

- 75 Accordingly I proceed on the basis that there is uncertainty as to the actual terms of the 2006 Will.
- 76 However, whilst the terms of the actual 2006 Will are not known, the fact that the deceased proposed gifts of \$30,000 to each of Natalie and Kathy as recorded in the draft copy of the 2006 Will arguably bears some relevance to the \$50,000 promises issue. I will refer to this below.

Evidence and witnesses

- 77 Each of Natalie and Kathy filed affidavits in the proceedings and there was additional evidence in their case by their mother Olga and by their partners respectively Malcolm and Chris. Their solicitor Mr Papadopoulos provided the formal costs affidavit.
- 78 In Mary's case she swore a number of affidavits, including the prescribed administrator's affidavit. Additionally Stan gave evidence. Mary's solicitor Ms

Newsom provided a number of the prescribed affidavits including the formal costs affidavit, which were read on the hearing. Specifically both Stan and Olga were served with notices of claim and did not make any claims: affidavits of Ms Newsom sworn 14 September 2021, 20 September 2021 and 19 October 2021.

Credit and reliability

79 Each of Natalie and Kathy gave their evidence in a clear way. Subject to some reservations I note below regarding their evidence, in particular on the topics of the \$50,000 promises and reliance on the general inheritance promises and \$50,000 promises, I generally accept their evidence.

80 Mary likewise gave evidence in a straightforward way. On the whole I accept her evidence. I had some reservation regarding Mary's recollection of the precise details in relation to the \$50,000 promises. Otherwise, I accept the substance of Mary's evidence on the contested issues on that topic.

81 Whilst Stan was a little defensive in cross-examination, I had no reason to doubt that he was attempting to tell the truth as best he recalled it.

82 Malcolm was somewhat combative during cross-examination, suggesting at one point that the assumptions for the questions were vague and asserting that the conclusions would be similarly vague: T 133.

83 When asked what appeared to be a relatively straightforward question of how much of loan expenses of \$5,000, he claimed as a tax deduction his response was "I don't know, because it would be annualised, so you have to multiply everything by 12, which is not the nature of your question": T137.

84 For a person who practised and specialised as a financial advisor, he seemed surprisingly vague regarding detail about amounts that were contributed by each of himself and Natalie to the purchase of a property at Hunters Hill (**Hunters Hill property**): T 132–133.

85 Nonetheless, in re-examination, he gave evidence of some effects of his illnesses which included inability to concentrate for long periods of time, tiredness and chronic tiredness, and it may be that his ability to recall was to some extent affected by his health: T 144.

86 Overall, I have no particular reason to doubt he attempted to give his evidence as best he could recall it.

87 Chris was not required for cross examination: T 144.

88 Olga, by her own admission, was somewhat stressed in giving evidence: T 75.

89 I had the impression that she felt the cross-examination was a little personally intrusive: T 75.35.

90 Clearly, she was frustrated about the events relating to the deceased's Will (T 76).

91 She had a view that the deceased should have left her estate equally to Mary and Myron's family, asserting that that the deceased used to talk about things being equal and fair always: T 83.

92 She was evidently blindsided by news regarding the 2010 Will and could not conceive of why the Will took the form it did:

“A. I heard about that.

Q. Well, that's it--

A. I cannot believe it. She must have been under a lot of pressure or manipulated or something was done, because I cannot believe that, I'm terribly sorry. That's not her. It's an insult to her memory.” (T 83.42-.47).

93 My concern regarding Olga's evidence is not that she was not attempting to tell the truth. However, as the above passage shows, she had a strong sense of her own view of the righteousness of the deceased's moral obligations to the family and it seems to me that a disappointment in the terms of the deceased's 2010 Will pervaded Olga's thinking and also coloured, albeit subconsciously, her evidence. It seems to me that this is particularly so in relation to her evidence regarding the \$50,000 promises.

Disputes regarding the extent of contact between the plaintiffs and the deceased

94 There were some differences as between Mary and the plaintiffs regarding the extent of the contact that the plaintiffs had with the deceased. The disputes in this regard were relevant to a number of issues.

- 95 One aspect of the dispute is that on Mary's case there were limited opportunities for the deceased to make the general inheritance promises to the plaintiffs.
- 96 Further, Mary says that there was no opportunity for the deceased to make statements to Olga regarding looking "after the girls": CB 174[68.1].
- 97 Mary asserts that she was always present during the deceased conversations with family members and never heard her mother make promises to that effect: CB 176[69.1].
- 98 Kathy says that Mary holidayed annually away from the deceased for approximately two months of the year: CB 103[60b].
- 99 Each year Stan and Mary took annual holidays initially going to foster with their caravan staying for about a month.
- 100 From 2012, they went further afield taking their caravan to North Queensland annually and were away for longer periods for about 6 to 8 weeks: CB 162[65.10]. However, Mary says that she spoke with the deceased on the phone every day during these times: CB 162[65.10].
- 101 As I note below, I accept that there were occasions on which the deceased interacted with Natalie and Kathy where Mary was not present and I do not doubt that there were opportunities for the deceased to make statements to Natalie and Kathy, away from the presence of Mary.
- 102 A second aspect of the level of contact related to the opportunities for Natalie and Kathy to spend time with the deceased as part of the claim for reliance upon the general inheritance promises and the \$50,000 promises.
- 103 Mary commented on the relationship of Natalie and Kathy with the deceased.
- 104 Mary accepted that when Natalie and Kathy were growing up, they had a close relationship with the deceased because Myron brought them regularly to visit the deceased and for mutual family activities at that time. Mary further indicates that the period of time that Myron's family lived with the deceased in Guildford brought them closer together: CB 155[53].

- 105 However, Mary says that when Natalie and Kathy became adults that contact with the deceased was far less frequent: CB 155[54].
- 106 Mary disputes Natalie's evidence that she and Natalie called each other as frequently as once a fortnight (CB 35[80]) and rather says that she (Mary) was the one who initiated the calls: CB 167[65.28].
- 107 Mary commented that Natalie and Kathy rarely visited the deceased, particularly when she was in hospital: CB 157[59]. Kathy was cross-examined regarding this. She indicated that in 2009 she did not visit any hospitals when she was going through IVF for concern of catching infections: T 119.
- 108 It is clear that Mary lived with her mother for her whole life at the Guildford property and spent considerable time with her other than occasions when Mary and Stan went on annual holidays.
- 109 Stan indicates that in the 40 years he lived with Mary and the deceased, with the exception of family celebrations held with the Guildford property he hardly saw the plaintiffs visit, although accepts that he never formed any particular relationship with either plaintiff over that time: CB 200–201[50]–[51].
- 110 However, Stan's seeming lack of involvement in some of the family activities related to his health issues regarding vertigo and suffering migraines: T 174.
- 111 Natalie and Kathy indicate that because of the general inheritance promises and \$50,000 promises they amongst other things spent more time with the deceased than perhaps they might have otherwise done, including on occasions throughout the years they did from time to time visit the deceased and additionally they celebrated birthdays and Christmas and other festive events during the year.
- 112 I accept their evidence of a goodly amount of contact with the deceased. However, I have doubts regarding Natalie's and Kathy's assessment of "increased extent" of their contact with the deceased, particularly in the context of reliance on the general inheritance promises and the \$50,000 promises.
- 113 Mary disputed that the contact between the plaintiffs and the deceased was constant. She indicated the contact was occasional and "not a great deal that she would've liked": T170.

114 As I understood this evidence, this is not said in an untoward way but rather simply recognising that the deceased appreciated the contact that she had with the plaintiffs, but recognised that their lives were busy and was perhaps even a little bit reluctant to initiate contact.

115 This is borne out in cross examination of Mary as follows:

“Q. Because Natalie and Kathy always had contact with Baba, didn’t they?

A. Well, when you say, “Always had contact,” because the girls worked, mum never used to bother - she knew they were busy with their working lives and their families, so nine times out of ten or eight times out of ten, it’d be me that would instigate the phone call. I’d have a talk to the girls and then they’d talk to mum on the phone. But, you know, we understood that they had family and that they were busy. So, we would ring when it was more convenient for them.”
(T170)

116 I accept that Mary was generally speaking, the instigator of contact as between the deceased and the plaintiffs.

117 The cross-examination of Mary proceeded on the basis that from 2011 after Mary retired, Mary “pretty much” took the deceased everywhere and she really did not go anywhere without Mary: T174.

118 Kathy gave some evidence regarding the deceased’s independence which also confirmed the deceased’s reliance upon Mary and Mary’s great involvement particularly in the last 10 years of the deceased’s life. Kathy’s evidence to my mind supported Mary’s assessment of the plaintiffs’ contact with the deceased especially from about 2006 (CB 47[50]-[53]):

“50 Baba was fairly independent up until she reached approximately 80 years of age Baba did not drive. She was able to get herself to church and appointments using public transport. She was able to walk on her own to Guildford shops for groceries.

51 In her eighties, Baba started to become reliant on Mary due to her health and age. Mary cared and assisted Baba when needed.

52 In the last few years of Baba's life, Baba received Community Care services and had regular visits from an Aged Care worker who took her out for a coffee.

53 In her eighties, Baba was especially reliant on Mary for transport. So much so. Baba bought Mary her car. During these later years. Mary drove Baba to church, the shops, the cemetery. and medical and legal appointments. Mary often attended these appointments with Baba.”

119 I consider that Mary was in a good position to assess the general level of contact as between the plaintiffs and the deceased. Whilst it is true that she

had no direct means of observing contact while she was away on holidays she did keep up phone contact with the deceased and had some degree of awareness that way.

Disputes regarding the general inheritance promises and the \$50,000 promises

120 I address below my particular findings regarding the disputes regarding the general inheritance promises in the \$50,000 promises.

The deceased

Upbringing and migration

121 In 1942 during the German occupation of Ukraine during World War II when the deceased was 16 years old, she was deported to Germany where she met Dido in an American displacement camp. They married in Frankfurt.

122 Myron was born in Germany.

123 In 1949, the deceased and Dido migrated to Australia, arriving in Melbourne.

Life in Australia

124 Dido worked as a "powder monkey" at Warragamba Dam and they travelled to Cowra where the deceased lived with Myron in an immigration camp whilst Dido went to live and work in Warragamba.

125 After about three months, the deceased and Myron moved to live with Dido in Warragamba.

126 In about 1957, the deceased and Dido purchased the Guildford property: CB 142[7].

127 The deceased continued to live in the Guildford property essentially until a few months before her death.

128 In September 1976, Dido passed away. It is common ground that this had a profound effect on the deceased.

129 I set out below some details of the relationship between the deceased and the parties.

130 The deceased communicated in a number of languages. Sometimes she spoke in Ukrainian or Polish. Other times she changed to English to include others

such as Stan (who could understand a reasonable amount of Polish) in the conversation: T189-190.

131 Although there was a little uncertainty about the timing it appeared that the deceased retired in or about 1984-1985: T174.

Deceased's failing health

132 The deceased suffered from bad arthritis in her hands and had operations for carpal tunnel when she was younger: T191.

133 In her later years, the deceased had several serious health issues requiring hospitalisation.

134 In August 2009, she had a bowel resection at Concord Hospital, following which she had a stoma bag for eight months: CB 151[42].

135 In 2016, the deceased had a severe lung infection after a right knee replacement and was in Fairfield Hospital for seven weeks: CB 151[42].

136 In 2019, the deceased suffered a severe bout of pneumonia and was in Westmead Hospital for ten days: CB 151[42].

137 On 28 April 2020, the deceased had a major stroke and was admitted to Westmead Hospital for four weeks: CB 151[42].

138 On 28 May 2020, the deceased was discharged from Westmead Hospital and was admitted to St Vincent's care facility at Yennora for respite care. The plan that she would return to the Guildford property was not realised: CB 152[43].

Financial resources

139 There was some debate in the proceedings regarding the size of the resources the deceased was likely to have had at times referable to the claimed promises in 2002 and 2005.

140 Mary indicated that the deceased was very thrifty with her money and saved well: CB 160[65.3]. Stan indicated that the deceased used to hate spending unnecessary money and agreed she lived a very frugal lifestyle and managed her money very carefully: T191-192. He stated she "knew exactly what she was doing with her money": T192.

- 141 Natalie did not know precisely about the deceased's financial circumstances. She "just knew that she had her house in Guildford which she owned": T58, 63.
- 142 Olga was cross-examined regarding where the deceased had the money in order to make good financially the general inheritance promises and \$50,000 promises.
- 143 Olga indicated that the deceased did not go anywhere, she had a pension and that she was aware from other people that "if you don't go anywhere and you save up, you can have money in the bank". Olga had the impression that the deceased was able to save and put a bit aside: T 82. However, Olga accepted that she did not know and was not privy to the deceased's finances: T83.
- 144 The deceased had relatives in Poland and she sent them money and clothes: CB 66[38].
- 145 It appeared clear on the evidence that the deceased's property following her retirement only comprised the property at Guildford, some amount of money, which was not precisely identified at any relevant point of time (other than the date of death) and the aged pension: T 82 (Olga).
- 146 It is clear from the administration of the estate that the deceased had at a term deposit with St George that at that stage had a sum of approximately \$26,143 and a bank account with a small amount of money albeit that the sum of \$3,100 had been withdrawn in cash post death. The deceased also had two accounts with the Commonwealth Bank with some amounts totalling a little over \$4,000 which had been withdrawn in cash post death: CB 312.

Financial arrangements with Mary and Stan

- 147 Mary has lived with her mother in the Guildford property since it was purchased.
- 148 Prior to Mary being married she paid board to the deceased and was "a contributing member of the household": T 149.
- 149 In 1980, after Stan had been dating Mary, he moved into live with Mary and the deceased in the Guildford property: CB 143[8]-[9].
- 150 Since 1980, Mary and Stan split household bills three ways: T191.

- 151 Mary and Stan did not pay rent for living in the Guildford property. However they did do work.
- 152 Mary was cross-examined to some degree about the board. It was suggested to her that she stopped paying board when Stan came to live in the house. Essentially, she affirmed that: T149-150. However, her further answers clarified the position somewhat. Neither Mary nor Stan viewed the financial arrangements as being formalised in the sense of the work they did being an “exchange” for or in lieu of rent: T152, 191.
- 153 In Mary’s words “We were still paying bills and food and like all the different bills that were coming in” (T150) and “We were living there, so, those things had to be done so they were done”: T152. Although, in the scheme of things it was relatively minor, Stan gave some content to this in terms of willingness to fix even minor things that were required to be done including changing a tap washer when the deceased complained that the tap in the bathroom or kitchen or laundry was dripping: T191.
- 154 Mary confirmed that the improvements which Mary and Stan did to the property were discussed with the deceased and the deceased approved “everything”: T152.
- 155 However, Mary accepted that in terms of the improvements that were done if she had had to pay rent over 30 years it would have cost her more than that (i.e. the cost of the improvements): T152.

Mary (and Stan)

Upbringing, education and employment

- 156 Mary attended initially Warragamba Public School and then Guildford Public School. She later attended Merrylands High School leaving in year 10 when she was 15 years old: CB 143[11].
- 157 Mary then attended Granville TAFE completing a course in shorthand typing and business principles. After leaving the college she worked the Commonwealth Bank in Sydney at a number of branches doing various jobs including working as a teller: CB 143[12].

- 158 Stan left school in year 10 at the age of 15 years and commenced a five-year apprenticeship as a fitter machinist with State Rail: CB 192[17]-[18].
- 159 After finishing his apprenticeship he stayed on for another nine years working in that capacity and then became an instructor with State Rail Apprentice Training College he remained for 14 years. After 28 years with State Rail, he was made redundant and received a redundancy package of about \$60,000: CB 192[18].
- 160 In 1976, after ten years Mary left the bank: CB 143[12].
- 161 Between approximately 1976 and 1992, Mary worked for 16 years with Bankcard: CB 143[12].
- 162 In or about 1982, following her marriage to Stan, Mary made a promise to the deceased that they would live with her until she passed away so that she would never have to live on her own: CB 145[18].
- 163 With that in mind Mary and Stan planned to save and buy house where they could eventually live.
- 164 Between 1994 and 2011, Stan worked as a subcontractor with Triple M Mechanical Services at Silverwater doing air conditioning maintenance and mechanical work: CB 193[20].
- 165 In 1986, Mary and Stan purchased a house in Gooden Drive, Baulkham Hills (Baulkham Hills property) for \$175,000 and took out a mortgage with St George Bank for about \$120,000 which was repaid over the next 30 years. In the meantime, they rented that house and made up any shortfall in the mortgage repayments from the cash funds. For a number of years of high interest rates the shortfall was substantial: CB 145[19].
- 166 Between 1992 and approximately 2000, Mary had other employment.
- 167 In 2000, Mary accepted a position as a container controller with United Transport at Arndell Park and worked there for 11 years until she retired in November 2011: CB 143[12].
- 168 In November 2011, Stan retired on the same day that Mary retired: CB 193[20].

- 169 When Mary and Stan retired they had liquidated their assets (apart from the Baulkham Hills property), including their superannuation and had \$600,000 in savings and term deposits as well as the rental income from the Baulkham Hills property.
- 170 In about 2015 by the time that Mary and Stan attained the age of 65, because of their holding of the Baulkham Hills property, they did not qualify and therefore did not apply for the age pension. They continue to live off the rental income and their cash funds which has been depleting: CB 144[16].

Relationship with the deceased

- 171 Mary gave evidence of an affectionate and loving relationship with the deceased sharing "a special bond": CB 148[28]–[29].
- 172 Mary also indicated assistance she gave to the deceased sharing in cooking and housework and taking the deceased shopping into various appointments: CB 148–149[30]–[32].
- 173 The deceased loved gardening and Mary frequently took her to garden centres: CB 149[33].
- 174 Mary provided significant detail of family celebrations and other activities, including taking the deceased to the Granville Ukrainian Orthodox Church, Remembrance Day occasions and various trips: CB 149–151[34]–[40]. Poignantly Mary says whilst there were many family celebrations, they never celebrated Father's Day: T 174.
- 175 Stan took the deceased to most of her medical appointments as his work permitted him opportunity to work around times for the deceased to see various doctors: CB 149[31], 153[47].
- 176 Natalie commented upon Mary's relationship with the deceased asserting it was unusual and a "love, hate, love" relationship and at times that Mary would use some degree of coarse language in referring to the deceased. Mary, whilst acknowledging that at times she does swear, denied she called her mother by such names: CB 33[66]; 166[65.22]. On the other hand, Natalie seems to accept that there may have been an element of occasional teasing in some of the interaction between the deceased and Mary: CB 33[68]–[69].

177 Kathy observes that whilst it was clear that Mary and the deceased loved each other they clash loudly and "fired up" each other: CB 47[54].

178 Overall, I accept that Mary had an enduring loving relationship with her mother.

Relationship with plaintiffs (nieces)

179 Natalie indicates that she genuinely loved Mary and used to call one another approximately each fortnight ending the conversations with expressions of love for one another: CB 35[80]. Mary says she was the one who initiated calls (which I accept) and that the calls were not as regular as once a fortnight: CB 167[65.28].

180 Kathy indicates that Mary always treated her with love, inclusion and admiration: CB 47[60].

Promises to Mary and Stan

181 Mary and Stan did a lot of repair work, both major and minor to the Guildford property including renovations and improvements. Mary details the degree of this work over the period from 1983 to 2019 totalling \$121,500: CB 153–154[48]. Mary indicates that often after jobs Stan attended to regarding the house she heard the deceased say to Stan:

"you will have all this back when I die as the house will be yours and Mary's": CB 153[48]

182 Further, Mary indicates the deceased said to her:

"you will get back all the money you and Stan spent on the house as it will be yours when I die": CB 153[48]

183 Stan refers to work he did around the house and indicates that on the occasion of completing the new garage driveway and paving at the Guildford property he gave the deceased a tour of the renovations and said to him:

"Son, you have done a marvellous job. You should be proud of yourself. You will get all this back when I go, as the house will be yours and Mary's." (CB 198[41])

184 Stan states that in the last 10 years (2011/12–2021/22), the deceased said to Mary and himself several times:

"You know this house will be yours": CB 198[41]

- 185 Stan was cross-examined regarding the statements: T192. I accept Stan's evidence that the deceased made the above-mentioned statements. By 2010, Mary and Stan had been coupled for the best part of 30 years (briefly living together and married in 1982).
- 186 Whilst the 2010 Will formally leaves the house to Mary, the deceased's statements regarding the house in including reference to Stan benefiting was, it seems to me, not attempting to convey the precise legal position regarding inheritance but rather simply acknowledging the factual reality of he and Mary being a couple and his being able to live in the property with Mary after the deceased's death.

Building contract for Baulkham Hills property

- 187 In December 2020, Mary and Stan entered a building contract with Beechwood Homes (dated 23 December but signed on 24 December 2020: CB 194[30]).
- 188 The building contract (CB 287–299) has a contract price of \$467,269. It is described as a "supplementary building contract".
- 189 The written contract does not (it seems) provide for demolition costs.
- 190 Nonetheless, Mary indicates that she and Stan have paid to the builder approximately \$30,000 for demolition costs, plans and Council fees. She indicates the builder omitted to check the flooding issues affecting the property resulting in the commencement of works being delayed and additional costs.
- 191 The contract price has been revised. One such variation appears dated 25 February 2022 was placed in evidence. It contains a list of various additions, deletions and modifications which provided a varied figure to be paid of \$727: CB 360-367. The variation was signed by the parties on 3 March 2022 (CB 363). A payment of \$41,226.90 was made by Mary and Stan on that day: CB 368.
- 192 On 4 May 2022, on the laying of the slab for the property further payments have been made by Mary and Stan of \$80,000 and \$36,817.25 covering the total amount due for the slab: CB 380-381.
- 193 Photos of the construction of the property including the slab appear in evidence: CB 383-385.

- 194 Mary indicated in her 23 September 2021 affidavit that the construction costs will now be approximately \$500,000 and take approximately 12 months to complete once a new contract is signed: CB 146[23].
- 195 At some point Mary and Stan arranged a line of credit with St George Bank for \$300,000 to assist with building costs. But since before Christmas 2020 (when the tenants moved out) and the house was demolished, they have lived off and paid expenses from their cash funds and line of credit and spent \$56,500 from the line of credit: CB 146[24].
- 196 Stan in his updating 26 January 2022 affidavit gave evidence regarding the building contract noting that the revised cost of the bill is estimated to be \$619,269 which, coupled with other expenses (installation of carpet, floating floor, blinds, shutters, driveway, paths, clothesline, landscaping, etc) at an estimated cost of \$82,450, will total \$700,719: CB 194–195[30].

Financial circumstances

- 197 In about 2015 by the time that Mary and Stan attained the age of 65, because of their holding of the property at Baulkham Hills, they did not qualify and therefore did not apply for the age pension. They continued to live off the rental income (until prior to Christmas 2020) and their cash funds: CB 144[16], 146[22].
- 198 They have not qualified for the pension and will not do so until they move into the completed residence on the Baulkham Hills property: CB 144[16].
- 199 Mary and Stan's current assets and liabilities and anticipated liabilities are as follows (CB 218[6]):

Assets:		
94 Gooden Drive Baulkham Hills (land) ("Baulkham Hills Property") - estimate market price		E \$1,500,000
Furniture for new home (with cost of new lounge added since my January		\$19,525

2022 Affidavit)		
Mary's Jewellery		E\$2,500
Box Trailer		E\$500
Goldstream Caravan (9 years old)		E\$20,000
2013 Mazda BT50		E\$20,000
2010 Ford Festiva (with hail damage)		E\$3,000
Great South Bank Account No [xxx] 778		E\$50,000
St George Bank Account No [xxx] 684		E\$16,000
Australian Mutual Bank Account Nos [xxx] 07871 & [xxx] 604		E\$15,000
		E\$1,646,525
Liabilities:		
St George Bank Line of Credit (\$300,000) Account No [xxx] 67871	E\$54,950	
Balance due under Building Contract with Beechwood Homes (paragraph 3(c))	\$304,450	
Balance legal fees of these proceedings	\$75,000	
Anticipated Liabilities		
Living Expenses before moving into	E\$16,100	

Baulkahm [sic] Hills Property		
Capital Gains Tax	E\$5,000	
Additional Costing pursuant to Building Contract (paragraph 3(d))	E\$59,000	
Installation of Additional Items in new home (paragraph 4 (a))	E\$66,110	
Additional Furniture for new home (paragraph 4(b))	E\$9,000	E\$589,610
		E\$1,056,915

200 It was clarified during cross-examination that the balance for the Australian Mutual Bank account item comprised two accounts including an account that Stan had earlier referred to in the affidavit and also proceeds of sale of a boat and trailer that Stan had sold in September 2021: CB 209[11], 218[5(b)]; T 194-195.

201 The figure for capital gains tax would appear to be a liability of the estate not of Mary and Stan.

202 There was a Valuer General's valuation for the land value for the Baulkham Hills property being the sum of \$771,000 as at 28 April 2022: CB 316.

203 On 1 September 2021, an estate agent gave an appraisal for the unimproved value of the Baulkham Hills property as being \$1 million up to \$1.1 million: CB 318. The agent provided an updated valuation on 5 July 2022 revising that figure to \$1.5 million: CB 386.

204 Mary estimates that after the building fit out and finishing is completed the Baulkham Hills property will be worth around \$2 million to \$2.2 million: CB 210[18]. She attempted to obtain a market appraisal with respect to a completed home, but agents would not provide an appraisal without the home having been actually built: CB 210[18].

205 Stan was cross-examined regarding the likely potential value of the completed property. Whilst it is common ground that Mary and Stan are building the property to live in, it was suggested (by reference to other sales in the area: see exhibit P1) that the completed property could sell for as much as \$2.7–\$2.8 million. However, Stan rejected that suggestion, indicating that the locality of the houses in exhibit P1 is several kilometres away, being on the other side of Baulkham Hills closer to Castle Hill and that the houses depicted in exhibit P1 are Eden Brae homes, being almost a third more expensive to build than a Beechwood home: T 197.

Health

206 Mary has glaucoma for which she takes medication in form of eye drops daily. Occasionally she suffers bouts of anxiety and has medication for that, as required. She also has trouble sleeping and has medication for that: CB 144[13].

207 Stan suffers from migraines and has done for most or all of his life. Some years ago he was diagnosed with reflux and formally diagnosed with benign positional vertigo of the left ear, which gives rise to episodes of dizziness and severe nausea: CB 144[14]. The vertigo, which has been a more recent illness (last six or seven years), Stan finds very debilitating: T190.

Competing claim to retain benefits

208 Mary states her future needs include:

- (a) \$470,000 to complete building the Baulkham Hills home;
- (b) \$81,450 for inclusions;
- (c) \$56,500 to repay the line of credit with St George;
- (d) \$121,500 for reimbursement for repairs and improvements to the Guildford property;
- (e) \$150,000 at least to top up cash funds: CB 147[27].

209 It is not obvious that the claim for \$121,500 for reimbursement for work in respect of the Guildford property is a need, let alone claimable. That is money that has been spent over many years. It was not advanced in any way as a form of loan. In any event, the Guildford property, it is agreed, will be sold: e.g. T 226.

210 However, leaving the sum of \$121,500 aside, importantly, it appears that Mary and Stan expect that much of the cost associated with the building work would come from the proceeds of the sale of the Guildford property and also to top up their joint savings: CB 195[31].

Natalie

Upbringing, education and employment

211 As noted above Natalie talks fondly of her upbringing in a small 'tightknit family' in which she had a loving relationship with the deceased which persisted to the deceased's her death: CB 25[10]-[11].

212 Family occasions were celebrated. This included, according to Natalie every family milestone being birthdays, christenings, weddings, kitchen teas, graduation ceremonies, formals, Christmas, Easter and Mother's and Father's Days and remembrance services: CB 25[11].

213 On birthday, Easter and Christmas occasions the deceased gave Natalie and her sons small sums of money, such as \$50.

214 On particular special occasions such as Natalie's 21st birthday or her wedding day, the deceased gave her larger sums of money: CB 26[15].

215 Natalie deposes to the fact that during her teenage years her relationship with the deceased deepened: CB 27[21].

216 Natalie attended Carlingford High School.

217 In 1989, she commenced a BA in Politics at Macquarie University and graduated in 1991.

218 Following her marriage to Taras in 1982, in February 1983 she commenced employment as an advisor and researcher at Parliament House working for Virginia Chadwick and subsequently for Malcolm Jones: T 33, 35.

219 Apart from approximately a year in America (1995–1996) Natalie remained in her employment at Parliament House until approximately April 2006: T 33.

220 In adult years Natalie says Kathy checked on the deceased regularly when Mary and Stan went away on holidays. Natalie also visited, took the deceased shopping and to lunch: CB 27[29].

- 221 In 1998, Natalie returned to work and for several years until 2000, the deceased looked after Alex one day a week so that Natalie initially could work part-time and then full-time at Parliament House: CB 28[31]–[33].
- 222 Natalie says she was dependent on the deceased to look after Alex and could not have gone back to work part-time without the deceased's support: CB 28[35].
- 223 Natalie indicates that her relationship with the deceased into adult years remained a close and loving one: CB 32[61].
- 224 In 2000 Natalie met Malcolm: CB 129[6].
- 225 In 2005 in the midst of her marital breakdown with Taras, Natalie moved out of the marital home in Amiens Street, Gladesville, and into Kathy's two-bedroom apartment in Meriton Street, Gladesville (**Meriton Street unit**), with her sons.
- 226 Taras and Natalie had an informal property settlement, in which she received "half of the assets" (which assets included the matrimonial home in Amiens Street Gladesville). That occurred before the formal divorce order of the Court, which enabled Natalie to purchase another property being a unit in Linsley Street, Gladesville (**Linsley Street unit**): CB 30[54]; T93.
- 227 On 10 November 2005, the Linsley Street unit was transferred into Natalie's name showing consideration of \$463,000. It was subject to a mortgage to ING Bank (Australia) Ltd: exhibit D1.
- 228 On or about 2 September 2011, the Linsley Street unit was sold for \$540,000: exhibit D1. This appears to have been relatively contemporaneously to the time at which Natalie started living together with Malcolm.
- 229 On or about 7 October 2011, Natalie and Malcolm purchased the Hunters Hill property for \$1.34 million: CB 129[1]; exhibit D5.
- 230 On or about 19 September 2014, Natalie and Malcolm purchased a unit at Surry Hills (**Surry Hills unit**) for \$760,000 (exhibit D6), which Malcolm used as an office: T134-135.

231 In April 2018, Natalie, Kathy and the various family members travelled to Cowra to take the deceased to places that she had stayed at when she had settled into the immigrant camp after the war: CB 32[62], 46[42].

232 Natalie refers to the fact that the deceased asked her to promise that she would not let her go into a nursing home: CB 33[70]. Ultimately, the deceased remained in the Guildford property until her stroke in April 2020 and following a four-week admission to Westmead Hospital she was discharged and admitted to St Vincent's care facility at Yennora: CB 152[43].

Financial circumstances

233 Natalie is employed by Thales Australia as a Communications Manager and earns \$5,423 per month net.

234 During the majority of Malcolm's working life, he was a licensed financial advisor. He is currently retired and does not receive any government benefits or pensions. He has no superannuation and subject to what is noted below states he has no income: CB 129[5], [8]–[9].

235 Malcolm draws approximately \$4,000 per month from the investment account (CB 129[9]) which as at 10 July 2022 had a market value of approximately \$2,459,804 (CB 387-388) and a closing balance as at 12 July 2022 of approximately \$2,425,400 (CB 130[16]) which is primarily used to pay rent and health insurance.

236 Their monthly expenditure totals \$9,798, the most significant items of which relate to groceries (\$1,732), rent (\$3,432) and entertainment (\$1,500).

237 In late 2021, they sold the Hunters Hill property (in which they had resided) and also the Surry Hills unit and entered into a contract purchase a property in Drummoyne (**Drummoyne unit**) off the plan.

238 The purchase price is \$1.9 million. They paid a 5% deposit on exchange of contracts (in September 2021): CB 130[11]. The front page of the contract indicates that a 10% deposit of \$190,000 was payable: CB 319. However in "additional provisions" to the printed form the contract there was provision for payment of the deposit by instalments being the sum of \$95,001 upon exchange and the balance of \$94,999 on completion (or default): CB 333.

- 239 Completion is expected towards the end of this year or early 2023.
- 240 The sale of the Hunters Hill property and Surry Hills unit has left Natalie and Malcolm with funds in excess of \$2 million with which to complete the purchase of the Drummoyne unit.
- 241 They are renting accommodation at Rundle Place, Gladesville for \$3,432 per month for the period 13 November 2021 to 12 November 2022: CB 336.
- 242 In summary their joint resources appear as follows:
- (a) investment funds approximately \$2,425,400;
 - (b) motor vehicles approximately \$68,000;
 - (c) camper trailer approximately \$35,000;
 - (d) sole and joint bank accounts (nominal amount);
 - (e) furniture and household contents approximately \$120,000; and
 - (f) Natalie's Thales shares approximately \$3,532.
- 243 In addition, Natalie has a superannuation entitlement currently valued at approximately \$331,408.
- 244 Their liabilities are, in summary, as follows (CB 131[18]):
- (a) Malcolm MasterCard \$9,630;
 - (b) share of legal fees approximately \$40,000;
 - (c) balance due on Drummoyne unit \$1,805,000 (plus adjustments in legal fees);
 - (d) stamp duty on contract for the Drummoyne unit \$89,097.
- 245 Alex has a degree in communications, works full-time in and has been financially dependent upon Natalie up until the present. He found other accommodation last month: CB 126[22]; T87.
- 246 Tomas has finished a degree in economics and lives independently in an apartment in Glebe, although he is assisted by Natalie from time to time with some money for home improvements: CB 126[23]; T87.

Health

- 247 Natalie has been under a degree of health and financial strain and required counselling sessions, physiotherapy and remedial massage. She has been

previously treated for alopecia areata, a stress related condition: CB 125[13], 420.

248 In December 2020, Malcolm was diagnosed with throat cancer. He was treated with radiation and chemotherapy until April-May 2021. Whilst his assessment period has not finished yet, the prognosis according to his doctors so far is good: T141.

249 Malcolm has other conditions including a heart condition.

250 He has had a left knee replacement in February 2022 (CB 400) and suffers from some mobility issues in pain and discomfort in his lower back, following an operation in 2014: CB 131.

251 Natalie has since it seems March 2021 been Malcolm's primary carer: CB 125[12]-[13].

Claim

252 Natalie's claim for provision in her initial affidavit (2 September 2021) outlined needs, including additional superannuation for her retirement of \$200,000 and a fund for contingencies of \$150,000: CB 37[107].

253 Natalie also outlined a need for secure unencumbered accommodation although, noted that she expected that she and Malcolm would be able to cover that from the proceeds of the sale of their home.

254 Natalie's claim for superannuation and a fund for contingencies was repeated in her updating affidavit (18 July 2022): CB 127[29].

255 Natalie makes reference to assistance they have provided to bring Natalie's cousin and her son from the Ukraine as refugees following the Russian invasion: CB 126[24]-[27], 374.

256 It can be seen that once Natalie and Malcolm complete the purchase of the Drummoyne unit their expenses will drop considerably having regard to the amount of rent currently paid: CB 436.

Kathy

Upbringing, education and employment

- 257 Kathy gave evidence of her childhood years and memories of her upbringing and involvement with the deceased. The deceased was present on occasions where Natalie and Kathy completed milestones for primary school, secondary school and tertiary education: CB 43[15].
- 258 The deceased paid for Kathy's annual church membership which continued into adulthood: CB 43[16].
- 259 Kathy outlined her relationship with the deceased leading up to and after the time of her father's death. Kathy describes the deceased as a "large presence" in her life and believed they had a close and loving relationship: CB 44[25].
- 260 Like Natalie, Kathy records birthdays and other events being celebrated and monetary gifts being received from both the deceased and Mary: CB 45[36]–[38].
- 261 In February 2000, Kathy purchased the Meriton Street unit for \$255,000: CB 45[39]; T103.
- 262 She records that the deceased gave her a new fridge and washing machine for use in the unit: CB 45[39].
- 263 Kathy commenced a relationship with Chris Vella in or about 2004 or 2005 (T104) marrying him in 2006: CB 45[40].
- 264 In 2005, Kathy and Chris commenced building a house in Silverdale. They have lived there 17 years: CB 57[145]–[146].
- 265 In early August 2006, Kathy hosted the deceased's 80th Birthday party at the Silverdale home for her friends and family: CB 51[97b].

Financial circumstances

- 266 The financial circumstances of Kathy and Chris are as follows.
- 267 Kathy has worked full-time since leaving university up to 2013. She currently works part-time three days a week: CB 58[146b].

- 268 Kathy has net fortnightly income of \$1,848. Her taxable income for the year ended 30 June 2021 was \$68,425 and like Chris she has not yet prepared a return for the year ended 30 June 2022: CB 118[10]–[11].
- 269 Chris operates a company Black Earth Excavations Pty Ltd (**Black Earth**), which owns excavation equipment and leases trucks and trailers. He is employed full-time by his company as a plant operator: CB 59[154]. Chris works often 6 to 7 days a week: CB 58[146b].
- 270 For the 2021 financial year Chris had a taxable income of \$51,872. He had not at the time of the hearing prepared a return for the financial year ended 30 June 2022: CB 112[14].
- 271 Recent events such as the COVID pandemic, flooding and long periods of wet weather have had some (undisclosed) impact upon the turnover of Chris's business: CB 114[27].
- 272 The business is also affected to some degree by mechanical breakdowns and rising fuel costs: CB 114[28]–[29].
- 273 Kathy prepared a schedule of what appears to be family fortnightly income (\$5,734) and expenditure (\$4,904): CB 118[12], 435.
- 274 Kathy still owns the Meriton Street unit which has a net value of approximately \$438,133: CB 118[14]. An appraisal for the Meriton Street unit as at 13 July 2022 assesses its current market value at \$650,000: CB 398.
- 275 Kathy owns jointly with Chris a property at Spring Farm which is mortgaged with a net value of approximately \$803,410: CB 118[15], CB 113[19]. There is an appraisal for the property dated 14 July 2022 which gives an estimate of its current value at \$900,000–\$950,000 (differing from earlier in the year of \$950,000 to \$1.05 million): CB 402.
- 276 The property is tenanted and the gross rent is \$580 per week: CB 113[19].
- 277 Chris recently received an inheritance of approximately \$84,647 from his grandmother's estate which he paid into his Spring Farm home loan: CB 113[21].

- 278 They have a joint offset deposit account with a balance of approximately \$5,668: CB 113[20].
- 279 Chris and Kathy own the property at Silverdale, which is unencumbered and worth approximately \$1.6 million: CB 112[15]. There is an appraisal from a Penrith real estate agent assessing the value of the property as at 12 July 2022 in the range of \$1.6 million to \$1.65 million: CB 389.
- 280 Chris has a number of cars valued at \$8,000: CB 112[15]. Kathy has a motor vehicle estimated at \$8,000: CB 118[13b].
- 281 Chris's company Black Earth owns plant and equipment totalling approximately \$275,000: CB 112[15e].
- 282 Additionally, Chris has two investment properties:
- (a) at Pacific Pines with a net value of \$498,756, which property is tenanted with a gross rent of \$600 per week; and
 - (b) a property in Gooloogong which is unencumbered with an estimated value of \$270,000 but which property is not tenanted: CB 113[17]–[18].
- 283 An appraisal for the Pacific Pines property values the property in the range of \$720,000–\$750,000: CB 396.
- 284 An appraisal for the Gooloogong property as at 12 July 2022 suggests a value for it of \$260,000 to \$300,000: CB 390.
- 285 Kathy has superannuation with Hesta (approximately \$184,974) and as at 30 June 2021 and superannuation with the Commonwealth Superannuation Corporation in the sum of approximately \$365,533: CB 118[13].
- 286 Kathy explained that she had not separately contributed to the superannuation. Rather, the Commonwealth has a very generous superannuation scheme: T 122.
- 287 The superannuation from the Commonwealth Superannuation Corporation arose from Kathy's employment with Australian Hearing for the period of about 11 years between 1993 and 2004 and she does not continue to add to that fund: T 122–123.

288 The Hesta superannuation amount arises from, or is connected with Kathy's employment with Audika at Penrith and has accumulated from about December 2004: T 123.

289 Chris has superannuation valued at approximately \$176,743: CB 112[15].

Health

290 Kathy has infertility and early menopause, and it took them 21 cycles of IVF over seven years at a cost of \$100,000 before Zoey was born: CB 58[146d].

291 Kathy has high blood pressure, which is controlled with medication and occasionally she suffers anxiety: CB 59[152].

292 Chris suffers from severe migraines and has allergies and sinus issues, but is otherwise in good health: CB 113–114[22]–[26].

293 Chris's father is aged 76 and is a widower. Kathy assists in his care: CB 58[146g].

Claim

294 In her initial affidavit (2 September 2021) Kathy outlined her claim for provision as being to reduce the mortgage on her solely owned property (the Meriton Street unit) then in the sum of \$208,000 and also to add to her superannuation (\$200,000) and replace her motor vehicle (\$40,000): CB 60[165].

295 Kathy was cross-examined regarding her financial circumstances and claim.

296 She agreed with the proposition that she had assets, including superannuation of approximately \$1,400,844 and Chris had assets of approximately \$3.718 million collectively totalling over \$5 million in assets: T 121.

297 Kathy further agreed that albeit she was working part-time, she was on a good wage, that Chris was working full-time and on a good wage and they netted at least \$150,000 a year income between them: T 121.

298 They have no major liabilities apart from the mortgages.

299 Kathy has like Natalie given assistance to the Ukrainian cousins: CB 119–120[18]–[25].

300 Zoey attends a State primary school and Kathy accepted that her education costs would be minimal: T 121.

301 It was put to Kathy that with assets and income, as outlined above she did not need further provision. She indicated that provision would be to continue to raise Zoey and they had payments for before and after school care and expenses: T 121.

Olga's financial position and testamentary intentions

302 Olga was cross-examined regarding her financial resources.

303 She had purchased the unit in Mitchell Street, Putney in August 2003, about a year after Myron's death: T 74.

304 She paid \$648,000 for that property: T 74; exhibit D2.

305 It was suggested to her that the property is currently worth in the order of \$1.5 million to \$1.65 million based on an appraisal: T 74; exhibit D3.

306 Olga accepted that she had some other financial resources including more than \$100,000 in the bank and that she owned a car, jewellery and household contents: T 75.

307 Olga was cross-examined regarding her Will and her current testamentary intentions in relation to Natalie and Kathy: T 76.

308 There was objection to the questioning on the basis that a Will is a confidential matter for the witness, and more particularly that it is subject to change.

309 I permitted the questioning, noting that the issue may be ultimately one of relevance and utility of any answer.

310 Logically, the prospect of a child or children, even if they are on very good terms with a single parent (as was admittedly the case here: T 75–76) of inheriting, is of contingent and limited value, if at all, as being regarded as a financial resource.

311 The probabilities that the plaintiffs might receive any significant benefit from Olga's estate are influenced by numerous factors including the health of the

parties, Olga's own need for her financial resources and the exigencies of life, which are inherently uncertain.

312 I do not accept that Olga's financial resources, current as they are, can be counted upon as being a financial resource for the plaintiffs in the form of an inheritance, in any significant way.

313 Nonetheless, Olga did indicate in relation to questioning that if Kathy and Natalie needed financial assistance at the present time if she could, she would help them in some way: T 76–77.

The 1978 stay at the Guildford property

314 In 1978, Olga and Myron commenced building a house at Carlingford as in effect an owner-builder: T29.

315 They sold their house at Merrylands and moved in to live with the deceased at the Guildford property for approximately up to 16 months.

316 At the time of the move to the Guildford property Myron was working full-time as a customs officer and Olga was working three days a week at David Jones in Parramatta as a beauty therapist, normally between the hours of 9 AM and 4 PM: CB 64[17]. She owned her own business renting a room at David Jones: T 73.

317 Natalie (then about 8) and Kathy (then about 7) attended Merrylands East Primary School starting school at about 9:00 AM: CB 43[20]; T 80.

318 During the time living with the deceased Natalie and Kathy shared a room at the Guildford property: CB 27[27].

319 It is common ground that Olga and Myron did not pay the deceased rent during that period of time: CB 27.

320 Evidence about the exact layout of the Guildford property emerged in cross-examination. The parties indicated it was described as a three bedroom with one sunroom property: T 30, 56 (Natalie), 79 (Olga), 152 (Mary).

321 Natalie indicated that her mother and father worked full-time, and that the deceased looked after Natalie and Kathy before and after school. She said that

the deceased picked them up, helped with meals, washing and homework and that they were very reliant upon her: CB 27[27].

322 Natalie was cross-examined regarding this. She appeared to accept that, given the deceased was working and did not drive, that in all likelihood, Olga must have taken Natalie and Kathy to school, although she definitely recalls the deceased picking them up after school: T 30–31.

323 The deceased would make them some afternoon tea or something before their parents came home from work: T 31.

324 Olga helped with cooking and cleaning at the house and sharing chores: T 31.

325 Kathy says that whilst they lived with the deceased she was dependent upon the deceased's care noting that the deceased collected Natalie and Kathy from primary school three days a week: CB 43[22].

326 She was also dependent upon the deceased for care and support until Olga returned home from work around 4:30 PM: CB 44[23].

327 Olga was somewhat unclear as to who took the girls to school although thinks that she must have taken them: T 80. She indicates that the deceased may have occasionally taken them to school, which was close by to Merrylands train station: CB 64[19].

328 Olga indicates that they lived with the deceased for about 14 to 16 months before the home in Carlingford was completed and during that time she and Myron were dependent upon the deceased whilst living with her and grateful for her help: CB 64[22]–[23].

329 In or about 1979 or 1980, Myron and the family moved into the Carlingford property: CB 27[28].

General inheritance promises - facts

Natalie's recollections

330 Natalie says Myron's death in 2002 took a heavy toll on the whole family and that she was in shock: CB 29[41]. Natalie says that the deceased was very depressed following Myron's death and was prescribed antidepressants and in fact continued on medication "for years after [he] died": CB 29–30[47]–[49].

331 On her first visit to the deceased at her home after that occasion, Natalie says that Mary was away with Stan.

332 Critically, Natalie says that the deceased engaged her in a number of conversations making what Natalie claims were general inheritance promises. The evidence is as follows:

“43 Baba said to me:

"I am so proud of you, Natalka. and Katia [Kathy's Ukrainian name] and the boys [Tom and Alex]. Your dad would be proud of you all too. You know, I promised him I would look after you. Myron is no longer here, he died too young, but we have to keep his memory alive. We need to keep things in the family and look after one another. That's all we have - each other."

333 Natalie was cross-examined regarding the context of the discussions.

334 Taras had a Bachelor of Engineering and was working at Sydney Water on or about the same salary as Natalie.

335 Natalie was on approximately \$60,000 a year or what could have been a bit more, perhaps \$63,000 including superannuation: T 45–46.

336 She accepted the proposition that between them at that stage their combined salary would have been at least \$120,000 and may be up to \$140,000: T 46.

337 She disputed the contention that they were financially comfortable asserting that they had a big mortgage and two children to raise with household expenses: T 46.

Comments to Olga

338 Part of Natalie's evidence regarding the general inheritance promises as I understood it were comments that were made by the deceased not to Natalie directly, but rather to Olga which were then recounted by Olga to Natalie.

339 Natalie's evidence regarding this was as follows:

“44 Baba had conversations with my mother after Dad died. Baba said to Mum: *"I will look after the girls. I promised Myron I would look after you and the girls."*

45 Baba also talked to my mum about fairness and making sure to do the right thing where family is concerned. Baba often talking about being *"fair with family and money"* and making sure *"everyone is treated equally"*.

46 After Dad died, Mum saw Mary and Baba often. Mary drove Baba to Mum's house at Putney and they went to lunch at North Ryde RSL. Baba said she loved to do this. Baba wanted to do this once a month, but they usually got together once every couple of months. Mum said to me that occasionally she would have "*private discussions with Baba*" during which Baba said "*I will look after the girls*." (CB 29[43]-[46]).

Kathy's recollections

340 Kathy, like Natalie visited the deceased shortly after her father's death. On this occasion Kathy visited by herself and Mary and Stan were not present. The conversation took place around the kitchen table and the deceased made Kathy aware that she was taking antidepressants. She indicates that the deceased, naturally, was very upset about the passing of Myron: CB 48–49[75].

341 Kathy records the conversation with the deceased as follows:

"75 During this conversation Baba told me she wished she could have done something to help Dad recover from his cancer. Baba said ·

"I will never get over the pain of losing him".

77 While we were talking about Dad. Baba said to me in English:

"Katya, we are a close family and I look after my family. When I am gone, I promise I will pass on your father's share of inheritance to you and Natalka. I will look after you girls."

"I am very proud of you and Natalka, and your father would be proud of you too. I miss him very much."

We both had tears in our eyes. I hugged Baba and thanked her for sharing this with me. I told her "*I love you*." (CB 49 [76]-[77])

342 Kathy said in her initial affidavit:

"Even though Baba and I were close, I never presumed to ask Baba about the specific contents of any of her Wills. I respected Baba. I never dared to ask Baba what was in her Will": CB 50[91].

"Following my conversation with Baba in 2002 shortly after Dad died, I did not believe I needed to ask Bab a about her Will because she had promised to look after me": CB 50[92] and

"Our family never really talked openly about our Wills": CB 52[110].

343 Kathy was cross-examined regarding the conversations. Like Natalie she had no particular notes of the conversation. It was suggested to her that her memory of the conversation might not be clear, having regard to the fact that it was long ago and that it was an emotional time: T105-106.

344 Kathy disputed that and indicated that the event was a "very clear moment": T 106.

\$50,000 promises – facts

Natalie's recollections

345 In 2005, following Natalie's separation from Taras she moved with her sons out of the matrimonial home in Amiens Street Gladesville and into Kathy's Meriton Street unit: CB 30[55].

346 In the context of her separation and/or divorce, Natalie says she wanted to purchase a property, preferably a house in the same area (Gladesville) and considered buying either a duplex in Junction Road Gladesville (**duplex**), or the Linsley Street unit. She says she needed another \$50,000 to buy the duplex and was afraid to extend herself financially: CB 30[57].

347 Natalie says during this time the deceased and Mary called her, indicating that they had heard from Olga that Natalie was short of money and they had a conversation to the following effect:

"Mary: We heard you are short of money for the house you want to buy. Don't worry, Baba wants to help.

Mary passed the telephone to Baba.

Baba: Natalochka, I will give you the \$50,000 now if you need it. I want you to buy the house for you and the boys so you have a home. You and Kathy are my only granddaughters. my family, Myron's daughters. I promised your father I would look after you both. I love you so much. You and Kathy have inheritance money from me and you can have some of this money now.

Natalie: Thanks Baba, I will think about it ... but wait what if I decide not to take the money now, what if I wait and take the money later ... what then? ... and what about Kathy?

Baba: It's ok if you want to wait ... if you do, then I promise to give you the money later when I die, kicked the bucket. Kathy and you will get the same amount.

Natalie: Thanks Baba. I will think about it." (CB 31[57c])

348 Natalie says that she telephoned the deceased that afternoon and had a conversation which included the following exchange:

"Natalie: Thanks Baba for the early offer of my inheritance money, but I'm not going ahead with the duplex. If it's OK with you, I prefer to wait to get my inheritance money at the appropriate time and at the same time as Kathy.

Baba: *OK but if you see some other property in the meantime and want some money, I promise you it's there for you. You are my blood, my family, my eldest granddaughter. I've always said, we Shymko women stick together. I make this promise to you, you can have part of your inheritance money now or later, whichever you prefer. You know my promise is my word and when I make a promise, Baba keeps it ... God is my witness. Us Shymko women stick together.*" (CB 31[57g])

349 Whilst Natalie needed the \$50,000 to buy the duplex she did not go ahead with that. Instead she purchased the Linsley Street unit, which was cheaper, and she did not require the \$50,000 in order to purchase the Linsley Street unit.

350 Natalie was cross-examined about the \$50,000 promise.

351 She stated (T58-59):

"A. No, because I was very desperate at the time and out of the - out of - I just sat there. I was living in my sister's apartment and Mary and Baba called me and Mary said, "I heard that you are short of \$50,000 to buy a house," and I said, "That's correct," and then Baba came onto the phone and Baba said, "I want to help," and that's when the offer, the testamentary promise of the inheritance and I was absolutely, like, blown away and could not believe that - the generosity and I was really touched.

Q. Yes, but so there's no mistake about it, Mary denies saying that she said to you, "We've heard you're short of money," that's on the record, she denies that. If that was said, you'd be surprised because here's an aged pensioner offering to give you \$50,000. Where—

A. I didn't know my grandmother's financial circumstances at the time.

Q. But seriously, she was, what, in her mid 70s, she was unqualified, she'd been a process worker, you knew she was on a pension and only a pension, didn't you?

A. She - there was three people in the house. So, she lived a very thrifty lifestyle.

Q. It's a what?

A. She lived a very thrifty lifestyle.

Q. Were you wanting Baba and Stan and Mary to somehow get together and raise some money for you?

A. No. I, I didn't ask, they approached me. I never - this phone call came from them. They heard from my mum. I, I did not ask. I did not beg for the money. I didn't initiate any phone call.

Q. Just to save time, I put it to you that the offer was not mate, that you are wrong? A. I'm right.

Q. But you have no independent record of that conversation, do you?

A. No, unless you - if Ronald Czinner was around, I, I talked to him about the, the testamentary promise from my grandmother and that's - he's the one that said not to buy Junction Street because there was something wrong with the

contract because it told him I had that extra 50,000 from my grandmother and he said, "I wouldn't touch it. There's something wrong with that contract."

Q. Yes, we understand that. Just so there's no misunderstanding, if you look at page 31, I put to you that what you say is attributed to your grandmother on the fourth line down where it says, "Natachocla(?)" that paragraph I put to you is not correct?

A. That's correct.

Q. I put it to you it's not correct for a number of reasons. One, is that it happened so long ago that your recollection of it is inaccurate?

A. I was sitting on the bed in my sister's unit in Meriton Street when they called me. Q. I put it to you that it was an offer come from an aged pensioner just does not make sense. An aged pensioner who would only have a pension?

A. She said it was, it was to, it was part of my inheritance. So, I, I do not know. That's, that was part of the conversation I had with my grandmother.

Q. You're suggesting that she was offering \$50,000 then to you, back in 2006?

A. Because that's what I was short.

Q. That might've been that's what you were short, but I'm putting to you that she was a pensioner, where would she get 50,000 from?

A. I don't know.

Q. I put it to you that she didn't say that she'd give you money when she dies?

A. She said to me - because I said to grandma, to Baba, I said, "Baba, thank you for the offer, but I'm not going to buy the unit, the house. I'm going to buy - I'm going to wait and buy something more within my means," and she said, "Well, the money is there if you need it because that is - you can have your early inheritance," and I said, "No, I thank you for the offer but I will wait to get it at the appropriate time." Because she said, "You and your sister are going to get the same amount," and I said I would wait for the appropriate time and she said, "Well, if you see something in the meantime, give me a call." And that, that's how it - the conversation went."

Mary's recollections

352 Mary denies that the deceased offered to give Natalie \$50,000 asserting that the deceased did not have that sort of money in her bank account: CB 164[65.15].

353 Mary says that when she heard that Natalie needed \$50,000 to purchase a property in Gladesville, she said to Natalie:

"If you need \$50,000, I'll see Baba, Stan and I can put the money together for you."

354 After discussing this with the deceased, Mary said the deceased said to her:

"I don't have that sort of money".

355 After discussing it with Stan, Mary indicates that "we decided we could not afford to help Nat" and subsequently said to Natalie:

"Mum does not have that sort of money and Stan and I cannot afford to help."
CB 164[65.15]

Subsequent discussions regarding the general inheritance promises and \$50,000 promises

356 In adult years when Mary was away Natalie says she visited the deceased. On some of these occasions, Natalie says the deceased said to her when they were together "I promise to look after you". She says because of this she made sure to look in on the deceased when Mary and Stan were away on holidays: CB 27–28[29].

357 At a few family occasions after Myron's passing and in the presence of Olga and Natalie, Kathy says the deceased said to them:

"I promise the girls will be looked after when I'm gone": CB 49[78].

358 Kathy says this is a phrase that the deceased often used when referring to her own Will and that she believed the deceased would be true to her word and honour her promise: CB 49[78].

2005-2006

359 In 2005, following Natalie's separation from Taras, Kathy states Natalie shared with both Kathy and Olga the conversation she said she had with the deceased and Mary: CB 49[81].

360 Kathy recounts the conversation was as follows:

"Baba offered me part of my inheritance early. I was \$50,000 short on a deposit for a house. Baba offered me \$50,000 towards the cost of the house. Baba said this sum \$50,000 would come out of my inheritance.

I said no. I told Baba and Mary I wanted to receive my full inheritance at the same time as Kathy. Baba and Mary promised to honour this agreement." (CB 49-50[82])

361 Kathy says that after receiving legal advice Natalie did not proceed with the purchase of the house: CB 50[83].

362 In 2005, Kathy states that the deceased and Mary came to visit them at their newly built home in Silverdale and indicates the deceased handed to Kathy a copy of a solicitor's letter dated 3 September 2002: CB 50[93].

363 The letter (CB 224) is from Warren F. Ball & Co to the deceased regarding "your old will, dated 29 June 1977" and it is in the following terms:

"Further to your recent attendance at this office when you signed your new Will we enclose your old Will dated 29 June 1977 which we have received from Coleman & Greig for destroying.

We advise that your new Will dated 22 August 2002 together with the title deed to your property namely Certificate of Title Volume [xxxx] Folio [xx] has been placed in safe custody on your behalf." (CB 224)

364 Kathy said that the deceased said to her in Mary's presence:

"Katya. I need you to know where my Will is kept. I need you to know who to contact for the reading of my Will" (CB 51[94])

365 Kathy states that the deceased and Mary asked her to keep the letter in a safe place in case either the deceased or Mary passed away. Kathy happily agreed to hold the letter and noted that the letter indicated that the deceased's Will had been updated on 22 August 2002.

366 There are two annotations on the letter dated 3 September 2002: CB 224. I address these below.

367 In early 2006, Kathy had a conversation with the deceased, Mary and Chris whilst they were sitting around Kathy's dining table enjoying lunch together. She indicates that the deceased said to Chris and herself:

"when I die, the girls will be looked after": CB 49[79]

368 Kathy says that Mary repeated the deceased's words, saying:

"Yes, the girls will be looked after".

369 In mid-2006, Kathy states that the deceased had a conversations with her about her Will as follows (CB 51[97a]):

"Baba said she had *'made a new Will, which is held by the same Solicitor'*"

370 Kathy indicates that she did not ask the deceased why she had updated her Will but jotted down the dates and details of the conversations on the original letter: CB 51[98].

371 In 2006, on the occasion that the deceased Mary came to visit the Vella's, Chris gives evidence that the deceased said:

"When I'm gone, I will look after you girls": CB 111–112[12].

372 On the letter dated 3 September 2002, there is an annotation (CB 224) with an arrow drawn from the second paragraph which states:

"- new will made mid 2006
- held by same solicitor".

2010

373 In 2010, Kathy says that the deceased told her she had "made a new Will": CB 51[97b]

374 On the letter dated 3 September 2002 there is another annotation (CB 224) which simply states:

"- new will 2010".

375 Kathy was asked in re-examination regarding these notes and she indicates that it is her handwriting on the document and she made the notes, each time the Will was changed.

376 The second notation was added in the 2010 year: T126.

2017

377 In about 2017, during a visit to the Guildford property, Chris says the deceased said:

"I will be leaving some money to Zoey when she is older, like I did for Tomas and Alex": CB 112[13]

2019

378 In 2019, the deceased was admitted to Fairfield Hospital for a knee replacement and remained there for approximately seven weeks with a severe lung infection: CB 166[65.26].

379 Following this time in about May 2019, Mary suffered an acute anxiety attack and admitted herself to the Northside Clinic at Wentworthville where she stayed for five weeks: CB 166[65.26].

380 Natalie says that during this time Mary called her several times and said:

"Whatever happens Nat, please promise me that if something happens to me please look after Baba and make sure Stan doesn't get everything" (CB 34[73])

381 She claims that Mary repeated this over and over: CB 34[73].

382 On 30 May 2019, Mary called Kathy and said:

“I'm calling you from the outside laundry. I can't stop shaking. Can you look after Baba while I am in the hospital? Make sure Stan helps Baba out while I'm not here.” (CB 51[100])

383 The conversation included the following exchange:

“Mary: *Kath, I'm so scared. I want you to make sure Stan doesn't get everything. Baba's Will leaves everything to me. If something happens to me. Stan gets 40%. Nat gets 20%. Kalli gets 20% and Alise gets 20%. Make sure Stan doesn't get it all. Kath, you get Power of Attorney over Baba.*” (CB 51[103])

384 Kathy promised Mary that she would look after the deceased and check in on her every few days. She states that she acknowledged to Mary that she understood that she was to hold the deceased's power of attorney even though she never held any documentation about it: CB 52[104].

385 The conversation continued as follows:

“Mary: I'm worried Stan is going to leave me.

...

Mary: 'Make sure Stan doesn't get everything.’ (CB 52[105])

386 Kathy says that she believed that Mary was referring to her own Will and estate.

387 She states this was the first time she was told any details about the deceased's Will and didn't question the arrangement at that time, understanding that Mary was telling her about the contents of her own Will: CB 52[106].

388 Kathy was cross-examined regarding this and indicated that she did not raise it with the deceased because she had a good relationship with Mary and thought was possible that she would be included in Mary's Will: T112-113.

389 On 30 May 2019, Kathy made a note of her discussion with Mary.

390 The note which is handwritten (CB 272) records as follows:

“Baba's will → all to Mary

Mary's will → 40% Stan

→ 20% Nat

20% Kath

20% Alise

POA over Baba → Kath

391 I pause to note that there was an additional note which was added to the handwritten note on 16 March 2021 and I reproduce this below in dealing with that aspect of the evidence.

392 During Mary's Hospital stay Kathy contacted Alise and two of Mary's closest friends, Roslyn and Beverly, and they communicated with one another to support Mary and the deceased: CB 52[111].

393 During the three weeks Kathy rang the deceased every few days to make sure she was okay with meals, laundry and general wellbeing: CB 52[111]. Stan was helping out with cooking meals (CB 53[111]) as is evident from the texts: CB 269[270].

394 Whilst Mary was in hospital Kathy had a conversation with her as follows:

“Kathy: What is bothering you so much?

Mary: Kath, I have lied. I need to deal with it.” (CB 53[112])

395 Kathy says that Mary did not tell her what she lied about and did not ask.

2020

396 In early August 2020, and in the week that the deceased passed away Kathy had a phone conversation with Mary in which Mary indicated that she was going to withdraw some money from the deceased's account before the bank froze the account: CB 53[114].

397 Natalie refers to other promises she said were made by the deceased including regarding jewellery as follows:

“When I was with Baba at family gatherings, I often commented on Baba's beautiful rings. Baba said:

“Well, you can have this one or this one. You choose. I want you and Kathy to have some of my jewellery to remember me by. I want my jewellery to stay in the fam 1Jy as something to remember Baba by.”
(CB 32[59])

398 In August 2020, after the deceased's death Natalie refers to a conversation in which Mary invited her to come over to look through the deceased's things including referring to the promise of some jewellery: CB 32[60].

399 The deceased's death appears to have been the particular catalyst for breach of the relationship between the parties.

400 On 20 August 2020, Kathy visited the deceased's grave with Mary and afterwards they had lunch at Blacktown. Mary talked about how she and Stan were finally building their first home at Baulkham Hills and Kathy revealed to Mary details regarding her financial position and Mary said, "thanks for being so honest": CB 53[115].

401 However, after the deceased's death following a period of forty days, a memorial service was held at the church.

402 A few days before this, Natalie says she had telephone conversation with Mary regarding the traditional family lunch in which she asserts, Mary said:

"We can go to lunch if you want but I'm not paying for everyone. All the fuckers can pay for themselves." (CB 35[84])

403 Natalie says she felt hurt because she thought Mary considered her to be one of the "fuckers": CB 35[81]–[84]; T 69.

404 Mary accepts there was some discussion but says that she did not swear rather, she said:

"Everybody can pay for themselves": CB 167[65.29]

405 In September 2020, in the week prior to the family attending the church service to commemorate forty days following the deceased's death, Kathy likewise says she had a phone conversation with Mary in relation to the proposed lunch says that Mary said, "all the fuckers can pay for themselves": CB 53[116].

406 Further, following the deceased's death, Natalie says that her phone calls with Mary became less frequent and when she did speak with Mary, she had the impression that Mary wanted to get rid of her quickly. In this regard, she cites an occasion in October 2020 regarding a celebration of Kathy's birthday at a restaurant near Silverdale: CB 35[87].

2021

407 On 14 January 2021, Kathy and Zoey visited Mary at the Guildford house.

408 Kathy commented upon two wedding portraits of the deceased and Dido, and Kathy says Mary told her "I will bequeath them to you": CB 54[118].

409 Kathy says that at this visit Mary said that Natalie and she would receive a piece of jewellery from the deceased and Kathy mentioned a particular ring that she would like being the ring that the deceased let her wear at her 93rd birthday: CB 54[119]. There was also discussion about other items of jewellery including a necklace and other personal items: CB 54[120]–[121].

410 On 16 March 2021, Mary called Kathy and Kathy initiated a phone conversation about the Will as follows:

“Kathy: I hope I don't upset you, but can I ask if Baba's Will has been read yet?”

Mary: Yes it has.

Kathy: Can I ask what was in the Will?”

Mary: 100% to me I'm the sole beneficiary of Baba's estate.

Kathy: Was Dad's side mentioned in the Will?

Mary responded words to the effect:

Mary: No. Baba helped your Dad with bills when he was sick before he died and left him jewellery which your Mother has. Ask your Mother. Baba asked me to give Zoey some money from her, like she did Tom and Alex.” (CB 54[123])

411 Kathy said Mary continued to explain that probate had been granted and said:

“Mary: If I was to pre-decease Baba the Will stated 40% to Stan, 20% to Natalie. 20% to Kathy and 20% to Alise.” (CB 55[124])

412 Although Kathy says the conversation ended amicably Kathy was bothered by the conversation: CB 55[125], [131].

413 On 16 March 2021, following the above, Natalie refers to a phone conversation in which Kathy telephoned her informing her of the conversation she had had with Mary about the deceased's Will: CB 36[89].

414 Mary says this phone call occurred (CB 171[66.19]) but disputed the final part denying that she said:

“No. Baba helped your Dad with bills when he was sick before he died and left him jewellery which your Mother has. Ask your Mother. Baba asked me to give Zoey some money from her, like she did Tom and Alex.”.

415 Kathy made a further handwritten note of the aspect of the conversation which related to the terms of the Will and the conversation. The note was made on the same document as the prior note on 30 May 2019 but as an addition on the lower half of that document (CB 272) as follows:

"16.3.21 - 100% to Mary

- Baba helped dad's bills when he was sick. And left him jewellery which mum has.
- Baba asked Mary to gift Zoey some \$ from Baba, like she did Tom & Al
→ ?? \$2,000 - \$5,000 each." (CB 272)

416 On 21 March 2021, in the above context, Kathy initiated another conversation with me with Mary (CB 55[132]).

417 The conversation was as follows:

"Kathy: As immediate family, why were we not invited to the reading of Baba's Will and offered an explanation of its terms?"

Mary: You didn't need to be.

Kathy: Why was Dad's side of the family completely omitted from the Will?"

Mary: Baba and I talked about this Natalie and you are both set up with everything.

Kathy Can I ask if you have left anything to Natalie and me in your own Will?"

Mary: No. We're leaving everything to our own kids ...

Kathy: Do you recall the conversation Baba and you had with Natalie when Baba offered her \$50,000 early inheritance to buy her own house?"

Mary: Nat didn't want it.

Mary: Baba wanted Zoey to have a piece of jewellery to remember her by.

Kathy: I'm not OK with this. You can change this.

Mary: No, I don't need to. Stan is surprised you didn't ask about the Will sooner Only you've had the balls to ask.

Kathy: I'm not OK with this. Does this sit it fine with you?"

Mary: It sits fine with me.

Kathy: You're really OK with everything?"

Mary: I'm fine with everything.

Kathy: I can't believe this; I'm not OK with this."

Mary: It sounds like you're going to contest the Will." (CB 56[133])

418 The reference to Mary stating we are leaving everything to our own kids was raised in the cross-examination of Kathy. This was a reference to Mary having Alise and Stan having his own child (Troy).

419 Kathy says she did not respond to the above statement and was unable to ask any more questions to Mary about the Will or for further explanation. As Mary said:

“I can see you're getting upset and I'm getting upset. I'm hanging up now.” (CB 56[134])

420 Kathy says that Mary hung up the phone on her for the very first time, she was shocked and surprised and felt very hurt: CB 56–57[134].

421 Kathy says she kept repeating "are you OK with this" and each time Mary replied "I'm OK with everything": CB 57[135].

422 Towards the end of the conversation Kathy asked Mary for a copy of the deceased's Will: CB 57[136]. Mary took a photo of the 2010 Will and sent it to Kathy on her mobile phone: CB 311.

423 Kathy made a note of the discussion (CB 310):

“21.3.21

\$50,000

→ Nat didn't want it

- Jewellery → Zoey

→ “sits c̄ Mary
fine”

- POA → Me”

424 On the other side of the note there is the following annotation:

“> Nat

- Kath

- “you are set up
c̄ every thing.”

- Mary's will = her
kids, not us

→ D[word unclear possibly Dementia]

→ Mary To all their
kids

”

425 Kathy says that she was shocked by Mary's revelation that she and Natalie would not be receiving any inheritance from the deceased estate and felt hurt, upset and angry with Mary. She says Mary said to her:

"You are both set up with everything".

426 Kathy comments that the deceased had always been "fair", had said her love for her two children was "equal" and her love for Natalie and Kathy was "equal": CB 57[143].

427 Mary acknowledges that there was such a telephone conversation but asserts the conversation was as follows (CB 167[65.30]; 171[66.20]):

"Kathy: I am going to ask you some questions that you are not going to like.

[Mary said "Go ahead"].

Kathy: Why weren't we invited to the reading of Baba's will?

Mary: The reason you weren't invited was because you didn't have to be there as Baba left everything to me. Had I died Baba's estate would have been split 40% to Stan, 20% to Nat, 20% to Kathy and 20% to Alise."

428 Mary says Kathy then became very aggressive and proceeded to question her about her father's legacy over and over again and she said to Kathy:

"Mary: Stan and I helped Myron when he was sick, paid some bills, gave him money and Mum gave Myron jewellery and paid for his wake." (CB 167[65.30])

429 Mary asserts that Kathy upset her during this phone call accusing her of fracturing the family relationship. Regrettably, they have not spoken since: CB 167[65.30].

430 On 21 March 2021, following the above Kathy telephoned Natalie about the conversation she had had with Mary.

431 Kathy told Natalie:

"I raised Baba 's offer of early inheritance money with Mary. She didn't deny it. She said 'Nat didn't want the money'." (CB 32[58a])

432 Natalie asserts that Mary's statement as above recorded is not true and rather she said that she would wait for her inheritance at the appropriate time: CB 32[58b].

Olga and the promises

433 Olga was cross-examined regarding the likelihood of promises being made.

434 Olga indicates that Mary told her of a cousin George who always wanted to know his share of his inheritance and that the deceased and Mary both said they were "disgusted" with this. Mary saying:

"This won't happen in our family as Bubba will look after the girls.": CB 66[39].

435 In about 2006, after Natalie had separated from Taras, Natalie told Olga "Baba is giving me \$50,000 to help me buy the house in Gladesville". However, seemingly a bit later, Natalie told her "I am not buying this house. I will wait for Kathy to get her share of her money from Baba". Olga said, "Take it now as you don't know what will happen in the future". Natalie replied, "Baba will look after us": CB 67[45].

436 Olga was cross-examined regarding her evidence that either the deceased or Mary said that "Baba (or I) would look after the girls": CB 66[40c].

437 She said that actually they both used to say that: T 82.

438 Olga accepted that the deceased did not talk about the \$50,000 to the deceased: T83. However, she emphasised the deceased acknowledged she would give the plaintiffs something basing this on a notion of fairness:

"A. Well, wills came, conversations about wills came up later, and she always acknowledged that she would give the girls a something, for sure the 50,000. She didn't discriminate between her children. She had two children, a son and a daughter. She built a house with her husband for her son and her daughter. They were refugees and everything was equal.

Q. So, that's your view, is it? Your view is that she should have left her estate equally to Mary and Miron's family?

A. Absolutely. She used to talk about things like that, that was her whole existence, being equal, being fair, always. That's how I was brought up with, I've known her, I knew her for over 50 years. Never had a fight with her, never had a harsh word. Never knew this was coming. We have no idea where this came from."

Findings regarding the general inheritance promises and the \$50,000 promises

439 It was common ground that the deceased kept her promises and was never one to make promises unless she could keep them: CB 31[57g], T60 (Natalie); CB 164[65.15], 175[68.5] (Mary); T 82, 83 (Olga).

Disputes regarding the general inheritance promises

440 There is differing evidence from the parties regarding the general inheritance promises.

441 Mary disputes that the deceased made general inheritance promises. However, there is no direct conflict on the evidence of actual conversations in which each of Natalie and Kathy on the one hand and Mary on the other hand were present in which it is said the deceased made the general inheritance promises.

442 Rather, as noted above, Mary said there was limited opportunity for such promises to be made and says that she was never present when any such promises were made.

443 At least in relation to the general inheritance promises in that sense they need to be assessed on the basis of Natalie's and Kathy's recollections.

444 Mr Morrissey reminded me of the need for caution in relation to uncorroborated statements attributed to a deceased person.

445 In *Ashton v Pratt (No. 2)* [2012] NSWSC 3 Brereton J (as his Honour then was) said at [18]:

“In the case of a claim against a deceased estate founded on the oral utterances of the deceased, which only the deceased could have denied, the Court scrutinises the claimant's evidence closely [*Plunkett v Ball* (1915) 19 CLR 544, 548-549 (Isaacs J); *Bovaird v Frost* [2009] NSWSC 337, [45]; *Varma v Varma* [2010] NSWSC 786, [418]-[422]], and although there is no absolute legal requirement for it, ordinarily looks for some corroboration [*Re Hodgson* (1886) 31 Ch D 177; *Weeks v Hrubala* [2008] NSWSC 162, [20] (Young CJ in Eq)].”

446 In this case the main 2002 conversations occurred 20 years ago. One of the critical aspects of making assessments of the evidence of Natalie's and Kathy's recollections is that even though they have given evidence of the words they say that the deceased used, and have referred to part of the context below, the Court, as often happens in such cases has only a partial picture of the context.

447 I am, as indicated below, prepared to accept that some generalised comments were made by the deceased regarding testamentary provision for the plaintiffs.

448 However even on the plaintiffs' versions the generalised comments were vague and the reasons I refer to below I do not regard them as being enforceable.

Disputes regarding the \$50,000 promises

449 There was a dispute between the parties regarding the evidence of the \$50,000 promises.

450 I have referred to each of Natalie's and Mary's evidence regarding the \$50,000 promises.

451 The evidence about the matter was a troubling aspect of the case.

452 Although Natalie in her initial affidavit indicated the conversations took place in 2006, as the hearing progressed it became obvious that the conversations must have taken place at least at some point prior to November 2005.

453 The conversations thus occurred almost 17 years ago.

454 The parties are essentially in agreement regarding the initial context of the matter.

455 Natalie says the deceased and Mary had heard from Olga that Natalie was short of money to potentially buy the duplex (in Gladesville) in the context of Natalie separating from Taras: CB 30[57].

456 Mary's evidence is similar, she heard that Natalie needed \$50,000 to purchase the property [duplex] in Gladesville: CB164[65.15].

457 In cross-examination, Mary indicated that it was Olga who had let her know that Natalie was looking to purchase the duplex and was \$50,000 short. Mary said (seemingly to Olga) that they would see what they could arrange between the deceased Stan and herself: T148-149. Her evidence in cross examination in that respect is consistent with her affidavit evidence.

458 The parties also agree that an approach was made at least by Mary to Natalie. In that sense Mary was the instigator of discussions.

459 The frailty of human memory is well known. In *Watson v Foxman* (1995) 49 NSWLR 315 at 319 McLelland J (as his Honour then was) said:

“[H]uman memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of

time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.”

460 However, it seems to me that each of Natalie, Mary and Kathy inevitably to some degree, with the passing of time, would not accurately remember the precise course of events.

461 On Natalie’s evidence there were two initial conversations that took place. I accept that in all likelihood there were at least a couple of phone calls.

462 The parties differ in a couple of respects.

463 First, Natalie’s version is that Mary telephoned her and she had a telephone discussion initially with Mary who then passed the telephone to the deceased: CB 30-31[57].

464 In the first conversation, Natalie says the deceased and Mary called her, indicating that they had heard from Olga that Natalie was short of money and they had a conversation. Natalie says the \$50,000 promise as an inheritance was made in the first conversation: CB 31[57c].

465 Mary in responding to the evidence denied that there had been such an offer. Her evidence essentially indicated that there was no direct phone call as between herself and the deceased to Natalie. Rather she spoke with Natalie indicated that she would “see if Baba, Stan and I can put the money together for you”. Then after discussing it with the deceased who said to her “I don’t have that sort of money”, and after discussing it with Stan, they decided they could not help Natalie and then she subsequently said to Natalie “Mum does not have that sort of money and Stan and I cannot afford to help”: CB 164[65.15]

466 There is no contemporaneous record of what the deceased said.

467 Natalie agreed that she did not take any note of the conversations: T58. She did say that she had spoken with her mother Olga immediately after. However I have reservations about the reliability of Olga’s evidence on the topic of the deceased’s testamentary promises.

- 468 The closest objective reference point for the deceased's testamentary intentions at or about mid to late 2005 is the draft of the 2006 Will which refers to a sum of \$30,000 to each of Natalie and Kathy, not a sum of \$50,000.
- 469 The draft of the Will is not conclusive evidence of what the deceased ultimately signed. But it is some evidence (though not decisive evidence) of what the deceased instructed her solicitor in 2006 of her then testamentary intentions.
- 470 The context of the matter is important to remember.
- 471 First, Natalie was going through a separation which was messy and required funds to purchase accommodation. Although it is not precisely clear, it seems that her preferred accommodation was the duplex. In any event, it is clear that she required a sum of \$50,000 to purchase the duplex as opposed to the other alternative being the Linsley Street unit.
- 472 Second, I have referred earlier to the paucity of precise evidence regarding the deceased's financial resources. However, Mary says, and I accept, that at that point of time she did speak with the deceased regarding coming up with funds to assist and indicates that between them (the deceased, Mary and Stan) they did not have readily available funds of \$50,000 in 2005.
- 473 In that context, I do think it is likely that there was an initial telephone call involving Mary who had heard from Olga that Natalie was in need of funds.
- 474 Mary has no recollection of the deceased speaking directly to Natalie about the \$50,000 sum: T149. That is also consistent with her evidence.
- 475 However, whilst Mary says that she spoke separately with Natalie about the matter, I think that it is more likely that there was (as agreed) a phone call from Mary to Natalie, but, the deceased was also present and Mary passed the phone to the deceased to say something to Natalie.
- 476 I think it is likely that in the first telephone call Mary was present with the deceased, and that there was some of initial discussion at least partly along the lines of what Natalie recalls to the effect of:

"Mary: We heard you are short of money for the house you want to buy. Don't worry, Baba wants to help".

- 477 It seems to me at that point there was likely some discussion about Natalie's precise needs and requirements.
- 478 However, I doubt Natalie's evidence that the deceased offered immediately the sum of \$50,000, I further doubt that the deceased immediately in the same statement made any description of the matter as being inheritance money at least at that point.
- 479 The context for the first phone conversation was an immediate issue with Natalie needing accommodation and in particular needing funds in order to purchase the duplex.
- 480 There was really no obvious occasion in the first phone conversation for the deceased to make a proffer of monies in respect of an inheritance. At that stage all the deceased knew was that Natalie was still to make a decision about purchasing either the duplex or the Linsley Street unit.
- 481 In the first phone conversation, I find that all that was discussed was the prospect of the deceased offering, potentially with the help of Mary and Stan, some funds to assist Natalie.
- 482 Natalie says that she telephoned the deceased that afternoon and had a conversation. Natalie says she thanked the deceased for an early offer of inheritance money but told her that she was not going ahead with a duplex and preferred to wait for "my inheritance money": CB 31[57g].
- 483 It seems to me that that is unlikely.
- 484 For the reasons I have given above I doubt there was any discussion about inheritance money at that point.
- 485 Rather, it seems to me, there was some discussion as between the deceased, Mary and Stan after the initial telephone conversation Mary and the deceased had with Natalie in which they discussed whether they could assist Natalie having spoken directly with her about her requirements.
- 486 I think it is likely, as Mary indicates, that she spoke with Natalie, most likely on the telephone, to indicate that they did not have the funds available.

487 I am not persuaded by Natalie's evidence that an inheritance offer was made in the first conversation and that in the second conversation her first statement to the deceased was to thank the deceased for the inheritance offer.

488 Rather, I find the inherent likelihood is that there was a second telephone conversation, not necessarily on the same day as the initial phone conversation on but in any event, for which Mary was not present, in which Natalie formally told the deceased (who may by then have already heard) that Natalie was not going ahead with purchasing the duplex.

489 It seems to me that in that context, the deceased, perhaps with some sense of regret that she, Mary and Stan had not been able to help to the tune of \$50,000, expressed to Natalie some desire to give funds that she had available to Natalie as an inheritance.

490 Mary was cross-examined regarding the conversation she had with Kathy. It was put to her that she said to Kathy "Nat didn't want it". Mary said she could not remember saying that: T148.

491 It seems to me highly likely that Mary did say that. However, I do not regard that as counting against Mary's credit. It must be remembered that ultimately Natalie did not need the money for the duplex because she purchased the Linsley Street unit.

492 On the above basis, it makes sense that Mary at that point did not know or hear anything about an inheritance discussion.

493 Natalie says that she shared the conversation with Olga immediately: CB 31[57h]. However, Natalie does not say that she spoke with Kathy about it.

494 Kathy on the other hand, says that in 2005, following Natalie's separation from Taras, Kathy states Natalie shared with both Kathy and Olga the conversation she said she had with the deceased and Mary: CB 49[81].

495 Kathy recounts the conversation as follows:

"Baba offered me part of my inheritance early. I was \$50,000 short on a deposit for a house. Baba offered me \$50,000 towards the cost of the house. Baba said this sum \$50,000 would come out of my inheritance.

I said no. I told Baba and Mary I wanted to receive my full inheritance at the same time as Kathy. Baba and Mary promised to honour this agreement.” (CB 49-50[82])

496 Kathy’s version indicates that Natalie had told her not only that Mary was present at the time that the deceased but that both the deceased and Mary had “promised to honour this agreement”.

497 The conversations that were said to have taken place regarding the \$50,000 are on the plaintiffs’ evidence 17 years ago.

498 I have doubt that Kathy has recalled, the above conversation from Natalie correctly in two respects.

499 First, I find there was no specific promise made by the deceased of a sum of \$50,000, as distinct from an intimation that she may give some money to Natalie as an inheritance.

500 Secondly, I seriously doubt the second part of the alleged conversation:

“I told Baba and Mary I wanted to receive my full inheritance at the same time as Kathy. Baba and Mary promised to honour this agreement.”

501 I seriously doubt and reject that Mary had made any such promise.

502 I mentioned earlier that whilst the terms of the actual 2006 Will are not known, the draft of the copy of the 2006 Will arguably bears some relevance to the \$50,000 promises issue.

503 It seems to me that in light of the second conversation which Natalie says she had with the deceased, the deceased within a period of about a year reflected on what she might be able to give Natalie and Kathy as an inheritance and in all likelihood gave instructions to Warren F Ball & Co for gifts of \$30,000 to each of Natalie and Kathy as recorded in the draft of the 2006 Will.

504 The fact that a draft will was prepared including such amount suggests that at least instructions were given for that, even if it is not known whether the Wills actually signed were in those terms.

505 Instructions for gifts of \$30,000 suggest to me that the deceased assessed what money she might have within her own resources apart from combining with Mary and Stan together amounts of \$50,000 for each of Natalie and Kathy.

506 I doubt the deceased made any promise of \$50,000 sums for each of Natalie and Kathy.

507 However, even if I am wrong about that and the deceased did make a specific reference to a particular to a sum of \$50,000 in the context of an inheritance, for the reasons that I outline below, I doubt the conversations gave rise to enforceable obligations.

Reliance

Natalie's actions - the general inheritance promises

508 In the context of the alleged general inheritance promises Natalie says that she did certain things, essentially as I understood it in reliance upon the promises she said were made. In particular, she said she:

- (a) spent more time with the deceased;
- (b) included the deceased in all family functions and celebrations;
- (c) telephoned and visited the deceased more regularly, especially when Mary was away on holidays and the deceased was alone, checking on her health and well-being and taking her out to coffee and lunch and socialising with her;
- (d) went on the trip to Cowra.

(CB 71–72[7])

509 Natalie was cross-examined regarding this.

510 It was put to her that the more time she spent with the deceased was not as a result of anything the deceased had said, but simply because she loved the deceased deeply, she was generous to Natalie and that it was the most natural thing in the world for Natalie to spend time with her: T 65.

511 Natalie indicated:

“That's partly correct, but also because of the promise that my baba gave me. We - I actually - we tried to do above and beyond, and we did not leave my baba out of anything. We had birthdays, Christmas's, every birthday, not just milestone events, every birthday, Easter, Remembrance Day, Christmas, Mother's Day, Father's Day, you name it.” (T 65.35-.39)

512 In relation to the assertion about including the deceased in family functions at least Natalie accepted that the reason for the inclusion was that she loved the deceased and not for any other reason but added:

"But also, I knew that Baba, Baba said she would look after us and she left us something and I thought that was extra special, extra special": T 66.1–3.

513 In relation to Natalie's assertion about extra contact, the cross-examination was as follows:

"Q. I put it to you that you telephoned and visited your baba whenever that was because you loved her?

A. Yes, correct." (T 66.40-42)

514 In relation to the Cowra trip the cross examination included the following:

"Q. So, you're not seriously suggesting that you were going beyond and above the call of duty by going down there to Cowra to see where--

A. No, I was, because we weren't going to go to Cowra, and then when I found out it was to do that, we decided to go." (T 67.42-45)

Natalie's actions - the \$50,000 promises

515 In relation to the alleged promise made by the deceased to offer Natalie the sum of \$50,000 "from my inheritance before she died" Natalie says as a result of the promises she took the following steps, namely she:

(a) was more appreciative of Baba. I was grateful that she would want to help me. I was overawed with gratitude and love for Baba but I did not want Baba to be financially compromised by trying to help me. I was content to wait until Baba died to receive my inheritance.

(b) continued to include Baba in all our family functions. I spent time talking to Baba. She also socialised with some of my girlfriends. After my partner, Malcolm's, 70th birthday party, some of our friends commented how knowledgeable and lovely Baba was and how her stories were so entertaining. I included Baba in my personal social interactions.

(c) made an effort to encourage Baba by celebrating her when we got together for her birthday and other social events. I helped in any way I could. For example, if we went to the club for lunch, I always helped Mary get the orders, carry the food and cutlery to the table, buy a round of drinks.

(d) tried to be generous to Baba. An example, for my 50th birthday party, I paid for everyone's food and drinks. Baba offered to help me pay for the food, but I didn't take Saba's money.

(e) continued to celebrate Baba on her birthday, Mother's Day, Christmas. I always bought her presents even though Baba insisted she didn't want or need anything. Baba was included in my family life. I also gave Baba photos of my sons from various milestone events as well.

(f) attended the remembrance day service at Pinegrove and Rookwood cemetery, a week after Ukrainian Easter. Baba always said this day was "particularly important" to her. The priest says a prayer for all our family members who are no longer with us. We especially remembered my dad on this day. We say a prayer for my dad. my Dido. my other grandparents. my cousin Vera, my Uncle's mother. It is very emotional. Later we only attended a

service at Rookwood cemetery (priest's decision). I attended this year. Mary did not." (CB 72-73[9])

- 516 Natalie was cross-examined regarding a degree of this material such as invitation to Malcolm Jones's 70th birthday: T 68.
- 517 Natalie was cross-examined regarding her indication that part of the reliance was making an effort to encourage the deceased by taking her at family functions.
- 518 The cross-examination included the following:

"Q. No, this is at 9C of paragraph page 72.

A. Yes, I was referring to that when we went and had family functions, I didn't sit there and just sat there and enjoyed, I actually participated and helped with the function, rather than just get one person to get up and do everything. So, we usually went to RSL clubs, so it wasn't like a restaurant, where you just sat there and you were served. So you'd have to get up and down, up and down, up and down.

Q. That's not such a big deal to place the order, was it? I mean that's--

A. It wasn't just the order, it was getting cake, it was taking care of all the orders, it was picking up the cutlery, it was moving tables.

Q. Are you seriously suggesting to the Court that as a result of what you say your--

A. No, I'm just saying that's what I did.

Q. Just listen to the question. You went and got up and took orders and organised cakes?

A. No, I'm not suggesting that." (T 68.28-46)

Kathy's actions - the general inheritance promises

- 519 Kathy gave evidence regarding reliance on the 2002 statements by the deceased.
- 520 She said that as a result of the promises made by the deceased she became much closer to the deceased after Myron's death, she upheld many Ukrainian traditions that the deceased and Myron had taught her, she attended the annual Remembrance Day at Rookwood and Pine Grove cemeteries where the priest blessed the graves of family members who had passed away; she took the deceased to the cemeteries if Mary was away on holidays at the time.

521 Further, she indicates that she drove the deceased to functions when needed and included her in all family functions, including birthdays, Mother's Day celebrations, Easter and Christmas: CB 76–77[6].

522 Kathy states that on more than one Remembrance Day the deceased said to her words to the effect:

“I miss your father. He was a good son. I need our family to stick together when I am gone. Katya, I need you to promise me to keep this family tradition alive when I die. Will you promise to visit Did Shymko's grave, your father's grave and my grave when I am gone?” (CB 77[6e])

Kathy's actions - the \$50,000 promises

523 In relation to the alleged promises made to Kathy and Natalie by the deceased in 2006 regarding the \$50,000 sum, Kathy similarly gave evidence of what she said was her reliance upon the promises being efforts to include the deceased in her life, joining the deceased for church services and including the deceased in family celebrations: CB 77–78[8].

524 Significantly, in respect of the reliance Kathy says she placed on the promises she indicates that her relationship with the deceased strengthened: CB 76[6b]. And in relation to the \$50,000 promise that her relationship with the deceased grew stronger: CB 78[8f].

525 Kathy was cross-examined regarding her reliance.

526 The cross-examination was as follows:

“Q. At page 76, paragraph 8(a) to 8(h), you set out what you say you did you say as a result of promises that your baba made to you. Right?”

A. Yes.

Q. Now, can you just read those to yourself quietly, please? Just to yourself, (a) to (h). Just to save time, I'm suggesting to you that you did the things that you describe there in (a) to (h) as a result of the love and affection that you had for Baba, not as a result of anything else?

A. That's incorrect.

Q. I'm putting to you that you would have done those things for Baba anyway no matter?

A. I did them because of the promises she made me.

Q. So, are you saying then that if she hadn't said the statements that you say she said, you wouldn't have done those things?

A. I would have done those things but I, I feel like my relationship strengthened because of the promises she made.” (T 118.11-.28)

Mary's response

527 Mary disputed the plaintiffs' claims of reliance.

528 For example Mary denied that Kathy gave Mum any "extra attention" when she became an adult: CB 177[69.12]. Mary asserted that Kathy attended the annual Remembrance Day for the blessing of Dido's and Myron's graves not because of some "alleged promises" the deceased made to her but because "it was customary in our religion when having lost a loved one": CB 176[69.3].

529 Mary disputed that the contact between the plaintiffs and the deceased was constant. I have referred to this above, and accept Mary's evidence.

General inheritance promises

The pleaded case

530 The pleaded case in relation to general inheritance promises is essentially as follows.

531 It is said that in 2002, following the death of Myron, the deceased represented to Kathy that she would bequeath to the plaintiffs' one-half share of her estate that she had left to Myron: CB 9[20].

532 Particulars are given of the promise that it was made by the deceased at a time when Kathy was at the Guildford home that an equal share of Myron's estate would go to the plaintiffs and that the deceased promised to "look after" the plaintiffs.

533 It is said that the deceased repeated the representation to Olga: CB 9[21].

534 It is said that in reliance upon promises the plaintiffs maintained a close relationship with the deceased, including, but not limited to taking her on outings, inviting her on holiday and including her in extended family activities, visiting her regularly and particularly when Mary was away on a holiday: CB 9[22].

535 Further, it is said that in or about early 2006 the deceased repeated her promise to provide for the plaintiffs.

536 The testamentary promise and estoppel claims are denied by Mary: CB 20[5].

Legal principles

537 Generally speaking, it is necessary to distinguish between claims framed in contract and claims framed as a form of estoppel.

538 Contractual claims essentially involve an exchange of promises.

General inheritance promises

539 The case regarding the general inheritance promises was framed in one respect as a testamentary contract. The law regarding testamentary promises was recently considered by Ward CJ in Eq (as her Honour then was) in *Moore v Aubusson* [2020] NSWSC 1466. A testamentary promise is enforceable (or otherwise) according to ordinary contractual principles and, if a claimant is successful in his or her contention, as promisee he or she receives under the contract a right to an effectual transfer of the relevant asset under the promisor's Will: at [265].

540 The plaintiffs' submissions made reference to decisions of the High Court *Horton v Jones* (1935) 53 CLR 475; [1935] HCA 7 and *Palmer v Bank of New South Wales* (1975) 133 CLR 150; [1975] HCA 51: see PWS [24]–[26].

541 *Horton v Jones* involved a case of testamentary promise framed as a contract in which it is alleged that the deceased had promised effectively that if the appellant promised to make a home for him and to look after him for the rest of his life, he would leave her his fortune. By his fortune he then described that he meant his 4/7th interest under his deceased father's Will and he also indicated he would leave her his insurance policy for £12,000: at 476, 483–484.

542 Various defences were raised to the claim including that the terms were vague and there was a lack of writing.

543 Rich and Dixon JJ, referred to the evidence and were prepared to assume that based on the evidence it was open to a jury to find that the promise was to act as the deceased's housekeeper and attendant under his reasonable and lawful directions, and that if that was its meaning it was not too vague or uncertain to afford a consideration for his promise to leave what he called his "fortune" to her: at 484.

544 The Court held that the agreement was unenforceable on the basis that there was a lack of writing sufficient to satisfy the provisions of the *Statute of Frauds* (s 54A *Conveyancing Act 1919* (NSW)).

545 Starke J noted that it has been recognised that definite proposals to leave property by Will for valuable consideration have been enforced as contracts: at 489.

546 However, his Honour considered the proposal to "leave you my fortune" was quite indefinite and until his death it was uncertain what his fortune would be, he being free to deal with his property in his lifetime and for the appellant's part she was free to serve or not serve the deceased as she thought fit, none of which his Honour regarded as being language of obligation or contract, or even any evidence of it: at 489.

547 Evatt and McTiernan JJ, considered that the evidence given by the appellant as to the arrangement which was entered into between herself and the deceased was not reasonably capable of proving a contract substantially in the terms as alleged: at 490–491.

548 Their Honours concluded that the terms of the arrangement proved were too uncertain to constitute a contract: at 492.

Estoppel - distinguishing the principles

549 The claim regarding the general inheritance promises, was seemingly alternatively pressed on the basis of estoppel.

550 I was referred to the decision of Brereton J (as his Honour then was) in *Vukic v Grbin* [2006] NSWSC 41 at [28];

“Although numerous attempts have been made to identify the various components of equitable estoppel, for present purposes, the matters which a plaintiff must establish to found an equitable estoppel may conveniently be summarised, in the present context, as follows:-

- *First*, in relation to the plaintiff's conduct: that the plaintiff acted (or abstained from acting) in reliance upon an assumption or expectation that a particular legal relationship existed or would exist between the plaintiff and the defendant, or that the plaintiff had or would acquire some interest in the defendant's property;
- *Secondly*, in relation to the defendant's conduct: that the defendant induced the plaintiff to adopt the assumption or expectation and encouraged the reliant activities of the plaintiff, or at least failed to deny the assumption or expectation

with knowledge that the plaintiff was relying on it to the plaintiff's potential detriment and that it could be fulfilled only by transfer of the defendant's property, a diminution of the defendant's rights or an increase in the defendant's obligations;

- *Thirdly*, in relation to the interest or property: that the assumption or expectation was one which the defendant could lawfully satisfy.

[See generally, *Waltons v Maher*, 428-429 (Brennan J); Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies*, (4th ed., 2002), [17-105]].”

551 The precise nature of the estoppel was not identified other than by reference to the decision of the Court of Appeal, and in particular that of Barrett JA, in *Van Dyke v Sidhu* [2013] NSWCA 198; (2013) 301 ALR 769 at [40]:

“The principles to be applied in determining the appellant's claim are not in dispute and were set out by the primary judge at [117] to [135]. As noted above, her Honour proceeded on the basis (at [135]) that the appellant had to establish the following to succeed in her estoppel claim:

- (a) the making of a clear and unequivocal promise (such that it was objectively reasonable for the appellant to interpret the promise in a particular way and to act in reliance on that interpretation);
- (b) that the respondent's promise caused the appellant reasonably to assume that a particular legal relationship existed between her and the respondent;
- (c) that the appellant acted reasonably in reliance on the promise;
- (d) that the respondent knew or intended that the appellant would act in reliance on the promise;
- (e) that the appellant's reliance on the promise was to her detriment; and
- (f) that the respondent acted unconscionably in not honouring the promise.”

552 Barrett JA in *Sidhu v Van Dyke* at [38]-[39] prior to the above passage referred to both proprietary estoppel and promissory estoppel. The reference to differing estoppel principles invites some consideration of the nature of the estoppel.

553 His Honour noted that Ward J (as her Honour then was) had drawn the principles from various authorities, including the judgment of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-429; [1988] HCA 7 in describing the requirements for establishing equitable estoppel in the following terms:

“In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or

expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

554 Traditionally proprietary estoppel has been used to refer to one or other or both of two established forms of equitable estoppel being the doctrines descended from *Dillwyn v Llewelyn* (1862) 4 De GF&J 517; 45 ER 1285 and *Ramsden v Dyson* (1866) LR 1 HL 129. In simple terms, the doctrine associated with *Dillwyn v Llewelyn* is otherwise known as estoppel by encouragement and the estoppel descended from *Ramsden v Dyson* is otherwise known as estoppel by acquiescence or standing by: see generally JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrine & Remedies* (5th ed, 2014, LexisNexis) (MGL) at page 519.

555 Promissory estoppel on the other hand is originally concerned with the exercise of rights arising from or said to arise from presently subsisting contractual (or legal) relations between the parties: MGL at page 532.

556 Proprietary estoppel enables a court to grant positive relief to a promisee by, for example, ordering a transfer of promised property by the promisor. Promissory estoppel, on the other hand, entails restraint upon enforcement of existing legal rights inconsistently with a promise: see *Van Dyke v Sidhu* (Barrett JA at [39]).

557 I understood the type of estoppel pressed by the plaintiffs was equitable estoppel in the sense of the doctrine associated with *Dillwyn v Llewelyn* i.e. estoppel by encouragement.

Reliance

558 The appeal to the High Court in *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 in particular focused upon the question of reliance.

559 The majority described one of the questions arising in the appeal as concerning the sufficiency of proof of detrimental reliance required to give rise to a sound claim for relief based on equitable estoppel: at [2].

560 The majority said in relation to reliance (at [58]):

“In point of principle, to speak of deploying a presumption of reliance in the context of equitable estoppel is to fail to recognise that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money* by dispensing with the need for consideration if a promise is to be enforceable as a contract. It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise. In *Giumelli v Giumelli*, Gleeson CJ, McHugh, Gummow and Callinan JJ approved the statement of McPherson J in *Riches v Hogben* that:

‘It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise.’ (footnotes omitted)

561 In the joint judgment their Honour's formulation is set at [84] as follows:

“If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in *Donis v Donis* are apposite:

‘[H]ere, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based.’ (footnote omitted)

562 Gageler J who agreed with the joint reasons stated at [90]–[91] as follows:

“90. Paraphrasing Dixon J in *Thompson v Palmer*, the respondent bore the onus of establishing that she believed the appellant's representations and that, on the faith of that belief, she took a course of action or inaction which would turn out to be to her detriment were the appellant to be permitted to depart from those representations. The respondent did not need to establish that the belief to which she was induced by the appellant's representations was the sole or predominant cause of the course of action or inaction she took but, in the language of Rich, Dixon and Evatt JJ in *Newbon v City Mutual Life Assurance Society Ltd*, she did need to establish that the belief was a “contributing cause”.

91. To establish that the belief to which she was induced by the appellant's representations was a contributing cause to the course of action or inaction which she took, the respondent needed to establish more than that she had

the belief and took the belief into account when she acted or refrained from acting. She needed to establish that having the belief and taking the belief into account made a difference to her taking the course of action or inaction: that she would not have so acted or refrained from acting if she did not have the belief.”

563 His Honour then stated at [93] that the question of causation is ordinarily framed in the following terms:

“The question of causation is therefore ordinarily appropriately framed, as it was implicitly framed by the primary judge in the present case, as being: ‘Despite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course (of either action or refraining from action) to that which [the party] did had the relevant assumption not been induced?’” (footnote omitted)

564 Recently in *Maxwell v Maxwell* [2022] NSWSC 1028, Ward P made reference to the comments of French CJ, Kiefel, Bell and Keane JJ in *Sidhu v Van Dyke* at [84]. In *Maxwell v Maxwell* her Honour did not accept that there had been detrimental reliance in the sense of a life changing decision in reliance upon the assumption: at [252].

565 Often the question of reliance can be difficult to factually assess.

566 Anna Lawson in her article “The things we do for love: detrimental reliance in the family home” (1996) 16 *Legal Studies* 218 at 230-231 made the following observation:

“The detrimental reliance requirement of constructive trusts and proprietary estoppel seems to cause few problems when applied to dealings between strangers. However, when the parties concerned are not strangers, but have lived together in a relationship akin to marriage, it is almost impossible to determine whether or not there was any detrimental reliance on that assurance. During the course of such relationships, the parties will inevitably change their positions in all sorts of ways and for all sorts of reasons. Allegations of detrimental reliance require judges to decide which of these changes of position would be factually disadvantageous to a claimant, should an assurance of ownership subsequently be denied, and to decide which of them were motivated by beliefs arising from that assurance. Not surprisingly, the results arrived at in the reported cases appear to be arbitrary and unrealistic.” (footnote omitted)

567 In the context of family circumstances comments or statements that are said to give rise to obligations, there is ordinarily a question regarding whether statements are intended to create legal relations.

568 Whilst historically there have been presumptions that family arrangements are not intended to give rise to legal obligations, the High Court has rejected the

utility of using the language of presumptions. Rather, there is more particular question of who bears the onus of proof: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 at [26] (per Gaudron, McHugh, Hayne and Callinan JJ).

569 In *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12 (*Ashton v Pratt* (CA)), Bathurst CJ at [140]-[142], [147] stated as follows:

“140 However, it is unnecessary to resolve these issues as to my mind Ms Ashton has failed to establish that she suffered detriment as a result of Mr Pratt resiling from his promise such as to give rise to the relief claimed. The detriment said to have been suffered in the present case was that Ms Ashton became Mr Pratt’s mistress and did not return to the escort business.

141 The relevant detriment is that which the party asserting the estoppel would suffer, as a result of her original change of position, if the assumption which induced it was repudiated by the party estopped: *Delaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at [42], *Grundt v The Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674–675 and *Sidhu* at [81].

142 What now appears clear is that there is no need to mould any remedy in the case of equitable estoppel to reflect the minimum relief necessary to remove the detriment: *Giumelli* at [48], *Delaforce* at [56]–[57] and *Sidhu* at [85]. Prima facie the courts should enforce a reasonable expectation which the party bound created or encouraged. However, relief will be limited where the enforcement of a plaintiff’s expectation would be out of all proportion to the detriment: *Delaforce* at [62] and *Sidhu* at [85]. This is because in those circumstances good conscience does not require the promisor be held to his or her promise.

...

147 As was stated by Gageler J in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 88 ALJR 552 at [150] the detriment or harm required to ground an estoppel can be any material disadvantage. Such material disadvantage must be substantial, although it need not be quantifiable in the same way as an order of damages. In the present case Ms Ashton suffered no material disadvantage, certainly not one which could be described as substantial.”

570 McColl JA at [222] and Meagher JA at [223] agreed with Bathurst CJ.

571 Meagher JA stated that the question of any intention to create legal relations turns on whether in the circumstances the participants (by what they said and did) conveyed such an intention in the sense that reasonable persons in their position would have understood that to have been intended: Meagher JA at [224] citing *Ermogenous* and also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35.

572 However, the fact that at no stage in a conversation anything is said by one party that conveys to the other that what is being promised is to be legally enforceable is not determinative of the matter: Meagher JA at [225] citing *Placer Development Ltd v Commonwealth of Australia* (1969) 121 CLR 353 at 367; [1969] HCA 29 per Windeyer J.

573 I will firstly address the plaintiffs' case in terms of contract and then, alternatively on the basis of an estoppel. As the plaintiffs' submissions placed reliance upon *Van Dyke v Sidhu*, I will in respect of estoppel proceed on the basis that the matters to be established in order for the plaintiffs to succeed are those which Ms Pringle's states, being the criteria from *Van Dyke v Sidhu* at [40].

Determination of general inheritance promises claim - testamentary contract

Submissions

574 The plaintiffs' submissions in relation to the general inheritance promises, frame the claim in part in contract in the context of the deceased making promises to the plaintiffs on which they relied on in response to which they engaged with the deceased: Plaintiffs Written Submission 28 July 2022 (**PWS**) at [22].

575 The PWS accepted that in some respects the promised "I'll look after the girls", "I'll leave you something in my will" were "somewhat vague": PWS[22].

576 In submissions in relation to the general inheritance promises, Ms Pringle submitted that the deceased's promises to them were relied upon by the plaintiffs, and "in response to those promises, they engaged more fully with the deceased than might have otherwise been expected of adult grandchildren with other responsibilities": T199.

577 During closing submissions, I raised in submissions with Ms Pringle a question regarding how the claim was framed, in particular whether it was framed as contract or in estoppel. As I understood the responses, the general inheritance promises case was based essentially in contract: T202-203.

578 Mr Morrissey submitted that the 2002 "representations" (using a neutral term) were not promises and no more than a present expectation or prediction and

that in any event, there was an inherent vagueness about the statements: T 213, 219.

Discussion and determination

579 It was suggested to Natalie in cross-examination that her memory of what was said may not be correct, not because she was being dishonest, but because of the simple frailties of human memory.

580 Natalie gave evidence that she had not made a record of the conversation and that the first time that she came to record it was in the period prior to the commencement of these proceedings in 2021: T 50–51.

581 Natalie gave reasons for indicating why her recounting of the promises was "as accurate as I can remember": T 52.24.

582 In particular, she referred to the fact that there were other conversations and that the memory was a raw one:

“Q. I suggest to you that your memory of what was said may not be correct, not because you were being dishonest but because of the simple frailties of human memory that you didn't have a record of it, you didn't keep a record of it and you're recounting a conversation 19, almost 20 years after the date of the conversation?”

A. 'Cause it wasn't the only conversation. I had conversations when, you know, Baba would come over about her looking after us and you know, us sticking together. So--

Q. That's not what I'm getting at. I'm just suggesting to you in fairness to you as I must do that that your record - because this is evidence here.

A. Yes.

Q. Your record may not be accurate simply because you're relying upon a memory of a conversation that took place almost 20 years before it took place or after it took place?

A. Well, it was, it was raw because it was after my father died.” (T 51.40-52.6)

583 In relation to the alleged general inheritance promises, I accept Natalie's evidence that conversations were broadly to the effect that she alleges took place.

584 However, accepting the conversations took place, does not establish that the conversations give rise to the relief claimed that the deceased's estate is bound to make provision for the plaintiffs in an amount equal to one half of the net distributable estate.

585 I have the impression that perhaps even subconsciously there has been a degree of overreach in Natalie's assessment of what occurred in her conversation with the deceased after Myron's death regarding the alleged general inheritance promises and that statements of well-wishing support have been reconstructed into promises.

Vague terms

586 First, the promises asserted by Natalie (CB 29[43]–[46]) are vague in their terms.

587 This appears to have been acknowledged by Ms Pringle who made submissions as follows (PWS[22]):

"In relation to the general inheritance promises, it is submitted for the plaintiffs that the deceased made promises to the plaintiffs on which they relied and in response to which they engaged with the deceased. In some respects, the promises may seem somewhat vague - "I'll look after the girls", "I'll leave you something in my will", but in other respects they are quite specific - "you can have \$50,000 now or have it as part of your inheritance when I die". The defendant admits a conversation was held in which the offer was made, however she casts the conversation in a completely different light. 6 The deceased also promised the plaintiffs certain jewellery, which the defendant denies."

588 The above submission recognises the difference between the general inheritance promises and the \$50,000 promises.

589 In respect of the general inheritance promises, there is an inherent vagueness in what was promised.

590 I raised in submissions with Ms Pringle the fact that there is a real difficulty in understanding the content, amount or quantum of the promise: T199-200.

591 Ms Pringle indicated that in the context of the premature death of Myron the expectation is that "Myron's half share would be preserved": T200.

592 I indicated that begged the question as to what evidence there was that Myron had a half share: T200.

593 There was discussion about this in submissions. Ultimately (as I understood it) Ms Pringle accepted that the only actual evidence was what might be inferred from representations about equality: T201.

- 594 I have set out the evidence regarding the discussions in 2002 and the discussions pleaded to have occurred in 2006. It appeared ultimately by the end of the hearing that the timing for the discussions said to have taken place in 2006 were more likely to have occurred in 2005: T203.
- 595 In any event it is necessary to deal with the discussion separately, as that is how the case is essentially framed, and also there are different juristic bases for pressing the claims.
- 596 On Natalie's evidence there is a distinct lack of clarity regarding what was promised.
- 597 In particular, the statements made by the deceased to Natalie on her first visit to the deceased after her father died, seemingly being on occasion, either in late January 2002, or February 2000 lack clarity.
- 598 The particular statements in paragraphs 43–46 of Natalie's affidavit: (CB 29) give no precision of content as to what was being proposed.
- 599 The statement in paragraph 43 of the affidavit is a statement by the deceased to Natalie.
- 600 The statements in paragraphs 44–46 are each statements that were said to be made by the deceased to Olga which have been reported to Natalie.
- 601 In *Horton v Jones*, the majority of the High Court found the statements that were made were too vague or uncertain to give rise to any contract.
- 602 Rich and Dixon JJ found the statements were not too vague or uncertain. However, that was in a context in which there was some description by the deceased of what he meant by his fortune: at 483.
- 603 Here there is no such description of what the deceased meant.
- 604 Kathy's version of what was said to her in 2002 after the father died and she visited the deceased contains on one view of gives a degree more particularity, namely (CB 49[77]):

"When I am gone I promise I will pass on your father's share of inheritance to you and the Natalka. I will look after you girls".

605 Ms Pringle submitted that the expectation was that Myron's half share would be preserved: T 200.

606 Whilst it is understandable why this submission was made insofar as it seeks to pick up on the language used, a difficulty with the submission is that it begs the question of what was "your father's share of inheritance" and also begs the question of why there was some expectation that it would be half share: T 200.

607 The statement made to Kathy does not refer to equality.

608 Statements made by the deceased to Olga that "everyone is treated equally" begs the question as to who is "everyone".

609 The deceased made a number of Wills.

610 There is no evidence regarding the content of the 1977 Will, the 2002 Will, and no agreed position nor evidence of the final form of the 2006 Will.

611 The 2010 Will was executed by the deceased, but its provisions hardly prove or demonstrate an intent of equality.

612 The Will provides for the whole of the deceased's estate to go to Mary. The gift over provision includes a number of beneficiaries not merely Natalie and Kathy, but also Stan and Alise. Even that gift over provision does not provide for equality between those persons but provides for 40% to be given to Stan with Natalie, Kathy and Alise receiving 20% each.

613 Whatever Natalie and Kathy assumed about a half share inheritance, simply does not appear to be objectively supported by the actual statements by the deceased, which as I understood it Ms Pringle accepted in submissions: T 202. Nor, is it supported by any evidence establishing in any quantitative way what was Myron's potential share of the deceased's estate.

614 Secondly, the conversations took place in a context fairly immediately after Myron had died.

615 Both in Natalie's evidence in chief and in cross-examination she accepted that the deceased was upset and grieving and that the conversation was "raw" because it was after the death of her father: T 52.

- 616 Further, there is a real doubt in my mind as to whether what was said was ever intended to be some legally binding promise between family members, as distinct from an expression of spontaneous goodwill from a mother in grief at the loss of her child.
- 617 There is a serious issue as to whether such a conversation is intended to give rise to legal relations.
- 618 As Slattery J has noted, the High Court no longer frames such questions in terms of presumptions. It is no longer presumed that in domestic transactions the parties do not intend to create legal relations. Rather, the modern approach is that the plaintiff has the onus of proving that there was an intention to create legal relations: *Steiner v Strang* [2016] NSWSC 395 at [117] citing *Ermogenous v Greek Orthodox Community of SA Inc* at [105]-[106] (Gaudron, McHugh, Hayne and Callinan JJ).
- 619 The deceased was never the same after Myron died and very soon after, saw a doctor and was on antidepressants: T 50–51.

No exchange of promises

- 620 Thirdly, accepting for the moment that the general inheritance promises were made by the deceased to Natalie and Kathy and Olga, there was no form of exchange of promises such as would give rise to a contract.
- 621 This judgment is not the occasion for analysing contractual theory.
- 622 Nonetheless, it suffices to note that a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 (*Integrated Computer Services*) at 11,117 per McHugh JA (as his Honour then was) citing *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523.
- 623 McHugh JA (at 11,117) commented, in the context of commercial arrangements:

“It is often difficult to fit a commercial arrangement into the common lawyers’ analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of “offer”, “acceptance”, “consideration” and “intention to create a legal relationship” which are the benchmarks of the

contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship : compare P S Atiyah, "Contracts, Promises and the Law of Obligations", *Law Quarterly Review*, vol 94, 1978, p 194".

624 Those comments in my opinion are particularly apt in the context of asserted family arrangements.

625 In the context of the commercial arrangements in *Integrated Computer Services* the question was posed as to whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. However, McHugh JA noted that the conduct of the parties must be capable of proving all the essential elements of an express contract: cf *Baltimore and Ohio RR Co v US* 261 US 592 (1923); *Fincke v US* 675 F 2d 289 (1982): *Integrated Computer Services* at 11,117.

626 In *Horton v Jones* there was a request which was made. Here, even accepting caution about viewing discussions in rigid contractual theory, there was on any view of it nothing approaching language of offer and acceptance or request and promise.

Determination of general inheritance promises – estoppel claim

627 In so far as the claim in relation to the general inheritance promises was pressed as being based on estoppel, I address this below.

Clear and unequivocal promise

628 For the reasons that I have given in relation to the contractual claim, I am not satisfied that there was a clear and unequivocal promise to support an estoppel.

629 In relation to the statement to Natalie (CB 29[43]) that the deceased would look after her I am not satisfied that it was a promise or sufficiently certain to give rise to a basis for estoppel.

630 In relation to the statements that Natalie says that the deceased made to her mother (CB 29[44]–[46]) even with the slightly different terminology of fairness and equality, I am not satisfied that they were such clear and unequivocal promises that it was reasonable objectively for Natalie either directly from the

deceased, or via Olga from the deceased to interpret the statements as promises to be relied upon.

631 In relation to the 2002 statement made to Kathy (CB 49[77]) regarding her father's share of inheritance, whilst I can accept that such a statement starts to edge closer towards a threshold of clarity, I am not satisfied that it was sufficiently clear and unequivocal that it was objectively reasonable for Kathy to interpret it as promising one half of the deceased's ultimate estate and to act in reliance on that interpretation.

Assumption of a particular relationship

632 As to the second criteria, it was not articulated what assumption of a particular legal relationship was assumed by Natalie and Kathy. At best the only relationship that they could conceivably assume was that of beneficiary in the context of a testatrix making a Will.

Reasonable reliance

633 Ultimately reliance is a question of fact.

634 I have outlined the evidence regarding what was said to be the reliance by Natalie and Kathy in respect of the 2002 statements.

635 I confess to finding it difficult to accepting Natalie and Kathy's claims of reliance upon the 2002 statements.

636 As at January 2002, Natalie was aged 32, and Kathy was 31.

637 They had already a warm and loving relationship with the deceased.

638 There is no suggestion that either of them had done anything they had done for the deceased over the 30-year period of their lives to that point motivated in any way by the prospect of some unspecified and unquantified inheritance, whatever it might be.

639 Natalie says for her part, she was motivated to go "above and beyond" what she would otherwise have done.

640 I have a distinct sense of unease regarding her assertions in that regard.

641 Mr Morrissey suggested to her that she was motivated out of love.

642 Whilst I do not suggest that Natalie was deliberately lying or giving any false evidence, the sense I have is that Natalie after the deceased's death and becoming aware of the terms of the deceased's Will has subconsciously reconstructed her involvement with the deceased into an analysis of reliance.

643 I have the same impression in relation to Kathy.

Knowledge of intended reliance

644 If I be incorrect regarding reasonableness of reliance, it is far from clear to me that the deceased knew or intended that Natalie and Kathy would act in a particular way that they allege in purported reliance upon her statements.

645 In part this aspect of the criteria is answered by the first criteria regarding the nature or character of the promise.

646 If one poses the question as to whether the deceased knew or intended that Natalie and Kathy would somehow increase their involvement with the deceased as a result of statements about looking after them I seriously doubt, and do not find, that the deceased knew or intended any such action.

647 The comments in my view were never intended to be legally binding or to call for action by Natalie and Kathy to increase their involvement with the deceased based upon some form of future testamentary reward.

648 The comments in my view, were simply an expression of goodwill and grace. The comments did not in my view, reasonably call for action and in any event, there is simply no evidence that either Natalie or Kathy ever indicated to the deceased in any way, shape or form that their interaction with the deceased as they suggest was increased because of what the deceased had said and that they would not have acted in such a way had the deceased not made the statements.

Detrimental reliance

649 I find it difficult to accept that Natalie's actions gave rise to detrimental reliance.

650 Ms Pringle submitted (T 202) that:

“the detriment is that they have done all of these things and at the end of the day, Baba has not made any provision for them of any kind”.

651 Whilst Natalie asserts that she had increased involvement with the deceased it is entirely unclear to me how that was a detriment to her.

652 She did not particularly give evidence of what she would have done but for the statements.

653 However, assume for the moment that Natalie did not spend the time that she did with the deceased, but spent it elsewhere.

654 There is simply no evidence to benchmark or otherwise assess how the alleged reliance was detrimental.

655 In my view, the position is even more stark in relation to Kathy. Kathy says that the things that she did strengthened the relationship she had with the deceased.

656 I doubt that there was any conscious acting by Kathy to do increased activity with the deceased based upon the statement of the deceased.

657 However, in any event, I cannot accept that the activity which Kathy says she did, was to her detriment. Essentially, for the same reasons as I have found in relation to Natalie's case.

658 Even if I am incorrect and that some of the things that Natalie and Kathy did can properly be regarded as being detrimental reliance, the cases make it clear that something of substance is required in this respect.

659 Here I do not accept that there had been detrimental reliance in the sense of a life changing decision in reliance upon the assumption: *Sidhu v Van Dyke* at [84] *Maxwell v Maxwell* at [252]. Nor (accepting that there is no need for quantification) do I accept that there has been for either of Natalie and Kathy a substantial material disadvantage: *Ashton v Pratt (CA)* at [147].

Unconscionable outcome

660 I do not accept that the deceased acted unconscionably in the matter, especially as I seriously doubt that the deceased knew or intended that either Natalie or Kathy would somehow increase their involvement with the deceased out of some prospect of monetary reward rather than simply out of pure relational love for the deceased.

661 Principally statements that were made by the deceased in 2002 I find were expressions of goodwill in a context in which the family were grieving the passing of Myron.

662 In my view the other general inheritance promises by the deceased were not intended to be promises or in any way binding.

\$50,000 promises – the framing of the case

663 The pleaded claim regarding the \$50,000 promises appears in the statement of claim under a heading of “testamentary promise”: CB9[20].

664 The claim is that the deceased offered to give Natalie \$50,000 as an advance on her inheritance in a context where Natalie's marriage had ended in 2005, she divorced in 2006, the matrimonial home was sold and Natalie wished to purchase a dwelling in Gladesville: CB 9[24].

665 Other particulars given are that Natalie elected to receive her inheritance at the same time as Kathy following the death of the deceased: CB 10[24g].

666 It is said that in reliance upon the promises the plaintiffs continued to maintain a close relationship with the deceased, included her in extended family activities, invited her to accompany them on holidays, visited her regularly and particularly when Mary was away on holiday: CB 10[25].

667 A virtually similar pleading is repeated in the statement of claim under the heading estoppel: CB 10[26].

668 Because the pleading deals with the \$50,000 promises in two ways, firstly in the heading of testamentary promises and secondly under the heading of estoppel, I have understood that as pleaded the case regarding the \$50,000 promises were pressed alternatively as first a testamentary contract, and second in estoppel.

669 I have referred above to the fact that during closing submissions in asking how the claims were framed. As I understood it, the \$50,000 promises case was based in estoppel: T202-203.

670 Nonetheless, in light of the pleading, I will briefly address a testamentary contract case and then address an estoppel case.

Determination of the \$50,000 promises claim - testamentary contract

671 In the PWS it is said that the \$50,000 promises are quite specific "you can have \$50,000 now or have it as part of your inheritance when I die". It is said that Mary admits that a conversation was held in which the offer was made, but she casts a conversation in a completely different light: PWS [22].

672 I have already dealt with the evidence regarding the \$50,000 promises. The reasons I have given I doubt that there was any express promise by the deceased of a sum of \$50,000, as distinct from an intimation that she may give her some money to Natalie as an inheritance.

673 However, even if I am incorrect on that and the deceased did mention to Natalie a sum of \$50,000 as an inheritance, there was no form of exchange of promises such as would give rise to a contract.

Determination of the \$50,000 promises claim - estoppel

674 I will proceed on the basis that the matters to be established in order for the plaintiffs to succeed in an estoppel claim are those which Ms Pringle states, I should have regard to namely the criteria from *Van Dyke v Sidhu* at [40].

Clear and unequivocal promise

675 For the reasons that I have given above I do not accept that the deceased promised a sum of \$50,000.

676 However, even if I am incorrect regarding that, I address the other criteria.

Assumption of particular relationship

677 It is unclear what particular relationship Natalie assumed existed as a result of the statements, although it could only conceivably be a relationship of donor or donee in the context of an inter vivos gift, or possibly beneficiary in respect of a testamentary gift.

Reasonable reliance

678 Natalie's case is that there was a promise of \$50,000 as a testamentary inheritance.

679 I have rejected that. However, if contrary to that such a statement was made, it is necessary to see what Natalie says she did based on the promise.

680 I find it difficult to accept the assertion that Natalie acted differently as a result of the statement.

681 When one compares Natalie's alleged reliance regarding the \$50,000 offer with her statements regarding her actions said to be in reliance upon the 2002 statements, there is a large degree of crossover, and it is hard to glean what if any additional thing Natalie did.

682 The only particular thing that seems somewhat separate, is Natalie referring to attendance at the Remembrance Day service at Pine Grove and Rookwood Cemetery: CB 73[9(f)].

683 It was asserted that that was a form of reliance. I reject that assertion.

684 In Kathy's case, there was no statement made directly by the deceased to Kathy.

685 Kathy in her affidavit asserts reliance based on what it Natalie told her.

686 Kathy in her first discussions with Mary after the death of the deceased and upon learning of the content of the deceased's will did not assert to Mary that either or both of the deceased and Mary had made any binding promise to give her or Natalie \$50,000.

687 Nor does Kathy assert to Mary that she acted in any way in reliance upon such promise.

688 True it is, that Kathy in discussions with Mary in March 2021 had a growing sense of disappointment that provision was not made for herself and Natalie. But Kathy did not assert any action by herself or detrimental reliance by herself or Natalie as the basis for her disappointment.

689 It seems to me that both Natalie and Kathy after the death of the deceased had a growing sense of disappointment with the terms of the 2010 and have taken general supportive comments made by the deceased and subconsciously elevated the remarks and their supposed reliance upon them to a level beyond what was properly conveyed by the deceased.

690 If Natalie had actually exchanged contracts on the duplex, in reliance upon a statement that the deceased would (with or without assistance from Mary and

Stan) contribute \$50,000 to that purchase, then if Natalie required the \$50,000 in order to be able to complete the purchase that would arguably be a form of detrimental reliance.

691 However, that is not this case.

692 The case is that Natalie and Kathy “relied” upon a promise of \$50,000 as an inheritance. I have rejected that.

Knowledge or intention of reliance

693 I do not accept that what was conveyed by the deceased to Natalie was intended by the deceased or could reasonably be regarded as being intended by the deceased to be relied upon by Natalie.

694 It seems to me that Kathy’s claim in relation to the \$50,000 offer is even more tenuous than that of Natalie.

695 Fundamentally, there is no evidence that the deceased was made aware that Kathy had been informed of the \$50,000 offer to Natalie, nor is there evidence that the deceased was aware that Kathy was acting upon it in some unspecified way.

Detrimental reliance

696 I do not accept that Natalie's alleged reliance upon the \$50,000 offer was to her detriment.

697 The only material additional thing that Natalie appears to have done different from her alleged reliance upon the 2002 statements was to attend Remembrance Day services.

698 I noted in relation to Kathy’s case the main difference between what she said she did in relation to the general inheritance promises and the \$50,000 promises was to join the deceased for church services. Ms Pringle indicated that there was also contact and transport (T 204). However, as I observed in submissions, the contact in the sense was already. In any event, there was no sufficient evidence to suggest in any meaningful way what level of contact and transport occurred beyond what Kathy would otherwise have done.

699 I do not accept in the case of either Natalie or Kathy, that there was detrimental reliance.

700 Even if I am incorrect in respect of that, and there has been some detrimental reliance, it does not seem to me that it is of sufficient substance that it can qualify as being the sort of detrimental reliance to ground an estoppel: *Sidhu v Van Dyke* at [84] *Maxwell v Maxwell* at [252]; *Ashton v Pratt (CA)* at [147].

Unconscionable outcome

701 I do not accept the deceased acted unconscionably in not providing the \$50,000.

Undue influence

The claim

702 The relief sought by the plaintiffs in their statement of claim included relief that the 2010 Will (and any Wills made between January 2002 and 23 March 2010) be set aside for undue influence.

703 I raised at the commencement of the hearing, whether that relief was still being sought and Ms Pringle indicated that she was instructed that it was still an issue "at large in the matter" although noting that "there isn't actually a revocation of the grant of probate, that should go with that, that's sought": T2.

704 On the final day of the hearing in submissions I raised for consideration my impression that there was no case to set aside the 2010 Will on the basis of undue influence.

705 Ms Pringle, initially pointed to the fact that the deceased was dependent upon the defendant, that she did not wish to be put into a nursing home and remained dependent upon Mary's good graces: T205. Further, she pointed to the fact that Mary had made the appointment for the deceased, had accompanied the deceased to the solicitor's office but also accompanied her into the conference with the solicitor: T205.

Legal principles

706 The law regarding undue influence in probate has been recently referred to and summarised by Hallen J in *Blendell v Byrne* [2019] NSWSC 583 at [450]-[461].

707 The law is clear that for probate purposes must be actual coercion. Coercion is pressure that overpowers the volition of the deceased. However, in any given case, the degree of coercion required may differ as was explained in *Winter v Crichton* (1991) 23 NSWLR 116 at 122. In gross cases, it may amount to some form of actual confinement or violence, or in other cases where the deceased is very weak and enfeebled a mere talking to the deceased in such a circumstance might (obviously depending on the facts) be enough to so fatigue the brain that the deceased may be induced for quietness sake to do anything. Each case depends upon its facts.

708 The claim of setting aside the Will for undue influence without seeking a revocation of the actual grant of probate was a little intriguing.

709 The possibility of the operation of undue influence might have some operation in a probate context, in relation to a disposition of property without finding that the Will is invalid on the basis of probate principles relating to undue influence was alluded to by Lindsay J in *Boyce v Bunce* [2015] NSWSC 1924 at [33]–[34].

710 However, such a possibility was not argued in this case.

Making of the 2010 Will

711 Apart from the fact that the deceased had made the 2010 Will, there was little detail in the affidavit evidence in chief regarding the circumstances of the making of the 2010 Will.

712 Mary indicated that it was in the context of the deceased's surgery for a bowel resection in August 2009 and the subsequent surgery to reconnect her bowel in 2010 that the deceased many times during that period expressed how grateful she was for the support of Mary and Stan: CB 157[61].

713 In early 2010, Mary indicates that the deceased "out of the blue," said:

“Deceased: Can you make an appointment with the Solicitor. I want to make a new Will.

Mary: Why do you want to make a new Will?

Deceased: Because you and Staczek have been so supportive of me, the way you are looking after me as no other family has. I want to make sure that you benefit totally from my Will. I am still hurt that my family never once offered to help, let alone come to visit me.

Deceased: You are my daughter Mary, and you and Staczek have always been there for me. I am so grateful to you both.” (CB 158)

714 Further details of what occurred emerged in the cross-examination of Mary.

715 Mary's evidence regarding the making of the 2010 Will was essentially as follows.

716 Following a period of time (which appears to have been limited to about 8 months to a year) in which the deceased had a stoma bag inserted and Mary and Stan were helping the deceased out, the deceased expressed to Mary that she was very grateful for the assistance and asked Mary to make an appointment to see a solicitor because she wished to change her Will.

717 Mary did make an appointment with the firm Warren F Ball & Co in particular with a solicitor Jon Easton. Mary took the deceased to the solicitor's office and went into the office. Further, she went into the actual consultation with Mr Easton and was physically present with the deceased. When she gave her instructions for the 2010 Will: T 179–180.

718 Mary indicated that her mother asked her to accompany her into the room with the solicitor. Mr Easton did not suggest to her that she ought not to be in the room: T 181.

719 Mary upon further questioning could not recall whether the Will was actually done on the day the instructions were given, or whether she took her mother back on another day to have the deceased sign the Will that had been typed up or prepared: T 182.

Determination

720 Mary was asked going back to 2002 when Myron died whether she spoke with the deceased at that time about changing the Will (i.e. her Will). Mary indicated that she did not: T 178–179.

721 Mary was asked whether she suggested to the deceased that she should change her Will. Mary denied that indicating "I've never suggested that mum do anything with the will at all": T 179.

722 I accept Mary's evidence.

723 Stan indicates that the deceased never spoke to him about any of her Wills and he was not aware that the deceased had made a Will in 2006 and again in 2010. He only became aware of the contents of the 2006 Will (draft) after the plaintiffs filed their claims and was aware of the contents of the 2010 Will sometime after the deceased's passing when Mary showed him a copy of the Will: CB 201[52].

724 I accept Stan's evidence.

725 Mr Morrissey referred to the context in which the deceased had made the request following her operation in respect of the bowel resection and the care she received from Mary.

726 That is not necessarily the only consideration as to why the deceased might wish to have favoured Mary. However, it does provide a rational basis for the deceased's intentions.

727 The practice of a major beneficiary taking a deceased to a solicitor's office for the purpose of making a Will and sitting in on the giving of instructions is not ideal.

728 In some circumstances which I hasten to add, do not include this case, it might amount to a sufficient basis to give rise to this suspicious circumstances for the Will to be set aside on the basis of knowledge and approval.

729 However, here the case asserted is not lack of knowledge and approval but rather undue influence.

730 As to the allegations of undue influence Ms Pringle submitted that an inference may be derived from Mary's strenuous and repeated assertions that the deceased did nothing without her assistance and spoke to no one if she did not arrange and participate in the telephone calls, and that Mary controlled the deceased's life and her ability to socialise. It was said that this evidence tends to support the plaintiffs' claim that the 2010 Will was made under the influence of Mary: PWS [31].

731 In closing submissions Ms Pringle submitted that on Mary's own evidence that the deceased "didn't really go anywhere without her and that she managed the telephone access to her, she made the phone calls for her when she contacted

the plaintiffs, that she essentially managed the deceased's life", which meant that whilst the deceased was dependent upon her for care and supervision and physical support, the deceased "was vulnerable, certainly vulnerable to the influence of the defendant": T205.

732 I reject those submissions.

733 I doubt that sort of case has actually been pleaded: T205.

734 Further I did not really understand the cross-examination to have been of a nature that suggested that there was an undue level of control by Mary or a taking advantage by Mary of a vulnerability: T205.

735 In any event there is simply no evidence of anything approaching coercion for the making of the 2010 Will itself.

736 On any view of the facts of this case I do not consider that there is any basis for considering that 2010 Will should be set aside for undue influence.

Family provision principles

The statutory scheme

737 The power of the Court to make a family provision order is found in s 59 of the *Succession Act*. In particular, the Court may make a family provision order if it is satisfied that, adequate provision for the for the proper maintenance, education or advancement in life of the [applicant] has not been made [by either or both of the Will of the deceased or operation of the rules of intestacy]: s 59(1)(c) *Succession Act*. Section 60 identifies issues to be determined to which I refer below.

738 The Court must be so satisfied at the time that in the Court is considering the application: s 59(1)(c) *Succession Act*.

739 Significant terms used in the legislation are not defined by the *Succession Act*. Thus there are no definitions for any of the individual terms "adequate", "provision", etc which appear in s 59(1)(c): e.g. *Mallitt v Gow* [2022] NSWSC 1012 per Hallen J at [187]-[188].

740 Ultimately an understanding what is meant by the statutory provisions is a question of construction.

- 741 Individual English words have a meaning which can be defined. However, often dictionaries will show that words have many meanings. Ironically, sometimes the meanings which are assigned to words in statutory provisions may be the last meaning assigned to the word in a dictionary: e.g. *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8; [1980] HCA 16 per Mason J (as his Honour then was).
- 742 Generally speaking words are never used in isolation and they gather significance by being placed together. The same word can carry a very different meaning having regard to context.
- 743 Further, it is necessary to have regard to the purpose or object underlying the provision so as to adopt a construction which would promote that purpose or object rather than a construction which would not: *Interpretation Act 1987* (NSW), s 33.
- 744 Thus, in the *Trustee Act 1925* (NSW), in broad terms “maintenance” denotes a periodical payment whereas “advancement” denotes a definite unique outlay for a specific purpose: JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (8th ed, 2016, LexisNexis) at page 491.
- 745 However, the terms “maintenance” and “advancement” when used in family provision legislation have not been understood as being limited in the above way but have been given a broader construction.
- 746 Understanding of what is meant by these terms has historically been left to judicial explanation in what is now in NSW over a century of three principal forms of family provision legislation since 1916 (*Testator’s Family Maintenance and Guardianship of Infants Act 1916* (NSW) (TFM Act); the *Family Provision Act 1982* (NSW) (FP Act) and *Succession Act 2006* (NSW)). Naturally, understanding of these terms has been refined over the years.
- 747 As was observed by Kirby P (as his Honour then was) there is always a danger where a reformed Act borrows heavily upon ideas which previously existed in the common law or in an earlier statute, that lawyers will approach the construction of the Act affected by the previous law: *Samsley v Barnes* [1990] NSWCA 161 at 4 citing *Gamer’s Motor Centre (Newcastle) Pty Ltd v Natwest*

Wholesale Australia Pty Ltd (1985) 3 NSWLR 475 at 478. The danger arises in part from the human tendency to perceive what we expect and expect that with which we are familiar: *Samsley v Barnes* at 4.

748 His Honour specifically indicated that there is a particular danger in the case of the FP Act in construing its terms by reference to the law which developed around the TFM Act: *Samsley v Barnes* at 4.

749 Likewise, the High Court, albeit in the context of taxation legislation, has affirmed that a statute is to be construed and applied according to its terms, not under the influence of “muffled echoes of old arguments” concerning other legislation: *Commissioner of Taxation (Cth) v Spotless Services Ltd* (1996) 186 CLR 404 at 414; [1996] HCA 34. See also *Federal Commissioner of Taxation v Visy Industries USA Pty Ltd* (2012) 205 FCR 317; [2012] FCAFC 106 at [52] per Edmonds, Greenwood and Robertson JJ; *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (In Liq)* [2022] HCA 3; (2022) 399 ALR 1 at [169] per Edelman and Steward JJ.

750 However, interestingly, Courts at the highest judicial level, in construing words in successive pieces of family provision legislation, have, sometimes, done so by adopting meanings explained in earlier legislation.

751 For example, the High Court, in *Singer v Berghouse (No 2)* (1994) 181 CLR 201; [1994] HCA 40 when considering the provisions of the FP Act, stated that the difference between “adequate” and “proper” and the interrelationship which exists between “adequate provision” and “proper maintenance” etc. in the context of family provision legislation were explained by the Privy Council in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 476, a case which considered the TFM Act: *Singer v Berghouse* at 209.

752 On the other hand, Courts have at times addressed differences in successive family provision legislation.

753 The Court of Appeal in *Andrew v Andrew* (2012) 81 NSWLR 656; [2012] NSWCA 308 addressed the issue of whether the structural changes between the FP Act and Chapter 3 of the *Succession Act* meant that a two-stage approach used under the FP Act in determining whether any order should be

made in the family provision claim also applied under Chapter 3 of the Succession Act.

754 Despite the debate about the effect of the legislation in determining whether or not the Court can and should make any family provision order, judges including those that appellate level, have proceeded to apply the terms of the *Succession Act* without settling on a unanimous determination about the effect of the changes in legislation.

755 For the purposes of Chapter 3 of the *Succession Act* in determining whether any order can or should be made in the family provision claim, it has been said that the question of whether the two-stage approach applies should be of no real significance, provided that the nature of the first stage of the inquiry is not misunderstood: *Sgro v Thompson* [2017] NSWCA 326 per White JA at [68]-[69] (McColl JA at [1] and Payne JA at [4] agreeing).

756 White JA observed at [72]:

“In *Poletti v Jones* [2015] NSWCA 107 Basten JA (with whom Emmett and Leeming JJA agreed) accepted that there may be circumstances in which that approach is preferable (at [19]). However, as Allsop P said in *Andrew v Andrew* (at [6]) this may be an analytical question of little consequence.”

757 A practical way of approaching the matter of whether any order can or should be made in the family provision claim is by considering the matter by reference to issues posed by s 60 to be determined by the Court and provides categories of factors or “matters” which may be considered, namely (a) whether the applicant is an eligible person; (b) whether a family provision order should be made, and (c) the nature of any such order: *Poletti v Jones* [2015] NSWCA 107; (2015) 13 ASTLR 113 per Basten JA at [17] (Leeming JA at [94] agreeing).

758 Clearly in the case of applicants who eligibility arises by reason only of paragraph (d), (e) or (f) of the definition of “eligible person” in s 57, there is a further question as to whether, having regard to all the circumstances of the case (past or present) there are factors which warrant the making of the application: s 59(1)(b) *Succession Act*.

Section 60(2)

759 Additionally, in determining whether to make a family provision order in the nature of any such order the Court may have regard to a number of other matters in which further which in any given case may be relevant to assessment of whether adequate provision has been made.

760 As has been observed by Hallen J (e.g. *Mallitt v Gow* at [220]):

“s 60(2) enumerates 16 specific matters, described by Basten JA in *Andrew v Andrew* [2012] NSWCA 308 at [37], as “a multifactorial list”, and by Lindsay J in *Verzar v Verzar* [2012] NSWSC 1380 at [123], as “a valuable prompt” to which the Court may have regard, together with “any other matter the court considers relevant”, for the purpose of determining whether the applicant is an “eligible person”, whether a family provision order should be made, and if so, the nature of any such order”.

761 Section 60(2) further contains words or expressions left undefined by the legislation such as, “financial resources”, “financial needs”, “financial circumstances” and “support”: s 60(2)(e), (f), (l). Likewise, understanding of what is meant by these terms has been left to judicial explanation.

762 Hallen J has helpfully commented upon the operation of s 60(2) in the scheme of the legislation as follows, e.g. *Mallitt v Gow* at [222]-[224]:

[222] The section does not prioritise the catalogue of matters that may be taken into account. No matter is more, or less, important than any other. The weight of each of the matters specified in the section, which may be taken into account, will depend upon the facts of the particular case. There is no mandatory command to take into account any of the matters enumerated. None of the matters listed are, necessarily, of decisive significance and none differentiate, in their application, between classes of eligible person. Similarly, there is no distinction based on gender.

[223] The section also does not say how the matters listed are to be used to determine the matters identified in s 60(1). Considering each of the relevant matters does not prescribe a particular result, and whilst there is likely to be a substantial overlap in the matters that the Court may take into account when determining the answers to what is posed in s 60(1), those matters are not identical.

[224] A reference to some of the matters in s 60(2) not only permits, but requires, a comparison to be made between the respective positions of the applicant and any other eligible person, as well as of any beneficiary, whilst others do not. Importantly, also, many of the matters in sub-section (2), of themselves, are incapable of providing an answer to the questions posed in s 60(1)”.

763 I agree with those comments.

Eligibility

- 764 A grandchild of a deceased will be eligible to make a family provision claim if the grandchild was, at any particular time, wholly or partly dependent upon the deceased: s 57(1)(e)(i) *Succession Act*.
- 765 Mr Morrissey submitted that the plaintiffs were not dependent upon the deceased.
- 766 In particular, he submitted that the authorities are to the effect that, for there to be dependency a grandparent had to have been in a form of *loco parentis*, and he submitted that the deceased was not in a relationship of *loco parentis* to either of the plaintiffs: T 221–222.
- 767 There has been in recent years some refinement in Court of Appeal decisions bearing upon the question of dependency.
- 768 The issue is addressed in a very recent decision of the Court of Appeal in *Chisak v Presot* [2022] NSWCA 100, in the judgment of White JA, with whom Macfarlan and Gleeson JJA agreed.
- 769 The case involved various issues in respect of an estate, including claims regarding the alleged lack of testamentary capacity and lack of knowledge and approval in respect of a will.
- 770 However, the case also involved a family provision claim by the appellant in respect of her grandmother.
- 771 The appellant had deposed that in about 2000 when she was five years old she stayed with the deceased in the deceased's home for about a month and stayed with the deceased on three or four occasions between 2000 and 2003 for about three weeks up to a month. The primary judge accepted that on two or three occasions between 2000 and 2003 the appellant stayed with the deceased for short periods of time: at [14], [42].
- 772 At first instance dependency was not established.
- 773 White JA reviewed the decisions regarding dependency and rejected an approach to dependency, which in the case of a grandchild requires that the form of dependency must be of such regularity and significance that one can

say that the grandparent had clearly assumed a continuing responsibility for the grandchild's maintenance, education or advancement in life (e.g., *Simons v Permanent Trustee Co Ltd*; *Estate D Hakim* [2005] NSWSC 223 at [42]-[43]).

774 White JA considered that such an approach conflates the question of whether a grandchild is eligible by reason of dependency, wholly or in part at any particular time upon the deceased with the questions as to whether there are factors which warrant the making of the application with the question of whether adequate provision has not been made by the grandparent: at [44], [49].

775 The Court of Appeal in *Spata v Tumino* (2018) 95 NSWLR 706; [2018] NSWCA 17 rejected the notion that a restrictive meaning of dependency is to be adopted.

776 Payne JA rejected the approach of earlier decisions of Young J (as his Honour then was) in *Clinch v Swift* (Supreme Court (NSW), Young J, 13 October 1986, unrep) and *Shaw v Lambert* (Supreme Court (NSW), Young J, 9 October 1987, unrep) that where dependency is based on the provision of accommodation, that the grandchild is not directly dependent upon the grandparent, but rather dependent on the mother or father: see Payne JA at [66]–[82].

777 Macfarlan JA agreed with the judgment of Payne JA (at [1]) as did Sackville AJA at [130]–[133].

778 As was explained by Payne JA, there is significant High Court and Court of Appeal authority that being “dependent” has long been understood as being determined on the basis of the actual fact of dependence or put simply, whether there is reliance on another to fulfil a need: at [78].

779 The authorities in this regard include *Ball v Newey* (1988) 13 NSWLR 489 at 491–492.

780 The standard of support is set by the parties themselves: see *Kauri Timber Co (Tas) Pty Ltd v Reeman* (1973) 128 CLR 177 at 190; [1973] HCA 8 per Gibbs J. Hence, as was observed in *Ball v Newey* it is irrelevant that an applicant could have provided separate living accommodation out of his (or her) own

income, if that is not what he and the deceased chose to do: *Ball v Newey* at 492E.

781 Further, as White JA in *Chisak* observed at [47], the phrase "partly dependent" means at least "more than minimally" and perhaps (significantly) although not (substantially) dependence citing *McKenzie v Baddeley* [1991] NSWCA 197 at [4].

782 It has been said that the test of partial dependency can be satisfied by contributions which meet a relatively small proportion of a person's needs: see *Porthouse v Bridge* [2007] NSWSC 686 at [18] per Bryson J.

783 It is not hard to find cases in which there is seemingly little factual material, which may give rise to a finding of dependency.

784 For example, in *Williams v Legg* (Court of Appeal (NSW), 16 March 1993, unrep) in a passage not set out in the law report at 29 NSWLR 687, the Court of Appeal referred to earlier Court of Appeal authority in *Ball v Newey* (supra) and *Petrohilos v Hunter* (1991) 25 NSWLR 343 at 346 per Hope JA regarding the extent of the understanding of the concept of being dependent.

785 In *Williams v Legg* dependency was found in circumstances where some 65 years prior to the hearing of the proceedings a niece then aged 5 had lived with her aunt (the deceased) then aged 27 in a house not owned by the aunt, for a period of approximately six months. The niece in need of care received it from the deceased amongst others which care involved matters such:

"as preparing food, giving her schooling, preparing her sandwich lunch and accompanying her to school and other parental care and mothering "appropriate to an aunt aged about 27 and a niece aged about 5", reading her books, putting her to bed, comforting her when in pain, accompanying her to the dentist and to school, to swimming baths, to picnics and for play in the park" (page 14).

786 It is clear that in a family provision context provision of accommodation can, depending on the facts, give rise to sufficient basis for dependency: see e.g. *Hurst v Public Trustee* [2000] NSWSC 1109 (Master Maccready, 29 November 2000); *Pitkin v Henderson* [2001] NSWSC 207 (Master Maccready, 29 March 2001); *Maloney v Goodwin* (Supreme Court (NSW), Needham J, 1 August 1989, unrep), *Budden v The Public Trustee* (Supreme Court (NSW), Needham

J, 4 November 1986, unrep), *Clinch v Swift* (Supreme Court (NSW), Young J, 13 October 1986, unrep), *Corcoran v Bizannes* (Supreme Court (NSW), Needham J, 4 June 1985, unrep).

787 The fact that a grandchild is dependent upon a parent, does not of itself preclude a finding that the grandchild is also dependent upon a grandparent for accommodation: *Spata v Tumino* at [76].

Factors warranting

788 Mr Morrissey submitted that even if I found that the plaintiffs were eligible, I should find that there are not factors warranting the making of their applications: T 223.

789 The basis for that submission focused upon what Mr Morrissey described as a "pecking order in the scheme of merited claims" upon the deceased's estate in which he observed that "Mary is streets ahead by a long way".

790 In particular, he submitted (T 224):

"MORRISSEY: Well, if you take everything into effect, in the pecking order in the scheme of merited claims on her mother's testamentary bounty, Mary is streets ahead by a long way. She's a loyal daughter, a supportive daughter who ordinarily - one hesitates to use the words community value or community test, who most people in the pub or the café or anything would conclude should receive the whole of her mother's estate." (T224.3-8)

791 In the case of persons including grandchildren who are eligible by reason only of s 57(1)(d)–(f), the Court may only make a family provision order if it is satisfied that there are factors which warrant the making of the application: s 59(1)(b).

792 The reference to "factors which warrant the making of the application" is an essentially identical expression which appeared in the provisions of s 9(1) *Family Provision Act 1982* (NSW) (**FP Act**).

793 There have been many judgments of this Court which have considered that expression.

794 However, for the last 35 years, this Court both by judges at first instance and judges on appeal have consistently applied the consideration of that expression of McLelland J (as his Honour then was) in *Re Fulop (deceased)* (1987) 8 NSWLR 679 at 681D in which his Honour (in addressing the filtering

process which distinguishes between classes of applicants) indicated that the factors referred to in that subsection, are factors which when added to facts which render the applicant an "eligible person" give him or her the status of a person who would be generally regarded as a natural object of testamentary recognition by the deceased.

795 In *Churton v Christian* (1988) 13 NSWLR 241 at 252A-E Priestley JA substantially agreed with the analysis of McLelland J in *Re Fulop*, although added that:

“although the classes affected by s 9(1) are not necessarily generally regarded as natural objects of testamentary recognition, in some cases members of those classes may, when the circumstances of their relationship with the deceased are set out, immediately be seen to be persons who would be regarded by most observers as, in their particular circumstances, natural objects of testamentary recognition.”

See also *Petrohilos v Hunter* at 347C per Hope JA.

796 In *Brown v Faggoter* [1998] NSWCA 44 Fitzgerald JA explained at 7:

“Subs9(1) is considered difficult to implement in practice. As Priestley JA pointed out in *Churton v Christian* in most cases it is very difficult to see how the Court could comply with the command that it should 'first' determine whether there were factors which warranted the making of the application 'having regard to all the circumstances of the case (whether past or present)' until all the evidence that any party wished to put before it concerning the case was before the Court and the Court had had an opportunity to have regard to the circumstances shown by that evidence. There may be cases where the executor thought the applicant would have no chance of succeeding because the criteria in s6(1)(c) or s6(1)(d) of the definition of "eligible person" in s6(1) were not satisfied as in the case, for example, where the applicant was neither wholly nor partly dependent upon the deceased person at any particular time or never a member of a household of which the deceased person was a member. Such might be a discrete issue suitable for a preliminary hearing and not requiring an investigation of other circumstances such as the applicant's need. Provided its operation is appropriately limited to unwarranted applications, subs9(1) has a potentially useful operation in ensuring that estates are not wasted on futile proceedings.

What needs to be emphasised, however, is that the Court is not authorised by the subsection to refuse to proceed with an application if there are "factors which warrant the making of the application". Once the Court is satisfied that such factors exist, the application must be determined on the merits. While an onus is cast on an applicant by the subsection, it is only an onus to establish that the application was warranted. In my opinion, the trial judge was wrong in his view that subs9(1) involves a "reasonably strict test". The requirement that an application is warranted is fulfilled if the application has reasonable prospects of success. It need not be demonstrated for the purpose of subs9(1) that the application is entitled to succeed; ie, that an order in favour of the

applicant is warranted. Conversely, if an application is entitled to succeed, it is axiomatic that the making of the application was warranted".

797 In many judgments of Macready AsJ, his Honour drew attention to the fact that that the comments of Fitzgerald AJA (with whom Sheller JA and Sheppard AJA agreed) seem to suggest that an application might be warranted if the application has reasonable prospects of success, and presented a somewhat different and perhaps easier test than that which the Court of Appeal had approved in *Churton v Christian*: e.g. *Morgan v Bohm* [2013] NSWSC 145 at [144].

798 In late 2017, in *Lodin v Lodin* [2017] NSWCA 327; (2017) 16 ASTLR 576 White JA (after referring to *Re Fulop*, *Churton v Christian* and *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639) cast doubt on the observations of Fitzgerald AJA in *Brown v Faggoter* in the following terms (at [9]-[10]):

"9. It is true that in *Brown v Faggoter* [1998] NSWCA 44 Fitzgerald AJA with whom Sheller JA and Sheppard AJA agreed, said that:

'The requirement that an application is warranted is fulfilled if the application [for a family provision order] has reasonable prospects of success. ... Conversely, if an application is entitled to succeed, it is axiomatic that the making of the application was warranted.'

10. In *Yee v Yee* [2017] NSWCA 305 McColl JA observed in a footnote (footnote at n 136) that *Brown v Faggoter* has never been applied nor commented upon in this Court and although this Court has not said that *Brown v Faggoter* is wrong, the fact that it has been singularly ignored is 'surely telling'. I agree. I agree with Windeyer J's observations in *Penfold v Perpetual Trustee* [2002] NSWSC 648 at [50] concerning *Brown v Faggoter*. It has often not been followed at first instance, as being inconsistent with other statements of principle in this Court (*Doshen v Pedisich* [2013] NSWSC 1507 at [75]-[81] per Hallen J)."

799 As recently as late July 2022, the Court of Appeal has yet again referred to the comments of McLelland J in *Re Fulop* in respect of factors warranting with seeming approval: see *Sun v Chapman* [2022] NSWCA 132 at [119] per White JA, Leeming JA at [1] and Brereton JA at [88] agreeing. Indeed, Brereton JA in additional comments expressly endorsed the test, as indicated by McLelland J: at [193].

Adequacy of provision

800 Logically, in approaching the question of inadequacy provision one needs to have some reference point for assessing inadequacy.

801 This issue was addressed by White JA in *Sgro v Thompson*. His Honour stated at [86] that:

“The most important word in s 59(1)(c) is “proper”. Until the court has identified what is proper maintenance, education and advancement in life for an applicant, it cannot assess whether the provision made, if any, is adequate. What is proper requires an evaluative judgment that has regard to all relevant circumstances, not merely the parties’ financial circumstances. Whilst the court will know the latter, it will only have an incomplete picture of the former. Of course, the court’s assessment of what is proper maintenance, education and advancement in life must be made when the court is considering the application. That does not mean that considerable weight should not be given to the assessment of a capable testator or testatrix who has given due consideration to the claims on his or her estate”

802 The evaluative judgment made under s 59(2) is fact specific and that the general words of the provision cannot be read down by applying constraints that are not to be found in the text of the legislation: *Sgro v Thompson* per White JA at [67] citing *Bates v Cooke* [2015] NSWCA 278 at [67].

803 Whilst an applicant’s financial needs and the financial needs of other persons with claims on a deceased’s testamentary bounty are important, and often highly important considerations, it “is important not to elide the distinction between needs and adequate provision; the former is but one indicator of the latter”: *Sgro v Thompson* at [71] citing Basten JA in *Chan v Chan* [2016] NSWCA 222; (2016) 15 ASTLR 317 at [22]. The adequacy of provision is not to be determined by a calculation of financial needs: *Sgro v Thompson* at [71].

804 Nonetheless, judicial comment at the highest levels of Court hierarchy have provided sufficient guidance to enable judges in applying the legislation to the facts of the various cases that come before the courts.

805 "Provision" covers the many forms of support and assistance which one individual can give to another": *Mallitt v Gow* at [187] citing *Diver v Neal* [2009] NSWCA 54; (2009) 2 ASTLR 89 at [34] (Basten JA).

806 “Maintenance” clearly includes sufficiency of means upon which to live but is clearly not to confined to that: *Vigolo v Bostin* (2005) 221 CLR 191 at 228-229; [2005] HCA 11 per Callinan and Heydon JJ.

807 “Advancement” goes beyond the need for education and maintenance: *Bartlett v Coomber* [2008] NSWCA 100 at [50] per Mason P (Hodgson JA agreeing).

- 808 The question as to whether an applicant has been left with inadequate provision for her proper maintenance, education or advancement in life involves a finding of fact, albeit one that is, in light of the substantive character of the matter to be decided, evaluative. It does not involve an exercise of discretion: see *Strang v Steiner* [2019] NSWCA 143 at [76] per Macfarlan JA and at [131] per White JA; *Georgopoulos v Tsiokanis* [2022] NSWSC 563 at [256] per Hallen J.
- 809 In relation to the general principles regarding grandchildren claims both counsel referred me to the decision of Hallen AsJ (as His Honour then was) in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [113] and the apparent approval of those comments by the Court of Appeal in *Chapple v Wilcox* (2014) 87 NSWLR 646; [2014] NSWCA 392 per Basten JA at [17]–[21] and Barrett JA at [65]–[67].
- 810 A specific consideration, as acknowledged by Hallen J and also by the Court of Appeal is that the general principles are not rules of law and each case is fact specific: e.g. *Sgro v Thompson* per White JA at [49].

Determination of family provision claims

Dependency

- 811 On the facts of the present case, it is evident from the primary evidence and the cross-examination that:
- (a) Natalie and Kathy resided with their parents at the home of the deceased for a period of at least a year and on other versions up to a period of 14 to 16 months in or about 1978 to 1979;
 - (b) the deceased over that period of time at least three out of the five weekdays collected Natalie and Kathy from school, safely saw them home and provided them with afternoon tea and supervision.
- 812 Further, Natalie refers to occasions where between 1998 and 2000, the deceased looked after Alex one day a week to enable Natalie to go back to work part-time and full-time at Parliament House: CB 28[31]–[35].
- 813 I find that in the circumstances, each of Natalie and Kathy were at least partly dependent upon the deceased for the provision of accommodation for period of at least a year and perhaps up to 14 to 16 months and for at least some degree

of regular care on afternoons at least three days a week for school terms during that period of time.

Factors warranting

- 814 Mr Morrissey submitted that I must look at the facts now not at the time of the Will, nor when Myron died and indicated that his in submission, the plaintiffs would not now be regarded as natural objects of testamentary recognition: T 225.
- 815 Whilst the determination of the Court as to whether to make a family provision order is made, having regard to the facts known to the Court at the time that the order is made: s 59(2), the consideration of facts or circumstances that may bear upon factors warranting is not limited to circumstances as of the date of the hearing.
- 816 The wording of the statutory provision is that the Court may have regard to all the circumstances of the case (whether past or present) as to whether there are factors which warrant the making of the application: s 59(1)(b).
- 817 I do not think it is right to assess factors warranting through the prism of a pecking order of scheme of merited claims on the deceased's bounty nor, do I consider it appropriate to assess it through a prism of community value or "a pub or café test": T 223–224.
- 818 It seems to me that that submission conflates the assessment with the consideration of whether adequate provision has been made (s 59(1)(c)) which it is the point of the observation of White JA in *Chisak* at [44].
- 819 The facts which in my opinion could have established the dependency of Natalie and Kathy, and so permit the finding of eligibility relates to the period of time in which they with their parents resided with the deceased at the Guildford property between 1978 through to 1979–1980.
- 820 Apart from those circumstances, a clear indication of whether an applicant is or might be described as a natural object of testamentary recognition involves looking at the terms of the Will or Wills that the relevant deceased person has made.

- 821 The terms of the Wills, apparently made in 1977, 2002 and 2006 (leaving aside the draft 2006 document) are not in evidence.
- 822 The 2010 Will makes clear reference to Natalie and Kathy in a provision of a gift over of the residue of the estate in the event that Mary were to have predeceased the deceased.
- 823 Each of Natalie and Kathy are given in that circumstance 20% of the deceased's estate.
- 824 That fact is, in my estimation, a strong factor suggesting factors warranting. It is one of a number of indicia that arise.
- 825 There is other very significant material indicating a warm and loving relationship between each of Natalie and Kathy with the deceased for many years and up until the time of her death.
- 826 This is borne out in part by numerous photos of family gatherings showing many if not most members of the plaintiffs' families celebrating events with the deceased and Mary: CB 82–83[19], 223, 229, 230 234–237, 241–246, 248–253, 258, 278, 422–423.
- 827 In particular, there are comments that on their account of the evidence were made by the deceased, which, even if they did not amount to general inheritance promises were some indication of the deceased's then present intention towards Natalie and Kathy.
- 828 It seems to me that in the circumstances there are factors which warrant the making of the application by each of Natalie and Kathy.

Adequacy of provision

- 829 The more difficult hurdle for each of Natalie and Kathy in the proceedings is the question as to whether in the circumstances of the case having regard to the facts known to the Court they have been left with inadequate provision.

Submissions

- 830 Ms Pringle indicated that Natalie and Malcolm were essentially on a comparable footing in relation to Mary and Stan in respect of properties: T206, 209. Ms Pringle noted that Natalie and Malcolm had been compelled to

downsize into unit that “will no doubt be relatively comfortable, but it is not an extraordinarily valuable remarkable property having regard to Sydney prices”: T209.

831 Ms Pringle submitted that Natalie has some need in so far as she does not have secure employment. It is said that she only has contract work which may or may not endure: T209. Ms Pringle reinforced that if Natalie is unable to secure another contract, she will be too young for anything like the age pension and if she is forced rely upon Centrelink for unemployment benefit, it is unlikely that she would survive financially: T210.

832 Ms Pringle, with commendable frankness, acknowledged that Kathy’s family provision claim was far more problematic: T210. She observed, in my view rightly:

“Her husband has significant assets and Kathy herself is not without resources. It is submitted that a further modest provision might be made for her, but having regard to her family circumstances, that may not be, in your Honour’s mind, a realistic submission.” (T210)

833 Mr Morrissey submitted that the deceased’s testamentary intentions as reflected in the will are of paramount and primary importance and should only be interfered with where absolutely necessary: T225.

834 In relation to Kathy, Mr Morrissey commented that she is in an extremely good financial position. She’s a qualified audiologist and has a capacity to earn a substantial income. She and her husband have combined assets of at least \$4.7 million and through hard work, savings and not being extravagant, which is to their credit, they simply are extremely well off: T225.

835 In relation to Natalie’s claim, Mr Morrissey submitted Natalie is young and highly qualified. She has been continuously in employment, to her credit, for 30 years and (because of Malcolm’s health problems early last year) she has been choosing at the moment not to exercise her full vocational capacity: T226.

836 He continued (T226) as follows:

“The relationship with Mr Jones seems to be a stable one. They’ve been together now for over a decade, I think it’s around 11 years now. He’s a bit older than her, but they have three cars between them, they have superannuation, they have funds in accounts, most of which will be used

towards the house, but she has not established that she's been left without adequate and proper provision, nor if she did, should she receive provision.”

837 As to the s 60 factors, regarding Mary, Mr Morrissey submitted that Mary had a relationship with her mother which was as close as “could probably imagine”. He indicated that there was a high degree of obligation owed by the deceased to Mary, which the deceased recognised, leaving her whole estate to Mary. He submitted that Mary and Stan have made a substantial contribution to the main asset being the Guildford property, in the sense that they enabled the deceased to hold onto it, “not to have to sell it or move”. They “improved it, conserved it and enabled it to be available for sale in 2022”: T 226.

Section 60(2) factors

838 The Court in assessing that may have regard to factors as set out in section 60(2) on the question of whether the applicants have been left with inadequate provision.

839 Many of the s 60(2) factors are applicable to consideration on that question.

840 Clearly, as has already been indicated there was a warm and loving relationship between each of Natalie and Kathy and the deceased.

841 Reference has already been made to evidence of testamentary intentions of the deceased, including evidence of statements made by her: s 60(2)(j).

842 There is no suggestion that there is any aspect of the character and conduct of Natalie and Kathy that count against them in the consideration: s 60(2)(m).

843 Each of Natalie and Kathy have given evidence of some contribution by them at least to the welfare of the deceased: s 60(2)(h).

844 Whilst Natalie and Kathy have each received some gifts from the deceased during her lifetime, the gifts would not be considered to be significant provision for them: s 60(2)(i).

845 However, there are compelling factors that count against each of Natalie and Kathy.

846 Natalie's financial position, albeit somewhat weaker than that of Kathy, is relatively strong. That is particularly so when one has regard to the financial resources of Malcolm, with whom which Natalie cohabits: s 60(2)(e).

- 847 Whilst Natalie has some health issues she is able to work and function relatively well: s 60(2)(f). She is still relatively young: s 60(2)(g).
- 848 Whilst I accept that Natalie has contributed to the welfare of the deceased there is no suggestion that she contributed in any way to the acquisition, conservation and improvement of the deceased's estate: s 60(2)(h).
- 849 Further, Natalie has the support of Malcolm Jones, both financially and relationally: s 60(2)(l).
- 850 Kathy's and Chris' financial position is very strong: s 60(2)(e). Kathy has a few health issues, which are not disabling. She is able to work and function well: s 60(2)(f). She is a year younger than Natalie: s 60(2)(g).
- 851 As is the case with Natalie, whilst I accept that Kathy has contributed to the welfare of the deceased she did not contribute in any financial sense to the acquisition, conservation and improvement of the deceased's estate: s 60(2)(h).
- 852 Kathy is secure in a long-term loving marriage with Chris with whom she has support both financially and relationally: s 60(2)(l).

Mary

- 853 I accept the submissions of Mr Morrissey that Mary has a very strong competing claim in order to be able to retain the benefits given to her under the 2010 Will.
- 854 There is very considerable force to the submissions of Mr Morrissey in relation to Mary. She had a close and loving relationship with the deceased effectively living with the deceased for most of her life.
- 855 The plaintiffs' case was predicated on the basis that the deceased was dependent upon Mary for care and supervision and physical support: T 205. Whilst that concession was made in the context of seeking to support the case for undue influence (which I have rejected), it nonetheless has relevance for the assessment of the family provision claims.
- 856 Apart from occasions when Mary was away on annual holiday, accompanied the deceased on most outings, she provided the deceased with company and

companionship for decades contributing to her welfare in a very significant way: s 60(2)(h).

857 It is clear from Mary's and Stan's financial position that whilst the Baulkham Hills property is valuable in the land sense, clearly they have they have no sufficient resources to complete payment for the residence being built on the land apart from the benefits received under the 2010 Will.

858 Since retirement in 2011, because of the holding of the Baulkham Hills property, by the time they attained the age of 65, they did not qualify and therefore did not apply for the age pension. They continued to live off the rental income and their cash funds: CB 144[16], 146[22]. The rental income ceased after the tenants left and the house was demolished.

859 It is only when the residents of the Baulkham Hills property will be completed, that they expect they will be in a position to apply for pension income: CB 144[16].

860 Mary and Stan are now aged respectively 72 and 71 and beyond the stage of any remunerative employment. They have no superannuation: s 60(2)(d),(e),(h).

Natalie

861 In relation to Ms Pringle's submissions about Natalie and Malcolm having a comparability of property situation with Mary and Stan, in the sense of having available to them real property, that is correct.

862 Both Natalie and Malcolm on the one hand and Mary and Stan on the other hand are in situations in which their residences are in the process of being constructed. They have financial outlays that are required before they can move into their residences going forward.

863 However there is a significant difference in the sense that Natalie and Malcolm have financial resources of their own in order to complete purchase of the Drummoyne unit, whereas, Mary and Stan are reliant upon the provision that is given to Mary under the Will in order to effectively pay for the completion of the Baulkham Hills property.

- 864 Whilst Malcolm draws upon his investment amount clearly the investment amount generates a degree of income and interest albeit that it is susceptible to market movements: CB 421.
- 865 Taking into account the balance due under the contract for the Drummoyne unit and stamp duty and discharging Malcolm's MasterCard debt will consume approximately \$1.9M of the funds available to Malcolm.
- 866 I accept that once the monies needed to complete the Drummoyne unit purchase is used Malcolm will have significantly less capital to generate income.
- 867 Nonetheless, that will still leave him with in the order of \$500,000 of funds available to him.
- 868 Natalie is employed part-time. I do not accept that Natalie's employment or contract work is as tenuous as suggested.
- 869 In any event, Natalie has significant superannuation available to her in the order of \$331,408: CB 125[18].
- 870 Once they complete the purchase of the Drummoyne unit their expenses per month will drop, by over one-third, by virtue of not having to pay rent. Without any revision of budgeting based on their current income that would have a shortfall of income over expenses of about \$12,000 per annum, if one only counted Natalie's net wage: CB 436. With contributions from Malcolm's drawings they are able to cover expenses.
- 871 They maintain at least three motor vehicles which accounts for at least some of the expenditure as outlined by Natalie. Their expenditure may be able to be diminished by budgeting, quite apart from whatever further income may be able to be cleaned by Natalie and Malcolm using their initiative and undoubted qualifications.
- 872 The assessment of whether Natalie has been left with inadequate provision is not merely a financial one. However, when I have regard to all the circumstances of the case including the s 60(2) criteria I have referred to above, I am not persuaded that Natalie has been left with inadequate provision.

873 I consider that in light of Mary's circumstances and her claim to retain the provision that has been given to her that Natalie has not established that adequate provision for her proper maintenance, education and advancement in life has not been made.

Kathy

874 Similar considerations apply to the claim of Kathy. However, in Kathy's case, the considerations are in my estimation, more compelling against the success of family provision claim.

875 On any view of it Kathy, when one looks at her own financial position coupled with that of her husband Chris, is in a very strong financial position well beyond many members of the community.

876 She has good employment. She has only one dependent child who as at the moment attends a state school without the expense of private school education.

877 Chris, despite some health issues is considerably younger than Natalie's partner Malcolm and Chris still has significant working years ahead of him.

878 As has been observed above, the assessment of whether Kathy has been left with inadequate provision is not merely a financial one. However, when I have regard to all the circumstances of the case including the s 60(2) criteria I have referred to above, I am not persuaded that Kathy has been left with inadequate provision.

Conclusion

879 In the above circumstances, I dismiss the plaintiffs' claims and will give the parties an opportunity to address on the question of costs.

880 The parties have made me aware that there may be correspondence which bears upon the question of costs and have requested me not to deal with the question of costs.

881 The orders of the Court are:

- (1) Dismiss the proceedings.
- (2) As to the costs of these proceedings:

- (a) The matter is stood over to 9:30 AM on 25 August 2022 to enable the parties to address on the question of costs.
- (b) In the event that the parties are able to agree on the question of costs they have liberty to provide my Associate with proposed orders in that respect.
- (c) In the event the parties are unable to agree on the question of costs they should provide a short outline of submissions and any affidavits by 4:00 PM on 22 August 2022.

