Supreme Court

New South Wales

Case Name:	Coote v Coote
Medium Neutral Citation:	[2021] NSWSC 59
Hearing Date(s):	17 and 18 August 2020, 25 September 2020, 11 December 2020
Date of Orders:	9 February 2021
Decision Date:	9 February 2021
Jurisdiction:	Equity
Before:	Robb J
Decision:	Order for further provision made in favour of plaintiff. See par [198].
Catchwords:	SUCCESSION — Family provision — Claim by adult child — Whether inadequate and proper provision made for the plaintiff and, if so, the nature and quantum of the provision to be made — where the plaintiff has numerous and significant ailments — where the plaintiff has no superannuation or fund to preserve him against the vicissitudes of life — where it is alleged that the plaintiff and his former spouse are either in a de facto relationship or a relationship of financial interdependence — where, consequently, it is alleged that there has not been a full and frank disclosure of the former spouse's financial circumstances — where the Court accepts that the plaintiff and his former spouse do not have a de facto relationship or a relationship of financial interdependence — where there is no basis for the submission that there was some default in the evidence provided that leaves open the possibility that the financial resources available to the plaintiff are significantly greater than acknowledged — where there was a level of estrangement between the deceased and the plaintiff — where legal costs have resulted in a

	significant diminution of the deceased's estate — further family provision ordered.
Legislation Cited:	Evidence Act 1995 (NSW) Succession Act 2006 (NSW)
Cases Cited:	Anderson v Hill [2017] NSWSC 1149 Armitage v Fraser [2020] NSWSC 979 Blendell v Blendell; Blendell v Blendell [2020] NSWCA 154 Chan v Chan [2016] NSWCA 222 Henry v Hancock [2016] NSWSC 71 John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451 Smith v Moore [2020] NSWSC 1446 Squire v Squire [2019] NSWCA 90 Steinmetz v Shannon (2019) 99 NSWLR 687; [2019] NSWCA 114 Strang v Steiner [2019] NSWCA 143 Watson v Foxman (1995) 49 NSWLR 315
Category:	Principal judgment
Parties:	Neil William Coote (plaintiff) Brian Thomas Coote (defendant)
Representation:	Counsel: K Morrissey (plaintiff) C Hodgson (defendant) Solicitors: Cicero Legal (plaintiff) Turnbull Hill Lawyers (defendant)
File Number(s):	2019 / 171193

JUDGMENT

1 Mrs Adelaide Rosemary Coote was born on 4 December 1918. She died on 15 June 2018 at the age of 99 years.

2 Mrs Coote's last will was dated 28 November 2013. Mrs Coote left two sons. The elder, Brian Thomas Coote was 75 years of age at the time of her death. Her younger son, Neil William Coote, was then 73.

3 Without meaning any disrespect, I will refer to the two sons by their first names. It will also be convenient to refer to the other witnesses by their first names, after I introduce them.

4 By her last will, Mrs Coote made Brian her executor. Probate of the will was granted to Brian by this Court on 11 March 2019.

5 These proceedings have arisen out of the terms of Mrs Coote's last will, by which she gave a legacy of $25,000 to Neil and gave the balance of her estate to Brian.

6 At the 31 July 2019 date of Brian's executor's affidavit, the value of the likely distributable estate of Mrs Coote was $508,770.98 before meeting the costs of these proceedings.

7 Neil is the plaintiff in these proceedings, by which he seeks an order for further family provision in his favour under s 59 of the *Succession Act 2006* (NSW) (the Act) for the proper maintenance, support, education and advancement in his life as the Court thinks fit.

8 Mrs Coote's second last will was made on 17 December 2001, when she was aged 83. She divided her estate equally between Brian and Neil. Mrs Coote changed her mind in terms of her final will when she was almost 95 years of age.

9 The primary basis of Neil's claim for further family provision is that, by reason of injury and illness, he has been unemployed since 1992, and for the whole of the period since then he has been required to live on a disability pension. Neil has significant additional ailments that will be considered more fully below. Neil has no superannuation or fund to preserve him against the vicissitudes of life. Neil will require significant medical treatments in the future. He has a precarious arrangement for his accommodation into the future by reason of his living under the same roof as his former wife, Robyn Leslie House, in a dwelling in Western Australia owned by Robyn. This arrangement is at will, although Robyn has stated that it is her intention to allow Neil to reside indefinitely under the same roof as she resides, albeit in a separate part of the house. The longevity of that arrangement is inherently uncertain, as Robyn

acts as Neil's carer, for which she receives a carer's pension as her sole income. The arrangement can only continue as long as it is manageable in accordance with the health of both parties.

10 Neil has quantified his needs as requiring a fund of some $197,000, including an amount of $45,000 to allow for contingencies.

11 Brian's response is that Neil's claim should be dismissed. That is primarily on the basis that Neil and Robyn are in either a de facto relationship or a relationship of financial interdependence such that Robyn's financial position is relevant to assessing the financial position of Neil. Brian submits that Neil has an onus of persuading the Court that adequate provision has not been made and so was required to lead evidence as to his and Robyn's financial and material circumstances. Brian submits that there has not been a full and frank disclosure of Robyn's financial circumstances.

12 In addition, Brian submits that there was a level of estrangement between Neil and Mrs Coote, limited contact between Neil and Mrs Coote and no contribution made by Neil to Mrs Coote's welfare and circumstances.

13 If the Court is satisfied that adequate provision was not made in Mrs Coote's last will for Neil's maintenance, in addition to the $25,000 legacy provided for him in the will, there ought, according to Brian, to be only a moderate order for an additional sum to provide a fund to meet contingencies in the range of $40,000-$50,000.

14 When determining whether to made an order for further family provision, and if so, the terms of that order, the Court has to consider the diminution of the estate by legal costs, including the diminution caused by payment of the successful plaintiff's costs: see for example *Chan v Chan* [2016] NSWCA 222 at [54] per Basten JA (Simpson and Payne JJA agreeing).

15 I understand the position of the parties to be as follows. On the assumption that Neil's legal costs are paid out of the estate on the ordinary basis and Brian's legal costs are also paid but on the indemnity basis, and allowing for additional costs incurred because the hearing took longer than the two days that were allowed, the net distributable estate will be between $200,424.68 to

$210,428.68, if the distribution of the legacy of $25,000 to Neil is added back in.[1]

16 Assuming the parties' calculation of the aggregate legal costs is correct, then almost 60% of Mrs Coote's distributable estate will be expended in the legal costs of these proceedings. That fact makes it difficult for the Court to achieve a satisfactory outcome to these proceedings.

Relevant legal principles

17 As a child of the deceased, Neil is an "eligible person" to make the present application.[2]

18 In order to exercise its power to make an order for further provision out of Mrs Coote's estate, the Court must first be satisfied that adequate provision for the proper maintenance, education and advancement in life of Neil was not made by Mrs Coote in her final will.[3]

19 The Act does not prescribe specific circumstances that do, or do not, constitute adequate provision for the proper maintenance, education and advancement in life of the plaintiff. It is necessary for the Court to evaluate the provision actually made in the deceased's will against the requirement for maintenance, education and advancement in life of the plaintiff that is established by the evidence. The enquiry must be based on the circumstances that exist at the time of the determination and not at the time when the deceased made his or her will. The question is not just whether the provision made in the will is "adequate" but whether it is also "proper".

20 The nature and content of what is adequate provision for the proper maintenance, education and advancement in life of the plaintiff is susceptible to change over time as community attitudes change. The test has sometimes been expressed in terms of what is considered to be right and proper according to the moral duty of the deceased, or alternatively contemporary accepted community standards: see for example *Steinmetz v Shannon* (2019) 99 NSWLR 687; [2019] NSWCA 114 at [109] per Brereton JA and [44] per White

[1] See Further Amended Schedule of Agreed Assets and Liabilities provided by the parties to the Court, and par 4 of Brian's Supplementary Submissions, which paragraph was not challenged by Neil in final oral submissions.
[2] s 57(1)(c) of the Act.
[3] s 59(1)(c) of the Act.

JA where the former test was preferred, and *Squire v Squire* [2019] NSWCA 90 at [10], where the latter approach was applied without comment. As Brereton JA said in *Steinmetz v Shannon* at [109] "…However, I doubt that the difference matters much; what the community expects a testator to do by way of provision for claimants on his or her bounty, and what the testator is morally obliged to do in that respect, are probably the same thing".

21 In *Henry v Hancock* [2016] NSWSC 71, Brereton J (as his Honour then was) said (footnotes omitted):

> [64] Applications such as these under the FP Act for provision out of the estate of a deceased person have been described by the High Court of Australia in *Singer v Berghouse (No 2)* as involving a two stage approach. The first requires the determination of the jurisdictional fact — whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second — which arises only if the first is resolved affirmatively — involves the discretionary assessment of what provision ought to be made out of the estate for the applicant. However, as the High Court explained, similar considerations inform both stages of the process:
>
> > The determination of the first stage in the two stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance, et cetera, appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty. The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the Court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant.
>
> [65] That said, because the considerations relevant to both stages overlap, consideration of a family provision application does not always divide neatly into the two questions, as Callinan and Heydon JJ pointed out in *Vigolo v Bostin*. Nonetheless, on an application by an eligible person under the FP Act, the court must consider whether the plaintiff has been left with inadequate provision for his or her proper maintenance, education and advancement in life; and if so, what (if any) provision or further provision ought to be made out of the estate for those purposes.
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> …
>
> [67] The relevant principles and considerations that inform those questions were summarised by McLelland CJ in Eq, in *Re Fulop Deceased*:
>
> > In making these determinations, the following principles apply: First, the Court should not interfere with the dispositions in the will except to

> the extent necessary to make adequate provision for the plaintiff's proper maintenance, education and advancement in life. Secondly, the expression 'proper' in this context connotes a standard appropriate to all the circumstances in the case, and thirdly, the Court may take into consideration any matter (whether existing or occurring before or after the death of the deceased which it considers relevant in the circumstances, including (a) the nature and quality of the relationship between the plaintiff and the deceased, (b) the character and conduct of the plaintiff, (c) the nature and extent of the plaintiff's present and reasonably anticipated future needs, (d) the size and nature of the estate of the deceased, (e) the nature and relative strength of the claims to testamentary recognition by the deceased of those taking benefits under the will of the deceased, and (f) any contribution, financial or otherwise, direct or indirect, by the plaintiff to the property or welfare of the deceased.

[68] It is important also to bear in mind the principle articulated by Young J, as he then was, in *Stewart v McDougall*, in explaining that the court's role is limited to making adequate provision for an eligible person's proper maintenance and advancement:

> It is important to state what the Family Provision Act permits a Court to do and what it does not permit a Court to do. The Act recognises that Australians have freedom to leave their property by their will as they wish with one exception. The exception is that a person must fulfil any moral duty to make proper and adequate provision for those whom the community would expect such provision to be made before they can leave money as they wish. Thus, in these cases, one does not ask if the will is fair, one does not ask if the testatrix divided her property equal, one does not as a judge ask how would I have made a will had I been the testatrix. What must be asked is did the testatrix fail in her moral duty to those who have a claim on her. Even if the Court comes to the view that the question should be answered in the affirmative, the Court still does not remake the will, but only alters it to the extent adequate provision is made for the eligible person in respect of whom the testatrix failed in her moral duty.

[69] Formerly, the yardstick which was applied was that of the wise and just testator. Nowadays, it is fashionable to couch it in terms of “community standards”, although I am not at all sure that this is any different from the moral obligation of a wise and just testator and, as has not infrequently been pointed out, there is no ascertainable external community standard to guide the decision, which involves a broad evaluative judgment unconstrained by preconceptions and predispositions, and affording due respect to the judgment of a capable testator who appears to have duly considered the claims on his or her testamentary bounty — subject to the qualification that the court’s determination is made having regard to the circumstances at the time of the hearing, rather than at the time of the testator’s will or death.

[70] Fair and reasonable members of the community may well differ as to whether a parent owes a moral or natural obligation to an able-bodied adult child such as to fetter the parent’s testamentary freedom.19 In *Taylor v Farrugia*, in a passage which appears subsequently to have received general approval, I said of a claim by an adult child:

> These are claims by adult children. It is impossible in this area to describe in terms of universal application the moral obligation or

> community expectation of a parent in respect of an adult child. I think, however, it can be said that ordinarily the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life — such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation [*McGrath v Eves* [2005] NSWSC 1006].
>
> Generally speaking, the community does not expect a parent to look after his or her children for the rest of their lives and into retirement, especially when there is someone else, such a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute. It is no longer the case, if it ever was, that an adult child has to establish a special need before obtaining provision from the estate of a deceased parent.

22 Hallen J has set out in a number of cases a summary of general principles (which are guidelines, and may assist with consistency, but are not rules of law) applicable to claims by adult children. For example, in *Anderson v Hill* [2017] NSWSC 1149 at [135]-[136], Hallen J said:

> [135] In considering the Plaintiff's claim, being a claim for provision by an adult child, the following principles are also useful to remember:
>
> (a) The relationship between parent and child changes when the child attains adulthood. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.
>
> (b) It is impossible to describe, in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, "ordinarily the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life — such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their child up in a position where she or he can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation": *Taylor v Farrugia* [2009] NSWSC 801 at [57] (Brereton J); *McGrath v Eves* [2005] NSWSC 1006 at [71] (Gzell J); *Kohari v*

Snow [2013] NSWSC 452 at [121]; *Salmon v Osmond* [2015] NSWCA 42 at [109] (Beazley P, with whom McColl and Gleeson JJA agreed).

(c) Generally, also, "the community does not expect a parent to look after his or her children for the rest of [the child's life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute": *Taylor v Farrugia* at [58] (Brereton J).

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant: *Re Buckland, Deceased* [1966] VR 404 at 411 (Adam J); *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 148 (Gibbs J); [1979] HCA 2; *Goodman v Windeyer* (1980) 144 CLR 490 at 498 (Gibbs J), 505 (Murphy J); [1980] HCA 31. But the Act does not permit orders to be made to provide for the support of third persons that the applicant, however reasonably, wishes to support, where there is no obligation of the deceased to support such persons: *Re Buckland, Deceased* at 411 (Adam J); *Kleinig v Neal (No 2)* at 537 (Glass JA); *Mayfield v Lloyd-Williams* at [86] (White J).

(e) There is no need for an applicant adult child to show some special need or some special claim: *McCosker v McCosker* (1957) 97 CLR 566; [1957] HCA 82; *Kleinig v Neal (No 2)* at 545 (Holland J); *Bondelmonte v Blanckensee* [1989] WAR 305 at 309 (Malcolm CJ); *Hawkins v Prestage* (1989) 1 WAR 37 at 45 (Nicholson J); *Taylor v Farrugia* at [58] (Brereton J).

(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: *MacGregor v MacGregor* [2003] WASC 169 at [179]–[182] (Templeman J); *Crossman v Riedel* [2004] ACTSC 127 at [49] (Gray J). Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life are relevant: *Marks v Marks* [2003] WASCA 297, at [43] (Wheeler J). In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: *Christie v Manera* [2006] WASC 287; *Butcher v Craig* [2009] WASC 164, at [17] (Sanderson M).

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

[136] I set out a very similar statement of the principles in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275, at [111], in relation to a claim by a child. Those principles were referred to, with no apparent disapproval (although in that appeal there was no challenge to the correctness of those principles), relatively recently, in *Smith v Johnson* (2015) 14 ASTLR 175; [2015] NSWCA 297, at [62] (Sackville AJA, with whom Macfarlan and Ward JJA agreed).

23 In the present case, the observations made by Hallen J at [135(c)] are of particular significance. The evidence shows that Neil has fallen on hard times and has been unable to accumulate superannuation or make other provision for his retirement. He has a real need for a buffer against contingencies. The elaboration of those considerations in [135(f)] is also material in this case.

24 Section 60(2) of the Act identifies 15 specific matters to which the Court may have regard in addition to "any other matters the Court considers relevant…" when considering whether to make a family provision order, and the nature of any such order.

25 Section 60(2) of the Act provides:

> (2) The following matters may be considered by the Court—
>
> (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,
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> (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
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> (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
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> (d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
>
> (e) if the applicant is cohabiting with another person—the financial circumstances of the other person,
>
> (f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
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> (g) the age of the applicant when the application is being considered,
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> (h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,
>
> (i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,

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

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

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

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

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

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

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

26 The list of factors is permissive and it will not always be necessary or appropriate for detailed evidence to be provided to the Court in relation to all of the factors. Judgment should be exercised by the parties and their legal advisors concerning the materiality of each of the factors and the likely benefits of exploring them in the evidence weighed against the costs of the exercise. I will return to this issue below.

27 The Court should give proper respect to the testamentary intentions expressed by the testator. The Court should not interfere with the deceased's testamentary dispositions just because the judge would have made a different disposition. As Macfarlan JA (with whom McCallum JA agreed) said in *Strang v Steiner* [2019] NSWCA 143 at [72], [73]:

> [72] So far as the testamentary intentions of the deceased are concerned (see factor (j) referred to at [69] above), the following observations of White J (as his Honour then was) in *Slack v Rogan; Palffy v Rogan* (2013) 85 NSWLR 253; [2013] NSWSC 522 at [127] are pertinent:
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> > In my view, respect should be given to a capable testator's judgment as to who should benefit from the estate if it can be seen that the testator has duly considered the claims on the estate. That is not to deny that s 59 of the Succession Act interferes with the freedom of testamentary disposition. Plainly it does, and courts have a duty to interfere with the will if the provision made for an eligible applicant is less than adequate for his or her proper maintenance and advancement in life. But it must be acknowledged that the evidence that can be presented after the testator's death is necessarily inadequate. Typically, as in this case, there can be no or only limited contradiction of the applicant's evidence as to his or her relationship and dealings with the deceased. The deceased will have been in a

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

[73] To similar effect were his Honour's observations (made with the concurrence of McColl and Payne JJA) in *Sgro v Thompson* [2017] NSWCA 326 at [86]:

> I adhere to the view I expressed in *Slack v Rogan; Palffy v Rogan*. To recognise that the court is not in as good a position as a capable testator to assess what maintenance or advancement in life is proper for an applicant having regard to all of a family's circumstances, including the relationships between the applicant and the deceased, and the merits and claims of other family members, is not to put a gloss on the statute. Rather, it is to acknowledge the superior position of the testator. 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" (see also at [6] per Payne JA).

28 It is appropriate to observe at this point that, while there is no evidence that Mrs Coote's testamentary capacity was inhibited in her 94th year, when she made her last will, save for the terms of the will, there is no evidence that Mrs Coote actually made an assessment of what maintenance or advancement in life was proper for Neil having regard to all of the circumstances. In particular, there is no evidence that she had any regard to the realities of Neil's poor health and many disabilities and his parlous financial position.

29 One of the factors that the Court may take into account is the plaintiff's "financial resources". As Hallen J said in *Armitage v Fraser* [2020] NSWSC 979:

> [82] In *Hall v Hall* (2016) 257 CLR 490 at 506–507 [54]–[55], French CJ, Gageler, Keane and Nettle JJ wrote, at [54]–[55] (albeit in the context of family law proceedings), that:
>
> > The reference to 'financial resources' in the context of s 75(2)(b) [of the Family Law Act] has long been correctly interpreted by the Family Court to refer to 'a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency'. The requirement that the financial resource be that 'of' a party no doubt implies that the source of financial support be one on which the party is capable of drawing. It must involve something more than an expectation of benevolence on the part of another. But it goes too far to suggest that the party must control the source of financial support …
> >
> > Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.
>
> [83] As will be read, "the financial resources … both present and future, of the applicant" is one of the matters that may be considered by the Court: s 60(2)(d) of the Act.

30 A plaintiff claiming a family provision order has an obligation to fully and frankly put forward his or her financial circumstances. As was said by Meagher JA (Gleeson and Leeming JJA agreeing) in *Blendell v Blendell; Blendell v Blendell* [2020] NSWCA 154:

> [27] As to the first argument, Dominic bore the onus of persuading the Court that adequate provision had not been made, relevantly for his proper maintenance or advancement in life. Thus it was incumbent on him to lead evidence as to his financial and material circumstances, and ordinarily he could be expected to be in the best position to produce that evidence.
>
> [28] As a general proposition, the fact of incomplete or unsatisfactory evidence may permit inferences unfavourable to the applicant for provision to be drawn. For instance, uncertainty left by imprecise or inaccurate evidence is not ordinarily to be resolved in favour of the person who was able to give the satisfactory evidence: *Nicholls v Hall* [2007] NSWCA 356 at [36] (Mason P, Hodgson and McColl JJA). And if the absence of such evidence is a consequence of deliberate falsehoods, or the deliberate withholding of evidence, the Court may be justified in proceeding on the basis that the evidence of the true position would have been unfavourable to that person's case: *In re the Will of FB Gilbert* (1946) 46 SR (NSW) 318 at 321–322 , 324 (Jordan CJ); *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [100]–[104] (Meagher JA, Basten and Campbell JJA agreeing).

31 The consequence of a plaintiff not putting forward evidence that satisfactorily explains his or her true financial position is not that the plaintiff is punished by denial of an order for further family provision that the facts would otherwise justify. The consequence is that the Court may not be able to be satisfied with sufficient certainty that the plaintiff's financial position is such that inadequate provision has been made, or what additional provision ought to be made.

32 Where the plaintiff is in a relationship with some other person who has financial resources that may be applied for the benefit of the plaintiff, the obligation of the plaintiff to put forward evidence that establishes the true financial position of the plaintiff may extend to requiring the plaintiff to provide evidence of the financial circumstances of the other party to the relationship, to enable the Court to judge the likelihood that the plaintiff will benefit from the application of the other party's financial resources: see for example, *Smith v Moore* [2020] NSWSC 1446 at [131] and [153]-[155]. That was a case where Williams J decided that it was not possible for the Court to reach the state of positive satisfaction required by s 59(1)(c) of the Act that adequate provision had not been made in the deceased's will for the plaintiff's proper maintenance, education and advancement in life.

Background

33 It will be appropriate to set out briefly the following background to Neil's claim for a family provision order.[4] I will limit my statement of relevant events to those that I consider to be most material. This is a case where the evidence explored all manner of events that occurred in the history of the Coote family.

34 In early 1960, Brian moved out of home in order to work as a metallurgist at BHP and study part-time for a science degree at the University of Newcastle.

35 In late 1960, Mrs Coote, her husband and Neil moved to the home in Charlestown in the Newcastle area that became Mrs Coote's final home. Subsequently, Brian moved back home.

36 On 24 November 1966, Brian married his first wife, but they separated in 1967, and Brian moved back into the Charlestown home for a few months.

[4] The events are taken largely from the chronology that was provided to the Court.

37 Neil married his first wife and the mother of his two daughters on 3 June 1967. Neil's first daughter, Michelle, was born on 27 November 1968 and his second daughter, Nicole, was born on 7 November 1970.

38 In early 1968, Brian graduated from university and was transferred to BHP's head office in Melbourne. He continued to undertake a second degree at Macquarie University. In December 1969, Brian was transferred to the Port Kembla Steelworks.

39 Brian married his second, and present, wife in October 1970.

40 Brian and his wife moved from Wollongong to Figtree in 1972. Their first daughter, Danielle, was born on 15 December 1973, and their second daughter, Jocette, was born on 13 October 1975.

41 In early 1974, Neil separated from his first wife. The couple were divorced in about 1976.

42 Neil and Robyn met on a cruise in June 1979. Their son, Nathan, was born on 7 August 1980. They married in 1981 and moved to Western Australia in 1983 so that Neil could pursue an employment opportunity.

43 Lionel, the father of Neil and Brian, died on 29 January 1990.

44 In 1991, Neil sustained a prolapse of his L4/5 disc when he fell as a result of attempting to restrain a falling gas bottle. He retired permanently from work as a result of his back injury.

45 On 28 March 1992, Neil and Robyn entered into a property settlement and deed which was registered in the Family Court of Australia on 2 October 1992. The deed recorded that the couple separated on 28 March 1992, although Robyn's evidence was that she recalled that the separation occurred in about 1991. Under the property settlement agreement, Robyn received the couple's residence and Neil received the company that conducted his business as well as the family trust. Neil and Robyn continued to reside in the former matrimonial home.

46 Neil was declared bankrupt on his own application on 16 February 1993, but an order annulling the bankruptcy was made on 23 May 1994.

47 Neil commenced receiving a disability pension in 1995 and has continued to receive that pension ever since.

48 Also in 1995, Neil and Robyn returned to New South Wales after Neil suffered financial difficulties.

49 Neil and Robyn were divorced on 7 April 1998. Neil continued to reside in the same house as Robyn.

50 Mrs Coote made her second last will on 17 December 2001. She appointed Neil and Brian as her executors and divided her estate equally between them.

51 Brian retired on 31 December 2006 aged 64.

52 In 2013, Robyn sold her home in New South Wales and returned to Western Australia to be near her son, Nathan. She bought her present home in Perth. Neil followed Robyn to Perth as he did not have accommodation in New South Wales or anyone to care for him. Since moving to Perth, Neil has lived in Robyn's home. I note that the parties' Chronology records Robyn as having returned to Western Australia in 2014. That is the year given in Neil's evidence[5]. Robyn stated[6] that she returned to Western Australia in 2013. I prefer the evidence of Robyn on matters such as dates. The issue is significant, as it will be important whether Mrs Coote made her last will before or after Neil moved back to Western Australia from the Newcastle area.

53 Mrs Coote made her last will on 28 November 2013, making Brian her sole executor and giving him the whole of her estate, save for a legacy of $25,000 to Neil.

54 Mrs Coote suffered a stroke on 4 July 2015. After discharge from hospital on 31 August 2015, Mrs Coote began to live at Brian's home.

55 In early 2016, Mrs Coote began respite care at an aged care facility and was placed into full-time care at the facility in about July 2016. She remained there until her death.

56 As stated above, Mrs Coote died on 15 June 2018 at the age of 99 years.

[5] 28 May 2019 affidavit par 24.
[6] 29 October 2019 affidavit par 13.

57 I have omitted from this brief chronological background the entries concerning Neil's and Brian's various injuries and medical circumstances, as they will be dealt with separately. I also omitted the entries concerning the assistance provided by one or other brother to Mrs Coote and their father.

Neil's health and the relationship between Neil and Robyn

58 The most significant forensic issue in this matter has been whether Neil and Robyn have been cohabitating in a de facto marriage relationship and whether Neil has the benefit of Robyn's financial resources and has failed to comply with his obligation to disclose those resources.

59 Neil's long-term disablement and his general health are matters that are intricately related to this issue.

60 Neil filed his summons to commence these proceedings on 31 May 2019, supported by an affidavit of the same date that dealt with the legal issues relevant to the making of a family provision claim.

61 Neil gave the following evidence concerning his health and medical condition (omitting parts of the affidavit that were rejected on formal grounds):

> 26. I have a multitude of serious health issues for which I am currently in need of significant treatment. My current needs include weekly medical appointments, prescribed medications, specialist treatments and hospital admissions which I estimate currently cost me about $472.89 per month on average. This represents a significant proportion of my pension income…
>
> 27. My health issues began when I suffered severe whiplash as the result of a motor vehicle accident in 1960 leading to a history of significant degenerative spinal issues and other health problems including, but not limited to:
>
> a. In 1990 I suffered a prolapse of my L4/5 disc. I retired from work in 1992 due to my back injury and have been on a disability pension since about 1995;
>
> b. In 1996 I suffered a meniscal tear in my left knee;
>
> c. In 1997 I was diagnosed with obesity and hypercholesterolaemia. Since that time I have been prescribed Lipitor to control an elevated level of cholesterol;
>
> d. I suffer from psoriatic, osteo and rheumatoid arthritis and I am on a number of pain killers and immunosuppressant therapies, including prednisolone and methotrexate, to control inflammation and pain resulting from these conditions;
>
> e. In 2009 I suffered Subcromial Bursitis (shoulder injury) and was treated with steroid injections;
>
> f. In 2013 I was diagnosed with osteoarthritis in my right hip;

g. Also in 2013 I was diagnosed with Carcinoma Prostate and underwent a radical prostatectomy in January of that year. I am currently in remission from that disease and require regular monitoring appointments;

h. In 2014 I was diagnosed with multiple Solar Keratoses and moderate to mild hearing loss;

i. In 2015 I suffered Achilles Tendinitis and underwent a surgical debridement and repair;

j. Also in 2015 I again suffered a prolapsed L4/5 disc in my back;

k. In 2013 I was diagnosed with macular degeneration of the Epiretinal Membrane for which I am yet to have surgery;

l. Also in 2016 I continued to suffer shoulder pain in my left shoulder which is due for review this year…;

m. In 2017 I underwent an arthroscopy of my right shoulder; and

n. In 2018 I suffered a severe injury to my right knee. I continue to suffer bouts of dizziness and adverse effects from the pain-killing medication I am prescribed for my ongoing health issues.

28. My future medical needs will include:

a. Physiotherapy;

…

d. An increased need for medication;

e. 2 shoulder replacement operations;

f. 2 knee replacement operations;

g. Specially fitted shoes due to psoriatic arthritis in my toes and feet;

h. More regular hospital admissions;

i. rehabilitation and walking aids.

62 Neil annexed to his affidavit a health summary sheet prepared by his general medical practitioner, Dr Winnie Lo, which broadly supported the evidence given by Neil.

63 Brian made no challenge to the evidence given by Neil concerning his disabilities and general medical condition. Objection was made to lay assertions made by Neil concerning his prognosis and likely future treatment needs, on the basis that the assertions were not supported by expert medical evidence. However, the evidence justifies a finding that Neil is likely to have a significant need in the future for medical treatment, without requiring Neil to have incurred the substantial additional costs of obtaining expert medical evidence from all of the specialists relevant to the procedures required by his various disabilities.

64 In his affidavit, Nathan gave evidence[7] about the effect of the injuries suffered by Neil in 1992 in the following terms:

> 14. In 1992 Dad seriously injured his back. This was the first of many physical health issues Dad was to face, and he was unable to work again following this injury. As a result, Dad was forced to put his business on the market, and it was eventually sold.
>
> 15. Dad required almost constant care during my teenage years and my recollections of Dad at that time are almost entirely of him in bed on a stretching machine. He had no one to help him except Mum and myself; he relied on us for his care.
>
> …
>
> 19. During my time in Newcastle, because Dad was frequently bed-ridden due to chronic pain and because I was "young and small", I was asked to work at Nanna's home…

65 This evidence was not challenged by Brian in Nathan's cross examination.

66 In his 28 May 2019 affidavit, Neil made the following disclosure and claims concerning his relationship over the years with Robyn:

> 23. In 1981 I was married to Robyn Leslie House ("Robyn") at Greystanes in New South Wales. Robyn and I were divorced on 7 April 1998. Due to my ongoing health problems I continued to share a residence with Robyn who acted, and continues to act, in the capacity of a carer for me. As a result of a dispute with the Department of Social Security with regard to the bona fides of my relationship with Robyn, I appealed to the Administrative Appeals Tribunal (AAT) [evidence of an extract from the finding of the AAT rejected].
>
> 24. Since that time any of the last remaining fragments of my marriage to Robyn have been completely extinguished and there is no ongoing relationship in the sense of the marriage or partnership. After we were divorced I continued to reside with Robyn in NSW until 2014 when she decided to return to Western Australia to be close to our son, Nathan, and our grandchildren. At this time Robyn sold her house in NSW and purchased a residence in Western Australia. Had I stayed in NSW I would have been left without a carer and with nowhere to live. I also wanted to spend time with our son and his children and, since our interests were aligned in moving from NSW, I too moved to Western Australia and continue to share a residence with Robyn on whom I have come to rely. Robyn also continues to provide me with the same care as she did when we resided together in NSW. All of our finances are separate and Robyn is the sole proprietor of the house. I pay Robyn the sum of $250 per week for board and lodging from my pension income. Robyn and I both live in separate parts of the house and Robyn continues to receive a carer's allowance from Centrelink to provide assistance to me in respect of my healthcare needs. This is necessary as I am prescribed significant doses of painkilling medication which has a serious effect on my ability to remember times and events and care for myself adequately. As a result I am unable to function effectively without the assistance of Robyn who accompanies me to appointments and ensures I do not injure myself or others

[7] 14 July 2020 affidavit.

> while attending to my daily activities. That Robyn is intimately familiar with my family life and history and inextricably linked to me by the bond of a child and grandchildren is the only element that has kept us together for the time since our divorce…

67 There is an issue in these proceedings as to the accuracy of the statement made by Neil that his and Robyn's finances are separate. I will deal with this issue in detail below.

68 It will be pertinent to comment on the significance of the appeal made by Neil to the Administrative Appeals Tribunal (the AAT). As Brian challenged the evidence given by Neil and Robyn that they have not lived in a de facto marriage relationship since they separated, the evidence given by Neil concerning the decision of the senior member of the AAT that Neil sought to tender was rejected, on the ground that the decision of the AAT was not admissible to prove the nature of the relationship between Neil and Robyn.[8]

69 The AAT made an order on 10 December 1999 in terms: "Therefore Ms House should be paid carer pension at the single rate and Mr Coote should be paid disability support pension at the single rate at all relevant times".[9] Although the decision of the AAT was not admissible to prove the nature of the relationship between Neil and Robyn, it was admissible to prove the actual decision as a fact.

70 I am satisfied on the evidence that both Neil and Robyn approached the present proceedings on the basis that, if the Commonwealth of Australia was prepared to pay them pensions on the basis of an acceptance that they were single and not in a de facto relationship, then it was proper for them to assume the validity of that position.

71 For the reasons that I will elaborate below, I also find as a fact that the relationship between Neil and Robyn has always been since their separation of the nature as they have described it.

72 Robyn affirmed her affidavit on 29 October 2019. She did so after Brian served his substantive affidavit made on 14 September 2019. The only evidence that

[8] See s 91 Evidence Act 1995 (NSW).
[9] Court Book 27, 28.

Brian gave concerning Neil's relationship with Robyn was:[10] "Neil never mentioned "carer" to me, or that he and his wife had divorced decades earlier…" The making of Robyn's affidavit for use in Neil's case was not a result of some exposure of the relationship as part of Brian's defence.

73 In relation to her relationship with Neil, Robyn gave the following evidence:

> 5. In about 1990 Neil and I separated. Neil and I have not shared an intimate or marriage-like relationship since this time.
>
> …
>
> 9. Due to his ongoing health problems Neil continued to share a residence with me. I acted, and continue to act, in the capacity of a carer for Neil.
>
> 10. As a result of the dispute with the Department of Social Security with regard to the bona fides of our relationship, Neil and I both appealed to the to the Administrative Appeals Tribunal (AAT)…
>
> 12. Since that time any of the last remaining fragments of my marriage to Neil has been completely extinguished and there is no ongoing relationship in the sense of the marriage or partnership.
>
> 13. After we were divorced Neil continued to reside with me in NSW until 2013 when I decided to return to Western Australia to be close to my son, Nathan, and my grandchildren. At this time I sold my house in NSW and purchased a residence in Western Australia. Had Neil stayed in NSW he would have been left without a carer and with nowhere to live. Neil also wanted to spend time with Nathan and his children and, since our interests were aligned in moving from NSW, he too moved to Western Australia and continues to live in my residence.
>
> 14. I also continue to provide Neil with the same care as I did when I cared for my father after my mother's death. We resided together in NSW.
>
> 15. All of our finances are separate, and I am the sole proprietor of my house property…
>
> …
>
> 19. Neil pays me the sum of $250 per week for board and lodging from his pension income.
>
> 20. Neil and I both live in separate parts of the house. Neil has his own bedroom, bathroom and living area with TV in the house.
>
> 21. I continue to receive a carer's allowance from Centrelink to provide assistance to Neil in respect of his healthcare needs. This is necessary as Neil is prescribed significant doses of painkilling medication which has a serious effect on his ability to remember times and events and care for himself adequately.
>
> 22. I accompany Neil to appointments and ensure he does not injure himself or others while attending to his daily activities. That I am intimately familiar with my family life and history and inextricably linked to Neil by the bond of a child

[10] 14 September 2019 affidavit par 130.

> and grandchildren is the only element that has kept us together for the time since our divorce…
>
> 23. My relationship with Neil has not changed since the decision of the AAT in 1999.
>
> 24. I continue to act as Neil's carer and will continue to provide such care for as long as my circumstances of both me and Neil allow but, at some stage, I will no longer be able to cater to Neil's needs due to age. At this time I envisage Neil will require the services of a full-time carer and suitable accommodation as I will no longer be able to provide this care for Neil.

74 Robyn annexed to her 31 August 2020 affidavit a copy of what was then her last will and testament made on 17 November 2015. That will appointed Nathan as her sole executor and, by clause 3, gave all of her household furniture and chattels to Neil if he survived her for 28 days, plus, by clause 4, a right to enjoy the her home in Western Australia for life on certain conditions concerning the maintenance of the property.

75 This affidavit was served between the first two days of the hearing and its resumption on 25 September 2020. It appears that Robyn had second thoughts, as she was cross-examined about whether her 17 November 2015 will remained in effect.[11] Robyn announced that she had made a new will leaving "everything to Nathan and his family and that's it". Robyn responded to a suggestion that she had changed her will only after she had been cross-examined to show she was in a de facto relationship with Neil by saying: "I am definitely not in a de facto relationship".

76 The new will, if it exists, was not tendered. Neil did not make a submission that his entitlement to a family provision order was enhanced by reason of Robyn having changed her will.

77 I find, having observed Robyn giving her evidence, and from the tone of many of her answers, that she resented having been required to become involved in Neil's proceedings, and that she took offence at not being believed on her evidence that she was not in a de facto married relationship with Neil. If it is true that Robyn changed her will, that is an act – which could be described as an act of defiance – in proving to herself that she was free to do what she wanted with her own property.

[11] T 128.39 to T 129.20.

78 Robyn was cross-examined about steps that she apparently took to obtain a new real estate appraisal for her home in the period that intervened between the two parts of the hearing.[12] The suggestion was that Robyn had prevailed upon the real estate agent's staff, in his absence on that day, to obtain an appraisal that was artificially low. The evidence established that the real estate agent in question retrospectively withdrew the appraisal and accused Robyn of having obtained the appraisal "through misleading and pressured circumstances".[13] The new appraisal was not tendered in Neil's case.

79 The evidence is not sufficient to justify the Court in making a specific finding concerning Robyn's conduct on this issue. It is fair to say, however, that it was impulsive and apparently unilateral conduct on Robyn's part that casts some doubt on her creditworthiness.

80 However, as the home in which Neil and Robyn live is Robyn's property, the precise value of the home will not be of great significance to the determination of Neil's family provision application. Brian did not attempt to make a case that Neil was likely in the future to gain any personal benefit from the value of the house; such as by Robyn selling it in order to apply part of the proceeds of sale to meet Neil's needs. Neil's case has always been that he has the benefit of accommodation in Robyn's home, albeit in separate living quarters, and although the arrangement is at Robyn's will, she is likely to permit the continuation of the status quo as long as Neil's and her health permit it.

81 Robyn did not in any real way hide the fact that she was partisan in Neil's case. Her conduct in respect of the new appraisal was probably improvident, but, having witnessed her give her evidence, it is most likely to have been a reaction to having been drawn into the case and a result of whatever private views she may have had about Brian resisting as strongly as he has Neil's attempt to gain a greater share in Mrs Coote's estate than the $25,000 legacy that she gave him.

[12] T 125.30 to T 127.6.
[13] Exhibit D8.

82 Nathan also gave evidence concerning the nature of the relationship between his parents.[14] He said:

> 11. Other than my wife, I have not told anyone that my parents are divorced as I have been embarrassed to do so in the past.
>
> 12. I cannot recall my parents showing any positive emotional connection since their separation. Since that time, they have slept separately.
>
> 13. Mum elected to stay in Mandurah and keep me close to Dad so he could help raise me and remain a part of my life. I recall for many years travelling between my parents separate homes in Mandurah Western Australia, where they lived and shared care of me on an informal basis without any need of court orders.
>
> …

83 Nathan was not challenged on this evidence in cross-examination. Although the cross-examination of Nathan was short, he appeared to me to be a straightforward and credible witness. As an only son, I would think that Nathan is the surest judge of the true nature of the emotional and practical relationship between his parents.

84 Neil has been entirely estranged from his two daughters, Michelle and Nicole since his divorce from their mother. Both daughters gave evidence in Brian's case. They gave evidence of events at Mrs Coote's funeral, which was attended by Neil and Robyn. Both said[15] that on at least one occasion at the funeral they noticed Robyn hugging and kissing Neil. They also said[16] that that they overheard Neil introducing Robyn as his wife. Each daughter said[17] that they were unaware that Neil and Robyn were divorced until they read Neil's 28 May 2019 affidavit.

85 Neil denied in cross-examination that he was openly kissed by Robyn at Mrs Coote's funeral.[18]

86 I do not consider that this evidence is of great significance in judging Neil and Robyn's claims to have been separated in the circumstances that they disclosed in their affidavits. It is consistent with the couple having maintained for certain purposes an outward appearance of the continuation of their

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[14] 4 July 2020 affidavit.
[15] Michelle's 5 December 2019 affidavit par 15 and Nicole's 5 December 2019 affidavit par 17.
[16] Paragraphs 16 and 19 respectively.
[17] Paragraphs 17 and 20 respectively.
[18] T 49.20.

marriage. As for the evidence that Robyn hugged and kissed Neil, it would be difficult for the Court to make a sound judgment as to the significance of such a fleeting event occurring during the course of Neil's mother's funeral. I accept that it is quite possible that Robyn felt a need to comfort Neil during the event.

Financial relationship between Neil and Robyn

87 Brian's claims that Neil and Robyn were in a de facto married relationship and consequently that Neil had failed to adequately disclose the availability to him of Robyn's financial resources depended upon a close cross examination and analysis of Neil's and Robyn's bank statements.

88 Brian tendered the statements for a number of bank accounts held by Neil and Robyn for periods from dates in 2015 or 2016.[19]

89 Each of Neil and Robyn had an account with P&N Bank into which were paid their separate Centrelink payments, being Neil's disability pension and Robyn's carer's pension.

90 The credit balance in Neil's account was generally less than $2,500 and, save for a number of exceptional transactions, Robyn's credit balance mostly was in a range between $2,000 and $3,000.

91 Nathan gave evidence that he was a pilot employed by Virgin Australia until November 2018.[20] He was retrenched due to budget cuts. Since that time he has been unable to attain paid employment. He was unemployed at the date of his affidavit and had been so for almost two years. His savings were almost depleted. Nathan has a wife and two children.

92 The P&N Bank statements for Neil's account for the period starting 13 December 2018 up to 24 October 2019 (the end of the period covered by the statements) shows that Neil reduced the number of his weekly transfers to his other bank accounts and started to make equivalent transfers to an account held by Robyn and described mostly as "HBA – Garden City" or similar. The transfers were made in pairs described as "For Alex" or "For Ainsleigh". They

[19] Exhibit D4.
[20] 4 July 2020 affidavit par 20.

are the names of Neil's grandchildren. According to my calculation, there were 22 payments of $250 (total $5,500) and 16 payments of $100 (total $1,600).

93 On 15 May 2019, there was a credit to Neil's P&N Bank account of $9,480.11, which raised the balance from $305.46 to $9,785.57. The explanation of the credit was: "Direct Credit IAG AUSTRALIA LI – TRAVEL CLAIM". The credit appears to have been for a claim under a travel insurance policy.

94 On 16 and 21 May 2019, Neil appears to have paid out an amount equivalent to the insurance payment by transferring to Robyn's HBA account the sum of $4,740 for each of Alex and Ainsleigh.

95 Neil was cross-examined about the regular payments that were made out of his P&N Bank account apparently for the benefit of Alex and Ainsleigh.[21] Neil unconvincingly claimed not to be able to remember what the payments were for.

96 Robyn's P&N Bank statements show fortnightly payments of board and lodging from Neil of $250 from 16 May 2019.

97 It appears from Robyn's P&N Bank statements that she made regular payments out of that account to Telstra, Water Corporation of Western Australia, to Synergy and to the city of Melville. I infer from these entries that Robyn was solely responsible for paying for her telephone and the service costs for the property. There are no similar entries in Neil's bank statements.

98 Neil and Robyn also maintained accounts with UBank. They each had two such accounts. One of Neil's accounts generally had a credit balance of less than $1,000. As to the other, Neil made regular weekly transfers from his P&N Bank account in amounts between $50 and $200. The greatest credit balance was $15,669.01.

99 One of Robyn's UBank accounts was usually about $500 in credit.

100 Robyn also made regular weekly payments in sums of about $100 into this account from her P&N Bank account. The highest credit balance was $24,022.07.

[21] T 31.40 to T 34.40.

101 Neil and Robyn also each had two Rabobank accounts. Neil mostly made weekly deposits from his P&N Bank account of $50 or $100 into one Rabobank account and $30 into the other. The first of these accounts shows a credit of $13,000 on 5 June 2019 from the maturation of a term deposit.

102 Neil transferred $8,500 and $4,500 from one of his Rabobank accounts into his P&N Bank account on 12 and 14 June 2019, leaving a balance of $2,666.13 in the account. On 14 and 15 June 2019, Neil transferred $8,500 and $4,500 out of his P&N Bank account to the "Nathan Coote Trust".

103 Robyn explained in her cross-examination that she and Neil had tried to put some money aside in trust for their two grandchildren, one of whom is autistic.[22]

104 When the balance in Neil's second Rabobank account was $733.15 on 1 October 2018, he transferred $700 into the first Rabobank account.

105 Robyn conducted her two Rabobank accounts in a similar fashion as did Neil. She mostly transferred $150 per week into one of the accounts out of her P&N Bank account and $30 into the other. The closing balance on the first of the accounts as shown by the available statements was $23,979.89. On 3 October 2018, when the balance in her second Rabobank account was $4,180.70, she transferred $4,100 into her first Rabobank account.

106 Neil and Robyn also maintained a single RAMS account each. Neil mostly paid $100 per week into this account from his P&N Bank account.

107 Robyn mostly paid $100 or $150 into this account from her P&N Bank account.

108 By 5 December 2018, Neil's RAMS account had a credit balance of $16,346.64. On that date he made a transfer of $16,250, described as "Board & Lodging".

109 On the same date, $16,250 was credited to Robyn's RAMS account. Robyn paid $16,000 out of her RAMS account on 5 February 2019 and $3,150 out on 6 February 2019. Robyn's RAMS statements describe the $16,000 debit as

[22] T 74.2.

"TRANSFER – To Trust" and the $3,150 as a transfer with the street address of Robyn's home.

110 It appears that Neil saved up an amount to pay his $250 per week board and lodging until December 2018, when he paid a lump sum. Neil and Robyn both gave evidence[23] that Neil was able to save the money because Robyn agreed to allow him to accumulate the money necessary to buy a new car. Neil ultimately gave up, because he realised that he could not save the money quickly enough. He then made a back payment of board and lodging. It should be noted that this payment was made before Neil filed his summons to commence these proceedings on 31 May 2019. As noted above, from 16 May 2019, Neil paid Robyn $250 per week out of his P&N Bank account.

111 Counsel for Brian cross-examined Neil and Robyn for the purpose of getting them to admit that their finances were "intricately connected".[24]

112 It does appear from the bank statements that Neil and Robyn conducted the same type and number of bank accounts, apparently opened at approximately the same times, and they conducted them in the same way. That is, they banked the income constituted by their pensions into their P&N Bank accounts and then, in comparable ways, though in slightly different amounts, they transferred small sums to build up small amounts of credit in their other accounts.

113 More significantly, the statements for the P&N Bank accounts showed that Neil and Robyn had a single MasterCard account that they used for their day-to-day purposes (and also, as it happened, the payment of the filing fee by Neil on his summons in these proceedings) and their practice was simply to divide the amount that they paid at the end of each payment period equally between them, without attempting to dissect items that were used by both from items that were used by the one or the other of them.

114 Robyn explained this practice in cross-examination by saying: "Yes, because it was convenient that way rather than try to split it up".[25] She said that her credit

[23] Neil's 11 August 2020 affidavit par 18 and T 75.3.
[24] T 77.1.
[25] T 76.33.

card was secondary to Neil's and that it was used mostly to pay joint expenses. Robyn explained that she and Neil were residing under the same roof and consequently incurred joint expenses, even though she said: "Finances are separate".[26]

115 Neil gave a similar explanation for the practice of splitting MasterCard repayments equally.[27]

116 While it is true that there are a number of transactions recorded in the MasterCard statements that appear clearly to be personal expenses of either Neil and Robyn, if every single line item in the statements is read, as I read them, they are almost all mundane transactions such as are entered into by every household to acquire goods and services to fulfil common needs.

117 Although Neil and Robyn shared expenses equally in this way, the evidence shows that they paid their income into separate bank accounts and dealt with the money in those accounts separately, albeit in a similar way to each other. The arrangement whereby they shared joint expenses is somewhat reminiscent of the arrangements in times past in share houses that many young people find necessary, where the rent is paid equally and all must contribute equally to the kitty.

118 The evidence therefore establishes that for many years Neil and Robyn have followed a practice of sharing expenses that are mostly joint expenses, in circumstances where they could not be bothered engaging in an intricate accounting process. It may be thought that such an approach was wise, because it would assist in avoiding the potentially catastrophic effect on the tenuous relationship between the two of consistently having arguments about how to properly divide up individual expenses.

119 The most significant conclusion to be drawn from a minute examination of the bank statements of Neil and Robyn tendered by Brian is that the statements prove that both Neil and Robyn live on their pensions and have almost no funds available as a buffer against vicissitudes.

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[26] T 77.7.
[27] T 35.50, T 36.27 and T 38.15.

120 In his submissions, Brian urged strongly on the Court that it should find that Neil had breached his obligation to the Court to fully disclose the financial resources of Robyn who was his de facto partner from the time of their supposed separation. In my view, on the whole of the evidence, Brian and Robyn did not in any substantial way cohabit as a de facto married couple. The relationship was in substance as explained by Neil and Robyn.

121 It is true that Neil did not initially disclose in any significant way Robyn's financial resources, or how they paid for their joint expenses and conducted their bank and credit card accounts. Brian decided to make a case that Neil and Robyn were in a long-term de facto relationship, and pursued an attempt to prove that in some way Neil had been supported by Robyn financially, and could look forward to the continuation of that arrangement. He failed. I am satisfied that Neil and Robyn genuinely have considered their relationship to be one of convenience, and on Neil's part, one of necessity. They have cooperated in order to maintain their family relationship with their only son, Nathan, and their grandchildren. Robyn, in particular, fiercely, and I am satisfied genuinely, resisted the claim that she was in a de facto relationship with Neil. It would not go too far to say that she was scornful of the suggestion.

122 I am satisfied that Neil did not volunteer evidence of Robyn's financial circumstances for two reasons. First, he genuinely believed that he was being cared for by Robyn on sufferance, and that emotionally Robyn considered herself to be a single woman. Secondly, as was made plain by Brian's attempt to prove that, in some way, the finances of Neil and Robyn were intermingled in a manner that would damage Neil's claim for a family provision order, Robyn is dependent upon her pension as much as is Neil on his. They both appear to have lived frugally and carefully, but Robyn needs her own income for her own maintenance. Sharing accommodation and expenses no doubt provides financial benefits to both parties. Those benefits are relatively meagre and depend upon the prudent expenditure of the two pensions.

Credibility of evidence given by Neil and Robyn

123 It will be appropriate to make the following observations concerning the credibility of the evidence given by Neil and Robyn.

Neil

124 Neil was not a satisfactory witness. He clearly appeared to be cranky in his response to cross-examination and muttered comments under his breath. It was necessary for me to counsel him to desist on one occasion.

125 In Neil's 28 May 2019 affidavit he disclosed[28] assets valued at $10,090, being a motor vehicle valued at $4,700, household furniture and electrical goods of $5,000, and about $390 in a P&N Bank account.

126 In an affidavit sworn on 4 July 2020, Neil acknowledged that he had money in the P&N Bank ($647), Rabobank ($34.04), RAMS ($1,093) and UBank ($1,280)

127 Neil also acknowledged owning 3,234 shares in Medibank Private with a value of $9,000. Neil claimed[29] that he believed he had transferred ownership of these shares to his grandchildren, but it had come to his attention that he was still the beneficial owner of the shares.

128 When it was put to him in cross-examination that he only corrected his evidence about his bank accounts when it had become apparent through the subpoena of records that Brian had become aware of those bank accounts, Neil answered: "I would assume so, correct, yes".[30]

129 Neil also stated in his 28 May 2019 affidavit that he had not made any gifts of amounts $1,000 or more in the last three years.[31] It was pointed out to Neil that, in fact, on 1 May 2017, Neil had made a payment out of his U Bank account of $5,019.15 described as: "Funds Transfer to Ainsleigh Paige For MYX".[32] Further payments were made to Ainsleigh Paige of $4,217.55 on 19 September 2017 and $5,119.95 on 20 December 2018 and $3,119.95 on 24 December 2018. Neil conceded that the payments were gifts to Ainsleigh.[33]

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[28] Paragraph 14 and annexure NWC-3.
[29] 4 July 2019 affidavit par 7.
[30] T 30.16.
[31] Paragraph 21.
[32] T 30.32 to T 31.38.
[33] T 31.1.

130 On a number of occasions Neil responded to questions that he could have been expected to be able to answer by saying something to the effect that he did not have a clue, or that he could not remember the detail of transactions.[34]

131 Neil's focus in cross-examination seemed to wax and wane; for periods he gave lucid and coherent answers to questions, but on other occasions his responses did not appear to be rational. The best example of this is probably the attempt by counsel for Brian to get Neil to admit certain consequences of the back injury that caused him to medically retire in 1992. The following cross-examination occurred:[35]

> Q. Now that is the injury which caused you to medically retire in 1992; that's correct, isn't it?
>
> A. That is correct.
>
> Q. And around that time, your business struggled presumably because of your injury, that's correct?
>
> A. No.
>
> Q. You were unable to work in that business after you medically retired; I presume that's correct, isn't it?
>
> A. No.
>
> Q. So when you say could you go to page 8 of the Court book?
>
> A. Yes.
>
> Q. "I retired from work in 1992 as a result of a back injury".
>
> A. That is correct.
>
> Q. Presumably if you are unable to work, that had an adverse impact on your business?
>
> A. No, that is incorrect.
>
> Q. You had difficulties with your business in around 1992; that's the case, isn't it?
>
> A. That is incorrect.
>
> Q. When did you say you had problems you had difficulties in relation to your business?
>
> A. None, I had none.

132 If the success of Neil's case depended upon his evidence being accepted to prove particular, detailed contentious facts, then it would be difficult to accept Neil's evidence in the absence of objective corroboration.

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[34] For example, T 34.40, T 14.48, and T 63.18.
[35] T 45.25 to T 46.3.

133 However, Neil's application is for an order for further provision under the Act.

134 Neil's case started by giving evidence to the effect that, by reason of his disabilities, he is prescribed significant doses of painkilling medication which has a serious effect on his ability to remember times and events and care for himself adequately.[36] Robyn gave evidence to the same effect.[37]

135 The manner in which Neil gave his evidence, to my observation, was in broad terms consistent with him having some medical impediments to having a clear and accurate recollection of events. His ability to be able to respond immediately and rationally to questions varied during the course of his cross-examination. Some of his answers were not credible, and the deficiencies were not consistent with intentional dissimulation by a clever witness.

136 The Court must at least be careful in how it uses the evidence of a witness whose claim is based in part on a disability that is acknowledged to impair his competence and recollection. The Court in such a case should hesitate to start with the assumption that the claimant should be able to give his evidence competently and then conclude that the witness is not truthful because the evidence given is incompetent.

137 The Court cannot ignore the unsatisfactory nature of much of the evidence given by Neil, but it is still able to deal with his application on the basis of the substantial matters relevant to his claim that are substantiated by the objective and unchallenged evidence.

Robyn

138 It appeared clear to me from the way that Robyn gave her evidence that she resented having been drawn into Neil's case and in a practical sense been forced to give evidence on his behalf.

139 Robyn also clearly resented being challenged as to the truthfulness of her evidence concerning her relationship with Neil, and the suggestion that in reality she was lying and that she and Neil had always lived as a de facto married couple notwithstanding their protestations to the contrary. Robyn

[36] For example, 28 May 2019 affidavit par 24.
[37] 29 October 2019 affidavit par 21.

clearly took offence to the attack on her truthfulness, notwithstanding, it should be said, that counsel conducted the cross-examination in a polite and respectful way.

140 Robyn's response to the cross-examination coloured the tone in which she gave her evidence, but it did not cause me to disbelieve her in respect of her evidence on the important issues.

141 I accept the evidence of Neil and Robyn that they maintained their finances independently save to the extent that, for the sake of the maintenance of their mutually convenient relationship, they split MasterCard payments equally in order to avoid argument and recrimination.

142 I accept their evidence that they lived separately under the one roof and that they did not have a relationship, following their separation, with the indicia of a de facto marriage.

143 Neil and Robyn have been able to maintain over the years a relationship of convenience and practical interdependence given their limited incomes, their need for accommodation, and their desire to maintain their relationship with Nathan and their grandchildren.

144 It is only human that, considering the length of the relationship, they have had a number of holidays together. Some of those holidays were examined in detail during the hearing, but I do not consider that it is necessary – or realistic – to make minute findings of fact concerning how Neil and Robyn conducted themselves during their holidays.

145 Neil and Robyn did not hide the special nature of their relationship, or the fact that it was Robyn's intention to continue to provide the care and accommodation to Neil, that she has provided for many decades, into the future, as long as she is able to do so.

146 There is no proper basis for insinuating that the relationship between Neil and Robyn is materially different to that which they have always disclosed in their evidence.

147 The most significant consideration, in my view, is the need to put all of this evidence in a proper perspective. There is no basis to make a finding that Neil

and Robyn have enjoyed any significant income, other than their respective pensions, since about 1995. That is borne out by the bank statements that are in evidence. There is no evidence that would justify a suggestion that, contrary to the evidence they have given, either Neil or Robyn have been in some gainful employment or that they have any entitlement to the receipt of income or assets that they have not disclosed.

148 It is a matter of common knowledge that persons who are dependent for decades on Centrelink pensions do not become rich, unless they win the lottery.

149 The principle that an applicant for family provision has the duty to satisfy the Court as to the financial resources of other persons who may share those resources with the applicant is an important one. But it is likely only to have significance when, on the evidence as a whole, the possibility is open that there may be significant, undisclosed resources that are properly material to the determination of the applicant's true financial position.

150 In the present case, Robyn owns the house in which both she and Neil live separately, but in circumstances of the full extent of the cooperation that the evidence has disclosed. They have both been pensioners for about 25 years.

151 There is no basis for the submission that the Court should decline to find that adequate provision for the proper maintenance of Neil was not made in Mrs Coote's will, because of some default in the provision of evidence by Neil that leaves open the possibility that the financial resources available to him are significantly greater than what he has acknowledged.

The family history and its relevance to the application

152 As appears to be common in family provision applications, the parties' evidence covers the broad history of the Coote family.

153 Measured against the fact that the chronology provided to the Court commenced with the birth of Mrs Coote on 4 December 1918, and noting that there is a relatively continuous record of supposedly relevant events from December 1956, the affidavits of the witnesses that have been read are relatively brief. This is especially so in light of the apparent expectation of the

parties that the Court will make positive findings of fact concerning the truth of contrary assertions based upon a judicial process of believing one set of witnesses rather than the other, and consequently accepting what will often be no more than subjective distillations of recollections formulated decades after the relevant events.

154 The well-known decision of McLelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319, delivered in a more commercial context, demonstrates how difficult it is for parties to prove facts dependent upon recollection and oral conversations where there is no objective corroboration long after the event. His Honour said:

> Furthermore, human 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.

155 The observation of Hammerschlag J in *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [94] that "the court must feel an actual persuasion" of the occurrence or existence of relevant facts demonstrates how unrealistic it may be for parties to expect that the Court will be able to solemnly make specific findings of contested fact about events distributed randomly through the decades of a particular family's history.

156 It will often not be feasible for the Court to do more than make broad judgments about the probable occurrence of events and the existence of relationships that are material to the proper determination of the issues raised by a family provision application.

157 In this case, Neil conceded readily in cross-examination that, when he spoke to Mrs Coote, he was sometimes very critical of her and that he would often complain about her conduct.[38]

158 Neil began his evidence by saying:[39]

[38] T 116.3.
[39] 28 May 2019 affidavit par 7.

> … My relationship with my mother was never as good as the relationship she had with Brian and she told me from a young age that I was only conceived and born in case something were to happen to Brian. During my childhood I was treated poorly by both my mother and father who favoured Brian over me in all things. Brian would take advantage of this and claim any new possessions our parents would provide while forcing me to take his hand-me-downs even if the new items were purchased specifically for me. Upon his death bed my father apologised to me for treating me badly as a child.

159 In so far as he could realistically do it, Brian disagreed with this evidence[40] and asserted from his perspective that he and Neil were treated equally. Brian also cast doubt on the likelihood that his father apologised to Neil on the father's death bed by giving evidence of the father's circumstances in the last few weeks of his life.[41]

160 Against this, Nathan was not challenged on the evidence that he gave[42] that, when Neil returned to Western Australia after Nathan's grandfather's funeral, Neil told Nathan that his grandfather had said to Neil: "I'm sorry for the way Mum and I treated you for all these years, please forgive me."

161 I will accept that Neil had a genuine perception that his parents preferred Brian. The issue is in practical terms now an entirely subjective one as it is quite impossible for the Court to resolve the issue in a positive way as if there were adequate objective evidence available to do so.

162 I accept that the evidence establishes that Brian was a good and dutiful son, who always maintained a positive and loving relationship with Mrs Coote, and that she reciprocated.

163 Brian gave evidence, which I accept, that he devoted a relatively considerable time to provide physical assistance to his parents in relation to the maintenance of their properties, particularly having regard to the fact that, for most of the time Brian, resided a considerable distance away from his parents' home.[43] It is not necessary to describe this work in detail. It would have contributed to the maintenance of the value of Mrs Coote's home, which was her primary asset.

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[40] 14 September 2019 affidavit pars 106 to 110
[41] 14 September 2019 affidavit par 108.
[42] 4 July 2020 affidavit par 9.
[43] 14 September 2019 affidavit pars 20, 29, 32, 36 to 38, 42 to 46, 51 and 52 to 74.

164 It is a fair conclusion that Neil did not provide the same level of help to his parents as Brian did. I accept that, while Neil was living in New South Wales between 1995 and 2013 or 2014, he occasionally assisted Mrs Coote by taking her to play cards with friends, and also from time to time mowed her lawn and did other work around the house. The evidence does not permit any precise findings concerning the nature and frequency of the assistance and the pastoral care that Neil provided to Mrs Coote.

165 In cross-examination,[44] Neil conceded, somewhat begrudgingly, that his evidence concerning the work that he did on the upkeep of Mrs Coote's home was an exaggeration.

166 This concession was in part obtained by a demonstration that Neil was so disabled by his back injury – having to spend much of his days in bed on a stretching machine – that his level of disability was inconsistent with him doing the work that he had claimed to do.

167 Against this, there was no real challenge to Nathan's evidence[45] to the following effect:

> 19. During my time in Newcastle, because Dad was frequently bed-ridden due to chronic pain and because I was "young and small," I was asked to work at Nanna's home. I would fix her asbestos roof, crawl beneath the cavities under her house and conducted numerous other odd jobs for her.

168 This evidence tends to show that, while it is probable that there was a disparity in the assistance to Mrs Coote given by her sons that favours Brian, Neil attempted to overcome his physical disability to some extent by providing assistance to Mrs Coote through the efforts of his son.

169 A strange aspect of the evidence in this matter is that Neil and Robyn created an informal, running record of contact between Neil and Mrs Coote, apparently in response to Mrs Coote's complaints that Neil ignored her.[46] The notes made by Neil and Robyn[47] would provide a dubious record even if they were admissible to prove the fact of the communications between Neil and Mrs Coote. It appears that some of the records were made by Robyn when she

[44] T 108.34.
[45] 4 July 2020 affidavit par 19.
[46] Exhibit P6.
[47] Exhibit P6.

claims she overheard telephone conversations between Neil and Mrs Coote. It is likely that some of the records were written up after the event. The notes purport to record contacts for the years 1998 to 2018, although by 2012, the notations are brief and descriptive.

170 The notes present as a strange record and do not appear to be inherently reliable. I would not place significant weight upon them, even if they had been admitted into evidence without restriction. In particular, aspects of the notes appear to constitute reconstructions made after the event.

171 The evidence as to the broad sweep of the history of the Coote family must be assessed in the light of the fact that on 17 December 2001, at the age of 83, Mrs Coote made a will in which she treated both of her sons equally. Whatever disappointment, if any, Mrs Coote may have had about her relationship with Neil up until that time did not affect her decision to treat Neil and Brian equally.

172 Furthermore, whatever happened after that date, Mrs Coote was not moved to change her will to reduce Neil's inheritance to a mere legacy of $25,000 until 28 November 2013, when she was almost 95 years of age.

173 The evidence does not demonstrate with any real clarity why Mrs Coote so dramatically changed her testamentary intentions. Nor does it show whether Mrs Coote had in mind when she prepared her final will the disparity in financial circumstances between her two sons, and the disadvantages from which Neil suffered because of his many disabilities.

174 The evidence included a number of letters that Mrs Coote wrote to Brian concerning her attitude to Neil. In particular, Mrs Coote wrote a letter to Brian on 30 May 2011 that included:[48]

> Thank you so much for the work you have done here for me; I do appreciate your kindness very much indeed knowing how busy you are back in Wollongong: I only wish I were able to compensate you more adequately than just thanking you.
>
> Unlike you, your brother, as I said, has been here to evaluate & choose the paintings he wants from my collection, he hasn't changed I fear. I don't think his son has much time for them, especially his mother, a woman I fear I find very hard to like. It seems I am staying alive much longer than I should so delaying the collection of my paintings by my son & his wife…

[48] 5 December 2019 affidavit par 23 annexure B.

175 Further, on 10 June 2012, Mrs Coote wrote to Brian saying:[49]

> I told you over the phone about Neil & the painting which he took home, never asking if he could, & my phone call, answered unfortunately by his wife Robyn, unpleasant as usual, resulted in me finding said painting at the front door the next morning: no phone call from him, so now I guess it will be years & years before he speaks to me as he has done before. So what, he has never once come & said 'What can I do to help'? & His father died as you know in January 1990. Les over the road has done more for me & I am grateful for his care. I can never thank you enough for your care and interest…"

176 While the sentiments expressed in these letters are material, it is a matter for speculation whether the matters discussed were instrumental in causing Mrs Coote to change her testamentary intentions so dramatically against Neil.

177 In cross-examination, Neil denied that he took any painting from Mrs Coote without permission.[50]

178 It would be problematic for the Court to make any determination as to the truth of what happened concerning the painting on the basis of the evidence that is available.

179 It is possible that Neil's return to Western Australia, if that happened in 2013, was a trigger for Mrs Coote's displeasure towards him, although, as I observed above, there is uncertainty in the evidence about the year when Neil left New South Wales.

180 I need only record that Brian's financial circumstances are sound and he has significant assets and an adequate source of income.[51] Brian's submissions included: "It is accepted that [Brian and his wife] are comfortably well off, although they are to a degree income poor". In the circumstances, there is no warrant for the Court to disclose the detail of Brian's assets and income.

Consideration

181 Given the value of the assets that remain in Mrs Coote's estate, after allowing for the payment of legal costs, the resolution of this matter will not depend in any precise way on a comparison between the respective financial positions of Neil and Brian. In any event, the exercise of the Court's jurisdiction to make a family provision order does not in any way involve an exercise in comparing the

[49] 5 December 2019 affidavit par 24 annexure C.
[50] T 117.4. See also the cross-examination of Robyn at T 127.35.
[51] Defendant's outline of submissions pars 24 to 29.

financial circumstances of the beneficiaries and redistributing the estate in accordance with the Court's view as to what is a fair outcome.

182 The estimated future financial needs of Neil are set out in his written case outline[52] as follows:

> i) Security of accommodation, and towards the purchase of a modest Strata unit in Perth, or towards a refundable accommodation deposit (RAD) at the Aegis Aged Care facility, Millville $100,000
>
> ii) Furniture, white goods and furnishings, $10,000
>
> ii) Motor vehicle $35,000
>
> iv) Mobility scooter $5000
>
> v) Wheelchair $2000
>
> vi) Cost of future unforeseen contingencies, including the cost of medication, not covered by the government $45,000
>
> Total $197,000

183 I am satisfied that Neil has demonstrated, as required by s 59(1)(c) of the Act, that adequate provision for his proper maintenance, education and advancement in life was not made by Mrs Coote in her final will.

184 In that respect, I consider a legacy of $25,000 out of an estate that had an initial value of about $500,000 was plainly inadequate, given Neil's demonstrated, long-term, multiple, and serious physical disabilities and the consequences of those disabilities for Neil's present financial position. That includes Neil's dependence upon his pension and the continuing forbearance of Robyn, and how he personally has no fund sufficient to alleviate the physical consequences of his disabilities and to provide adequately for him in the future.

185 I consider that Neil's application satisfies the situation described by Hallen J in *Anderson v Hill* at par 135(c) and (f), where his Honour refers to the situation of an adult child who falls on hard times and where an adult child lacks reserves to meet demands, particularly of ill health, and where such a child lacks a fund to provide against the ordinary vicissitudes of life.

186 I find that, while Neil has an expectation of receiving continuing accommodation and assistance from Robyn, albeit at her sufferance, the

[52] See also 11 October 2019 affidavit par 21 and following.

income of each of Neil and Robyn from their pensions is needed to service each of their needs.

187 I have not ignored the evidence that each of Neil and Robyn have been able, particularly since the time when Nathan lost his employment, to divert part of their income for the benefit of Nathan and their grandchildren. That establishes that the pension incomes of Neil and Robyn are adequate to meet their daily needs and to provide a small surplus on a continuing basis.

188 It also demonstrates that Neil has chosen to apply a significant part of his small surplus in providing for his family rather than preserving a fund to meet the future vicissitudes in life that he may encounter.

189 Neil cannot expect Mrs Coote's estate to make good a fund that would have remained available to Neil that he has chosen to apply for the benefit of others, even though it may be thought admirable for Neil to have done so given the loss of employment of Nathan: see *Anderson v Hill* at 135(d).

190 While the costs attributed by Neil to his future physical and financial needs may not be unreasonable in a general sense, they are somewhat arbitrary. I accept the submissions made by Brian[53] that there is insufficient assets in the estate to provide a fund for Neil for accommodation in addition to the other needs claimed by Neil that have been listed above.

191 The reality is that the scope for the determination by the Court of the family provision that will be adequate and proper for Neil in the circumstances is substantially circumscribed by the value of the estate that will remain after the usual costs orders are made.

192 The circumstances do not warrant the making of a family provision order in favour of Neil that would give him substantially all of the remaining assets in the estate.

193 While I consider that Neil has demonstrated that he has physical and financial needs that justify the making of a family provision order under which he will get substantially more than the $25,000 legacy left to him under Mrs Coote's final will, it would not be appropriate for the Court to overturn the testamentary

[53] Defendant's Supplementary Submissions pars 49 to 51.

preference of Mrs Coote that would be necessary before the Court could make the family provision order sought by Neil.

194 Constrained by the circumstances, the best that the Court can do is to make a family provision order that will provide Neil with an additional fund that should assist him in the future depending upon the contingencies that may arise.

195 I will make an order that Neil receive a legacy of $100,000 in total (i.e. inclusive of the $25,000 of the legacy that he has already been paid).

196 A legacy in that amount would have constituted about 20% of Mrs Coote's estate, had it been able to be made without the diminution of the estate that has now been caused by the parties' legal costs.

197 I will also make the usual orders that Neil's costs be paid out of the estate on the ordinary basis and that Brian's costs, as executor, be paid on the indemnity basis.

198 The orders of the Court therefore are:

(1) Having found that the plaintiff is an eligible person, that the proceedings were commenced within time, and that the provision made to him pursuant to the operation of the rules of intestacy is inadequate for his proper maintenance or advancement in life, order that he receive, by way of provision, out of the estate of the deceased, a lump sum of $100,000 in total.

(2) Order that no interest is to be paid on the lump sum, if it is paid within 28 days of the date of this judgment, otherwise, interest calculated at the rate prescribed by s 84A(3) of the *Probate and Administration Act 1898* (NSW), on unpaid legacies, is to be paid from that date until the date of payment of the lump sum.

(3) Order that the plaintiff's costs, calculated on the ordinary basis, of the proceedings, be paid out of the estate of the deceased.

(4) Order that the defendant's costs, calculated on the indemnity basis, of the proceedings, be paid, or retained, as the case may be, out of the estate of the deceased.

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