[2015] WASC 71

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	MEAD -v- LEMON [2015] WASC 71
CORAM	**:**	MASTER SANDERSON
HEARD	**:**	2 - 5 FEBRUARY 2015
DELIVERED	**:**	26 FEBRUARY 2015
FILE NO/S	**:**	CIV 3076 of 2012
BETWEEN	**:**	OLIVIA JACQUELINE MEAD Plaintiff AND DAVID JOHN NEALE LEMON as Executor of the Estate of MICHAEL JOHN MAYNARD WRIGHT First Defendant LEONIE ANGELA MAYNARD BALDOCK Second Defendant ALEXANDRA ODETTE BURT Third Defendant VOC GROUP LTD Fourth Defendant

Catchwords:

Family Provision Act 1972 (WA) - Large estate - Claim by daughter of inadequate provision - Turns on own facts

Legislation:

Family Provision Act 1972 (WA)
Trustees Act 1962 (WA)

Result:

Provision made for plaintiff

Category: B

Representation:

Counsel:

Plaintiff	:	Mr L Ellison SC & Mr C V Eastwood
First Defendant	:	Ms J Needham SC & Ms A A Gomez
Second Defendant	:	Ms J Needham SC & Ms A A Gomez
Third Defendant	:	Ms J Needham SC & Ms A A Gomez
Fourth Defendant	:	Ms J Needham SC & Ms A A Gomez

Solicitors:

Plaintiff	:	Eastwood Sweeney Law
First Defendant	:	Clifford Chance
Second Defendant	:	Clifford Chance
Third Defendant	:	Clifford Chance
Fourth Defendant	:	Clifford Chance

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

Bondelmonte v Blanckensee [1989] WAR 305

MASTER SANDERSON:

Introduction

1 The plaintiff is the daughter of the late Michael John Maynard Wright (the deceased). The deceased died on 26 April 2012 aged 74. He was survived by his wife Mary whom he married on 2 May 1997. He was survived by three adult children born of his earlier marriage to Jennifer Turner. The second defendant was born on 28 August 1971. The third defendant was born on 18 December 1973. The deceased's son Myles who is not a party to these proceedings is the other adult child. The deceased's three earlier wives (from whom he had been divorced) survived him. The plaintiff was born on 3 September 1995 from a relationship with Elizabeth Anne Mead.

2 The deceased made many wills during his lifetime with those many wills being altered by even more numerous codicils. The deceased made his last will on 6 March 2012 and that will was altered by codicil on 11 March 2012. On 10 July 2012 probate was granted in this court to the first defendant. The first defendant was the executor named in the will. He was over many years the deceased's solicitor.

3 The fourth defendant is now, after partial distribution of the estate, a company owned jointly by the second and third defendants. The main value in the estate is held in this company. Quite why it should have been a party to these proceedings is not clear. In any event the fourth defendant took no separate part in the action and no orders were sought against it.

4 The plaintiff maintains she has not been left with adequate provision from the estate of the deceased.

Size of the deceased's estate

5 Up until now in every case brought under the *Family Provision Act 1972* (WA) (the Act) it has been necessary to assess the value of a deceased's estate as at the date of death and as at the date of the hearing of the action. This case is different. After some initial skirmishing over the level of financial disclosure relating to the estate the parties agreed no attempt at valuation was necessary. They were clearly correct.

6 The deceased's estate is colossal. By reference to the statement of assets and liabilities attached to the affidavit sworn by the first defendant on 1 June 2012 in support of his application for probate the value of each of the second and third defendant's entitlements is in the order of $400 million. That needs to be put in context. Evidence was given by

two actuaries during the course of the hearing - I will come to that evidence below. Both actuaries agreed a reasonable rate of return on capital is in the order of 6½%. If that is right then each of the second and third defendant can expect an income of more than $24 million per year without touching the capital. Of course that assumes each of their interests is only worth $400 million. In his written submissions counsel for the plaintiff speculated the size of the estate may be in excess of $1 billion. No issue was taken with that estimate by the defendants. Anyway it is difficult for most people to comprehend such wealth.

7 The bulk of the deceased's estate has been distributed by the first defendant. Once a claim was made against the estate under the Act an executor should not further distribute the estate. The first defendant appears to have ignored that rule - presumably he believed the estate was of such a size any distribution he might make would not affect the capacity of the estate to meet any award. Be that as it may it is rule of practice the estate should not be distributed and no exception exists for large estates. If the executor is of the view further distribution would be appropriate and there was no risk of any award made to a party not being met he should seek the appropriate directions from the court under the provisions of the *Trustees Act 1962* (WA).

8 At present the amount standing in the estate and undistributed is $45,272,231.18. It would seem just over $3 million of that amount is held in cash. The rest represents intercompany loans. In his evidence the first defendant said he had no doubt the full amount left undistributed could be realised within 30 days. Counsel for the plaintiff, while reserving his position so far as the distribution of the estate was concerned, accepted it was highly likely any award made to the plaintiff could be met from the undistributed assets of the estate.

The plaintiff's entitlement to bring this claim

9 As the daughter of the deceased the plaintiff is an eligible person under the definition of 'child' in s 4(1) of the Act. Her entitlement to maintain this action is found in s 7(1)(c) of the Act. The application is then to be determined under the provisions of s 6(1) of the Act. That section reads as follows:

> If any person (in this Act called the ***deceased***) dies, then, if the Court is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of

> the persons mentioned in section 7 as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose.

10 The proper approach to s 6(1) of the Act has been considered in numerous cases. It is now well settled the approach adopted by Malcolm CJ in ***Bondelmonte v Blanckensee*** [1989] WAR 305 is to be applied. His Honour said (307):

> On an application under this provision two issues arise. The first question is whether the disposition of the estate by the deceased was not such as to made adequate provision for the proper maintenance, support, education or advancement in life of the claimant. This is in effect a jurisdictional question, which is to be determined at the date of death of the deceased: ***Coates v National Trustees Executors & Agency Co Ltd*** (1956) 95 CLR 494. If that question be answered in the affirmative, the court in exercising its discretion to make such provision as it thinks fit, must take into account the relevant facts as they exist at the time of making the order: ***Coates v National Trustees Executors & Agency Co Ltd*** (supra); ***Dun v Dun*** (1957) 99 CLR 325 at 331; ***Goodman v Windeyer*** (1980) 144 CLR 490.

11 Much judicial ink has been split attempting to define what is meant by the expression 'adequate provision' in the section. In the end all that can be said is what is adequate depends on the circumstances of the case - the size of the estate, the nature of the relationship between the claimant and the deceased, the claimant's present circumstances and other legitimate claims. Any attempt to refine the meaning of this section runs the risk of putting a gloss on the statute.

12 There were three matters which were not in issue between the parties. First, the defendants accept the claim was brought within time - there is no limitation issue. Second, the defendants concede there was no conduct on the part of the plaintiff which would amount to what is sometimes called disentitling conduct. These are what might be called the statutory non-issues. But there is one further concession made by the defendants which is of great significance. They concede no award made to the plaintiff will have any effect whatever on any other party who is to take under the will. This concession requires more elaboration.

13 The will of the deceased provided for a number of specific bequests. For instance the wife of the deceased and his son Myles were provided with specific amounts. No order made in these proceedings will have any effect on their entitlement under the will or the entitlement of any other

nominated beneficiary. The second and third defendants are the residuary beneficiaries. As the will stands at present they will receive what is remaining in the estate less any entitlement the plaintiff may have. But they acknowledge what they receive under the will is so significant that any award to the plaintiff will make no difference to their position. So one element that is usually a significant part of determining if any award should be made under the provisions of the Act is in this case of no account.

The plaintiff's entitlement under the will

14 The plaintiff's entitlement under the will is found in cl 6A(c)(i)(E) of the deceased's will. It is in the following terms:

> **(E) Olivia Trust No. 2**
>
> (a) I note that I have given to the trustee of the trust called the Olivia Trust No 2 dated 18 April 2007 between Peter Cornelius Beekink as Settlor and me, Michael John Maynard Wright, as trustee (the 'Trust' as amended, supplemented, novated or replaced from time to time), sufficient funds to purchase a commercial building in Peel Street, O'Connor for $720,000 (which I currently rent from the Trust) plus $20,000.00 in cash. I note that periodically I place surplus cash on deposit with the trust at interest but on call;
>
> (b) I propose to make 5 annual payments to the trustee of the Olivia Trust No 2 to increase the trust fund up to a maximum amount of $3 million in cash and/or property. These annual payments will be increased annually by the CPI increase;
>
> (c) if I die prior to making all of those annual payments, and for so long as Olivia Mead is a beneficiary under the Olivia Trust No 2, to pay the balance of those 5 annual payments to the trustee of the Olivia Trust No 2 as if I were alive but only up to a maximum amount of $3 million (subject to CPI Increase) in cash and/or property inclusive of any amounts paid into that trust under Clause 3 above, as well as any loans I may have made to the Trust under Clause 6A(c)(i)(E)(a) above to which I waive repayment,
>
> (d) subject to clause 6A(c)(i)(E)(b) and (c), the amount of the last payment I make to the trustee of the Olivia Trust No 2 before my death will be the amount of each of the balance of these payments to the trustee of the Olivia Trust No 2 under my Will;

(e) the amount of each payment referred to in clause 6A(c)(i)(E)(c) will be increased annually by the CPI increase;

(f) it is my belief that the payments contributed generally in support of Olivia Mead and to the trustee of the Olivia Trust No 2 during my lifetime (in this regard my Trustees should have my personal records to ascertain the extent of my support to Olivia Mead and provide evidence of this support to such persons as they consider appropriate) and the provision for further contributions to the trustee of the Olivia Trust No 2 after my death, are such as to provide for the adequate and proper maintenance, support, education and advancement in the life of Olivia Mead;

(g) for the purposes of this clause 6A(c)(i)(E) only:

CPI means the Consumer Price Index - All Groups for Perth, Western Australia, published by the Australian Bureau of Statistics, or any index which officially replaces it. If no index officially replaces it, the trustees will arrange for an expert to assess what it would have been

CPI Increase means the figure determined by dividing the current CPI by the previous CPI

Current CPI means the CPI number for the quarter ending immediately before the relevant payment

Previous CPI means the CPI for the quarter ending immediately before the payment immediately preceding the payment to be increased by the CPI increase

(The reference to the 'Olivia No. 2 Trust dated 18 April 2007' should be a reference to the Olivia Trust No 2 dated 18 April 2008. This was a typographical error and was acknowledged as such by the first defendant in his affidavit.)

15 To make sense of this clause it is necessary to refer to the provisions of the Trust Deed itself.

16 In some ways the Trust is a classic family discretionary trust; but in some respects it is highly idiosyncratic. Under the heading 'Background' there is a recital to the following effect:

> One of the main objectives of the Olivia Trust No 2 is to provide for the advancement and benefit of Olivia Mead.

17 In the definition section, 'Vesting Date' is effectively the date upon which the plaintiff turns 30. However, there is an extended definition found in cl 5 of the Deed. It is in the following terms:

> **5 Trust Fund at the Vesting Date**
>
> 5.1 If the Vesting Day is:
>
> 5.1.1 The date on which Olivia Mead attains the age of 30 years and:
>
> (a) Olivia Mead satisfies the Trustee (acting reasonably) that she is the natural daughter of Michael John Maynard Wright, and
>
> (b) Olivia Mead is not an Excluded Person,
>
> the whole of the Trust Fund will vest in Olivia Mead.
>
> 5.1.2 After the date of Olivia Mead's death and:
>
> (a) Olivia Mead has not attained the age of 30 years; and
>
> (b) Michael John Maynard Wright is still alive,
>
> the whole of the Trust Fund will vest in Michael John Maynard Wright.
>
> 5.1.3 After the date of Olivia Mead's death and:
>
> (a) Olivia Mead has not attained the age of 30 years; and
>
> (b) Michael John Maynard Wright is dead,
>
> the whole of the Trust Fund will vest in the executor of the will of Michael John Maynard Wright to be held in accordance with the terms of the distribution of his estate.
>
> 5.1.4 any other date than those referred to in clauses 5.1.1 - 5.1.3 the Trustee has a discretion to pay or apply the entire amount, in such shares as the Trustee determines, to or for the benefit of one or more of the Beneficiaries (to the exclusion of the others) who are alive or in existence on the Vesting Date and if there are no Designated Beneficiaries then eligible, the whole of the Trust Fund shall vest in the executor of the will or personal representative of Michael John Maynard Wright to be held in accordance with the terms for the distribution of his estate.

18 The plaintiff is and always has been a beneficiary under the Trust. However, there is an extended definition of the term 'Beneficiary' found in the Deed. It reads as follows:

> **Beneficiary** means any of the following:
>
> (a) Olivia Mead, Michael John Maynard Wright, any other person nominated in writing by Michael John Maynard Wright personally (**Designated Beneficiaries**);
>
> (b) any company in which any one or more of the Designated Beneficiaries, either directly or indirectly through one or more interposed entities:
>
> - holds a controlling interest; or
> - holds or is beneficially entitled to more than 50% of the voting power in the company or to rights to more than 50% of any dividends or any distribution of capital either on a return of capital or on a winding up,
>
> (but only until such Designated Beneficiary becomes an Excluded Person) excluding
>
> - the Settlor;
> - any person in the capacity as trustee of any other trust to the extent that a distribution to that trustee would infringe the rule against perpetuities; and
> - any Excluded Person.
>
> (c) Any trust, association or company formed for charitable purposes.

19 The expression 'Excluded Person' which is referred to in cl 5 is defined in the definition section but more extensively defined in cl 14. That clause is in the following terms:

> **14. Excluding Beneficiaries**
>
> **Excluded Persons**
>
> 14.1 Any person whether a Designated Beneficiary or not who:
>
> 14.1.1 if Michael John Maynard Wright at any time before the Vesting Date, declares that person or class of persons is or are an Excluded Person;
>
> 14.1.2 is a child of Olivia Mead;

14.1.3 has become an alcoholic and/or whose capacity for rational behaviour in a competent and satisfactory manner has been impacted by alcohol;

14.1.4 has at any time suffered a conviction relating to drugs, their use or any other illegal association therewith in any recognised form;

14.1.5 is or has been in the opinion of my Trustees recently suspected or knowingly had any involvement or association whatsoever in relation to illegal drugs;

14.1.6 in the opinion of my Trustees has become a drug addict or become involved with illegal drugs in the manner described in the preceding subclauses as a result of the legal use of drugs fur any reason whatsoever;

14.1.7 is in the opinion of my Trustees a member of or in any other way involved with any religious body other than the Roman Catholic, Anglican, Presbyterian, Baptist, Uniting or other similar traditional faiths; or

14.1.8 has been convicted of a felony at any time after the death of Michael John Maynard Wright or within 10 years preceding the death of Michael John Maynard Wright,

will be an Excluded Person and, as such, will be excluded as a Beneficiary under this Deed.

Effect of declaration

14.2 A declaration in accordance with, or exclusion under, clause 14.1 takes effect on the date specified in the declaration or the occurrence of the relevant event (as the case may be) and continues to have effect thereafter. However, such declarations and events do not derogate from any interest in the Trust Fund to which any Beneficiary is indefeasibly entitled on or before the date of the declaration.

Declaration revocable unless otherwise specified

14.3 A declaration or opinion made in accordance with clause 14.1 may be revoked at any time before the Vesting Date, unless Michael John Maynard Wright specifies at the time of making the declaration or opinion that it is to be irrevocable.

20 The appointor of the Trust was the deceased. Pursuant to cl 7.1 of the Deed upon the death of the deceased his executor, the first defendant, became the appointor. He also became trustee of the Trust with power to appoint another trustee if he wished (cl 7.2). The Trust Deed contained

provisions dealing with how the income of the Trust Fund was to be distributed and how the trustees were to deal with the capital of the Trust. Both are of some importance and I will quote each clause in full:

> **3 Income of the Trust Fund**
>
> **Distributable Income**
>
> 3.1 Notwithstanding the definition of Distributable Income in clause 1.1, the Trustee has a discretion to determine the amount of the Distributable Income of the Trust Fund with respect to an Accounting Period. Subject to the exercise of this discretion, the amount of the Distributable Income with respect to an Accounting Period is whichever is the greater of Trust Income or Tax Income for that Accounting Period.
>
> **Trustee's discretion**
>
> 3.2 In relation to the Distributable Income of the Trust Fund, the Trustee has a discretion either:
>
> 3.2. 1 to pay or apply all or part of the Distributable Income as or for the benefit of Olivia Mead and in particular for her education (to the date Olivia Mead attains the age of 23 years or the attainment of her first tertiary qualification, whichever is the earlier to occur), maintenance, health and medical expenses;
>
> 3.2.2 to pay or apply all or part of the Distributable Income, in such shares as the Trustee determines, to or for the benefit of one or more of the Beneficiaries (to the exclusion of the others) who are alive or in existence from time to time; or
>
> 3.2.3 to accumulate all or part of the Distributable Income.
>
> **Exercise of Trustee's discretion**
>
> 3.3 On or before the last day of each Accounting Period until the Vesting Date, the Trustee may exercise its discretion under clause 3.2 in respect of part or the entire Distributable Income of the Trust Fund for that Accounting Period.
>
> **Failure to exercise discretion**
>
> 3.4 Where the Trustee fails to exercise its discretion in accordance with clause 3.3 in respect of all or any part of the Distributable Income of the Trust Fund for an Accounting Period (**unallocated amount**), the Trustee is deemed to have accumulated the Distributable Income.

Exercise of discretion irrevocable

3.5 Where the Trustee has exercised its discretion in accordance with clause 3.3 or is deemed to have exercised its discretion in accordance with clause 3.4 that exercise of discretion is irrevocable.

4 Capital of the Trust Fund

Trustee's discretion

4.1 In relation to the Capital of the Trust Fund, the Trustee or Michael John Maynard Wright has a discretion to pay or apply all or part of the Capital, in such shares as the Trustee or Michael John Maynard Wright determines, to or for the benefit of one or more of the Beneficiaries (to the exclusion of the others) who are alive or in existence from time to time.

Exercise of Trustee's discretion

4.2 Without:

4.2.1 limiting clause 4.1, it is the intention and wish of the Trustee and the Appointor as at the date of this Deed that there will not be any vesting of any of the capital of Trust Fund [sic] upon Olivia Mead until both of the following events have occurred:

(a) Michael John Maynard Wright has died; and

(b) Olivia Mead has attained the age of 30 years; and

4.2.2 being under any obligation, until the Vesting Date Michael John Maynard Wright may exercise his discretion under clause 4.1 in respect of all or part of the Capital of the Trust Fund at any time.

Exercise of discretion irrevocable

4.3 Where Michael John Maynard Wright has exercised his discretion in accordance with clause 4.2, that exercise of discretion irrevocable.

Power of advancement

4.4 In exercise of the discretions conferred by either or both of clause 3 or clause 4 of this Deed, the Trustee may pay, apply or accumulate Property comprising or comprised in the Trust Fund for the advancement or benefit of Olivia Mead.

21 The picture that emerges then is this. Any benefit which was to flow to the plaintiff upon the death of the deceased passed to her through the Trust. As at the date of the death of the deceased the assets of the Trust were a building in O'Connor which was purchased for an amount of $720,000 and roughly $20,000 in cash. There was a debt attached to the building but that was cancelled under the terms of the will. As at the date of his death the deceased had not made any of the five annual payments to the Trust to bring its capital up to $3 million. Pursuant to cl 6A(c)(i)(E)(c) of the deceased's will, the executor is directed 'to pay the balance of those 5 annual payments to the trustee of the Olivia Trust No 2 as if I were alive but only up to a maximum amount of $3 million'.

22 There appears to be some uncertainty as to how this clause is to operate. Assuming the property in the Trust together with the cash amount to $740,000 then the executor is to pay into the Trust an amount of $2,260,000. It may or may not be the case the will requires annual instalments of $452,000. It may require no more than annual instalments of whatever amount the trustee deems appropriate with a final balloon payment bringing the total capital in the Trust up to $3 million (adjusted by CPI).

23 It is also not clear what the phrase 'up to a maximum amount of $3 million' actually means. Counsel for the plaintiff suggested it provided the trustee with a discretion to make payments up to that amount or to make payments of a lesser amount. Counsel for the defendants submitted the intent of the will was clear and the trustee was required to ensure the capital amount in the Trust was $3 million. It is not for me to determine precisely what cl 6A(c)(i)(E)(c) of the will means. But it does appear the position is arguable.

24 As at the date of death of the deceased the plaintiff and the first defendant had never met. In fact the evidence of the plaintiff was to the effect she had no knowledge of the existence of the Trust and its terms. The deceased had never mentioned it to her. Clause 3 and cl 4 of the Trust gives the trustee an absolute discretion with respect to the income and capital of the Trust. So, for instance, if the trustee decided to retain all of the earnings in the Trust until the plaintiff was 30 there is nothing she could do to alter that decision. In fact it appears as though the deceased intended the income from the Trust would not be just distributed to the plaintiff on an annual basis. Pursuant to cl 3.2.1 distribution of the income is permitted for the purposes of education but only up until the plaintiff is 23 years of age. What the Trust envisages is the plaintiff

approaching the trustee for distribution for particular purposes; and the trustee has the discretion to agree or to refuse to make a distribution.

25 So far as capital is concerned the plaintiff has no right to call for any part of the capital. For instance, if she decided she wished to buy a house and sought a capital sum for that purpose the trustee would be quite entitled to refuse. He would not have to give any reason for doing so. The trustee might advance the funds. But the plaintiff under the terms of the Trust is at the mercy of the trustee.

26 Under the definition of 'Beneficiary' in the Trust it would be open to the appointor to include an organisation formed for charitable purposes - the Salvation Army for instance. The Trust allows all of the income to be distributed to that nominated beneficiary. It is most unlikely that would ever occur. But it is a possibility and is another odd feature of the Trust.

27 The strangest aspect of the Trust is cl 14. This provision could operate in an entirely oppressive fashion. It is arguable if the plaintiff were convicted of a drink driving offence she could be excluded as a beneficiary under the terms of cl 14.1.3. The same is true if she were convicted of simple possession of marijuana. It may even be the case if she was suspected of involvement with someone who used an illicit substance she could be excluded under cl 1.4.5.

28 The most egregious of all the provisions is cl 14.1.7. If the plaintiff converted to Buddhism, or perhaps Islam, she would be an 'Excluded Person'. In fact it is arguable if she took a deep interest in, or was associated with persons who practiced these faiths, she would fall foul of the provision. Most Australians would regard freedom of religion as part of their birthright. The plaintiff in order to be sure the Trust would vest in her when she turned 30 would have to give up that basic human right. That is an extraordinary proposition.

Did the will of the deceased provide adequately for the plaintiff?

29 In my view it is clear the will of the deceased did not make adequate provision for the plaintiff. The starting point in reaching that conclusion is the size of the estate. The deceased had a vast fortune and he was in the fortunate position of being able to provide for all of the parties who had a claim on his bounty. It may be that providing the plaintiff with a sum of $3 million tied up in a Trust could be regarded as adequate - although for reasons which follow I am not satisfied that is the case. But this structure does not guarantee the plaintiff $3 million. There is a real prospect she might get nothing.

30 Furthermore, the whole structure is unwieldy. To have her fate in the hands of a man she had never met and who had close ties with other family members is unreasonable. How could the first defendant be expected to understand the wants and needs of a 19-year-old girl living in Perth's outer suburbs when he was a solicitor in Sydney? How was the first defendant to ensure the plaintiff did not fall foul of any of the provisions of cl 14? The terms of the Trust make it incumbent upon him to ensure the plaintiff did not breach any of the terms of that clause. The first defendant may well have had a philosophy that it was best to retain earnings in the Trust so that when the plaintiff turned 30 she would come into a substantial fortune. All of that is uncertain. The whole system is unworkable.

31 When the term 'adequate' found in the section of the Act is considered it is almost always in the context of whether the financial provision in the will is sufficient. But there is no reason why the term could not be used to described the form in which the provision is made in the will. The *Macquarie Dictionary* has as a definition for 'adequate' the word 'suitable'. The structure mandated by the will and the Trust is, to my mind, not a suitable provision to provide for the proper maintenance, support, education or advancement in life of the plaintiff.

32 What ***Bondelmonte v Blanckensee*** makes clear is the jurisdictional question is to be answered at the date of death of the deceased. My assessment of the interaction of the provisions of the will and the terms of the Trust are focused on the date of death. But it is instructive to look at what has happened since the death of the deceased. Prior to the trial the first defendant offered to give to the court an undertaking that he would within 28 days after judgment bring the capital value of the Trust up to $3 million. On behalf of the defendants it was submitted this would remove any uncertainty as to what the plaintiff would receive from the deceased's estate.

33 It is difficult to know what to make of that offer. In part it is of no consequence. What I have to assess is whether as at the date of death of the deceased adequate provision had been made for the plaintiff. It is the operation of the will and the Trust taken together which provide the answer to that question. An undertaking proffered subsequent to the death of the deceased can have no bearing on the decision on that issue.

34 In her closing submissions counsel for the defendants said the first defendant was prepared to give an undertaking to the court he would relinquish his position as appointor of the Trust and ensure a person

acceptable to the plaintiff took up the position of appointor. Once again that undertaking cannot inform the decision of whether or not the provision in the will was adequate.

35 But two points can be made about these undertakings. First, the undertakings could only be accepted if I was satisfied the will of the deceased did not make adequate provision for the plaintiff - that is to say, if I was satisfied the plaintiff had satisfied the jurisdictional requirements of the section. It is satisfaction of that jurisdictional test which enlivens the jurisdiction. Undertakings given to the court could in any way effect that decision. If the jurisdictional requirement were not satisfied it is difficult to see on what basis the undertakings could be accepted and how they would be enforced.

36 Second, the offer of the undertakings suggests the defendants concede the terms of the will and the Trust do not adequately provide for the plaintiff. Counsel for the defendants hotly denied there was any such concession. How can the offer of the undertakings can otherwise be characterised? In any event in determining this question I have not taken into account any concessions on the part of the defendants.

37 It is also instructive to look at what has occurred in relation to the Trust since the date of death of the deceased not for the purpose of determining whether or not the interaction of the will and the Trust were adequate to provide for the plaintiff but rather to see whether any of the concerns raised by the plaintiff about the structure of the Trust are real. Since the date of the death of the deceased the first defendant has made two payments of $100,000 into the Trust. Why he should have made these payments is not explained. Clearly he was of the view he was not bound to make five equal payments and nor does he consider the payments ought be made annually. It could not be said the first defendant has in any way breached the terms of the Trust. The first defendant's actions serve to highlight the uncertainty surrounding when payments into the Trust were to be made.

38 The first defendant has, pursuant to his power as appointor, retired as trustee and appointed a new trustee. There is no suggestion the new trustee is anything but independent. However, it is difficult to know why the first defendant took this step. Doubtless he is well motivated. But he did not discuss the appointment of a new trustee with the plaintiff and it would appear the plaintiff has had no contact with the new trustee. She knows nothing of the new trustee and presumably the new trustee knows

nothing of her. This serves to illustrate again the capricious nature of the power given to the first defendant by the terms of the Trust.

39 In my view given the size of the deceased's estate and the uncertainty surrounding the interaction between the deceased's will and the Trust taken together with the terms of the Trust itself there has not in this case been adequate provision made for the plaintiff. I am satisfied the jurisdictional question should be answered in her favour.

Evidence of the plaintiff

40 The plaintiff swore four affidavits in these proceedings. They were admitted into evidence without objection. The picture that emerges from the plaintiff's evidence is in many respects unremarkable. She grew up a normal well-adjusted child with a single mother. Her first recollections of her father were from the age of 3 or 4. She wondered why her father did not live with the family. From the age of 6 she did have some contact with her father but it was sporadic. He appears not to have taken much of an interest in her welfare. He was consistently late when he arranged to pick her up and apart from one or two nights the plaintiff never spent any extended period of time with her father. That was his choice. The fact is she did not have a close relationship with her father and that was of the deceased's choosing.

41 During her childhood the deceased provided little to the plaintiff or her mother in material support. He did pay childcare as he was obliged to do under the relevant legislation. He paid for school fees for a private college and he provided the plaintiff with some pocket money. But really that was the extent of his largess. Any gifts he gave the plaintiff were of nominal value. The deceased never purchased a home in which the plaintiff and her mother could live despite the fact they moved a number of times from one rented premises to another. In no sense could it be said the plaintiff was spoilt by her father.

42 As part of the plaintiff's case evidence from an actuary was produced. I will deal with this evidence in due course. However, as part of preparing that evidence the plaintiff's solicitors asked the plaintiff to specify expenditure she was likely to make for the rest of her life. That was a big task for a 19-year-old girl. She specified expenditure on some items which were clearly fanciful. For instance the plaintiff has a keen interest in music and learned to play the guitar. When specifying what guitar she might purchase if she had funds available she specified a guitar valued at $250,000. No one needs a guitar of that value - particularly a 19-year-old girl who is not now and never will be a professional musician

and who has not had guitar lessons for some years. There were other items in a similar vein.

43 Counsel for the defendants was particularly effective in drawing attention to the fact the plaintiff's likely expenditure throughout her life was overstated. But I was not left with the impression the plaintiff was a gold digger or in some way a narcissistic greedy individual. Faced with a question about what guitar she might like she let her imagination run wild. A 19-year-old boy in the same position would probably, when asked about a car, have nominated a Ferrari or a Lamborghini. I do not draw any adverse inferences against the plaintiff consequent upon her answers to her solicitor's inquiries.

44 What did emerge from the evidence was the plaintiff was a 19-year-old woman who faced all the uncertainties and possibilities of a young adult in today's world. Upon completing a one year bridging course she enrolled to study commerce at Notre Dame University. She then changed her mind and is now studying for a Bachelor of Arts Degree with a double major in media and marketing and public relations. She had no real idea of what career path she would follow. She anticipated undertaking post-graduate studies but there was no certainty she would be in a position to do so. She hoped to live either in the Eastern States or overseas for a period but she had no concrete plans and much would depend on her academic results. No doubt this case and the uncertainty in her life as a consequence made formulating any plans difficult.

45 The plaintiff did say she had a boyfriend whom she hoped to marry within the next two years. She anticipated having four children. Of course it is possible after one child she might reconsider; most sensible people do. Alternatively the joys of motherhood might be such that she may have six children. The point about all of this is the plaintiff's future is uncertain. Attempting to speculate now where she may be in two years time, let alone in 50 or 60 years time is impossible. Her relationship with her boyfriend may break down. She may decide media, marketing or public relations is not for her. The possibilities are endless. All that can be said is based upon the affidavit material she filed and the way she handled herself in cross-examination the plaintiff is a well-balanced, reasonably intelligent 19-year-old. She has a life in front of her the same as any other 19-year-old. Beyond that trite statement nothing is certain.

Actuarial evidence

46 Each party called evidence from an actuary. On instructions from solicitors each of the actuaries approached their task in a different way.

When each reviewed the other's conclusions there was agreement as to methodology. After a conference between the experts a joint memorandum dated 24 October 2014 was produced (exhibit 3). In the end I found the actuarial evidence of little assistance in determining the outcome of this application. But for the sake of completeness I should mention briefly the differing approaches taken by the experts and their respective conclusions.

47 The plaintiff relied on the evidence of Mr Corey Plover of the firm Cumpston Sarjeant Consulting Actuaries. Mr Plover's report is document 15 in the trial bundle. Mr Plover was asked to make certain assumptions. These were:

- Olivia Jacqueline Mead was born on 3 September 1995 and is currently aged 18.3
- she will have a normal life expectancy for a female of her age (which I have estimated to be an additional 70 years based on prospective mortality projections published by the Australian Bureau of Statistics)
- cost estimates are itemised in the schedule provided, supplemented with information from the following:
  - Detailed tables from ABS publication 6530.0, 'Household Expenditure Survey, Australia (2009-10)' ...
  - 2013 RACV vehicle operating costs ...
  - AMP.NATSEM 33 'The cost of kids' ...

48 Mr Plover then produced a schedule which he described as 'Estimated future expenditure'. Some of these expenditures were estimated by reference to the ABS figures and others were the estimates provided by the plaintiff. By way of example under the heading 'Domestic fuel and power' the estimate of the total expenditure between the date of the report and the anticipated death of the plaintiff was either $58,200 applying a 3% discount or $45,700 applying a 5% discount. That estimate was based on the ABS figures. On the other hand the annual cost of handbags and other fashion accessories were estimated by the plaintiff. The result was $298,400 applying a 3% discount and $200,800 applying a 5% discount.

49 Taking all of these factors into account in his report Mr Plover estimated the amount needed to provide for the plaintiff during her

lifetime was $20,528,500 on the 3% discount scales and $15,371,000 on the 5% discount scales.

50 There are a number of difficulties with this approach. First, the outcome in dollar terms is highly dependent upon what might be called the discretionary spending of the plaintiff. Mr Plover's conclusion in his report anticipated the purchase of a guitar for $250,000. When that and some of the other unrealistic items were taken out the figure was reduced to something around $13 million on the 3% tables. So the conclusions reached by Mr Plover were based on assumptions which in my view could not realistically be made. Perhaps the most glaring example of that is the assumption the plaintiff would have four children. Were she to have just one child the final figure would be significantly different.

51 But the difficulties with this approach are rather more fundamental. It assumes some sort of entitlement on the part of the plaintiff to have each and every one of her needs met from the estate. It does not factor in the prospect of her earning a living; nor does it factor in any income earned by a partner. While it is of interest I was not persuaded this mathematical approach was the proper way to determine how the discretion should be exercised.

52 The defendants relied on the evidence of Ms Catherine Nance an actuary with PWC. The approach of Ms Nance is set out in her report of 28 February 2014 (document 16 in the trial bundle). It reads as follows:

> The trust fund will invest the investment capital for capital growth and to generate income. Each year the trust will pay an amount to the beneficiary. The payment amount will be set at commencement (initial amount) and then indexed each year to maintain the real value of the annual payment. The trust fund may earn more or less income from the capital than the payment each year. Any excess will be re-invested; any shortfall will be made up by a withdrawal from the capital. The payments continue until the death of the beneficiary or the capital is exhausted, whichever comes first. On death the remaining capital, if any, will be distributed in accordance with the trust deed.
>
> I have considered clauses 4.1and 4.2 of the discretionary trust deed for Olivia Trust No. 2 and I note it is not the intention that the trustee release any capital to the beneficiary until she reaches age 30.
>
> In many cases, the starting annuity payments represents less than 3% of capital and in these cases, it would be reasonable in my opinion to assume that the trust income would be sufficient to meet the annual annuity payments over the next twelve years. However, in other cases, the starting annuity payments are higher (over 6% of capital) and in these cases it

> would be unlikely that the trust income would be sufficient to meet the annual annuity payments for all years up to age 30. In all cases, there is a possibility that the trust income may be insufficient in any one year to make the annual annuity payment due to volatility of income.
>
> You have confirmed that if there is an income shortfall in any year while the beneficiary is under age 30, the trustee will be able to access capital in order to make up the shortfall and pay the full amount of the annual annuity payment in that year. I have therefore assumed that the trustee would access the capital if required for this purpose.
>
> You have instructed me to allow for a house purchase in seven years (when the beneficiary is aged 25) which I note will also require the trustee to access capital before the beneficiary reaches age 30.
>
> The initial amount will be determined so that if all assumptions are met, the capital will be exhausted at the beneficiary's date of death and not before. If the assumptions are not met, then the capital may be exhausted before the beneficiary's death, or there may be capital remaining at the beneficiary's death.
>
> I have determined the initial amount of the annuity applying the assumptions outlined below, and rounded all results to the nearer $1,000.
>
> I have not assumed that a life annuity will be purchased from a life insurance company (or other financial product provider). In that situation, the life insurer determines the payment amount taking into account the longevity risk (that the beneficiary lives beyond the expected lifetime), the investment risks and margins for expenses and profit. These additional margins would mean a lower income for the beneficiary than that calculated here, all else being equal.

53 Ms Nance makes various other assumptions which are detailed in her report. She also makes assumptions as to earning rates, when the plaintiff will purchase a home, she accepts the plaintiff will have four children, and she anticipates an annuity from investing rather than the purchase of an annuity.

54 By way of example Ms Nance looked at what annuity the plaintiff might receive on an investment of $3 million. She put the question this way:

> An analysis of an investment of $3 million (as at 30 June 2014) up to age 25 used for provision of an annuity for the plaintiff, at which time a capital withdrawal for a suitable house (figures of around $500,000, $750,000 and $1,000,000) and the balance to then provide an annuity.

55 Ms Nance then made assumptions about price inflation, house price inflation and investment return. By way of example if it is assumed the

plaintiff purchased when she was 25 a house as at 30 June 2014 valued at $500,000 then from the age of 18 she would receive an annual income of $101,000 per year assuming a 6.5% return on investment. If the same approach was adopted but the value of the house was put at $1,000,000 then the annual return would be $81,000 per annum.

56 Once again the evidence is of interest but in my view of no real value. What the defendants have done is assume $3 million is the amount in the exercise of my discretion I ought award to the plaintiff. Ms Nance's approach did not allow for the difficulties occasioned by the terms of the Trust and, insofar as her evidence is directed at the jurisdictional question, it seems to me to be of no moment. What Ms Nance's evidence does show is the sort of return that could be achieved by the plaintiff making a strategic investment of an award of $3 million. But it leaves open the question of whether $3 million is the proper award.

Evidence of other witnesses

57 A number of other affidavits were filed in these proceedings. Only one of those witnesses, apart from the first defendant, was cross-examined - the third defendant. Nothing emerged from that cross-examination which was relevant to my determination of the action. There are however a number of observations I would make about the evidence.

58 First, the evidence of the second and third defendants indicates they did not have a close relationship with the deceased. The picture which emerges is of a difficult man more at home in the world of business than dealing with emotions and interpersonal relationships. That is not to say there was not real affection between the deceased and his two eldest daughters. Undoubtedly there was. Moreover, the fact the second and third defendants had developed the Voyager Estate Winery in such an effective way was clearly a source of great pride to the deceased. But it would be a mistake to suggest the deceased and his two daughters constituted one big happy family.

59 As at the date of death of the deceased he rented the O'Connor property owned by the Trust. That arrangement continued until 1 February 2014. Based on the evidence of the first defendant it would seem the property is now rented out to third parties, presumably with the rental being paid to the trustee. There is no evidence as to the present value of the O'Connor property, its present rental return or the terms of the lease with the present tenants. The distribution made to the plaintiff from the Trust for the year ending 30 June 2014 was $22,069. Quite how that

figure was calculated and why a distribution of that amount was made is not apparent from the evidence.

60 In her evidence the plaintiff indicated she suffered a hearing difficulty which required her from time to time to wear a hearing aid. Both parties instructed medical experts - Dr Ian Mitchell for the plaintiff and Professor Terence McManus for the defendant. The medical experts prepared a joint report. In essence they found while the plaintiff had a hearing loss it was minimal and would not effect her day to day activities. In reaching my decision I have assumed the plaintiff does not suffer from any or any significant hearing disability.

Exercise of discretion

61 As the Act itself makes plain and as was said in ***Bondelmonte v Blanckensee*** s 6(1) provides the court with a discretion. Once the jurisdiction question is answered in a plaintiff's favour then it is open to the court to make 'such provision as it thinks fit'. The approach of the defendants was to say if a plaintiff is entitled to an award then that award should be no more than adequate provision for the proper maintenance, support, education or advancement of life of the plaintiff. With respect that puts a gloss on the statute. The discretion in the Act is unfettered. It must be exercised judicially and all relevant factors must be taken into account. But there is no warrant for assuming that the award should be no more than that which will provide adequate provision for a plaintiff.

62 During the course of the hearing I was referred to dozens of cases. None bear comparison to this one. When it comes to exercising a discretion three factors are consistently found in the cases - the size of the estate, the needs of the plaintiff and the interests of other parties having a legitimate call on the bounty of the deceased. From time to time other factors arise in particular cases. But these themes are universally present. The weight to be given to each of these factors varies between the cases, as is to be expected. But the result is always what might be called a triangulation - a balancing exercise within the reference points provided by the three factors. But this case is different. The estate is massive and its value irrelevant in determining the outcome. No other individual will be prejudiced no matter what award (within reason) I make. That means there is no way of triangulating here; put another way, there are no factors to weigh in the balance. There are no markers for an exercise of discretion.

63 It is always necessary to remain cautious about reaching a decision in an evidence free zone. But it is difficult to see in this case what evidence

could have been led and which was not led which might in some way influence the exercise of my discretion. As I have indicated, taking into account all of the evidence of the plaintiff, I was satisfied she was an honest level-headed young woman. But she is subject to all of the vagaries and uncertainties of youth. The actuarial evidence really took the matter no further. None of the other evidence was as such weight as to influence my decision.

64 In the exercise of my discretion I would award to the plaintiff a cash payment of $25 million conditional upon her forfeiting any right or interest in the Trust. Subject to hearing from the parties that amount ought be paid to the plaintiff within 60 days.

65 Clearly this decision requires some explanation. I need to make it plain in settling on this figure I am exercising a discretion. The one factor which has influenced me most is the size of the estate. This award will set up the plaintiff and her children and perhaps their children for their lives. Wisely invested the fund will provide enough income so the plaintiff and her relatives will never want for anything again. All that against a background of the award making no difference whatever to the position of the other beneficiaries. Even in this day and age $25 million is a considerable amount of money. But in the context of this estate it is little more than a rounding error.

66 It is important to note what this decision is not. It is not about fairness. There is no test of fairness in the Act. If I was called upon to determine what in all the circumstances would have been fair it is difficult to see how the estate would not have been split equally between the deceased's four children - perhaps with some provision for his widow.

67 This decision is not about compensating the plaintiff for the deceased's limitations as a father. That is not the thrust of the Act. But in my view there is no warrant, as was suggested in the closing submissions of the defendants' counsel, that the distant and difficult relationship between the plaintiff and the deceased in some way limited the plaintiff's entitlement. Any suggestion that some concept of 'bare paternity' meant that an inadequate parent in some way had a lesser moral obligation to a child seems to me to be wrong as a matter of principle.

68 The authorities do refer to the 'moral duty' of a testator to those entitled to expect to benefit from his bounty. This moral duty test was once in favour, seems then to have gone out of favour and is now perhaps

back in favour again. It feeds into two approaches which are prominent in the authorities.

69 The first is the concept of what a wise and just testator would do in the position of the deceased. This conjures up the rather archaic image of a grey haired gentleman in a smoking jacket, pipe in mouth, sitting at a leather top desk, fountain pen in hand, attempting to balance the interests of his wife and children. With that image in mind the internal dialogue might go something like this:

> I am a fabulously wealthy man. I am able to provide for my wife, my children and others to such an extent that all will be well provided for without any of the others suffering. My two daughters Leonie and Alexandra have proved themselves loyal and have run the Voyager Estate business extremely well. They have supported me in every possible way. They deserve the lion's share of my estate and they will have it. My son Myles is a successful musician who has forged his own career without much help from me. I should provide for him, conscious of the knowledge he has not been involved in the family business and will always be in a position to provide for himself.
>
> That leaves my daughter Olivia. At her age she has no real idea of what she wants to do - she might get married and have four children. She might become an arts administrator when she finishes university or she may change her mind. She should have complete financial security so that she can pursue whatever interests she wishes into the future. She is young but she is level-headed and with sound advice she can doubtless invest anything I leave to her to provide for her long term benefit. I can afford to spoil her and there is no reason why I should not do so.

70 Whether or not those ruminations would have led to the wise and just testator leaving the plaintiff $25 million is open to question. In my view it would and it is on that basis I have made the award.

71 The second approach, which appears to be favoured at present, is what might be called the community expectation test. That is to say, what amount should be left to a person in the plaintiff's position to meet community expectations. Whether or not I am the ideal person to judge community expectations must be open to doubt. No doubt at one end of the scale a section of the community would believe the plaintiff should get nothing beyond what her father left her in the will. At the other end of the

scale there would be those who could see no reason why the estate ought not be split equally between the deceased's children. The majority view no doubt falls between those two extremes.

72 What can be said about community expectation is that most people would expect the plaintiff to be more than adequately provided for. Given the size of the estate and the lack of limitation on any award it is difficult to believe a majority would not see it appropriate to set up the plaintiff for life. How members of the community would settle on a figure is a rather more difficult question. In my view an award of $25 million would not fall outside the reasonable expectation of most members of the community.

73 In reaching this decision I did give careful consideration to establishing some form of trust into which the fund could be paid and which would be managed on behalf of the plaintiff. In the end I concluded such an approach would be paternalistic and unjustified. True it is the deceased did see a trust structure as appropriate. But that structure was fraught with difficulty so ordering the fund to be paid into the Trust is not option. Establishing a new trust while it might be possible would not seem to be practical. Who for instance would be the trustee of that trust? The result then is a substantial amount of money paid to a young woman without any restriction. On balance I am satisfied that is the best outcome.

74 Clearly it will take some time to frame the orders to give effect to these reasons. The parties' solicitors should confer with a view to producing orders which facilitate the transfer of the Trust assets to the estate and the payment of the fund to the plaintiff. The costs of this action including the reserve costs ought be taxed and paid out of the estate. The plaintiff's costs should be paid on a full indemnity basis save insofar as those costs have been unreasonably incurred.

75 None of us can choose our parents. But functioning adults can choose whether or not they have children. If they do have children certain duties arise. Here I am not referring to moral duties or duties which arise as part of community expectation. I am referring to the statutory duty which arises at death by virtue of the Act. The deceased must have been aware of that duty - he was well advised by a competent solicitor. But it is a duty he could have avoided. The deceased was aware some six months before his death he was afflicted by terminal cancer. At that stage he was free to distribute his estate in any way he wished. That would have meant on his death neither the plaintiff nor anyone else could have

maintained a claim - there would have been nothing to claim against. But of course if the deceased had taken that course he would have been liable for millions of dollars in, effectively, gift duty. The price the deceased paid for passing his assets tax free to his nominated beneficiaries was acceptance of the statutory duty arising under the Act to the plaintiff.

76 Finally, I would add this. When the $25 million is paid to the plaintiff the rest of the residuary estate will pass to the second and third defendants. They will get about $10 million each less perhaps $1 million for costs. That is on top of the $400 million they already have; and they can rest easy in the knowledge their half-sister will be financially secure for the rest of her life.