ISSUES IN THE CONDUCT OF FAMILY PROVISION LITIGATION IN THE DISTRICT COURT

A paper delivered to the Gympie District Law Association
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Introduction

[1] I was invited to give this paper by Chris Anderson on behalf of the Gympie District Law Association. I was very pleased to accept his invitation. Professional associations like the GDLA are important. They provide a framework for professional support for practitioners in regional areas. They provide a focus for a regional profession to contribute to public debate in their community. And perhaps most importantly, they provide a collegiate environment for regional practitioners to meet and mingle.

[2] It is a particular honour to be invited to give this address, being the first CLE paper presented to the GDLA.

[3] Gympie holds a special place in my heart as a Judge. My first solo circuit following my appointment was my visit to Gympie in May 2018. My circuits have all been memorable.

[4] The first circuit was memorable for two things. The first was a jury verdict which remains the quickest I have ever had. Barely 10 minutes. The second was my visit to Executive Menswear in the main street which made the Gympie Times.

[5] My second circuit was the one dominated by the Tomlinson trial. It was full of legal issues and human dramas. My decision on the no case submission on the Forcible Entry charges against two of the defendants remains one of the few judgments on s.

70 *Criminal Code 1899* (Qld).[1] My decision to select from the two reserve jurors by coin toss remains the most theatrical moment in my short judicial career. The jury selection process for that trial, at 2.5 days, remains the longest in my career so far.

[6] Despite COVID 19 preventing me from travelling to Gympie, my third circuit went ahead virtually, with Court to Court link in place for the whole circuit. With the support of your members and counsel, we managed to sit every day but one of the two weeks.

[7] I want to now turn to my subject for this address: practice and procedure in the conduct of family provision applications (**FPA**). I chose this subject for three reasons.

(a) **First**, I have an interest in trust and estate matters.

(b) **Second**, I have also had experience in FPA at the bench, delivering two substantive judgments,[2] and perhaps more directly relevant, acting as the Chief Judge's delegate to review the FPA practice direction.

(c) **Third**, I am aware that practitioners in regional centres have broader practices than city firms and that those practices involve succession matters. I hope that my comments will be of assistance to you in a practical way in dealing with the FPA aspect of that work.

[8] By way of overview, I will tell you the topics I will cover and, in 25 words or less, a summary of my address on that topic.

(a) **First**, I will address the scope of the jurisdiction of the District Court in FPA. The central message on that topic is this: The Court has jurisdiction in just about every FPA case you are likely to deal with;

(b) **Second,** I will address you on the approach to affidavit evidence generally. The central message on this topic is this: Make sure that your affidavit material mostly contains only relevant and admissible evidence (I say mostly because some judgment about the cost benefit analysis of taking the time to put all the evidence into that form is justified);

(c) **Third**, I will address you on the place of relationship evidence in affidavit material filed in FPA. The central message of that topic is this: Detailed relationship evidence is often unimportant and pointlessly expensive. Do less.

(d) **Fourth**, I will address you on the vexed question of whether a person is a de facto spouse and how to go about addressing that question in evidence. The central message of that topic is this: Keep your eyes fixed firmly on the statutory test – Can the applicant be shown to have been living together with the deceased as a couple on a genuine domestic basis?

(e) **Fifth**, I will address you on the potential cost and ethical consequences of the inefficient conduct of applications. The central message of this topic is this: Keep asking yourself whether the costs you are incurring are reasonably necessary to resolve the application efficiently and according to law?

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[1] *R v Tomlinson, Tomlinson and Redden-King* [2019] QDC 98.
[2] *Charlesworth v Griffiths & Anor* [2018] QDC 115; *Fenton-Anderson & Anor v Power & Anor* [2020] QDC 293.

Outline of the law applicable to Family Provision Applications

[9] Section 41(1) *Succession Act 1981* (Qld) provides:

> **41 Estate of deceased person liable for maintenance**
>
> (1) If any person (the ***deceased person***) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.

[10] The section dictates, and the authorities confirm, that what is required is a two-stage approach:

(a) **First**, the Court must determine the so-called jurisdictional question: that is, whether by the terms of the will (or on intestacy), adequate provision is not made for the proper maintenance and support of an eligible applicant.

(b) **Second**, if that jurisdictional question is determined in favour of the applicant, then the Court may exercise a discretion to order that such provision as the Court thinks fit be made out of the estate for one or both of the applicants.[3]

[11] The jurisdictional issue is determined as at the date of death. The discretion falls to be exercised as at the date of the order. However, the assessment of the two matters may overlap. An uncommon, but not unknown, situation is that where a person did not have any relevant need at the date of death, but suffers an accident, health crisis or other personal disaster after the date of death. It is not automatically the case that such matters can be relied upon to sustain a claim under s. 41(1). Indeed, where the event is not one which was reasonably foreseen at the date of death, it cannot be relied upon as supporting the determination of whether adequate provision was made. That might seem harsh, but it has been the law since at least 1956,[4] and no amount of wishing will make it otherwise.

[12] The primary considerations which arise in applying the provision were conveniently summarised by Justice Martin in *Darveniza v Darveniza* [2014] QSC 37 (footnotes omitted):

> [16] From those, and other, decisions the following may be drawn:
>
> (a) The court must determine whether the applicant has been left without *adequate* provision for his or her *proper* maintenance, education and advancement in life.
>
> (b) When considering the proper level of maintenance, the following, at least, should be taken into account:
>
> (i) the applicant's financial position,
>
> (ii) the size and nature of the deceased's estate,
>
> (iii) the totality of the relationship between the applicant and the deceased,
>
> (iv) the relationship between the deceased and other persons who have legitimate claims upon his or her bounty,
>
> (v) present and future needs including the need to guard against unforeseen contingencies.

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[3] *Gersbach v Blake* [2011] NSWSC 368 at [94] to [96].
[4] *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494 at 507-509.

(c) The use of the word "proper" means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the "station in life" of the parties and the expectations to which that has given rise, in other words reciprocal claims and duties based upon how the parties lived and might reasonably have expected to live in the future.

(d) "Maintenance" may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live.

(e) "Support", similarly, may imply provision that exceeds a person's bare needs. The use of the two terms serves to amplify the powers conferred upon the court. And, furthermore, provision to secure or promote "advancement" would ordinarily be provision beyond that for the mere necessities of life. It is not difficult to conceive of a case in which it might appear that sufficient provision for support and maintenance had been made, but that in the circumstances, further provision would be proper to enable a potential beneficiary to improve his or her prospects in life, or to undertake further education. This might be the case where, for example, a promise had been made, or where a claimant reasonably held an expectation that such provision would be made.

(f) The totality of the relevant relationship would include:

(i) any sacrifices made or services given by the claimant to or for the benefit of the deceased;

(ii) any contributions by the claimant to building up the deceased's estate; and

(iii) the conduct of the claimant towards the deceased and of the deceased towards the claimant.

(g) Any such sacrifices, services or contributions (whether described as giving rise to a moral duty/moral claim or not) are a relevant consideration (as part of the totality of the relationship between the claimant and the deceased), but are neither a necessary nor a sufficient condition for the making of an order under the Act.

(h) A claimant may fail to establish that the disposition of the deceased's estate was not such as to make adequate provision for his or her proper maintenance, etc, even though no provision was made for him or her in the will.

(i) The determination of whether the disposition of the deceased's estate was not such as to make adequate provision for the proper maintenance, etc, of the claimant will always, as a practical matter, involve an evaluation of the provision, if any, made for the claimant on the one hand, and the claimant's 'needs' that cannot be met from his or her own resources on the other.

(j) The adequacy of the disposition is assessed as at the time of the testator's death. Any order that might be made is considered in the light of the applicant's circumstances at the time of the trial.

[17] Care must be taken not to extend the idea of a "moral claim" beyond the language of the statute. Section 41 does not give a court carte blanche to remake a will in a way that may appear to be more just. It is a power that should be exercised with the restraint dictated by the terms of the section. The predicament in which a court finds itself has been commented upon many times. In *Pontifical Society for the Propagation of the Faith v Scales* Dixon CJ observed that it was never intended by the legislation that "freedom of testamentary disposition should be so encroached upon that a testator's decision expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court". Consideration of these applications must always proceed with the understanding that the capacity of a court to make an assessment is necessarily limited, as the deceased cannot explain his or her reasons for the disposition of the estate or respond to the claims of an applicant.

[18] While the terms "moral duty" and "moral claim" have been used as shorthand expressions in the consideration of applications for provision they must be used with care. As Gleeson CJ observed in *Vigolo*:

"The descriptions of references to moral duty or moral obligations as a gloss upon the text was not new. In 1956, in *Coates v National Trustees Executors and Agency Co Ltd*,

> Fullagar J said: 'The notion of "moral duty" is found not in the statute but in a gloss upon the statute. It may be a helpful gloss in many cases, but, when a critical question of meaning arises, the question must be answered by reference to the text and not by reference to the gloss.'" (citation omitted)

[13] In determining both the matters, the Court approaches the statutory tests from the perspective of the wise and just testator, rather than the fond or foolish testator.[5] Care must be taken, however, to apply this approach with modesty, and bearing in mind that there is a range of responses to given facts which could be considered wise and just.

[14] This applies particularly to the first stage of the process where a will is involved, where the Court must sit in judgment on the provisions made by the deceased. In my view, it is in this context where reasons given by a testator for making a will in a certain form are rationally probative.[6] The wisdom and justice of the provisions of a will might be cast in a quite different light where the Court has identified for it, by the testator's reasons, matters which might not be obvious at trial and which are directly relevant to assessing the provisions of the will against the statutory standard.

Jurisdiction of the District Court

[15] Jurisdiction is conferred on the District Court to hear and determine applications for family provision under s. 41(1) *Succession Act* by s. 68(1)(b)(x) *District Court of Queensland Act 1967* (Qld). That subsection provides that the Court has jurisdiction to hear and determine actions and matters:

> For family provision pursuant to the *Succession Act 1981*, *sections 40* to *43*, but so that any provision resulting from an order made by the court shall not exceed in amount or value the monetary limit.

[16] It is frequently assumed by practitioners, at least in my experience, that the monetary limit applies to the value of the estate, not the value of the provision made under the order. In my opinion, that is clearly not correct. Section 68(1)(b)(x) defines jurisdiction by reference to the amount or value of the order, not the size of the estate. The Court is given jurisdiction to deal with an application in *any* estate, no matter how large, so long as the provision resulting from the order is under the amount of $750,000.

[17] Despite that, it has been the position of one of the leading texts for many years that one should approach the question of jurisdiction as if it applied the monetary limit to the value of the estate. *Family Provision in Australia* by De Groot and Nickel (in its 5th Edition), advises that

> …since it is possible for the court to order the whole estate of the deceased to be provided for the maintenance of an applicant, it is usual and prudent for the application to be made in the Supreme Court where the net estate exceeds $750,000.

[18] With respect to the learned authors, I disagree with the proposition that it is either usual or prudent to apply in the Supreme Court whenever the estate exceeds $750,000 for the following reasons.

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[5] John De Groot and Bruce Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 5th ed, 2016) [7.11]. See also *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-9 (Lord Romer); *In re Sinnot* [1948] VLR 279 at 281 (Fullagar J); *Sgro v Thompson* [2017] NSWCA 326; *Niebour-Pott & Anor v Pott* [2020] QSC 7 at [130] (Ryan J).

[6] See the useful discussion on the admissibility and use of such statements in AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook Co., 8th ed, 2019) [13.300].

[19] **First**, in most cases, an applicant will have a good idea of the maximum value of the estate and the likely competing claimants even before the personal representative files affidavits in the application. That knowledge is frequently acquired in one or more of the following ways:

(a) The applicant is a beneficiary and is entitled to be provided with a copy of the will upon request per s. 33Z of the Act which may give an indication of assets within the estate;[7] and/or

(b) The applicant is a close relative of the deceased and is generally aware of the assets and liabilities of the deceased from their own knowledge; and/or

(c) The personal representative provides details of the estate and the will when requested by solicitors acting for a potential applicant. This practice is quite common and can be an effective way of avoiding unnecessary costs in the resolution of an FPA.[8]

[20] **Second**, the applicant will be aware of course of the basic facts relating to the strength of their claim. They will know their health status, financial position, and relationship history with the deceased. They are also likely to know in broad terms the position of many of the beneficiaries and other likely family provision claimants.

[21] **Third**, and this applies most strongly in smaller regional centres, there is likely to be general awareness of the persons in the community with the kind of assets which might sustain a very large family provision award (and $750,000 is still a large award).

[22] **Fourth**, outside exceptional cases involving extreme need for an applicant, very large estates or large contributions to an estate, it will be rare that any applicant has a realistic prospect of obtaining an order for provision of more than $750,000.[9] I recently spoke to some senior barristers working in succession and their estimate was that at most only one in five applications had any realistic prospect of an order at more than $750,000. Given that those counsel tended to be briefed in large matters, I suspect the real figure is much less.

[23] For all these reasons, it will be possible in most cases to be confident that the applicant will not have any realistic prospect of obtaining more than $750,000 in provision even if successful on the application. In such cases, there is a strong argument that you should bring the application in the District Court as the most

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[7] Though note that a specific legatee is not entitled to be informed of details of all assets of the estate.

[8] If the purpose and intended effect of disclosure is to persuade an applicant that there is no point to bringing an application, then a personal representative is in a reasonably good position to argue that doing so is consistent with his or her obligations as personal representative, be they fiduciary obligations (proscriptive) or positive obligations defining the scope of the equitable and common law obligations as personal representative. However, care should be taken in disclosing without a legal obligation to do so, where it might have the effect of facilitating the success of the application. The personal representative's duties are to the beneficiaries of the will or on intestacy, not to the applicant for provision. Disclosure should only occur if it is in the interests of the estate to do so. It is impossible to say in advance when that will be. Factual circumstances will vary. The personal representative does not owe fiduciary duties or general law duties to an applicant for family provision as such: see *Brooks v Young* (2018) 131 SASR 365.

[9] See *Grimsley v Paul* [2021] QSC 78, where provision of $750,000 was made for a moderately needy applicant disability support pensioner who was the stepchild of the deceased (where part of the estate comprised assets passing from her biological parent to the deceased) out of an estate of $4.4m and where a further $600,000 in superannuation was available to meet the needs of various third parties and beneficiaries.

appropriate Court. Your duty is arguably not to bring it in the Supreme Court just in case a miracle happens, and your client gets the whole estate.

[24] And of course, there might be thought to be good reasons favouring bringing the matter in the District Court:

(a) **First**, there might be costs consequences of bringing the matter in the Supreme Court when it could be determined in the District Court;

(b) **Second**, and perhaps most important for a regional association, you can file in Gympie or in Maroochydore and, if there is a need for interlocutory hearings or ultimately a trial, you can get on locally and, I suspect, pretty quickly.

[25] To my mind, this last point is one of the most important. Since I have been in this Court, I have become aware of its importance as a regional Court. I recently completed a rather complicated family provision trial in Toowoomba. It would have been regrettable for such a matter to be dealt with in Brisbane. Gympie family provision matters, like Gympie criminal trials, should be heard by this Court in Gympie if possible, or at least in this region.

[26] There are two further legal issues I should address on this subject:

(a) What is the scope of the Court's jurisdiction where there are multiple applicants seeking provision in the one proceeding?

(b) What, if any, formal steps are required to demonstrate that the application is within jurisdiction?

[27] Dealing first with the situation where there are multiple applicants, the question is whether the Court's jurisdiction is to order a total of $750,000 in the proceedings or whether its jurisdiction is to order up to $750,000 *per applicant*, such that if there is, say, 10 applicants, the Court could order a total of $7.5m? In my view, the answer is clearly the latter.

[28] The subsection confers jurisdiction to order family provision "so that *any provision* resulting from an order made by the court shall not exceed in amount or value the monetary limit". The question is whether, on the proper construction of that subsection, it should be read:

(a) Broadly as meaning "any provision *<u>for any applicant</u>* resulting from an order" shall not exceed $750,000; or

(b) Narrowly as meaning "any provision resulting from an order… shall not exceed in *<u>total</u>* amount or value" $750,000.

[29] In my opinion, the broad construction is correct for the following reasons.

[30] **First**, as most of you would know, an application by one eligible applicant for family provision stands as an application for all. The relevant provision is s. 41(6) *Succession Act* which provides:

> Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.

[31] Given this provision, it might be argued that when jurisdiction is conferred over "actions and matters…for family provision", all proceedings by all applicants comprise a single action, and therefore it is the total provision in that action which limits jurisdiction. However, in my view, that argument is wrong.

[32] The word *actions* in s. 68(1) has been consistently given a broad construction.

[33] The word is used in the same sense in s. 68(1)(a) as it is in s. 68(1)(b), in that it confers jurisdiction on the Court to hear and determine actions of specified kinds. In the context of s. 68(1)(a), there is longstanding authority in the Court of Appeal that the word refers to each separate cause of action advanced in a proceeding,[10] so that jurisdiction is conferred on the District Court to hear and determine in the one proceeding any number of individual actions, so long as each separate action (read *cause of action*) claims an amount less than the statutory limit. There is no reason to read the reference to actions in s. 68(1)(b) more narrowly.

[34] Reading the relevant subsection with that chapeau provision in the context of that authority, it confers jurisdiction on the Court to hear and determine one or more actions in the one proceeding such that provision resulting from an order is less than $750,000. That surely must be read as an order in each such action.

[35] Further, in my view, it is not open to doubt that each claim by an eligible applicant for family provision is a separate action. Section 41(1) confers power on the Court to make an order in favour of "the spouse, child or dependent" individually by reference to whether proper provision was made for each such person.

[36] **Second**, in my view, the language of s. 41(6) *Succession Act* tends to support that conclusion. The section does not in terms specify that there is in fact a single claim for relief for all persons who might apply with a single order for provision. Rather, the section has the effect of permitting the application by one person as being a distinct claim for relief on behalf of all others who might apply. The provision is procedural, not substantive. Its task is to make the initiation of such proceedings simpler.

[37] **Third**, in choosing between a broad and narrow construction of jurisdiction-conferring provisions, the broader construction always has a head start. The general principle is that laws conferring jurisdiction are construed broadly. That proposition has been explained as follows (footnotes omitted):[11]

> Courts resist finding restrictions or limitations upon provisions conferring jurisdiction. The standard modern statement of principle is from an admiralty case:
>
> > It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.
>
> For example, the provision granting a right to appeal from decisions of the Supreme Court of Victoria at first instance was construed by Gaudron, Gummow, Hayne and Callinan JJ as follows:
>
> > Section 17(2) is a provision which confers jurisdiction upon a court and it is, on that account alone, to be given no narrow construction. Rather, it is to be construed with all the amplitude that the ordinary meaning of its words admits.
>
> Further examples may be found in relation to the generality of s 68(2) of the Judiciary Act (which is addressed further below) and to the (statutory) jurisdiction of Supreme Courts to rectify a will or to give judicial advice. There is authority for the proposition that a conferral of jurisdiction has retrospective effect. If it is sought to displace the broad legal meaning, then

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[10] *Merrin & Anor v Cairns Port Authority* [2006] QCA 278, adopting the approach to a different provision in *Remote Data Systems P/L & Ors v Hoover & Ors* [2000] QCA 116.

[11] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (The Federation Press, 2nd ed, 2020) 135.

> "cogent reasons must be advanced", and ordinarily "explicit words" will be required to read down such a provision.

[38] Given the compelling case favouring the broader construction in any event, this principle is apt in my view to put the question almost beyond doubt.

[39] **Fourth**, there is authority in this Court in support of my construction, from your very own Judge Cash QC, given in the District Court at Maroochydore. His Honour's analysis is consistent with my own analysis, developed incidentally without reference to his Honour's.[12]

[40] The second point can be briefly dealt with. You will be aware that for money claims asserting personal actions, s. 68(1)(a) confers jurisdiction to hear and determine "all personal actions, where the amount… sought to be recovered does not exceed the monetary limit…". This is usually construed as requiring the claim or statement of claim or originating application expressly to identify a sum sought to be recovered which is below the monetary limit or to abandon any claim above that limit.

[41] In my respectful opinion, and without having heard an argument to the contrary, I consider that there is no such requirement for claims brought in the Court for family provision because s. 68(1)(b)(x) is not cast in terms of the amount sought to be recovered, but rather the amount of the provision. I do not think that there is any formal requirement in an originating application seeking family provision in this Court to state expressly that it seeks an order within the monetary limit.

[42] Over the last decade, the figures kept by the Supreme and District Courts show that between a quarter and a third of FPA are commenced in the Supreme Court: see below.

Court Type	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
District Court	53	202	199	164	204	254	236	211	183	40	1,746
Supreme Court	29	50	83	77	75	90	82	83	88	24	681
Total	***82***	***252***	***282***	***241***	***279***	***344***	***318***	***294***	***271***	***64***	***2,427***

[43] A review of published Supreme Court decisions since the beginning of 2010, however, discloses only four orders made in contested proceedings where provision was ordered in excess of $750,000.[13] This is not to ignore that many claims for large amounts are undoubtedly settled and that the review undertaken might not be comprehensive. Given the analysis in this paper though, it seems likely that many applications are being commenced in the Supreme Court which could be commenced in the District Court.

Affidavit evidence generally

[44] I want to start by saying some general things about affidavits, before moving to specific comments about relationship evidence.

[45] You will all know of course that the Practice Direction[14] contemplates evidence in chief by affidavit and this provision is usually embodied in the consent order which is supposed to get proceedings underway without troubling the Court with an

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[12] *Danckert & Ors v Holmes* [2021] QDC 6. In that case, three applicants were awarded between them provision of $930,000 – differing provisions of $480,000, $275,000 and $175,000 were made. Cash QC DCJ considered that s. 68(1)(b)(x) is to be read to refer to the amount provided to each applicant individually such that no jurisdictional issue arose.

[13] *Stewart v Stewart* [2015] QSC 238: $850,000; *Darveniza v Darveniza* [2014] QSC 37: $3m; *Pizzino v Pizzino & Anor* [2010] QSC 35: approximately $950,000; *Currey v Gault* [2010] QSC 27: $900,000 + a share of residuary.

[14] District Court Practice Direction No 8 of 2001.

appearance. This procedure seems to work fairly efficiently in most cases. It is rare that I have had to deal with an application for directions because the parties are unable to agree on consent directions.

[46] The rules of evidence apply to those affidavits. And those rules are the rules applying to a final hearing, not an interlocutory hearing. Accordingly, affidavits filed in FPA intended to be relied upon to sustain final relief at trial cannot be prepared on an information and belief basis. The inclusion of statements in such affidavits to that effect is wrong, and embarrassingly so, as was made clear by Judge McGill SC in *Baker v Baker (No 1)* [2019] QDC 92 at paragraph [5] where his Honour explained:

> One of the features of all the affidavits, as is usual with applications under s 41 of the Act, is that they are replete with hearsay. Indeed each concludes with the formula "all the facts and circumstances above deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear in this affidavit." This formula is conventionally used in an affidavit within UCPR r 430(2), which allows hearsay, but this sub-rule does not apply to an affidavit for use in an application for final relief. On the hearing of an application under s 41, which is what I have done here, I am hearing an application for final relief. In those circumstances r 430(1) applies, and "an affidavit must be confined to the evidence the person making it could give if giving evidence orally." In other words, no hearsay.

[47] Contrary to what some might think, there are no exceptions to the rules of evidence for FPA, and frankly there is very little scope for any Court in Queensland which applies the rules of evidence to waive their application.

[48] The previous more permissive rule in the *Uniform Civil Procedure Rules 1999* (Qld) has been repealed,[15] and in its place is the much more confined s. 129A *Evidence Act 1977* (Qld) which provides:

> **129A Order that evidence may be given in a different way**
>
> (1) This section applies in a proceeding that is not a criminal proceeding if either—
>
> (a) the fact in issue is any of the following—
>
> (i) the proof of handwriting;
>
> (ii) the proof of documents;
>
> (iii) the proof of the identity of parties;
>
> (iv) the proof of authority; or
>
> (b) a court considers—
>
> (i) a fact in issue is not seriously in dispute; or
>
> (ii) strict proof of a fact in issue might cause unnecessary or unreasonable expense, delay or inconvenience in a proceeding.
>
> (2) The court may order that evidence of the fact may be given at the trial, or any other stage of the proceeding, in any way the court directs.
>
> (3) Without limiting *subsection (2)*, the court may order that evidence of a fact be given by—
>
> (a) a statement on oath of information and belief; or
>
> (b) the production of documents or entries in records; or
>
> (c) the production of copies of documents or copies of entries in records.
>
> (4) The court may at any time vary or revoke an order made under this section.

[15] See former *Uniform Civil Procedure Rules 1999* (Qld) r 394.

[49] These provisions might ameliorate some of the strict requirements of the rules of evidence for FPA, though it must be recalled that a party is not entitled to such an order.

[50] I am well aware that most FPA are resolved by agreement. A rough guide to the rate of settlement is reflected in the number of judgments in this Court in the year to date compared to the number of applications made. Over the last three years, the average number of applications filed is 210. In the year to date, there have been three judgments given in this Court where the application was heard and determined by the Court. There have been another seven substantive hearings on issues arising from FPA other than hearings resulting in making or refusing an order for provision.

[51] Given the settlement rate, it might be thought that the extra time and care required to draft affidavits which are limited to relevant and admissible evidence will likely be wasted. However, can I suggest that you should take the time to put affidavits largely into admissible form in respect of the key elements of the evidence, and to make a real effort to limit them to relevant and material evidence?

[52] The following considerations favour that course.

[53] **First**, it is not usually that hard to put evidence into proper form in FPA. The main matters to keep in mind are the hearsay rule, the opinion rule and the need to confine evidence to matters about which a person can properly give direct evidence. The complexities of similar fact evidence or strict proof of the output of complex analytic computer programs rarely rear their heads.

[54] **Second**, evidence which is in admissible form is usually more persuasive. Following the basic rules of hearsay and opinion, and avoiding speculation, is apt in family provision cases to tend to guard against unnecessary and inflammatory evidence. It will also tend to cause the person taking the statement to focus on ensuring that the relevant evidence a person can give is in fact in the affidavit.

[55] Let me give an example. It is common in family provision affidavits for a person to swear that their deceased parent knew something. By itself, that is inadmissible. However, it is usually the case that there is admissible evidence which supports that conclusory statement. So, in the example I have given, the witness, if asked, might say that they knew their parent knew something because they frequently said so. That makes the evidence more persuasive and allows the other side properly to address the allegation.

[56] **Third**, it is common for a person to give evidence about the value of estate assets. Unless there is a proper basis for that person to give opinion evidence on value, such evidence is inadmissible. But it is also apt to delay the proceedings if it creates unrealistic expectations in an applicant as to the provision which an estate could sustain. This can become a major obstacle to the resolution of the application by agreement. At the least, inadmissible estimates, if included for practical reasons, must be kept under review, and if valuations are to be disputed at trial, admissible valuation evidence must be obtained.

[57] **Fourth**, while many matters settle, some do not. A solicitor needs to be aware of the possibility of the matter proceeding to trial. If that happens, the relevance and admissibility of the affidavit evidence will be subject to Court scrutiny, including on costs. Recent judgments of this Court have made plain the concerns held in this Court in relation to excessive costs incurred in irrelevant or inadmissible affidavit material. I will return to this further at the end.

Relationship evidence

Introduction

[58] I now turn to relationship evidence. Based on my experience, relationship evidence is the area where family provision affidavits most commonly and spectacularly fail.

[59] Let me first make clear what I mean by relationship evidence.

[60] You would all be aware that s. 41(1) *Succession Act* dictates the two-stage process I have already described. At both stages, the issue of need looms large. Need for support is of course central to the claim of the applicant. Indeed, an applicant who can show no need for support at all will likely fail to establish an entitlement to an order, regardless of other considerations favouring their claim, such as contributions to the deceased's estate.[16]

[61] Need is also important to the strength of the competing claims of any other applicant and to the question of whether a beneficiary's gifts under the will should be disturbed.

[62] However, notwithstanding the central place of need, it has been consistently accepted that in determining whether adequate provision has been made, the Court must also consider the totality of the relationship between the deceased and the applicant.[17]

[63] The totality of the relationship contemplates at least the following distinct, but related, issues:

(a) Whether and to what extent the applicant contributed to the estate of the deceased;[18]

(b) Whether and to what extent the applicant has already benefitted from the resources of the deceased during their lifetime;[19]

(c) Whether the applicant and deceased had a close relationship, including the love and support flowing both ways;[20] and

(d) Whether the applicant and the deceased had a distant or hostile relationship.[21]

[64] While it cannot be doubted that each of these considerations might be relevant to the determination of the application for provision, the problem is that too much evidence of tangential or no material relevance is included in affidavits filed in FPA dealing with these issues.

[65] This part of my address is directed at suggesting that you carefully scrutinise the extent to which these matters are likely meaningfully to impact on the outcome of an application and to approach the affidavit material with that consideration in mind.

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[16] *Vigolo v Bostin* (2005) 221 CLR 191.
[17] *Singer v Berghouse* (1994) 181 CLR 201 at 209-10 (Mason CJ, Deane and McHugh JJ). See also *Vigolo v Bostin* (2005) 221 CLR 191.
[18] See *Coates v National Trustees, Executors & Agency Co Ltd* (1956) 95 CLR 494; *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 147 (Gibbs J).
[19] See *Re Adams, deceased* [1967] VR 881; *Talent v Talent* [2020] ACTSC 240 at [55] (McWilliam AsJ).
[20] See *Re Buckland, deceased* [1966] VR 404 at 413.
[21] See *Riches v Margaret Ann Holdman as Executrix of the Estate of Rita May Anderson* [2001] WASC 321; *Wright v Wright* [2016] QDC 74; *Andrew v Andrew* [2012] NSWCA 308 at [40], [49] (Basten JA); *Browne v Macaulay (Executrix of the Will of the late John Henry Craig Macaulay)* [1999] WASC 208 at [19] (Murray J); *Larkin v Leech-Larkin* [2017] NSWSC 1418; *Jodell v Woods* [2017] NSWSC 143.

[66] Let me first expand a little on that statement.

Contributions to estate

[67] On the extent to which a person has contributed to the deceased's estate, one often sees every minor event whereby a parent benefitted from a child explained in affidavit material, often accompanied by a sub-text of jealousy or bitterness.

[68] One example I recall involved about three pages of evidence about how an applicant worked constantly on his parent's turf farm after school without pay.

[69] Now that might be of some marginal relevance, but let's face it, not much. Parents are entitled to make their children work hard out of school hours. And really, if the child stopped working on the turf farm when they were young adults, and 30 years has passed since then, is it likely to be material? I think not.[22]

Inter vivos benefits

[70] Inter vivos benefits conferred on children are also productive of much irrelevant or barely relevant material. It is common to see affidavits in which one sibling explains how their brother or sister got sent to private school, got help buying their first car, got support for their rent when they moved out, got taken on a holiday, got given a parental guarantee for their first loan, or were allowed to agist their horses for free – you know the kind of thing. In my opinion, this evidence is useless.

[71] The Courts have recognised that benefits which are part of the ordinary run of parental care and support carry little weight (to my mind they carry none).[23] Do not waste time and money documenting this kind of thing.

Closeness or distance of relationship generally

[72] The closeness or distance of the relationship is probably the area most productive of irrelevant detail. While a broad picture of the course of a relationship is of assistance to a Court, it is common to see an almost daily account of love and support, particularly in the later years of the deceased's life, covering numerous pages of affidavit material. This is frequently juxtaposed with barely concealed criticism of the lack of closeness of competing siblings. Again, such evidence is of limited significance. Most parent/child relationships involve taking a whole of life perspective.

[73] In *Hampson v Hampson* [2010] NSWCA 359 at paragraphs [79] to [80], the New South Wales Court of Appeal observed relevantly to this point:

> [79] *Singer v Berghouse (No 2)* puts it beyond argument that *"the totality of the relationship between the applicant and the deceased"* is a matter to be had regard to on the jurisdictional question. However, I would not draw the conclusion that the judge failed to do so. The fact that (as the judge found) the Testatrix permitted Glen to stay on Lot 12 *"and do what he liked without intervention by her",* that she paid the rates, and did not ask for rent or any other contribution, to some extent speak for themselves. The judge's description of this conduct as an *"unremarkable indulgence"* by the Testatrix, and that she took the financially significant step for a widow on the pension of mortgaging her home as security for a guarantee of Glen's

[22] That scenario is to be contrasted to where an applicant has made contributions to the building of the estate or has made sacrifices for the benefit of the deceased which may be relevant to the totality of the relationship; *Darveniza v Darveniza* [2014] QSC 37 at [16].

[23] *Towson v Francis* [2017] NSWSC 1034 at [70], citing *Taylor v Farrugia* [2009] NSWSC 801 at [57] (Brereton J).

> debt to purchase the Hay property, are in themselves indications in the judgment of her goodwill towards Glen.
>
> [80] The requirement to have regard to the *totality* of the relationship can in many cases be satisfied by considering the overall quality of the relationship assessed in an overall and fairly broad-brush way, not minutely. Consideration of the detail of the relationship is ordinarily not called for except where there is an unusual factor that bears on the quality of the relationship, such as hostility, estrangement, conduct on the part of the applicant that is hurtful to the deceased or of which the deceased seriously disapproves, or conduct on the part of the applicant that is significantly beneficial to the deceased and significantly detrimental to the applicant, such as when a daughter gives up her prospects of a career to care for an aging parent. Neither entitlement to an award, nor its quantum, accrues good deed by good deed. Indeed, it is a worrying feature of many *Family Provision Act* cases that the evidence goes into minutiae that are bitterly fought over, often at a cost that the parties cannot afford, and are ultimately of little or no help to the judge.

[74] Further, just because an applicant has been a good son or daughter does not, of itself, qualify a person for provision. The jurisdiction is not conferred to provide rewards for past services.[24] Similarly, just because a deceased was a bad parent does not qualify an application for provision. The jurisdiction is not conferred to provide recompense for poor parenting (unless of course that poor parenting has had consequences which lead to a substantive consequence which sustains a claim for provision, such as psychiatric illness or the like).[25]

Disentitling conduct? (Good luck with that)

[75] Another area which frequently attracts large quantities of marginally relevant evidence is the application of s. 41(2)(c) *Succession Act*, which provides relevantly that the Court may refuse to make an order in favour of a person whose character or conduct is such as, in the opinion of the Court, to disentitle him or her to the benefit of an order.

[76] It is very common to see extensive evidence in which one sibling blackens the name of the other by reference to their view of the other sibling's attitude to their deceased parent. However, as a rule, it is only very serious conduct which will attract the exclusion. In considering whether to open this pandora's box of contested recollections and recriminations, however, the following additional circumstances need to be kept in mind.

[77] **First**, it is not just any bad conduct which is relevant, but rather bad conduct which is relevant to the purpose which the Act is intended to serve: that is, to make provision for those who the testator should properly have provided for in the disposing of his or her estate. So, the focus must be on either:[26]

(a) Misconduct towards the testator showing a comprehensive disregard and rejection of the testator (which negates Parliament's identification of that person as being in a category entitled to look to the testator for maintenance and support); or

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[24] *Blore v Lang* (1960) 104 CLR 124 at 134 and 137.
[25] *Harris v Carter* [2020] NSWSC 196 at [158] to [160].
[26] *Re Gilbert* (1946) 46 SR (NSW) 318 at 321. For example, the fact that an applicant may have engaged in illegal conduct is not a bar to a claim under the Act nor is the illegality of the conduct, in itself, a relevant circumstance. Illegal conduct by an applicant can, however, sometimes bring consequences that are relevant circumstances, or be a part of a bigger picture that is a relevant circumstance; see, for example, *Hastings v Hastings* [2008] NSWSC 1310.

(b) Conduct which demonstrates that any need is due to the applicant's own default.

[78] **Second**, alienation from a testator resulting from the testator's own conduct is irrelevant. So, for example, where a child has fled with his or her mother from an abusive relationship, there is no room for the exception to apply.

[79] **Third**, it is not sufficient simply to show that the need is due to the applicant's own hopeless inability properly to manage his or her life, whether through alcoholism, indolence or poor judgment. Cases are full of examples of sons and daughters who are lame ducks. Although there will of course be a limit, a testator retains a duty to their hopeless offspring.[27]

[80] **Fourth**, by far the better view is that the onus of showing disentitling conduct lies on the respondent. This proposition obtains support from authority, but also in my view from the proper construction of the particular provision in s. 41(1). On the latter point, strictly speaking, the discretion to refuse provision only arises where the jurisdiction has been made out and an entitlement to an order is prima face established. In *Vines v Djordjevitch* (1955) 91 CLR 512 at 581 to 519, the High Court dealt with how to approach such questions of construction generally (in a different context) as follows:

> The first question which arises in considering the correctness of this conclusion is whether the burden of proving facts amounting to a compliance with the proviso rests upon a plaintiff in an action brought under s. 47(1) against a nominal defendant.
>
> It is said that the form of the sub-section places the burden of disproof on the defendant. For the requirement of prompt notice after the injured party becomes aware of the impossibility of identifying the car inflicting the injuries is expressed in the form of a proviso. "There is a technical distinction between a proviso and an exception, which is well understood. All the cases say, that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not" - per Abbott J. in *Steel v. Smith* (1817) 1 B & Ald 94, at p 99 (106 ER 35, at p 37). The distinction has perhaps come to be applied in a less technical manner, and now depends not so much upon form as upon substantial considerations. In the end, of course, it is a matter of the intention that ought, in the case of a particular enactment, to be ascribed to the legislature and therefore the manner in which the legislature has expressed its will must remain of importance. But whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies. When an enactment is stating the grounds of some liability that it is imposing or the conditions giving rise to some right that it is creating, it is possible that in defining the elements forming the title to the right or the basis of the liability the provision may rely upon qualifications exceptions or provisos and it may employ negative as well as positive expressions. Yet it may be sufficiently clear that the whole amounts to a statement of the complete factual situation which must be found to exist before anybody obtains a right or incurs a liability under the provision. In other words it may embody the principle which the legislature seeks to apply generally. On the other hand it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts. In the same way where conditions of general application giving rise to a right are laid down, additional facts of a special nature may be made a ground for defeating or excluding the right. For such a purpose the use of a proviso is natural. But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence

[27] *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 148 (Gibbs J), citing *Re Hatte* [1943] St R Qd 1 at 26 (Philp J). See also *Gabriele v Gabriele* [2015] VSC 115.

> of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter...
>
> [Underlining added]

[81] In my respectful view, the exclusion created by s. 41(2)(c) is of a kind described in the underlined passage. It must also be kept in mind that if the disentitling conduct amounts to criminal offending or unethical or seriously immoral conduct (like alleged physical or sexual abuse), the principles in *Briginshaw v Briginshaw*[28] will apply.

[82] **Finally**, even if disentitling conduct is established within the meaning of the statute, all it does is give rise to a discretion in the Court to refuse to make provision. Where a person is an alcoholic, for example, but otherwise has need, the response might be to create a trust over provision or some similar arrangement, rather than to refuse relief.

[83] Few cases will establish disentitling conduct and even fewer will result in refusal of relief if it is otherwise justified.

How to approach relationship evidence

[84] For the reasons I have exhaustively explained, a great deal of relationship evidence is included in affidavits which is of marginal or no relevance. Even where some general evidence on a topic is useful in explaining in broad terms the history of an applicant's relationship with the deceased, it is common for way too much detail and way too much emotion, and sniping at other parties, to be included.

[85] It is inevitable that many clients will want to give this kind of detailed evidence. For many parties, FPA are seen as their opportunity for cathartic expressions of all that was unjust and wrong in their family life. Old hurts and injustices are resurrected, and redress sought in a way which could never be sought while the testator was alive.

[86] Why should you resist the temptation to indulge your client and keep relationship evidence to a minimum necessary to address the material issues in the application? There are at least three good reasons.

[87] **First**, and most important, is cost and its evil twin, delay. The longer the affidavit, the more it costs. Further, and worse, most respondents feel that they must address the detailed relationship evidence in their responsive affidavit. And then, reply affidavits are frequently concerned with answering that response. So, the parties can end up paying for pages and pages of expensive affidavit material which is of marginal relevance as they follow each other in a death spiral of irrelevant recrimination. This incurs extra cost. Further, long affidavits take longer to prepare and result inevitably in delay.

[88] **Second**, relationship issues tend to engage the emotions of the parties, making it harder to reach a settlement. You should not underestimate the barrier it creates. The more dirty laundry of family life is brought out, the more entrenched the position of the parties can become. And spare a thought for the independent personal representative, trapped between waring siblings, trying to hose down the

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[28] (1938) 60 CLR 336.

beneficiaries who see any settlement as "giving in" to the lies told by the applicant about mum or dad!

[89] **Third,** you have an ethical duty to independently turn your mind to the evidence which is sought to be led and determine if it is relevant, admissible and properly put before the Court. Certainly, merely to take the diatribe of a witness and put it in the form of an affidavit will likely be a breach of ethical duty as well as poor practice. Solicitors, no less than barristers, are officers of the Court with independent duties, they are not mere mouthpieces of their clients. In *Olsen v Olsen* [2019] NSWSC 217, this point was forcefully made at paragraphs [45] to [47]:

> [45] When I complained about the plaintiff's affidavit evidence being unhelpful and far more extensive that it needed to be, junior counsel disavowed responsibility. She said 'The plaintiff insisted on drawing his own [affidavits]'. She added 'We did not have control. It was a difficult situation'. This is, I am afraid, an abdication of the responsibility of the plaintiff's legal representatives. No matter how determined a plaintiff may be to unburden himself of memories of real or imagined distant family events, his solicitor and counsel are duty-bound to restrain his enthusiasms.
>
> [46] I referred to this duty in *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [19]:
>
> > [19] It is common for some litigants to want to use their evidence as an opportunity to unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case. But a fair hearing of their case can be seriously hindered by such unfiltered outpourings. That is why, among other things, counsel have a duty to the court which is additional to their duty to the party whom they represent. This duty is a legal duty, not merely a rule of practice or etiquette: Teece, *The Law & Conduct of the Legal Profession in New South Wales,* second edition, Law Book Co, pages 30-35 and 41-44.
> >
> > I added at [22]:
> >
> > [22] … Counsel's duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence. In all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client's best interest. It is more likely to ensure that a just result is reached - sooner and with less expense.
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> [47] And in *Donnelly v Australia and New Zealand Banking Group Limited* [2016] NSWSC 263 at [16], I drew attention to certain remarks by Sir Anthony Mason:
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> > In *Giannarelli v Wraith (*1988) 165 CLR 543 at 556-7 Mason CJ highlighted the importance of counsel exercising 'independent' judgment to aid the efficient administration of justice:
> >
> > > …a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice… counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case… This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.

[90] So, how does one judge what is material and what is not? It is impossible to give a simple answer to that question. The relationship considerations I have mentioned already are factors which are relevant in FPA and in some cases might be important.

[91] As a general guide, however, I would suggest the following.

[92] On the issue of contributions to the estate, it will generally only be significant and sustained contributions without any corresponding return which are material. An example might be financially supporting an aging parent who is asset rich and cash poor over years. Another might be the common situation of the son or daughter who works the family farm for many years after the parents retire, sometimes on a promise of inheriting and sometimes not.[29]

[93] On the issue of benefits received from a deceased, again it will generally be only significant or sustained benefits conferred after a child or dependent has reached adulthood and completed education or training which will be material.

[94] On the issue of closeness or distance of the relationship generally, it is in my view useful to give an overview of the history of a relationship between the deceased, the applicant and other relevant parties, good and bad, but only by way of context to the application or response. Otherwise, unless a relationship is very bad or distant, the detail of relationship history is unlikely to have a significant impact on the outcome of the application. All the more so on the issue of disentitling conduct.

The de facto partner as applicant

[95] One of the most difficult issues practically to deal with in FPA is the fraught question of whether a person is an eligible applicant because they were a de facto spouse of the deceased.

[96] If a person is in a relationship of some kind with the deceased, but the person was never a de facto partner of the deceased, then that person is not an eligible applicant and the application must fail.[30]

[97] If a person is in a de facto relationship with the deceased, but that relationship was not both of at least two years standing and existing at the date of death, then the person is not an eligible applicant.[31]

[98] Its importance goes further. If a person was an eligible applicant as a de facto partner of the deceased, then a child of the de facto partner will be an eligible applicant as a stepchild of the deceased.[32]

[99] Thus, not only is it important to determine whether a person was ever a de facto partner, it can be equally important to identify the day that any such relationship started or ended. Given the amorphous nature of intimate relationships existing outside the legally certain status of husband or wife, real difficulties of proof can arise.

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[29] Promises made and expectations raised by a deceased have always been regarded as relevant to the ascertainment of what is proper provision for an applicant; see *Frey & Anor v Frey & Anor (as personal representatives of the estate of HE Frey, dec'd) & Anor* [2009] QSC 43; *Young & Grainger v Outtrim* [2011] NSWSC 391 at [106] and the authorities cited.

[30] As in fact occurred in *Barker v Linklater* [2007] QSC 125.

[31] *Succession Act 1981* (Qld) s 5AA(2)(b).

[32] *Succession Act 1981* (Qld) ss 40, 40A.

[100] In applying the relevant provisions of the *Succession Act*, the term 'de facto partner' is expressly defined as that phrase is defined in s. 32DA *Acts Interpretation Act 1954* (Qld).

[101] It is useful to set out that provision. It relevantly provides:

> **32DA Meaning of de facto partner**
>
> (1) In an Act, a reference to a "de facto partner" is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.
>
> (2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances—
>
> (a) the nature and extent of their common residence;
>
> (b) the length of their relationship;
>
> (c) whether or not a sexual relationship exists or existed;
>
> (d) the degree of financial dependence or interdependence, and any arrangement for financial support;
>
> (e) their ownership, use and acquisition of property;
>
> (f) the degree of mutual commitment to a shared life, including the care and support of each other;
>
> (g) the care and support of children;
>
> (h) the performance of household tasks;
>
> (i) the reputation and public aspects of their relationship.
>
> (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.
>
> (4) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.

[102] In one sense, this provision makes the task of establishing whether a person is a de facto partner or not seem a straightforward one. Just apply the statute. However, in practice, it is far from simple. I make the following comments which you might find of some assistance.

[103] **First**, it is to be remembered that the onus lies on the applicant to prove, on the balance of probabilities, that they meet the requirements of the statutes, both the definition in the *Acts Interpretation Act* as to the nature of the relationship and the requirements of the *Succession Act* as to timing. If the evidence leaves the trial Judge in doubt as to whether there is such a relationship at the relevant times, the application will fail.

[104] **Second**, notwithstanding the specific considerations in s. 32DA(2), the ultimate task for the Court is to determine whether it is satisfied of the test in s. 32DA(1). The words "living together as a couple on a genuine domestic basis" are ordinary words to be given their ordinary meaning. However, Justice of Appeal Keane (as his

Honour then was) explained the phrase in these terms in *FO v HAF* [2006] QCA 555 (footnotes omitted):[33]

> [24] It can be seen that the legislation does not provide any great assistance in resolving the uncertainty which attends the identification of the point at which a de facto relationship can be said to have commenced. None of the matters listed in s 32DA(2) of the *Acts Interpretation Act 1954* is necessarily of decisive significance in this regard: those matters are identified as relevant considerations. The ultimate issue to which they are relevant, however, is whether the parties "are living together ... on a genuine domestic basis". This phrase necessarily draws attention to whether the parties are living, or have lived, together to maintain a household in a relationship which exhibits the characteristics of the relationship of marriage, save for the solemnities involved in the formal exchange of wedding vows. That this focus is correct is confirmed by the reference in s 292(1)(b) of the PLA to "the family constituted by the de facto partners ...".
>
> [25] In *PY v CY*, this Court confirmed that continuing cohabitation in a common residence is not necessary to establish the continuation of a "de facto relationship" where the parties have lived together as a couple, and have not effected a permanent separation. Nevertheless, the definition of "de facto relationship" suggests that, usually, the parties should have, at some stage, been "living together as a couple on a genuine domestic basis". It must be shown that "the parties have so merged their lives ... that they [were], for all practical purposes, living together as a married couple". The fact that the parties have never lived together in a common abode must be acknowledged to be a strong indicator that they have not "lived together as a couple on a genuine domestic basis". This indication will be especially significant where the parties have not shared the burden of maintaining a household.

[105] I think that this comment is apposite to the construction of the section as incorporated into the *Succession Act*. This is so because that context also calls up the notion of a marriage-like relationship by use of the word spouse.

[106] **Third,** the specific considerations in s. 32DA(2) are not exhaustive. You should, therefore, keep an open mind about what secondary facts might tend to prove or disprove that the applicant and the deceased are living together as a couple on a genuine domestic basis. As Justice Ann Lyons (Holmes and Gotterson JJA agreeing) observed in *Spencer v Burton* [2016] 2 Qd R 215, at paragraph [123]:

> [123] …the criteria in s 32DA are all to be weighed up and analysed together with other factors or circumstances the judge considers relevant. It is also clear that one criterion is not to be considered more significant than any other. Neither is it necessary for all the criteria to be present in order for a declaration to be made. It is clear that the question as to whether two people are living together as a couple on a genuine domestic basis is to be determined by circumstances which include but are not limited to those listed in s 32DA.

[107] It is interesting to note what happened in *Spencer v Burton*. In that case, the trial Judge had made findings as to the existence of an intimate loving relationship but put great weight on the lack of financial interdependence and acquisition of joint property. Justice Lyons, writing for the Court, could see no good reason for giving primacy to the financial aspects of the relationship over other social and personal aspects.[34]

[108] **Fourth**, the challenge in dealing with these kinds of cases, at least where there is some doubt over the situation, is to assemble and lead the relevant evidence on the

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[33] In *Perry v Killmier & Anor* [2014] QCA 64 at [63], a dependency damages claim which also incorporated s 32DA *Acts Interpretation Act 1954* (Qld), Muir JA (with whom Gotterson JA and Applegarth J agreed) observed that Keane JA's comments provide some useful guidance as to the requirements of s 32DA but, of course, cannot displace the statutory test.

[34] See [2016] 2 Qd R 215 at [117] to [121].

matter. This problem is initially one for the applicant. However, the personal representative must also consider what evidence to lead in response.

[109] In doing so, it is important in my view to seek to lead corroborating evidence as well as direct evidence of the applicant (or any respondent). Letters, utility bills, cards and observations by credible witnesses (i.e. witnesses who are independent of the dispute between the applicant and the other beneficiaries) are all important.

[110] I would also sound this warning for solicitors acting for a personal representative who is one of the deceased's children or having to consider their views as beneficiaries. Children of the deceased frequently find it very difficult to accept that their mother or father has developed a new relationship after the divorce or death of their biological parent. And to keep the peace, it is not unknown for a deceased not to tell his or her adult children the full truth of the nature of his or her relationship with the other person. Accordingly, declamatory denials by adult children that an applicant was a de facto spouse should be treated with care.

[111] **Fifth**, one final warning. Once a de facto relationship is established, it does not necessarily end because of a period of living separately, particularly where one partner has to move into a nursing home or into palliative care.[35] Where that is relied upon as demonstrating the end of the relationship before death, real care must be taken accurately to identify the status of the relationship.

Cost consequences of inefficient conduct of applications

[112] It has long been the perceived practice in FPA that almost regardless of the outcome, the costs of all parties will be paid out of the estate. This perception has had deleterious results. I have observed from my own experience the following:

(a) It tends to encourage applicants, and their solicitors, sometimes to run poor cases, expecting to get something at mediation because of the costs implications for the estate even if the applicant fails at trial; and

(b) It tends to encourage personal representatives, especially those with their own emotional involvement in the case, to resist the claim on the estate where, acting properly, the claim should be settled.

[113] It was never the practice that unsuccessful applicants generally received their costs out of the estate, though the leading authority for what might be called the 'old-fashioned' approach was that the applicant with a good moral claim making a reasonable application might get their costs, but that only in vexatious claims would a costs order be made against an unsuccessful applicant.[36] This approach was applied in Queensland for many years.[37]

[114] Similarly, though personal representatives were entitled to indemnity for their costs, that indemnity only extended to costs reasonably incurred, consistent with the scope of the indemnity for all trustees.[38] However, it is fair to say that in the past, a generous view was taken of what was reasonable in defence of an FPA.

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[35] See the observations collected by Lyons SJA in *In the Estate of HRA deceased* [2021] QSC 29 at [28].
[36] *Bowyer v Wood* (2007) 99 SASR 190 at 210. This approach has been applied in Queensland.
[37] *Jones v Jones* [2012] QSC 342.
[38] See a case where the personal representatives went too far in *Collett & Anor v Knox & Anor* [2010] QSC 132 at [163] to [171].

[115] However, there was never a statutory basis for the above merciful approach to costs in FPA. And in 2014, the UCPR was amended clearly to signal a change in direction. Rule 700A was inserted in 2014.[39] It provides:

> **700A Estates of deceased persons and trusts**
>
> (1) This rule applies to—
>
> (a) a proceeding under the *Succession Act 1981*, *part 4*; or
>
> (b) another proceeding relating to an interest in property under a will or trust.
>
> (2) Without limiting the court's discretion under these rules to make an order about costs in relation to all or part of the proceeding, the court may, in determining an order for costs, take into account the following matters—
>
> (a) the value of the property the subject of the proceeding and, in particular, the value of the property about which there is a disputed entitlement;
>
> (b) whether costs have been increased because of any one or more of the following—
>
> (i) noncompliance with these rules;
>
> (ii) noncompliance with a practice direction;
>
> (iii) the litigation of unmeritorious issues;
>
> (iv) failure to make, promptly or at all, appropriate concessions or admissions;
>
> (v) giving unwarranted attention to minor or peripheral issues;
>
> (c) an offer of settlement made by a party to the proceeding.

[116] These days, solicitors, applicants and personal representatives should expect resistance in this Court to costs being ordered on an indemnity basis and/or from the estate for any party, much less all parties, where excessive, inadmissible and irrelevant affidavit material is filed or where other unreasonable conduct has occurred or where the applicant fails in the proceedings.

[117] A good example of the approach likely to be taken in this Court is the judgment of Judge McGill SC in *Baker v Baker (No 2)* [2019] QDC 140 at paragraph [6]:

> [6] Given that family provision applications frequently reflect profound and deep-seated divisions within families, it is perhaps not entirely surprising that sometimes the parties themselves might prefer the estate to be consumed in legal costs, rather than be passed to those other members of the family with whom they disagree, or with whom they are in dispute. But there is an obligation, in my view, on the legal practitioners involved, nevertheless to ensure that the litigation is conducted efficiently, and the requirements of rule 700A are to be applied, even if the parties are enthusiastic in fighting tooth and nail over every little point.

[118] His Honour then proceeded to list the defects in the affidavit material filed in that proceeding along with other aspects of its conduct which did not meet the standard to be expected of solicitors conducting such litigation. I urge all solicitors to read that case with care.

[119] Rule 700A is a warning to parties to ensure that FPA are litigated as efficiently as possible, particularly in small estates. In small estates, it is not uncommon for the costs incurred in making an application under s. 41 to exceed any award a Court may make by way of provision from the estate, or to be disproportionately high when compared with the value of the estate. Courts view such developments with concern,

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[39] By the *Uniform Civil Procedure and Another Rule Amendment Rule (No. 1) 2014* (Qld) s 15.

because the unsatisfactory outcomes are wasteful of the Court's resources, and both the applicants and respondents are left disappointed and often disillusioned in circumstances following the passing of a loved one.

[120] Unreasonable behaviour in prosecuting or defending a FPA will likely result in costs orders of the kind ordinarily made in civil litigation. *Baker v Baker (No 2)* emphasised that parties should not litigate on the assumption that their costs on the indemnity basis will be paid out of the estate, regardless of the outcome.[40] This proposition has been adopted by Judge Barlow QC in *Stojanovska v Stojanovski (No 2)*[41] and Judge Fantin in *Pitt v Fricke*.[42]

[121] The case law demonstrates that the Court will consider the facts of the case *in toto*, especially how the parties have conducted themselves and whether any of them could be said to have acted unreasonably, including in response to offers made pre-trial.

[122] In *Yeomans v Yeomans & Anor (No 2)* [2011] QSC 415, the applicant did not accept three offers of settlement prior to trial. She was awarded further provision in a sum which exceeded the last offer of the respondent by only $2,500. Consequently, her costs were ordered to be paid out of the estate on the standard basis. Justice Mullins noted at paragraph [12]:

> [12] In all the circumstances, the unreasonable approach of the applicant to what she thought she was entitled from the proceeding should not deprive her of a costs order in her favour, but can be accommodated by giving her costs on the standard basis only.

[123] *Stojanovska v Stojanovski (No 2)* heeded strong warnings from the Court in earlier cases. The estate was not large. The applicant made an offer to settle the proceeding which was rejected. The administrator and the respondent, likewise, made an offer. However, his Honour was concerned about the amount of costs incurred by the parties (which came to more than $260,000) and noted that the unreasonable conduct of both parties increased the costs of the litigation. Each attempted to diminish the other's part in the care of the deceased and to over-state their own. Had they been willing to acknowledge the other's involvement, then a large volume of non-party disclosure and evidence would have been unnecessary, and the proceeding should have settled much earlier. Accordingly, the applicant's costs were ordered to be paid out of the estate on an indemnity basis, but limited to the sum of $60,000. Matters involving small estates should not be given the "Rolls Royce" treatment.[43]

[124] A decision to litigate in family provision claims should not be made lightly. The parties' legal representatives should ensure that the costs their clients incur in pursuing or opposing an application do not spiral out of control. It is important to keep in mind the size and nature of the estate, the merits and reasonableness of any claim for provision, the strengths and bases of competing claims, the financial position of the applicant, and the parties' conduct in the proceeding (for example, whether proper consideration to any offers of settlement was given or unnecessary affidavit material was filed).[44]

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[40] [2019] QDC 140 at [4].
[41] [2019] QDC 198 at [9].
[42] [2019] QDC 193 at 14.
[43] [2019] QDC 198 at [36].
[44] *Stojanovska v Stojanovski (No 2)* [2019] QDC 198 at [6], citing *Adkins v Adkins (No 2)* [2009] TASSC 32 at [7]-[8]; *Tapp v Tapp (No 2)* [2009] TASSC 62 at [7].

Judge Bernard Porter QC
5 May 2021