SUPREME COURT OF QUEENSLAND

CITATION:	*Wight v Wight as legal personal representative of Mark Lynton Wight deceased* [2019] QSC 149
PARTIES:	**GILLIAN EDITH WIGHT** (applicant) **v** **CRAIG LYNTON WIGHT as legal personal representative of MARK LYNTON WIGHT, deceased** (respondent) **&** **ANDREW CHARLES CHAPMAN** (litigation guardian for the infant beneficiaries)
FILE NO:	SC No 510 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Townsville
ORDERS MADE:	1 April 2019
PUBLICATION OF REASONS:	11 June 2019
DELIVERED AT:	Townsville
HEARING DATE:	1 April 2019
JUDGE:	North J
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH SUFFICIENT PROVISION – CLAIMS BY SPOUSE OR PARTNER – where the deceased made no provision for the applicant – where the applicant is the widow of the deceased – where the beneficiaries are the infant children of the applicant and the deceased – where the applicant's circumstances are relevant to a determination – whether the deceased failed to make adequate provision for the proper maintenance and support of the applicant SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH SUFFICIENT PROVISION – GENERAL PRINCIPLES – where the court is asked to approve a settlement reached at

	mediation – where the proposed settlement involves reducing the interests of the infant beneficiaries and making provision for the applicant – whether the court has jurisdiction to make an order in a compromised family provision application – whether the court is satisfied that the proposed settlement falls within the bounds of a reasonable exercise of the discretion – whether the settlement should be sanctioned as being in the best interests of the infant beneficiaries
LEGISLATION:	*Succession Act* 1981 (Qld), s 41
CASES:	*Abrahams (by his Litigation Guardian The Public Trustee of Queensland) v Abrahams* [2015] QCA 286, distinguished
	Affoo v Public Trustee of Queensland [2012] 1 Qd R 408, cited
	Watts v The Public Trustee of Queensland [2010] QSC 410, cited
COUNSEL:	AW Collins for the applicant GB Cowan (Solicitor) for the respondent P Askin (Solicitor) for the litigation guardian for the infant beneficiaries
SOLICITORS:	Connolly Suthers for the applicant Rees R & Sydney Jones for the respondent Roberts Nehmer McKee for the litigation guardian for the infant beneficiaries

Introduction

[1] **NORTH J:** The applicant is the widow of the deceased. Her Originating Application sought provision out of the estate of her late husband under s 41(1) of the *Succession Act* 1981. On 1 April 2019, at the request of all parties, I made an order for provision in favour of the applicant and other related orders in terms of the draft order submitted by the parties. These are my reasons for making those orders.

[2] The applicant and the deceased married on 7 January 2006. The deceased died on 31 October 2015. The last Will of the deceased was made on 27 April 2007. Subsequent to making the Will two children were born. "K" (DOB 2 August 2010) is now eight years of age and "C" (DOB 17 December 2012) is now aged six. The applicant (DOB 11 July 1975) is now 43 years of age.

[3] The deceased made no provision for the applicant, his widow, in his Will. In his last Will he left the residue of his estate (after the payment of debts) on trust to his children who survived him for 30 days and attained the age of 18 years. The commencement of these proceedings put the applicant in a position of conflict of interests vis á vis her children, the infant beneficiaries. To meet this situation and to ensure that the interests of the children were protected Mr Chapman, an uncle of the infants and brother of the applicant, filed a consent to act as their Litigation Guardian. In turn he retained experienced solicitors to advise him. Those solicitors in turn retained Mr DB Fraser of Queens Counsel for advice.[1]

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1 See Consent filed 29 September 2016 and Notice of Address for Service filed 29 September 2016.

[4] In her affidavit[2] the applicant deposed:

> "6. I grew up on a cattle station owned by my parents west of Gladstone. I have two older brothers, one of whom is now in partnership with my parents on the property and the other of whom works in the energy business in Western Australia. I went to boarding school in Brisbane in grade 11 and grade 12. After I left school, I undertook a two-year agricultural studies course at Emerald College. After graduating, I worked on various properties mainly as a station hand until my mid-20s. I then worked on my parents' property for about five years including doing the bookwork.
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> 7. After Mark and I married in Gladstone, we lived on Jellinbah Station which was owned by Jellinbah Pastoral Company and being run by Mark and his brother Craig Lynton Wight. I was an employee of Jellinbah Pastoral Company doing mainly stock work. I was a casual employee being paid by the day. I estimate that I probably worked three-quarters of a full-time position. Mark and I were on Jellinbah Station for about three years until Jellinbah Pastoral Company bought Inkerman Station south of [sic] and we moved up to Inkerman Station to run it and nearby Woontonvale Station.
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> 8. We worked hard to clean up Inkerman Station. There was a lot of mustering and sorting out to do. We were helped by other family members as required.
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> 9. We did this together for about a year until I had to stop as my pregnancy with "K" progressed. Then I had "C". My role was looking after the children and doing office work as required."

[5] In the Outline of Argument on behalf of the applicant[3], counsel for the applicant summarised the applicant's financial circumstances drawing upon the affidavits. Joint assets passed to the applicant by way of survivorship valued at $361,161.72 but at the same time there were joint liabilities of $240,581.23. The applicant's own assets as at the date of her husband's death (excluding the surplus of joint assets over joint liabilities referred to) totalled just over $175,000. Current valuation suggest that her own assets are now worth approximately $240,000. In her affidavits the applicant summarises her personal circumstances and the family circumstances. Currently in her most recent affidavit[4] she says that she receives $5,000 per month from the partnership (which will be referred to in more detail shortly). She does the accounts for the partnership and she cares for the two children. "K" is in grade 3 and "C" is in grade 1. Nothing in the evidence suggests that they are other than healthy happy children.[5]

[6] At the time of his death the deceased owned the following assets. They were valued by the respondent executor in 2017. The evidence exhibited to affidavits relied upon supported these valuations. The parties proceeded on the basis that the valuations carried out in 2017 remain reliable:

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2 Filed 18 July 2016.
3 Filed 29 March 2019.
4 Filed 25 March 2019.
5 See further the affidavits of the applicant filed 18 July 2016, 17 May 2017 and 25 March 2019.

Colonial First Choice investment	$	127,937.03
NAB farm management account	$	25,000.00
NAB farm management account	$	28,125.00
NAB farm management account	$	10,000.00
Sugar Terminals Limited shares	$	Not stated
Units (Cnr Hatte and Schuffenhauer Streets, Rockhampton) (1/4th interest)	$	75,000.00 to $ 80,000.00
Jellinbah Pastoral Company (1/16th interest)	$	3,402,245.00
Sugar Terminals Limited dividend payment	$	73.50
Sugar Terminals Limited dividend payment	$	73.50
Sugar Terminals Limited dividend payment	$	75.87
	$	$3,668,529.90 to $ $3,673,529.90

[7] The substantial asset is the interest the deceased held in the Jellinbah Pastoral Company which is a grazing and farming partnership.

[8] In an affidavit[6] the applicant explained why she wished to keep the interest in the partnership for her own benefit and also for the benefit of her children and, subject to orders being made in her favour for herself she said:

"Future intentions

> 2. I have given careful consideration to the way in which I would like the distribution of my late husband's estate to occur. My preference is that the estate's 1/16th interest in the partnership of Jellinbah Agricultural and Pastoral Company be assigned, in proportions yet to be determined, to me on the one hand and to the respondent and me (as trustees for the children) on the other hand and that the partnership should continue (subject to the other partners' consent). The reasons I have reached this conclusion are that I believe that it is in our best financial interests to remain in the partnership. It is a strong and successful family-oriented business run by people with vast experience in agricultural and pastoral matters. The financial returns that could reasonably be expected from remaining in the partnership far exceed the commercial returns currently and foreseeably available from investing in the stock or property market or from placing the money on deposit with a bank. The commercial risks of remaining in the partnership are no greater than the alternatives previously mentioned. Furthermore, I remain on very good terms with my late husband's family, in particular the respondent (my co-executor and co-trustee)

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6 Filed 17 May 2017.

> and his wife and children and it is my intention that the children and I will continue that relationship into the future and remain closely connected to the family and the land. I also see it as a better way to manage the children's expectations of their inheritance under their father's will (which vests in them absolutely at 18 years of age) if it is invested in a business rather than represented by a large sum of money in the bank or by other liquid assets such as shares."

[9] The parties have agreed to compromise the application on the basis that one half of the deceased's residuary estate be distributed to the applicant and that the other half to the deceased's trustees (the applicant and the brother of the deceased Mark Lynton Wight) upon two separate fixed trusts equally for the benefit of "K" and "C".

The jurisdiction of the court in "compromised" family provision applications and the two stage process

[10] I was referred to decisions of this Court that gives authoritative guidance to the Court when asked to approve an agreement reached at a mediation.

[11] In *Affoo v Public Trustee of Queensland*[7] Dalton J said:[8]

> **"Final Orders in a Family Provision Application**
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> [24] The final disposition of a family provision application calls for the exercise of the Court's discretion, it cannot be achieved by agreement or deed. The rule has its origins in the policy that a person cannot by contract exclude the jurisdiction of the Court to make a family provision order. When parties to a family provision application make an agreement as to the final orders they believe ought to be made in the proceeding, a court will have regard to that agreement as a factor, usually a significant factor, in deciding what order to make in the exercise of its discretion. Accordingly, whatever the terms of the agreement reached at mediation in this case, it could not dispose of the family provision application made by Mr Blair; an order this Court was required to do that.
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> [25] There is a question of construction as to whether the introductory words to the mediation agreement, "subject to the … sanction of the Supreme Court of Queensland …" referred to the need for a sanction in the event that Mr Blair did not have capacity (ie a sanction pursuant to s 59 of the *Public Trustee Act* 1978), or referred to the need for a court order to put an end to the family provision application. In my view, the former construction is correct, as indeed both parties submitted. The word "sanction" is the word used in s 59 of the *Public Trustee Ac*t 1978. The text, *Family Provision in Australia* says of an application for final orders in a family provision application where there has been an agreement of the parties as to terms, "in effect, the court is being asked to sanction the agreement

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7 [2012] 1 Qd R 408.

8 At [24]-[28].

reached by the parties." As discussed above, this is not strictly an accurate description of the Court's function on such an application and, in my view the use of the word "sanction" is apt to confuse in a jurisdiction where consideration of the interests of infants and incapacitated persons is not infrequent. The same criticism can be made of the use of the word in para 4 of the application in this case, see above. The Public Trustee drew the application but it is apparent from its submissions in the matter that it wants determined the question of whether the Court should make final orders in accordance with the agreement reached at mediation, not a sanction pursuant to s 59 of the *Public Trustee Act* 1978.

[26] As discussed above, the parties in this case having doubts as to Mr Blair's capacity, were determined to ensure that, so far as they were able, the agreement they had reached would be honoured, whether or not Mr Blair had capacity. That is, reading the introductory words to the agreement all together, they provide what is to happen if Mr Blair has capacity (declaration), and what is to happen if he has not (sanction). They are concerned with Mr Blair's capacity, not the exercise of discretion by this Court in disposing of the proceeding. The provision at numbered cl 4 of the agreement tends to support this construction. I find that the agreement reached at mediation referred to a sanction pursuant to s 59 of the *Public Trustee Act* 1978 in its introductory words.

[27] Counsel for Mr and Mrs Affoo submitted that, as a result of this construction, the only question before me was the question which must be asked pursuant to s 59 of the *Public Trustee Act* 1978: whether the agreement reached at mediation was one which was in Mr Blair's best interests or whether it would be in the interests of Mr Blair to reject the offer and continue the family provision proceeding in the hope of receiving a larger benefit.

[28] The approach taken by the Public Trustee on this application is that, like the agreement reached in *Bartlett v Coomber*, the agreement reached at the mediation was subject to the sanction of the Court pursuant to s 59 because of Mr Blair's disability, but also that the Court needed to consider whether or not to make an order finally disposing of the family provision application in terms of the agreement reached at mediation. In view of my discussion of the law, above, that position is plainly correct."
(footnotes omitted)

[12] In *Watts v The Public Trustee of Queensland*[9] Jones J made similar observations.[10]

"Jurisdiction

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9 [2010] QSC 410.
10 At [11]-[15].

[11] **This Court's jurisdiction to make an order will only arise if it is of the opinion that the disposition of the deceased's estate effected by her will is not such as to make adequate provision from her estate for the applicant.** This is in accord with the approach to claims of this kind as determined by the High Court in *Singer v Berghouse* and confirmed in *Vigolo v Bostin*. In the former case the High Court was dealing with the provisions of the New South Wales legislation which provide the equivalent relief to that under s 41 of the *Succession Act* (Qld). From the joint judgment of Mason CJ, Deane and McHugh JJ the following passage appears (at p 208):

> "It is clear that, under these provisions, the Court is required to carry out a two stage process. The first stage calls for a determination of whether the applicant has been left without adequate provisions for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question'. That description means no more than that the Court's power to make an order in favour of an application under s 7 is conditioned upon the Court being satisfied of the state of affairs predicated in s 9(2)(a)."

[12] Following this decision, the New South Wales Supreme Court in two unreported decisions in 1995 dealt with the question in circumstances where the parties had settled claims under the family provision legislation. In the first case *Hore v Perpetual Trustee Co Pty Ltd* (unreported, NSWSC, 8 June 1995) Windeyer J referred to the Court's jurisdiction in these terms:-

> "Those provisions give the basis for exercise of jurisdiction by the court. Parties are absolutely entitled of course to make any rearrangement of the terms of the will they wish, if all beneficiaries are of age and absolutely entitled. That has nothing whatever to do with the jurisdiction under the relevant Act. Section 7 and s 9(2) raise jurisdictional questions. This has been described in various ways, sometimes making it appear discretionary but there is no doubt now that for the court to assume jurisdiction, the provisions of s 9(2) must be satisfied.
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> As the power to make orders is governed by s 9(2) and s 7, the court cannot by consent, assume a wider jurisdiction. Parties cannot by consent, confer power

> upon the court to make orders which the court lacks the power to make."

[13] In the second case *Hadley v McNamara re the Estate of Mary Anne McNamara* (unreported, NSWSC, 7 December 2005) Young J pointed to the change wrought by the decision of the High Court, he said:-

> "In former times the court used to look at these applications as if they were discretionary matters and seek to work out whether the court had jurisdiction. It is now clear that that is the wrong approach under the Family Provision Act and that if the parties agree to settle proceedings under the Family Provision Act, and there is no other interest involved, ordinarily the court should merely make the orders in accordance with the terms of settlement. There will, of course, be the odd exception where it clearly appears on the face of it that there is no jurisdiction in the sense that the plaintiff has no need of provision."

[14] The point was further considered by the Supreme Court in Western Australia in *Schaechtele v Schaechtele* where Le Miere J considered (at para 18):-

> "This Court cannot make an order giving effect to the proposed settlement unless the Court thinks that such provision should be made out of the estate of the deceased for the proper maintenance or support of the plaintiff. But that does not mean that the Court is in effect to hear the matter as if it were it a contested application and then to give or withhold orders to give effect to the settlement by comparing the settlement with the judgment which the Court would have given. The Court must give proper consideration to the evidence before it. The Court should be aware of the risks of litigation in an area in which reasonable people can reasonably reach different conclusions and give property weight to the fact that the parties wish to effect the settlement. If the Court is satisfied that the settlement falls within the bounds of a reasonable exercise of discretion then the Court should make orders to give effect to that settlement."

I respectfully agree with this approach to the question.

[15] **Once the court is of the view that the jurisdictional question has been satisfied then the issue arises as to the effect of the parties' agreement. Obviously considerable weight must be given to the agreement of the parties. The inquiry thereafter is limited. The circumstances would be unusual indeed for the court to override the agreement of the parties who are**

> **of full age and where there is no evidence of undue influences at work in the reaching of the agreement.**"
> (footnotes omitted) (emphasis added).

[13] Both these decisions were discussed with evident approval in the decision of the Court of Appeal in *Abrahams (by his Litigation Guardian The Public Trustee of Queensland) v Abrahams*[11] where the Court said:[12]

> **"The nature of the Court's jurisdiction in Family Provision Applications**
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> [30] As Dalton J observed in *Affoo v Public Trustee of Queensland*, the final disposition of a Family Provision application is an exercise of the court's discretion. It cannot be achieved by agreement of deed. Any agreement reached at a mediation or between the parties at any stage cannot in any way circumvent the requirement that the court must consider whether it should make an order in the terms sought because it would finally dispose of the Family Provision application. The court can only make an order if it has jurisdiction to act under the terms of the statute.
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> [31] The test for a Family Provision application was set out in *Singer v Berghouse*. The High Court referred to the test as a two stage process. The first stage calls for an assessment as to whether the provision, if any made, was "inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty."
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> [32] The first part of the test involves looking at the circumstances of the case. Once the court is satisfied that the first stage has been answered in the affirmative, the second stage involves the determination as to what provision should be made.
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> [33] As a disabled son, there is no doubt the applicant has a need and a moral claim. In the circumstances, the requirements of the *Succession Act* were made out as no provision was made for the applicant out of the estate of the deceased at all. The jurisdiction of the Court was clearly enlivened.
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> [34] In the normal course of events, that claim would have been litigated at trial. However, the Public Trustee, as the applicant's litigation guardian, reached an agreement with the solicitor for the other three family members who had an interest in the estate and applied to the District Court pursuant to UCPR r 98 for the court to approve the compromise pursuant to s 59.

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11 [2015] QCA 286.
12 At [29]-[35].

[35] The appropriate approach for a court to take in relation to an application to sanction a compromise of the proceedings was set out in *Watts v The Public Trustee*:

> "[13] In the second case *Hadley v McNamara re the Estate of Mary Anne McNamara* (unreported, NSWSC, 7 December 2005) Young J pointed to the change wrought by the decision of the High Court, he said:-
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> > "In former times the court used to look at these applications as if they were discretionary matters and seek to work out whether the court had jurisdiction. It is now clear that that is the wrong approach under the Family Provision Act and that if the parties agree to settle proceedings under the Family Provision Act and there is no other interest involved, ordinarily the court should merely make the orders in accordance with the terms of settlement. There will, of course, be the odd exception where it clearly appears on the face of it that there is no jurisdiction in the sense that the plaintiff has no need of provision.'
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> [14] The point was further considered by the Supreme Court in Western Australia in *Schaechtele v Schaechtele* ([2008] WASC 148) where Le Miere J considered (at para 18):-
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> > 'This Court cannot make an order giving effect to the proposed settlement unless the Court thinks that such provision should be made out of the estate of the deceased for the proper maintenance or support of the plaintiff. But that does not mean that the Court is in effect to hear the matter as if it were a contested application and then to give or withhold orders to give effect to the settlement by comparing the settlement with the judgment which the Court would have given. The Court must give proper consideration to the evidence before it. The Court should be aware of the risks of litigation in an area in which reasonable people can reasonably reach different conclusions and give [proper]. Weight to the fact that the parties wish to effect the settlement. If the Court is satisfied that the settlement falls within the bounds of a reasonable exercise of discretion then the Court should make orders to give effect to that settlement.'
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> I respectfully agree with this approach to the question." (emphasis added).

[18] In *Abrahams* their Honours added towards the conclusion these final observations:[13]

> "[44] **Once the jurisdictional question had been satisfied, considerable weight must be given to the agreement, and "[t]he circumstances would be unusual indeed for the court to override the agreement of the parties who are of full age and where there is no evidence of undue influences at work in the reaching of the agreement**."
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> [45] The question before the primary judge was whether the compromise of the applicant's claim for further and better provisions out of his father's estate should be sanctioned by the court pursuant to s 59 of the *Public Trustee Act* was in his best interests and whether the compromise which had been reached between the parties was appropriate."
> (emphasis added).

The question of jurisdiction

[19] This question can be addressed in short compass. The 2007 Will made no provision for the applicant. There was no change to the situation when the deceased passed away. All of the deceased's substantial estate was left for the benefit of his two surviving children. The evidence before me of the applicant's background, earning capacity and her relatively modest circumstances when considered in the context of her age, her reasonable needs and her obligations to care for her two remaining young children make it plain in my view that the deceased did not make adequate provision for his wife, the applicant.

[20] I am satisfied that there is jurisdiction to make an order to make provision for the applicant out of the estate of the deceased.

The exercise of the discretion and the sanction

[21] The proposed settlement involves reducing the interests of the children under their father's Will and commensurately making provision for the applicant, their mother. Thus the circumstances are arguably distinguishable from those that applied in the matter of *Abrahams*[14] quoted above.[15] The considerations here are twofold. First, whether the court is satisfied that the proposed settlement falls within the bounds of a reasonable exercise of discretion.[16] Second whether the settlement should be sanctioned as being in the best interest of the infants under s 59 of the *Public Trustee Act*.[17]

[22] The first of the considerations, whether the proposed settlement reflects a reasonable exercise of discretion, may also be important in the context of considering whether it is in the best interests of the infants to materially reduce their inheritance from the estate of their father. A number of factors can be relevant here. Saving costs by the early sanction of a compromise distinguished from the more

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13 At [44]-[45].

14 See *Abrahams (By his Litigation Guardian The Public Trustee of Queensland) v Abrahams* [2015] CQA 286.

15 In *Abrahams* at [44]-[45], quoted above at [18].

16 See for example *Watts v Public Trustee of Queensland* [2010] QSC 410 at [14], quoted above at [12].

17 See *Abrahams* at [45], quoted above at [18].

substantial cost associated with a trial can be one. Containing risk, because after a trial having heard all the evidence the court might make a more generous provision for the applicant further reducing the infant's inheritance maybe another. In any number of ways the young infants might materially and personally benefit because their mother and carer has adequate provision for herself. Further the structure of the settlement may be relevant here, providing an opportunity to save costs, reduce tax or duty imposts or provide for enhanced prospect of income or capital growth. There may be other factors relevant in the particular circumstances of a case.

[23] Relevant to the application and the consideration of the sanction of the proposed compromise the solicitors for the litigation guardian for the infant beneficiaries obtained advice from experienced counsel, Mr D.B. Fraser QC.[18] It is apparent from Mr Fraser's advices that he was at the material times comprehensively briefed with the affidavit evidence and other documents relevant to the consideration of whether the proposed settlement could said to be in the interest of the infants. At the time of writing of his first advice the proposal being considered by him involved the creation of discretionary trusts in favour of the infants. For reasons that he explained in his second advice, including the saving of cost and potentially duties a decision was made to alter the structure of the proposed settlement to the one I referred to.[19]

[24] In his first advice Mr Fraser QC, after a detailed examination of the evidence, including the valuation evidence and the other financial data and also a thorough review of the case law relevant to both jurisdiction and to the factors relevant to the exercise of the discretion. Following that Mr Fraser said, concerning both the jurisdictional issue and the exercise for the discretion the following:

> "[53] …What she is left with under the estate is plainly inadequate. She has been given nothing and while her children will have the support provided for them under the will that is of no assistance directly to her, save that she is able to call upon that resource to assist in their maintenance. The Applicant does not own a home and her superannuation is quite modest. Ordinarily a widow would benefit from substantial life insurance proceeds but that is not the case here. The Applicant has relatively modest cash resources and the equity of about $80,000 in the investment property. While she is able bodied and has capacity to earn income that is limited by the need to care for their young children. The Deceased could have provided a home and a fund to generate an adequate income for the Applicant but instead the Will sought to keep intact the rural property and business interests he owned for the benefit of his children.
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> [54] The calculations I have done above indicate, in my opinion, that the proposal is within the range of awards which might be expected. Importantly, it is consistent with what the Deceased wished to achieve by his will. It is an outcome which is, as I understand matters, designed to achieve a harmonious result within the family, and that is important because of the overall family arrangements. There is, of course, a risk as noted earlier, about the success of the grazing business but, it seems to me, that

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18 See Exh. 1 and his advices contained therein dated 9 November 2017 and 13 December 2018.

19 See above [9].

accepting the Applicant's evidence at face value (and there is no reason not to) the children will be looked after appropriately and consistently with the Deceased's wishes. Early resolution means there will be considerable saving of costs, particularly for the estate as, in a case this kind, it is almost inevitable that the costs of all parties will be paid out of the estate on the indemnity basis. While it will be necessary to incur the expense of a sanction, that is far less significant outlay than a contested hearing. It seems to me that the Court does have the jurisdiction to make the orders which will be necessary to give effect to the settlement proposal."

[25] In conclusion Mr Fraser expressed the opinion:

> "[57] In my opinion, the Applicant is likely to receive an award which falls within the range occupied by the settlement proposal.
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> [58] I consider that the settlement proposal is in the best interests of the children. The essential elements of the transaction are unlikely to change and, if instructing solicitors are content with the terms of the trusts proposed and can advise the Court as to that matter, there is no reason why this opinion could not be used on the sanction if that is desired by instructing solicitors. Accordingly, I acknowledge that this advice is an appropriate one to be used by instructing solicitors in seeking such a sanction."

[26] In his subsequent advice, having been appraised of the proposed change in the structure of the trusts to be established in favour of the infants Mr Fraser said:

> "[13] In my opinion, the proposed settlement is in the best interests of the children for whom this advice is being provided. Instead of the uncertainty of litigation there is certainty of outcome. There is the added advantage that their interest in the pastoral company will not be eroded by duty when it passes to them because of the mechanism which has been adopted.
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> [14] In effect the Applicant is to receive sufficient funds and property which will provide for her a house and an income. She plans to deploy that benefit, as I understand my instructions, in advancing the larger family interest as that will benefit her children as well as herself. The same considerations that I adverted to in my previous advice still have application.
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> [15] The only change of significance is that the children will be dependent upon the Applicant not making a will cutting them out of her testamentary dispositions or otherwise disposing of her interest in the pastoral company. While that is an obvious risk, it seems to me that once the children are 18 and the Applicant has no legal liability to maintain them that is a risk that they must bear. While, in theory, they could themselves make an application for family provision from the Applicant's estate on her death in the eventuality I have noted, by then, as adult sons who are presumably well educated and able to get on in life, consistently with my instructions, their expectations should, I

> think, be seen as somewhat more limited in that case. On the other hand, they will receive a substantial interest in the pastoral company which will not be diminished by stamp duty and until they turn 18 there is that legal entitlement to be maintained and the prospect of income from their trusts, which involve, not just the Applicant, but another relation on their father's side.
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> [16] I appreciate, in providing this assessment, that the next friend will rely upon my advice and, further, that it is to be provided to the court in support of the proposed compromise. My role is to ensure that the interests of the children are protected, in the context of adversarial litigation, which had the prospect of reducing the estate's value. I consider that it is an important factor that the Applicant's claim will, in all probability succeed and the costs will be borne by the estate. As I have said, it seems to me that settlement in the terms proposed is in the best interest of the children, and I so advise."
> (footnotes omitted).

[27] Somewhat unusually I have taken the liberty of quoting extensively from the advice of Mr Fraser. This is because my own view, after a consideration of all the affidavit evidence, coincides with counsel's opinion. The circumstances are a little unusual because any discretionary provision for the applicant reduces the inheritance of the infants, her children. But the sound exercise of the discretion here requires that a substantial provision be made for the applicant. The provision agreed upon and the structure of the settlement for the reasons outlined is well within the bounds of a sound discretionary range. Further, and very importantly, it is one that is in the interests of the infants and should be sanctioned.

Conclusion

[28] For these reasons I made the orders on 1 April 2019.