

SUPREME COURT OF QUEENSLAND

CITATION: *Aronis & Anor v Aronis (No 2)* [2020] QCA 153

PARTIES: **THEODORA LOULA ARONIS AS EXECUTOR OF THE ESTATE OF PETER GEORGE ARONIS (DECEASED)**
(first appellant)
THEODORA LOULA ARONIS
(second appellant)
v
MATTY ARONIS AS EXECUTOR OF THE ESTATE OF MARIA ARONIS (DECEASED)
(respondent)

FILE NO/S: Appeal No 12617 of 2019
SC No 12875 of 2015
SC No 11046 of 2019

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2019] QSC 275 (Bowskill J)

DELIVERED ON: Date of Order: 20 February 2020
Date of Publication of Reasons: 21 July 2020

DELIVERED AT: Brisbane

HEARING DATE: 20 February 2020

JUDGES: Sofronoff P and Morrison and Mullins JJA

ORDER: **Order made 20 February 2020:**
Appeal dismissed with costs.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – PARTICULAR CASES – where the appellant claims declarations for constructive trusts over various properties as a result of alleged breaches by her husband’s parents of oral agreements and representations made in 1979, 1991 and 1993 and the conduct of her husband and her in reliance on those agreements and representations – where her mother-in-law defended the proceeding – where the mother-in-law died and her executor who was the deceased’s daughter was substituted as the defendant in the proceeding – where the executor was the beneficiary of the deceased’s estate – where the executor continued defending the proceeding with her own funds – where the executor sought judicial advice on continuing to defend the proceeding and to use estate funds to

do so – where the executor did not provide a legal opinion to the court as to the prospects of defending the proceeding – where there were affidavits from the appellant and her mother-in-law about the alleged oral agreements and representations – whether the primary judge erred in permitting the executor to use funds raised by mortgaging an estate property to meet the legal costs of defending the proceeding

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – where the appellant claims declarations for constructive trusts over various properties as a result of alleged breaches by her husband’s parents of oral agreements and representations made in 1979, 1991 and 1993 and the conduct of her husband and her in reliance on those agreements and representations – where her mother-in-law defended the proceeding – where the mother-in-law died and her executor who was the deceased’s daughter was substituted as the defendant in the proceeding – where the executor was the beneficiary of the deceased’s estate – where the primary judge found the appellant had no better than a 50/50 chance of success on the constructive trusts claim – where the primary judge considered the circumstances regarding a will and power of attorney signed by the deceased in 1991 were a concerning feature – where the primary judge considered the financial circumstances of the executor – where the primary judge concluded it was in the best interests of the estate for the executor to continue defending the proceeding – whether the primary judge took into account irrelevant considerations

Trusts Act 1973 (Qld), s 96

Aronis & Anor v Aronis [2020] QCA 147, related
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42, considered

COUNSEL: G R Allan for the appellant
 S J Webster for the respondent

SOLICITORS: Walt Allan for the appellant
 Cooper Grace Ward for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of Mullins JA.
- [2] **MORRISON JA:** I have had the considerable advantage of reading the draft reasons prepared by Mullins JA. Those reasons reflect my own conclusions as a result of which I joined in the orders made on 20 February 2020.
- [3] **MULLINS JA:** This is another appeal involving the Aronis family. The background to the dispute and the progress of Supreme Court proceeding number 12875 of 2015 (the constructive trust proceeding) are set out in *Aronis & Anor v*

Aronis [2020] QCA 147 (the earlier reasons). As in the earlier reasons, where appropriate and for ease of reference, I will refer to the parties and other family members by their given names.

- [4] Matty as the executor of Maria's estate filed an originating application in proceeding 11046 of 2019 (the caveat removal proceeding) to remove the caveat over the Vulture Street property to enable her to sell the property and use the proceeds for the purposes identified in the application. Matty also sought directions pursuant to s 96 of the *Trusts Act* 1973 (Qld) (the Act) that she was justified in selling the Vulture Street property and using the sale proceeds for the identified purposes and continuing to defend the constructive trust proceeding.
- [5] Theodora filed an application on 23 October 2019 in the constructive trust proceeding seeking an order that Matty in her personal capacity be included as the second defendant. That application together with Matty's originating application were heard together by the learned primary judge on 29 October 2019.
- [6] With respect to the caveat removal, Theodora put forward the proposal to Matty that, in lieu of selling, Matty should raise funds by mortgaging the 95 Burn Street property rather than the Vulture Street property. Theodora accepted that the estate required funds to meet the maintenance and repair costs and other outgoings in respect of the estate properties. By the time of the hearing before the primary judge, Matty accepted that the removal of the caveat should be over the 95 Burn Street property and agreed to attempt to obtain a mortgage over it, rather than selling it. The learned primary judge ordered that the caveat be removed from that property, subject to the following conditions set out in order 1 made on 8 November 2019 in the caveat removal proceeding:
- “(a) 95 Burn Street may be mortgaged, but not sold, provided that any mortgage loan funds are paid into a trust account operated by Cooper Grace Ward;
 - (b) any mortgage loan funds from secured by 95 Burn Street:
 - (i) must be dealt with in accordance with: subparagraphs (b)(ii)-(v) of this order; or otherwise:
 - (A) any further order of the Court; or
 - (B) the written agreement of the plaintiffs;
 - (ii) may be used for the administration, maintenance and repair of the estate properties and the payment of other outgoings;
 - (iii) may be used for legal costs and disbursements in respect of proceeding BS 10436/19, and any subsequent application by Matty Aronis seeking probate of Maria's 2016 will in solemn form;
 - (iv) may be used for legal costs and disbursements in respect of proceeding BS 12875/1[5] (the Constructive Trust Proceeding), and appeal proceeding CA 10524/19;

- (v) may not be used to repay any of the money Matty Aronis, in her personal capacity, has loaned to the estate.”

- [7] The primary judge otherwise adjourned the originating application to a date to be fixed and dismissed Theodora’s application in the constructive trust proceeding to join Matty as a second defendant. The primary judge’s reasons for making the orders are set out in *Aronis v Aronis & Anor* [2019] QSC 275 (the reasons).

The reasons

- [8] The primary judge referred (at [15] of the reasons) to the factual matters that were relevant to disposing of the applications. These can be summarised as follows. Matty is 72 years old and not employed. Her only source of income is the pension and she resides in her West Chermside home which is her only asset. She has loaned her mother’s estate just over \$229,000 to continue to defend the constructive trust proceeding after her mother’s death. She swears that neither she nor the estate has sufficient funds to pay the anticipated legal costs to continue to defend the constructive trust proceeding and the other related proceedings. The rental income from the properties is not sufficient to meet outgoings and property maintenance costs.

- [9] The primary judge expressed (at [22] of the reasons) the question to be decided on the applications as “whether it is appropriate for Matty, as executor of Maria’s estate (rather than in her personal capacity, as beneficiary) to continue to defend the constructive trust proceedings and to use estate funds, including those which may be obtained by mortgaging the Burn Street property, to defend those proceedings (and the appeal)”. After referring (at [23] of the reasons) to the principles in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 applicable to the exercise by the court of the power conferred by a provision such as s 96 of the Act and after noting that, where a trustee sought recourse to the trust property to pay the reasonable costs of defending a proceeding, the financial capacity of the relevant parties to the litigation was a relevant factor to what is practical and fair, the primary judge concluded at [25] of the reasons:

“I have no hesitation in concluding that Matty is justified in continuing to defend the constructive trust proceeding. Theodora’s claim in that proceeding is based upon oral conversations dating back to 1979, asserting a beneficial entitlement to all of the property owned by Maria. There are some concerning features, including the circumstances of the purported appointment of Peter as Maria’s power of attorney in 1991, and the 1991 will purportedly made by Maria. The proceeding was commenced against Maria as defendant during her lifetime; and defended by her personally, with the claims made by Theodora clearly and unequivocally refuted by Maria in her affidavit made in May 2016.”

- [10] Although the primary judge referred to Maria’s affidavit being made in May 2016, it was sworn on 1 July 2016. In addition to that affidavit, the primary judge also had Theodora’s affidavit sworn on 21 October 2019 that verified the conversations on which she was relying to allege relevant conversations in 1979, 1991 and 1993 that were the basis of the constructive trust claims. The primary judge analysed the evidence on the applications and noted (at [30] of the reasons) that the merits or

strength of the claim in the constructive trust proceeding was a neutral factor, as the claim was based on contested oral conversations and the primary judge did not consider it could be said there was more than a 50/50 prospect of the constructive trust claims succeeding. The primary judge expressly took into account (at [31] of the reasons) the consequence for the diminution of the estate of allowing Matty to access funds through the estate for defending the constructive proceeding and the other related proceedings, the primary judge concluded (at [32] of the reasons) that, “in the circumstances of this particular case, it is neither practical nor fair to require that Matty, in her personal capacity, fund the constructive trust proceeding at her own expense and risk as to costs generally”.

The appeal

- [11] Theodora appeals against the failure of the primary judge to dismiss that part of the originating application which sought a direction that Matty was justified in continuing to defend the constructive trust proceeding, the condition contained in order 1(b)(iv), the order otherwise adjourning the originating application, and the dismissal of the joinder application.
- [12] There were 15 grounds of appeal. The appellant abandoned ground 8. During the hearing of the appeal on 20 February 2020, the court would not hear the appellant on grounds 1 to 4 and proceeded to hear the appellant on the remaining grounds which were expressed as alternative grounds to grounds 1 to 4. At the conclusion of the hearing of the appeal, the appeal was dismissed with costs. These are my reasons for joining in these orders.

Grounds 1 to 4

- [13] Grounds 1 to 4 were described as jurisdictional grounds in the notice of appeal and focused on the fact that in making the directions in order 1, the primary judge was exercising the jurisdiction under s 96(1) of the Act. It was submitted on the appeal by Theodora that Matty had failed to provide a statement of facts, as required by that provision, for the purpose of obtaining the judicial advice and the court was therefore deprived of jurisdiction.
- [14] It is not necessary to deal with the substantive arguments addressed by the parties on these grounds. When the issue was raised by the appellant’s solicitor before the primary judge that the application under s 96 of the Act should be done in the proper form upon a written statement, the primary judge noted that the written statement of facts could extend to the submissions and therefore there was a written statement of facts before the court. The appellant’s solicitor submitted that it was up to her Honour how to deal with it. When the primary judge suggested that it would not be consistent with the principles of r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) for the application to be adjourned to allow the submissions to be rewritten in another form, the appellant’s solicitor did not pursue the point. The written submissions of Matty’s counsel in support of the originating application set out at paragraphs 2 to 12 (with references to relevant affidavits) the background to the bringing of the application that summarised the relevant facts and was relied on by the primary judge for the purpose of dealing with the caveat removal proceeding. It was an appropriate decision made by Theodora’s solicitor before the primary judge not to press an objection to the form of the facts put before the primary judge.

That precluded an appeal by the appellant on the basis that there was no statement of facts before the primary judge.

Ground 5

- [15] Ground 5 was a catchall ground to the effect that the primary judge erred at law by not making the orders that the appellant had sought, but relied on the contents of the remaining grounds. It added nothing to the other grounds.

Ground 6

- [16] The primary judge did not expressly give a direction to the effect that Matty was justified in continuing to defend the constructive trust proceeding, but the fact the primary judge reached that conclusion was expressed at [25] of the primary judge's reasons and it was implicit in the giving of the direction that permitted the respondent to use the funds raised from mortgaging one of the estate's properties for the purpose of paying the costs to be incurred by the respondent in continuing to defend the constructive trust proceeding. Ground 6 alleges the primary judge erred at law by misconceiving questions to be decided, taking into account irrelevant considerations, and by failing to consider relevant evidence by finding at [25] that "There are some concerning features, including the circumstances of the purported appointment of Peter as Maria's power of attorney in 1991, and the 1991 will purportedly made by Maria." in the circumstances then set out at paragraphs (a) to (f) of ground 6.
- [17] Paragraph [25] of the primary judge's reasons must be read in conjunction with the balance of the reasons by the judge and particularly [30]:

"In terms of the merits or strengths of the constructive trust claim, on the basis of the material presently before the court I do not consider it could be said there is more than a 50/50 prospect of the constructive trust claim succeeding – based as the claim is on contested oral conversations going back many years, between people three of whom are no longer alive to give evidence about them, in the face of the contrary sworn evidence from Maria. Of course, Theodora has also provided sworn evidence attesting to the veracity of the allegations. It must be observed, however, that the extent to which the court can assess the strength or otherwise of a claim of this kind, on a summary application such as the present, is limited. As Lyons J (as her Honour then was) said in *Salmi v Sinivuori* [2008] QSC 321 at [16], in an application such as this '[i]t is not the function of the court to investigate the evidence and make a finding whether or not the trustees will be successful in the litigation'. I have had regard to the written submissions on behalf of Theodora (at [41]), and the material referred to in that paragraph. The role of Peter in managing the properties over many years is acknowledged by Maria in her affidavit. But as counsel for Matty submitted, what the claim does not take account of is the question of Peter (and Theodora's) receipt of rental income from the properties over the years; and on the other hand, the support provided by [Matty], with whom George and Maria lived in each case until their death. At best,

it seems to me this (the merits or strength of the claim) is a neutral factor.”

[18] The appellant submits that Maria’s evidence about the 1991 will and power of attorney was contradicted by the evidence of the solicitor Mr Jacobson who witnessed her signature on both documents. Mr Jacobson did not have a specific recollection of the appointment with Maria during which those documents were executed, but relied on his established routine for dealing with clients who attended to sign wills and powers of attorney. The appellant asserts that by the primary judge’s failing to refer to the Jacobson evidence, the primary judge erred in the exercise of her discretion.

[19] First, the primary consideration the primary judge referred to in [25] of the reasons for justification in the continued defence by the respondent of the proceeding was the nature of the appellant’s claim based on oral conversations dating back to 1979. Second, the reference to the 1991 will and power of attorney was made in terms of being a feature of Maria’s evidence that was of concern to the primary judge. As is apparent from [30] of the reasons, the primary judge was not endeavouring to make concluded findings on the outcome of the litigation, but was adverting to an aspect of Maria’s evidence that raised a concern for the primary judge. It is apparent from [30] that Maria’s evidence was not considered in isolation from the appellant’s submissions and the material referred to in [41] of those submissions which included reference to the evidence from Mr Jacobson. In the appellant’s outline of submissions on this appeal, the reference by the primary judge to the concerning feature of the 1991 will and power of attorney of Maria is described as a finding. From a reading of [25] of the reasons in the context of the reasons as a whole, that is an incorrect characterisation of the evidence referred to by the primary judge. The issue of the circumstances in which Maria executed the 1991 will and power of attorney is raised on the pleadings and will be pursued in the constructive trust proceeding. The fact that the primary judge expressly referred to it as one of the matters to be litigated that justified the continued defence of the constructive trust proceeding does not fit the description of an irrelevant consideration. There is no substance to this ground.

Ground 7

[20] Ground 7 focuses on three factors referred to in [27] of the reasons and alleges that the primary judge erred by treating those factors as significant, when they were irrelevant considerations. Paragraph [27] relevantly provides:

“In my view, it is significant that the relevant proceeding was commenced against Maria whilst she was still alive; and Maria made the decision to defend the proceeding while she was still alive. Matty’s role, in continuing to defend the proceeding to date, has been as executor of Maria’s estate. Her conduct in doing so is, firstly, consistent with Maria’s sworn evidence and defence; and, secondly, in the best interests of the estate, since the proceedings are a challenge to the whole of the property comprising the estate.”

[21] The constructive trust proceeding was brought against Maria, as she was the beneficial owner of the subject properties at the time the proceeding commenced and filed a defence on 7 March 2016 that put in issue conversations alleged to have

occurred in 1979, 1991 and 1993 involving Maria that resulted in the alleged agreements (and representations) relied on by Theodora to pursue the constructive trust proceeding. Maria also swore her affidavit on 1 July 2016 that set out her responses to the allegations in the statement of claim. Each of the three factors referred to in [27] of the reasons are matters that should have been taken into account by Matty as the executor of her mother's estate in deciding whether to continue to defend the constructive trust proceeding. If they were relevant for the executor, they cannot be characterised as irrelevant considerations for the primary judge in giving the judicial advice that was sought about the continued defence of the constructive trust proceeding. The weight to be given to these factors was a matter for the primary judge. There was no error in the exercise of the primary judge's discretion in taking these factors into account.

Ground 9

- [22] Ground 9 also focuses on the conclusion of the primary judge in [25] of the reasons "that Matty is justified in continuing to defend the constructive trust proceeding" and a statement to similar effect in [29] of the reasons that "it is plainly in the best interests of the estate [for Matty] to continue defending". Ground 9 asserts that the primary judge acted on wrong principle, failed to apply relevant law, failed to take into account relevant considerations and accord sufficient weight to the appellant's evidence, acted in the absence of evidence and thereby erred by making these findings. The factors the appellant relies on to support this ground include:
- (a) the absence of evidence from the respondent of the market value of the estate properties;
 - (b) the absence of a written legal opinion as to the respondent's prospects of successfully defending the constructive trust proceeding;
 - (c) the fact that the respondent's interests as the sole beneficiary under Maria's 2016 will coincided with the interests of the estate which meant that it was in Matty's interests rather than the estate's interests that the constructive trust proceeding be defended;
 - (d) the demonstrated strength of the appellant's case in the constructive trust proceeding.
- [23] The complaint about the absence of evidence of the market value of the estate properties has no relevance to the aspects of the primary judge's orders that are the subject to this appeal. In any case, both parties were very familiar with the properties which comprised the estate and there was at least evidence of the rateable value of each of the properties that was referred to in [5] of the reasons.
- [24] The absence of a legal opinion to support the respondent's position did not preclude the primary judge's consideration of whether the respondent should continue to defend the constructive trust proceeding. Particularly when an application for judicial advice is heard without any active opponent, the provision of a legal opinion obtained by the applicant for judicial advice would usually be expected by the court. It is not essential, however, to the exercise of the court's jurisdiction pursuant to s 96 of the Act that a legal opinion be provided, where it is otherwise apparent from the material before the court as to the matters relevant to the issue on which the judicial advice is sought. That is consistent with the caution emphasised in *Macedonian Orthodox Church* at [55] that it is inappropriate to imply or impose

limitations in provisions conferring jurisdiction or granting powers to a court which are not found in the express words.

- [25] The pleadings in the constructive trust proceeding are detailed and as the appellant's claims would ultimately depend on how her evidence about the conversations that she alleged took place in 1979, 1991 and 1993 (which was contradicted by Maria's evidence) is received, the primary judge's estimation that the appellant's prospects of success were no more than 50/50 and therefore a neutral factor was not an inappropriate basis on which to consider whether the respondent was justified in continuing to defend the proceeding.
- [26] The absence of a legal opinion may affect the exercise of the discretion to give the judicial advice. In this matter where the appellant's solicitor who appeared on her behalf before the primary judge expressly adverted to the fact that the respondent had not provided the primary judge with a legal opinion for the purpose of obtaining the judicial advice, it can be concluded that the primary judge did not disregard the absence of a legal opinion in deciding to exercise the discretion to give the advice sought.
- [27] This application for judicial advice was heard in the context of a contest between the parties during which the factors relevant to whether Matty should have recourse to estate funds for the purpose of defending the constructive trust proceeding (and related proceedings) were disclosed in extensive material filed by both parties. The appellant sought to characterise the dispute as one between two beneficiaries seeking to claim the same estate. That is not the correct characterisation. Before Maria died, the subject properties were registered in her name. Upon her death, they therefore comprised her estate, subject to the outstanding constructive claims made by the appellant. The appellant pursues her claim of entitlement to those properties on the basis of a constructive trust, but needs to establish her claim, in order for those properties to be removed, in effect, from Maria's estate. That is why it is appropriate for Matty as the executor of Maria's estate to defend the constructive trust proceeding in that capacity. The primary judge squarely addressed (at [28] of the reasons) the issue raised by the coincidence of interest between Matty as the effective sole beneficiary of her mother's estate and the estate's interests in deciding what was practical and fair in relation to whether Matty should have recourse to the estate's funds to defend the constructive trust proceeding because she was both executor and beneficiary. The fact that the primary judge reached a different conclusion on that question to that sought by the appellant does not mean there was an error in the exercise of the primary judge's discretion.
- [28] The primary judge did not err in any way in concluding that the appellant's prospects of success in the constructive trust proceeding were no more than 50/50. That was a conclusion consistent with the nature of the claim and the unpredictability of whether the appellant's evidence as to oral conversations that took place around 30 to 40 years ago would ultimately prevail. It was that factor that was relevant to the exercise of the primary judge's discretion and not the appellant's assertion as to the strength of her claim.
- [29] There is no substance to ground 9.

Ground 10

- [30] Ground 10 is also a challenge to the finding in [27] of the reasons that to date Matty's defence of the constructive trust proceeding was "in the best interests of the estate". Prior to applying to the primary judge for judicial advice in relation to paying the legal costs of defending the constructive trust proceeding from the estate, Matty had been funding the estate's legal costs from her own funds which she had lent the estate. The need to seek directions from the court arose from the fact that Matty no longer had funds which she could loan to the estate for that purpose. The point of Matty's seeking the judicial advice, when it was sought and not earlier, was to enable her to access estate funds for the purpose of defending the constructive trust proceeding. The finding challenged under this ground was made as a step to considering the question on which the primary judge's advice was sought. In light of the analysis of the history of the proceeding, the primary judge's finding that Matty's defence of the constructive trust proceeding was in the best interests of the estate was an unexceptional finding. It was made in circumstances where Matty was continuing with Maria's opposition to the constructive trust claim which was not unreasonable on the basis of Maria's affidavit and was for the purpose of preserving the assets of the estate. The fact that the defence of the constructive trust proceeding was also in Matty's interests as the primary beneficiary of her mother's estate did not preclude the finding.

Ground 11

- [31] Although the complaint in ground 11 is that the primary judge did not apply the case law to which her Honour had been referred by the appellant, the substance of the ground is directed at the process of reasoning the primary judge undertook before making the orders that were in the nature of judicial advice. This ground adds nothing new to the other grounds of appeal. It is notable that the appellant asserts that the primary judge failed to have regard to *Macedonian Orthodox Church*, when the primary judge expressly summarised relevant principles from that decision at [23] of the reasons. In addition, the terms in which the primary judge accepted the issue to be determined on the application could be posed (at [28] of the reasons) comes directly from the adoption by Gummow ACJ and Kirby, Hayne and Heydon JJ at [84]-[85] of the *Macedonian Orthodox Church* of the issue formulated by Palmer J at first instance in that case. Where a trustee of a charitable trust sought an order that it was justified in defending a claim against the trust estate by recourse to the trust assets for the costs of the litigation, the issue was expressed by Palmer J as whether it was more practical, and fairer, to leave the competing claimants for the beneficial interest in the trust estate to fight the litigation out amongst themselves or whether it was more practical, and fairer, that the trustee be the active litigant with recourse to the trust fund for the costs of the litigation.
- [32] The appellant refers specifically to the primary judge's failure to have regard to *Macedonian Orthodox Church* at [44] in informing the opinions her Honour was required to form in providing the judicial advice. Gummow ACJ and Kirby, Hayne and Heydon JJ at [44] confirmed what the High Court had previously emphasised that "close attention must be made to the provisions which found the jurisdiction which is invoked" and reference was then made to English cases that are relied on by the appellant with the observation that they "may provide useful guidance" in considering how the powers given by provisions such as s 96 of the Act should be exercised in a particular case. Those English cases and the others relied on by the appellant before the primary judge are examples of the exercise of the jurisdiction under the relevant statutory provisions applicable to, and in the circumstances of,

those other cases. The discretion that is conferred by s 96 of the Act is wide and must be exercised by reference to the nature of the dispute on which advice is sought, the circumstances of the parties to the dispute, and any other relevant circumstances of the particular case.

Ground 12

- [33] Ground 12 is also concerned with the relevance of the fact that Matty was the primary beneficiary under her mother's will by reference to the findings in [28] and [32] of the reasons. It is asserted by the appellant that the fact that Matty was both an executor and primary beneficiary under her mother's will was not a relevant consideration, except to the extent of the possibility for conflicts of interest between the executor's role and the beneficiary's desire to obtain the benefits stated in Maria's 2016 will. This has been covered in dealing with grounds 9 and 10 above.

Ground 13

- [34] The appellant challenges the finding of the primary judge (at [29] of the reasons) that "Matty does not, on the evidence before the court, have the financial means to continue defending the claim, without recourse to the estate" and that the primary judge did not accept that it was "fair or practical" to require her to sell her only asset to fund the continued defence of the litigation in the circumstances of this family dispute. The primary judge had referred (at [18] of the reasons) to the possibility of the respondent mortgaging her home, but expressed that there was doubt on the basis of the respondent's evidence whether she would qualify for a loan, as she had no employment income to service a loan. The appellant's solicitors had raised the possibility of a reverse mortgage before the primary judge. It cannot be said that in the circumstances of the dispute, it was outside the range of possible decisions on the material before the primary judge for the primary judge to reach the finding which her Honour did (at [29] of the reasons). There is no appellable error in this finding.

Ground 14

- [35] Ground 14 challenges the primary judge's conclusions set out (at [30] of the reasons) that the appellant had a 50/50 prospect of success in the constructive trust proceeding and that, for the purpose of giving the judicial advice, the merits or strength of the claim was "a neutral factor". The application for judicial advice is a summary procedure (*Macedonian Orthodox Church* at [61]-[63]) and the primary judge correctly observed at [30] of the reasons that there is limited opportunity to assess the strength or otherwise of a claim of the kind of the constructive trust proceeding on an application for judicial advice. The primary judge's approach was consistent with the nature of a summary application and the proscription from endeavouring to decide the issues in the main proceeding. *Macedonian Orthodox Church* at [74] specifically noted that "the judicial advice proceedings are not to be treated as a trial of the issues that are to be agitated in the principal proceedings" which was precisely the approach adopted by the primary judge in treating the appellant's prospects of success as a neutral factor.

Ground 15

- [36] Ground 15 is another catchall ground. It is based on the errors identified in grounds 5 to 14 and adds nothing to the other grounds.

Conclusion

- [37] The appellant did not succeed on any of the grounds of appeal. The primary judge made a direction to permit the respondent to access funds obtained by mortgaging one of the estate's properties which could be used for funding the costs of the estate's defence of the constructive trust proceeding going forward. It is relevant that the respondent's application for that direction was otherwise adjourned to a date to be fixed, as the direction allowing that access was expressly subject to any further order of the court. That was prudent, as the question of the propriety of the respondent's costs being funded from the estate can be reviewed, if circumstances change, as the constructive trust proceeding progresses.