SUPREME COURT OF QUEENSLAND

CITATION:	*Richards v Augustine & Anor* [2012] QSC 46
PARTIES:	**CAROL ANN RICHARDS** **(applicant)** **AND** **COLIN BRUCE AUGUSTINE** **(first respondent)** **AND** **MERVYN CLIVE AUGUSTINE** **(second respondent)**
FILE NO/S:	5634/10
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane Supreme Court
DELIVERED ON:	12 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2011- 28 October 2011
JUDGE:	Peter Lyons J
ORDER:	**1. The parties provide further submissions relating to orders consequential to these reasons, including as to costs**
CATCHWORDS:	SUCCESSION - FAMILY PROVISION AND MAINTENANCE - FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT - WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION - CLAIMS BY CHILDREN - where legacy of $45,000 made for applicant in the will of applicant's father - where applicant contends provision was insufficient - whether provision was insufficient *Succession Act 1981* (Qld) Part IV, s 41 *Ahearn v Ahearn* [1917] St R Qd 167, considered *Blore v Lang* (1960) 104 CLR 124, considered

Bosch v Perpetual Trustee Co Ltd [1938] AC 463, considered

Collings v Vakas [2006] NSWSC 393 at [67], considered

Frey v Frey [2009] QSC 43, considered

Goodman v Windeyer (1980) 144 CLR 490, followed

Hughes v National Trustees, Executors And Agency Company Of Australasia Limited (1979) 143 CLR 134, considered

Kay v Archbold [2008] NSWSC 254, distinguished

McCosker v McCosker (1957) 97 CLR 566, considered

O'Donnell v Gillespie & Anor [2010] QSC 22, considered

Pontifical Society for the Propagation of the Faith v Scales (1962) 107 CLR 9, considered

Public Trustee v Brown (1915) 34 NZLR 951, considered

Re Campbell [1951] GLR 287, considered

Re Guthrie (1983) 32 SASR 86, considered

Re Hatte [1943] St R Qd 1, considered

Re Leonard [1985] 2 NZLR 88, considered

Re Lintern (1982) 32 LSJS 202, considered

Re Schwerdt [1939] SASR 333, considered

Rose v Rose [1922] NZLR 809, considered

Singer v Berghouse (1994) 181 CLR 201, considered

Vigolo v Bostin (2005) 221 CLR 191, followed

Wolnizer v Public Trustee [2001] NSWSC 667, considered

COUNSEL: D Schneidewin for the applicant

D Morgan for the respondents

SOLICITORS: De Groots Wills & Estates Lawyers for the applicant
Payne Butler Lang for the respondents

[1] The applicant (*Carol*) has applied under Part IV of the *Succession Act* 1981 (Qld) for further provision from the estate of her deceased father Mervyn Augustine (*Mervyn*). Mervyn died on 19 September 2009. The application is opposed by the executors of Mervyn's will, who are Carol's two brothers (respectively *Bruce* and *Clive*).

The deceased's will

[2] The deceased's will is dated 2 October 2003. At the time of his death, Mervyn owned a 3/8th interest in land described as Lot 5 on RP864721 (*Oakey Creek*).

Under the will, this land passed to Bruce. Mervyn owned two parcels of land described as Lot 30 on YL143 and Lot 80 on YL230 (together the *Home Property*), and an adjoining property described as Lot 33 on CP YL143 (*Hills Property*). Under the will, the Hills Property and the Home Property passed to Clive and Bruce as joint tenants.

[3] The will provided for a legacy of $45,000 to Carol, and a legacy of $45,000 to Carol's sister Marie. The deceased's cattle brand was given to Bruce. The residue of the estate was to be divided equally between Mervyn's four children. The affidavits of Clive and Bruce in August 2010 indicate the value of the residue (by my calculations) to be $126,781.24.

Carol's background and personal circumstances

[4] Carol's date of birth is 6 November 1951. She is now 60 years of age.

[5] She grew up on the family farm in the Mundubbera area. Like the other children in the family, she helped with farm work in her childhood. Like her sister Marie, she also helped her mother with the housework. She completed Year 12 of her schooling. Although she was awarded a scholarship to study at the University of Queensland, she chose to attend Kelvin Grove Teachers Training College. She did so because she knew that after school she was expected to support herself, and she was able to do that with an expenses allowance provided to her when she attended the college.

[6] Carol married in 1970 at age 19. Her son Adam was born in 1982, and her daughter Nicole in 1985. Her employment as a teacher was interrupted for some four months on the occasion of each of these births.

[7] Carol and her husband were partners in a speculative home building business which experienced severe financial difficulties about the end of 1985. As a result, they were declared bankrupt in early 1986. She was discharged from bankruptcy in 1989, the creditors having been paid in full.

[8] Carol's evidence is that her husband was a heavy drinker, and was abusive towards her. They separated in June 1987.

[9] In 1987 a house at 64 Oxley Drive, Karalee, was purchased in the name of Carol's mother (*Dawn*). Carol gave evidence that Dawn suggested that the house be bought in her name, with a mortgage also taken out in her name, so that Carol and her two children could have a place to live in. At this time, Carol was an undischarged bankrupt. Carol gave evidence that the arrangement with Dawn was that all of the payments would be made by Carol, and that that arrangement was carried out. The house at Oxley Drive was transferred from Dawn's name to Carol's name in about May 1990, some years before Dawn died.

[10] In his affidavit, Bruce gave evidence that he believed Dawn had purchased this house in 1987 for Carol to live in, and that she had obtained a loan for this purpose. He also deposed that the property was left to Carol pursuant to Clause 3 of Dawn's will dated 23 December 1987. He exhibited a number of documents, which appear to be intended to demonstrate that Carol obtained a significant benefit from Dawn. He swore that he believed that Dawn had attended to the repayments of the loan

herself; and that she had made additional payments relating to the purchase of the property and the taking out of the mortgage.

[11] In cross-examination, Bruce admitted that at the time when he swore to these things, he had in his possession Dawn's account statements from Queensland Teachers' Credit Union Limited, from which payments on the mortgage were made. Those statements demonstrated that payments were made into the account, corresponding to the payments on the mortgage. Bruce's affidavit did not draw attention to these payments. He admitted that he knew that Carol had paid "most of the money back"; and that he had seen "where she had made continual payments into Mum's account", at the time he swore his affidavit. He said that he had presented the information about any payments made by Dawn to "see if it helps our cause". Clive's affidavit refers to "the extra debt that my parents had taken on to buy a house for Carol", but he was not cross-examined about this evidence.

[12] I accept Carol's evidence to the effect that she fully reimbursed Dawn for any payments Dawn made in respect of this property. Bruce acknowledged that he knew this to be substantially true, and there is documentary evidence to support it.

[13] Dawn was diagnosed with breast cancer in 1987, and underwent surgery. Carol and Marie (who also lived in Brisbane) cared for her in this period. They also cared for Dawn at various times when she had other health problems.

[14] In 1994, a family meeting was held in Brisbane. By then, Mervyn's mother had died, leaving him the Hills Property, although her estate had not been finalised. Dawn proposed that the Hills Property should be given to Marie and Carol. The deceased reacted violently to this suggestion, because Marie and Carol "were not Augustines". Indeed, Bruce's evidence was that Mervyn said, "My land will be going to my boys, because they bear the Augustine name".

[15] In the same year, Dawn again became ill with cancer. She came to Brisbane on a number of occasions for treatment, including chemotherapy. Marie and Carol provided her with support and assistance. Dawn died on 30 September 1994.

[16] In 1992, Carol was diagnosed as suffering from what was then referred to as chronic fatigue syndrome, now identified as myalgic encephalomyelitis. By that time, she had been displaying symptoms of this condition for about 10 years. However, she continued to work in education. In October 2000, she took two weeks' sick leave as a result of this condition, and exhaustion.

[17] In August 2001, Carol was diagnosed with breast cancer. She underwent surgery, chemotherapy for six months, and radiation for two months. She was unable to work until May 2002.

[18] In April 2005, Carol did not work for a period of two weeks, the cause being identified in the evidence as workplace stress and bullying. She then returned to work four days a week until August 2005, when she resumed full time employment. At this time, she held the position of Deputy Principal. Her son Adam then had a well paid job as a laboratory manager. In January 2006, Carol and Adam purchased a property at 68 Greens Road, Purga, in equal shares. They each took a loan to pay for their respective shares. They each guaranteed the other's loan, and Carol

provided a mortgage over her present home at 129 Lyndon Way, Karalee, in support of the loan.

[19] Early in 2006, Carol's health worsened considerably, with the result that she stopped work about the end of February of that year. She took sick leave and then long service leave, and in this period when she was not working, she also relied on WorkCover entitlements.

[20] In May 2007, she attempted to return to work. However, she accepted a career change payment from the Queensland Government, resulting in her receiving a lump sum of $50,000, on the basis she could not return to any form of teaching with Education Queensland. Up to this time, she was entitled to superannuation under a defined benefit scheme, the benefit being calculated by reference to her annual salary at the time of her retirement. As a result of her financial circumstances, this was converted to an allocated pension, and she also received a lump sum payment of $65,000. At about this time, she paid out the mortgage for the purchase of her house at Lyndon Way, the amount paid being $134,173.

[21] Carol subsequently made further cash withdrawals from her superannuation.

[22] Carol then did not work for about 11 months for health reasons. She then undertook casual work initially for one day a week, and was considering tutoring students and establishing a consultancy tutoring and mentoring young teachers. She was then offered, and accepted, a position with TAFE Queensland working 16 hours a week. Since October 2009, Carol has been working three days a week.

Carol's health

[23] Carol has been treated by Dr John Whiting for her myalgic encephalomyelitis. Dr Whiting is a physician, whose specialties include chronic fatigue disorders. Dr Whiting has been treating Carol since 1994.

[24] Dr Whiting considers that the impact of Carol's condition on her functionality is of the order of a moderate to severe illness. He describes its effects in her case at times of relapse as being "malaise, aches and pains, exhaustion, cognitive and sleep difficulties, and physical weakness, somewhat akin to the symptoms associated with an acute Ross River viral infection". The condition affects the immune system, the brain, the heart, and the musculoskeletal, the gastrointestinal, and the endocrine systems to varying degrees, sometimes severely. Carol also suffers from a severe form of insomnia, which Dr Whiting describes as a common complication of myalgic encephalomyelitis. Dr Whiting states that there is no prospect for a cure for this condition at present. It does not affect life expectancy. Treatment seeks to reduce the severity of the symptoms as much as is possible. Dr Whiting considers that Carol is working beyond her capacity, and should not be working more than two days a week. He considers that her present level of work places her future health and capacity to function in jeopardy. He also notes that the medications used to treat someone with this condition are expensive.

[25] A letter from a registered psychologist, Ms Rosamond Nutting, was included in the material exhibited to one of Carol's affidavits, without objection. Ms Nutting has been treating Carol since January 1997. Ms Nutting expressed the view that Carol

suffers from anxiety and depression, and that she will require a significant amount of professional counselling in the long term.

Carol's children

[26] For the respondents, it was submitted that expenditure made by Carol for the benefit of her children is discretionary, and that it is unreasonable for her to rely on it in support of her claim. It is therefore necessary to say something further about them.

[27] Adam is now 29 years of age. As has been mentioned, in 2006 he was employed as a laboratory manager, a position described by Carol as a "well paid job", and which provided him with a company car.

[28] Adam, too, suffers from myalgic encephalomyelitis, and is treated by Dr Whiting. He is also under treatment from Dr Andrew Scott for sleep apnoea. He has been undergoing counselling from Ms Nutting since 2006, for a major depressive disorder with anxiety. She expects that he will require treatment for a long time in the future.

[29] In addition to the half interest which he has in the Purga property, Adam owns two investment properties, subject to mortgage. These two properties are rented.

[30] At the end of 2007, Adam's health deteriorated. In 2008, he resigned from his position as a laboratory manager, to take up a less demanding, but less well paid, job with the Department of Transport and Main Roads.

[31] In 2010, Adam attempted to sell one of his investment properties. He was unable to obtain a price which would avoid a significant loss, and decided to take the property off the market.

[32] Nicole is now 26 years of age. She too suffers from myalgic encephalomyelitis, and has been treated by Dr Whiting since April 1999. In January 2010 she underwent open heart surgery. She developed post operative depressive, and did not work for a period of three months. In this period, she was fully supported by Carol. She returned to work initially on a part time basis, but now works full time. Her net annual income was said to be $33,800. She also studies at the TAFE College.

[33] Carol meets Nicole's costs of medical treatment and her education costs. Nicole lives rent free with Carol, Carol paying some of her living expenses.

Carol's siblings

[34] The evidence provides no information about Marie's financial position.

[35] Bruce was born on 30 April 1956. He has been married for 31 years. He has three children, David, Marcus and Ashley.

[36] David is 25 years of age, has completed Year 12, and has had only casual or part time employment in recent years. He lives with his parents, and does not pay board or supply food. Bruce provides him with a car.

[37] Marcus is 22 years of age, and is employed by the North Burnett Regional Council. He, too, lives at home, and does not pay board or supply food. Bruce has provided him with a car.

[38] Ashley is 20 years of age and is an apprentice plumber employed by the North Burnett Regional Council. He, too, lives at home, pays no board and does not supply any food. Bruce has also purchased him a car. Bruce has paid for the education costs associated with his apprenticeship as a plumber.

[39] Bruce is a mechanic by trade. In 1990 he purchased Schmidt Motors with Roslyn Kugel, whom he describes as his partner (thought the business is operated by a company, Tulare Holdings Pty Ltd - *Tulare*). They continue to operate this business.

[40] Bruce has provided evidence of his current assets. His estimates of value of real estate are generally based without objection on valuations or on estimates by a real estate agent. In his affidavit sworn 6 October 2011, he attributed to his 5/8th share in Oakey Creek a value of $131,500 (as at 17 January 2010; the value of this property is contentious). In his affidavit sworn 26 August 2010, he claimed a half share in the improvements to Oakey Creek, attributing to them a value of $90,000. In addition, he has a half share in land described as Lot 6, Oakey Creek, to which he attributed a value in 2010 of $35,000; and in February 2011 of $35,250. The other half share in Lot 6 is owned by his wife. He also has a half share in land described as Lot 1 on RP 194222. The other half share is owned by his wife. This appears to be the land referred to in his 2010 affidavit as the River Block. He then attributed a value of $35,000 to his interest, and in the later affidavit, a value of $24,400 (including water rights).

[41] Bruce also owns a unit at Grand Florida, Miami, the value of which he estimated in his 2010 affidavit to be $200,000; and in his 2011 affidavit to be $245,000. He has a half share in a unit at Burleigh Heads (Roslyn Kugel owning the other half share), and in his 2011 affidavit attributed a value to his interest of $129,500. In his 2010 affidavit, he attributed a value of $140,000 to this interest. Both these properties are described as tenanted.

[42] In his 2010 affidavit, Bruce attributed a value of $30,000 to a quarter share in the land on which Schmidt Motors is conducted. In his 2011 affidavit, he attributed a value of $37,500 to a quarter share in this land. His 2010 affidavit attributed a further $40,000 to his interest in Schmidt Motors. His 2011 affidavit includes the 2010 balance sheet for Tulare. According to that document, net equity was, as at 30 June 2009, $79,477.57; and at 30 June 2010, $91,379.68. There were also shareholders' loans, the amounts owing to Bruce and his wife in 2009 being $18,928.92, and in 2010, $ 26,243.92. On both dates, cash assets exceeded $90,000; and liabilities (excluding shareholders' loans) were in 2009, $45,131.48; and in 2010, $34,176,40.

[43] In his 2010 affidavit, Bruce identified the value of his superannuation at $100,000, and he estimated the value of his half share in an investment portfolio at $100,000. In his 2011 affidavit, he identified the value of his half share (the other half is held by Ms Kugel) in a superannuation fund at $79,222.47; and the value of his half share in an investment portfolio (his wife holding the other half share) at

$84,153.57. He also had a small amount in another superannuation fund; and, with his wife, owned 267 shares in the Commonwealth Bank of Australia.

[44] In his 2011 affidavit, Bruce stated he had a half interest in cash in a number of bank accounts, some held with his wife and some with Ms Kugel, the half interest amounting to $55,094.89. The balances were at dates several months prior to October 2011. In the same affidavit, he valued his motor vehicles, plant, equipment and household contents at almost $60,000.

[45] Bruce purchased cars for each of his three sons, the prices ranging between $34,000 and $40,000. These are not identified in his list of assets, presumably on the basis that they were gifts to the sons.

[46] Bruce gave no other information about his wife's assets. He does not identify any liabilities.

[47] Bruce has exhibited his 2010 tax return, as revealing his income for that year. His gross income included $20,000 by way of wages from Tulare; and a rental income of $21,690. His taxable income was estimated at $29,509. However, his tax return reveals that his wife had a taxable income of $54,444 for the year, and made reportable superannuation contributions totalling $31,531. The financial statements for Tulare show that it made a net profit of $11,902.11 for the year.

[48] In his 2010 affidavit, Bruce deposed to annual rental expenses of $12,671; and living expenses (his half share) of $28,000. No detail was provided of his expenses.

[49] Bruce gave generally unchallenged evidence that he had made extensive contributions, both financial and otherwise, to the farming operation conducted by Mervyn; and that he was close to his father.

[50] Clive was born on 20 November 1959. He was married, but his marriage was dissolved. He has a daughter, Kailan, from his marriage.

[51] He lives with his partner, Angela, and they have two children, Carly and Blake.

[52] Kailan is 20 years of age, and studies accounting at Central Queensland University. She also works with an accounting firm. Clive assists her with her rent and medical insurance, and provides other financial assistance when necessary.

[53] Carly is 16 years of age. Blake is 14 years of age. They both are boarders at Rockhampton Grammar School, and are fully supported by Clive.

[54] Clive and Angela own real property and have conducted a farming operation. Clive has also operated a drilling business through Mundubbera Water Drilling Services Pty Ltd (*Drilling Services*).

[55] Clive owns a smaller rural property at O'Bil Bil, the value of which was estimated in February 2011 to be $61,800. Clive and Angela own a larger rural property at Derri Derra, the value of which was estimated then at $1,032,500. In addition Clive attributed a value of $17,100 to his half share in a water allocation. He also has superannuation, the value of which at 30 June 2010 was $61,307.78.

[56] As at 30 June 2010, Angela and Clive had a debt to the Queensland Rural Adjustment Authority of $209,695.77. They owed her parents $165,000; and Clive had a further loan of $50,000 for the purchase of a tractor.

[57] The tax returns for the farming partnership conducted by Clive and Angela show losses for a number of years. The 2010 financial statements for Drilling Services also show a loss for that year and the previous year.

[58] In about February 2010, Clive was diagnosed as having cancer, described as a soft tissue sarcoma in the left pectoral region. After radiation, he underwent surgery which included the removal of the left pectoral muscle. He has not worked subsequently. The evidence does not suggest that, prior to that time, his capacity to earn income was affected. It appears that his condition has a significant effect on his life expectancy.

[59] At about the time when the cancer diagnosis was made, Clive purchased a new vehicle. The cost of the changeover was $24,000.

[60] Clive gave evidence that he has drawn $56,000 from his superannuation. He also received a payout of $301,000 under a permanent disablement policy. The financial documents which he has provided, and the liability position to which he has deposed, generally relate to the period leading up to 30 June 2010, and do not appear to reflect these payments.

[61] For Carol, it was submitted that it is difficult to determine Clive's financial situation by reference to his evidence. He has not had a taxable income for a number of years; but has managed to maintain his family in that period, including meeting the expenses of his children's' attendance at a boarding school (and supporting Kailan); and he has been able to purchase a new vehicle. While I accept that the evidence of Clive's income is unsatisfactory, and it is therefore difficult to have a reliable picture of his financial position, I also accept that he has the assets previously mentioned, and that the debts he has identified are in fact debts which he (or he and Angela) owed. However, I note that the financial statements also record partnership plant and equipment with a value, written down after depreciation, of $466,923.39; and that Drilling Services has plant and equipment with a written down value of $114,442.02. While the net equity in this company is low, the major liability ($116,818.56) is directors' loans, not referred to in Clive's account of his assets.

[62] I accept that Clive, like Bruce, was close to his father for most of his life (though there is evidence that Clive was estranged from Mervyn at some time prior to Mervyn's death). I also accept that at times Clive provided considerable financial and other support to him.

The deceased's estate

[63] The respondents attributed to the estate at the date of Mervyn's death, values which resulted in a net asset position of $876,449.77. This included values for the land based on a valuation provided by Mr Col Otto, as at 17 January 2010. In October 2011, they attributed a value of $838,034.61 to the estate, including the same land values. They identified expenses which had by then been paid, including a sum of $13,585 for legal costs. Apart from costs associated with the current litigation, the only outstanding item of expenditure is the cost of a headstone for Mervyn's grave.

[64] The major component of the estate is the land, the values attributed to which are contested.

[65] Mr Otto was engaged to value the land by Clive and Bruce. He performed his valuation work in January 2010, his valuation date being 17 January of that year. He valued Mervyn's interest in Oakey Creek at $78,750. This did not include the value of improvements. He valued the Hills Property at $185,000; and the Home Property (including Lot 80) at $350,000.

[66] Mr Allan Gees, a valuer, gave evidence in Carol's case. He carried out his work in about October 2011, providing valuations as at 19 September 2009, and 6 October 2011.

[67] Mr Gees valued Oakey Creek (including improvements) at $460,000 on 19 September 2009, and $425,000 on 6 October 2011. He valued Lot 80, being the smaller lot forming part of the Home Property, at $75,000 in 2009, and $65,000 in 2011. He valued the balance of the Home Property, and the Hills Property, together at $715,000 at the earlier date, and $655,000 in October 2011.

[68] Mr Otto valued Lot 5 without reference to the improvements, on the basis of his instructions. Although Bruce was not directly involved in the giving of these instructions, his explanation was, "I would just assume if I built the yards and house and stuff there would be mine".[1] He did not explain why this approach should apply to the improvements on Oakey Creek, but not to other improvements on the other properties, to which the respondents had contributed. Nor did he relate these instructions to the fact that, when identifying his assets, he included only half of the value of the improvements. It may be noted that Bruce has resided at Oakey Creek for many years, though Mervyn carried out farming activities on the land for much of this time.

[69] In my view, the correct approach is to assume that Mervyn's estate includes a 3/8th interest in the Oakey Creek property, including its improvements.

[70] Both valuers made reference to soil types in assessing the value of the properties. A consideration of the quality of the soil no doubt played a part in the application of evidence of the sales of other properties, in assessing the value of Mervyn's lands. For this exercise, Mr Otto relied on his experience, and visual inspections, which in respect of the sales properties, was an inspection from the road. Mr Gees, in addition to inspecting the sales properties and Mervyn's land, and forming a view on this basis, drew support from soils mapping from the Department of Environment and Resource Management Soil Maps. It seems to me that his assessment of the soils of the properties is likely to be more reliable than Mr Otto's.

[71] Mr Otto suggested that none of the properties owned by Mervyn was sufficient to support a viable farming operation; and that it was unlikely that a potential purchaser would examine soil maps, or carry out reliable testing of soils. However, the properties referred to in the sales evidence were generally not capable of supporting a viable farming operation. So far as the evidence goes, it would seem they were purchased for rural activities, often as an additional paddock for a farming operation. Their suitability for rural activities, affected by the soil quality,

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1 Errors in transcript have not been omitted.

seems to me plainly to have been a relevant factor. The more reliable the basis for comparison of the properties, the more reliable the valuation of the estate land is likely to be.

[72] Mr Gees had the advantage of knowledge of a sale of a property immediately to the east of the Hills Property and the Home Property. He was able to carry out a comparison between that property and the lands which formed part of Mervyn's estate. Mr Otto became aware of this sale only the evening before he gave evidence. He did not know the sale property, and could not reliably comment on a comparison between it and Mervyn's land. The location of this property makes the evidence of its sale very relevant. There was no suggestion that the date of the sale, 31 May 2011, affected its utility as evidence.

[73] For his valuation of Oakey Creek, Mr Gees relied on sales of slightly smaller properties on 27 January 2010, which were in close proximity, to the west. The sales referred to by Mr Otto were of substantially larger properties, and more distant from Oakey Creek.

[74] Mr Otto carried out his inspection at a time when Mervyn's land was badly affected by drought. He formed the view that the Home Property was significantly eroded, and would require refurbishing of pastures or lengthy spelling with good rainfall. Mr Gees inspected the properties after the drought had broken. In his view, spelling is not required. In light of this evidence, it seems to me that it is likely that Mr Otto has taken an unduly negative view of the Home Property.

[75] Overall, it seems to me that Mr Gees enjoyed a number of advantages, which make his valuation of the lands forming part of the estate more reliable than that of Mr Otto.

[76] There was a separate issue relating to the treatment of Lot 80. This lot has an area slightly in excess of four hectares. Mr Gees valued it as a rural home site; while Mr Otto valued it with Lot 30, effectively as land used for rural activities. In oral evidence he gave three reasons for doing this. One was that the water supply (or, as he described it in his oral evidence, one of the water supplies) for Lot 30 is found on Lot 80. Another is that there was a possibility that the house on Lot 30 encroached onto Lot 80. The third was that its remoteness from Mundubbera made it less attractive as a rural home site.

[77] Mr Gees was not cross-examined on the water supply question. I note that in his description of Lots 30 and 33 (which he valued together) he referred to a total of 10 dams for stock water, and a bore on the southern side of the block. By reference to aerial photography, Mr Gees doubted that the buildings in Lot 30 encroached onto Lot 80; but in any event expressed the view that any encroachment could be accommodated by a realignment of boundaries. He referred to a sale of a rural home site nearby (close to Oakey Creek) which occurred in April 2010. The land area involved was similar. In my view, the sale demonstrates that there is some market for small rural home sites in the general locality.

[78] On balance, I am prepared to accept the evidence of Mr Gees that the highest and best use for Lot 80 is as a rural home site. His application of sales evidence to this lot, considered as a rural home site, was not challenged.

[79] As will have been apparent, Mr Gees assigned lower values to the properties in October 2011 than in September 2009. His oral evidence was that the market had softened. Mr Otto was unable to comment on market movement in the area where the estate lands are located, his experience being principally in the South Burnett area. There, it appears difficult to identify whether the market has weakened. Mr Otto's evidence was that some sales showed a reduction in the market, though an occasional sale showed an improvement. Given the state of the evidence, I am prepared to accept the opinion of Mr Gees that the market for the estate land weakened between September 2009 and October 2011.

[80] Accordingly, I accept the evidence of Mr Gees about the valuations to be attributed to the lands forming part of Mervyn's estate. It follows that the value of Mervyn's lands at the time of his death was $962,500; and at the time of the hearing was $879,375. It also follows that the value attributed by the respondents to the estate at the time Mervyn's death should be increased by $348,750 to $1,225,199.77; and the value attributed to the estate by them in October 2011 (subject to allowances for legal expenses) should be increased by $265,625 to $1,103,659.61.

[81] At the hearing, the parties tendered without objection, estimates of their legal costs. The costs for the respondents were estimated at $85,550; and for the applicant at $127,239.78.

Carol's financial position

[82] In September 2009, Carol owned her home at Lyndon Way, Karalee. In February 2011, she estimated its value at $375,000. In October 2011, she estimated its value at $339,000, on the basis of a market appraisal from a real estate agent, suggesting a list price of $339,000. The agent expressed the view that the house was in a flood prone area, and that prices in that area had dropped by 22.7 per cent since the flood in January 2011. There was no objection to any of this evidence.

[83] The precise value of Carol's house in September 2009 and currently is not a critical matter in determining this application. For such assistance as it might provide, I propose to proceed on the basis that in September 2009 the house had a value of the order of $400,000; and its current value is of the order of $335,000.

[84] In February 2011, Carol estimated the value of her interest in the Purga property at $262,500, on the basis of an assessment by a property consultant of the value of the property as between $500,000 and $550,000. In October 2011, on the basis of an assessment from the same person of the value of the property at between $425,000 and $450,000, she estimated the value of her interest at $225,000. Again, there was no objection to this evidence. In the absence of any challenge to her evidence, I would accept Carol's estimates of the value of her interest in the Purga property. There being no other evidence, and in particular no evidence that the Purga property was flood affected, I would accept the value of Carol's interest in January 2011 as its value in September 2009.

[85] Carol owns a Nissan motor vehicle, the value of which she estimated in February 2011 at $12,000 and in October 2011 at $8,500. It would appear to be the car that she purchased in the 2009 financial year for $12,500. Her estimates were not challenged.

[86] The amount credited to Carol's superannuation account as at 3 October 2011 was $411,229.50. In May 2010 she stated that the amount was approximately $400,000. Although Carol was drawing on her superannuation fund, it seems likely that it was also earning some income. In the absence of better evidence, I accept that in September 2009, the amount credited to her in the superannuation fund was of the order of $400,000.

[87] Carol has no other significant asset. Her only significant liability is the loan relating to the Purga property, amounting to $252,228, secured by a mortgage over her home.

[88] Carol gave evidence that in the year ending 30 June 2008, her income was $120,633. The bulk of this was a superannuation drawdown ($65,000) and allocated pension ($42,167). Her expenses (apart from a payout of the debt owed for her home) were $50,515.

[89] For 2009, Carol's income totalled $60,256. This amount included rental income of slightly in excess of $8,000, and her allocated pension of $26,795. Her expenses for that year, on her evidence, totalled $83,548. That included the purchase of the car; and home improvements for her house at Lyndon Way, of $15,324. The balance covered her general living expenses, and mortgage repayments and outgoings for the Purga property. The home improvements were a carport and associated work, to provide cover for Nicole's car. In this year she also received a tax refund of $7,807.28.

[90] In the year ending 30 June 2010, Carol's wages increased by some $14,000. She drew $30,000 from her superannuation fund. Her living expenses increased from the 2009 figure by about $35,000. She carried out further improvements to Lyndon Way, for the sum of $8,540. Her evidence was that this was because the carpet and linoleum for the living area required replacement, there being a risk of tripping.

[91] Carol's evidence of her income for the year ending 30 June 2011 was as follows:

INCOME	**VALUE**
Net wage	$41,830.00
Allocated pension	8,675.00
Rental income	8,320.00
Superannuation drawdown	30,000.00
TOTAL	**$88,825.00**

[92] Carol's expenses for the same year were

EXPENSES	**COST**
Mortgage repayments - over half share of the Purga property	$23,270.00
Rates - 129 Lyndon Road, Karalee ("Karalee")	1,800.00
Water - Karalee	603.00
House Insurance Karalee	1,380.00
Car Insurance	464.00

Trailer registration	85.00
Car registration	630.00
Petrol	2,340.00
Car maintenance	1,255.00
RACQ membership	149.00
Phone and internet	1,610.00
Mobile	780.00
Electricity	1,418.00
Health insurance	2,149.00
Teachers union	240.00
Teachers registration	68.00
Security	637.00
Clothes	1,330.00
Doctors scans and tests (out-of-pocket)	2,056.00
Medications (out-of-pocket)	3,363.00
Massage, dentist, prosthetics	786.00
Groceries (all food items cleaning products, cat food, sundries, Panadol, etc.)	9,880.00
Toiletries and haircuts	1,440.00
Household items (towels sheets, utensils electric goods, blankets)	591.00
Gifts	1,384.00
Holiday	900.00
Recreation (movies, DVD, coffee, breakfast, lunch with children, nights away, tickets to theatre)	3,165.00
Home maintenance - Karalee (replace leaking taps, engage plumbers and electricians, fixing air conditioning, repair leaking toilet, mower repairs, mower fuel, oil, grease trap pump, termite check, garden products, potting, mix, plants, pavers, road base, hedge trimmer, mulch, door locks cupboard doors, blinds, curtains and awnings).	2,218.00
Gym memberships	636.00
Miscellaneous (credit card fees, bank fees, parking, tolls, bus fares, computer repairs)	625.00
Teacher aids, computer repairs, ink, stationery and donations	699.00
Work conference accommodation and food	335.00
Taxation advice and lodgement	649.00
Nicole's study costs	600.00
Nicole's out of pocket medical costs (medication and doctors)	2,120.00
Insurance Purga (half share)	632.00
Maintenance Purga (half share) (pest control, new curtains, grease trap, smoke alarm maintenance, water softener, general repairs, water softener, salt)	605.00
Rates Purga (half share)	1,202.00
Home improvements (see above) Karalee	8,800.00
Legal Fees	29,649.00
TOTAL	**$112,543.00**

The parties' submissions

[93] The application was made under s 41 of the *Succession Act*, which provides that if, in respect of the deceased, "adequate provision is not made from the estate for the proper maintenance and support of the deceased person's … child … the court may … order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such … child … ."

[94] It was common ground that the proper approach to the determination of the application is to proceed in two stages, determining first whether the applicant has been left without adequate provision for her proper maintenance and support; and if that question is answered in favour of the applicant, determining what provision ought to be made out of the deceased's estate for the applicant.[2] It also appeared to be common ground that, in determining the first question, it is necessary to assess "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".[3]

[95] To that statement may be added the following statement of Callinan and Heydon JJ in *Vigolo v Bostin:*[4]

> "Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

[96] With respect to the second question, I was referred to the following statement of Dixon CJ in *Pontifical Society for the Propagation of the Faith v Scales:*[5]

> "The Court is given not only a discretion as to the nature and amount of the provision it directs, but what is even more important, a discretion as to making a provision at all."

[97] I was also referred to authoritative statements to the effect that the words "adequate" and "proper" in the legislation are relative terms, for the application of which there are no fixed standards.[6]

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2 See *Singer v Berghouse* (1994) 181 CLR 201, 208-209; *Vigolo v Bostin* (2005) 221 CLR 191, 197, 212, 227.

3 *Singer v Berghouse* (1994) 181 CLR 201, 210.

4 (2005) 221 CLR 191, 231.

5 (1962) 107 CLR 9, 19.

6 See for example *Vigolo v Bostin* (2005) 221 CLR 191, 218, citing *Goodman v Windeyer* (1980) 144 CLR 490, 502.

[98] The parties referred to cases dealing with the disposition of "the family farm", left to one or some of the children (usually sons), with much smaller legacies or even nothing, left to the other children of the family.[7] Of these cases, the following was said (in my respectful opinion, correctly), in de Groot and Nickel, *Family Provision in Australia*[8] (references omitted):

> "The legislation does not identify the family farm for special treatment and there are no special rules which apply in these cases. As has been said many times, each case is determined on its own circumstances. However, there are common factors in these cases which tend to influence the result. It may well be that the strong moral claim of the son who inherits the farm is the major factor in many cases and results in limiting the provision which the court makes for other siblings.
>
> It is clear that the sons of farming parents do not have a right to inherit the farm to the exclusion of their siblings if proper provision has not been made for them. In proper circumstances, provision can be made by way of annuities or legacies charged on the property, or a legacy payable immediately, none of which threaten its viability."

[99] However, as the authors note, in *Re Guthrie* (a decision of the Full Court of the Supreme Court of South Australia), it was recognised that if an applicant's need was such as to justify an order which would require the sale of the family farm, nevertheless the order should be made.[9]

[100] I was referred to *O'Donnell v Gillespie & Anor*[10] where McMurdo J considered that the testator in that case should have taken into account the possibility that one of his sons might not be able to continue to work; and might have to provide for himself for decades beyond his working life.

[101] I was referred to *Hughes v National Trustees, Executors And Agency Company Of Australasia Limited*[11] for the proposition that the court is not free to rewrite the will as it sees fit.[12]

[102] Reference was also made to *Kay v Archbold*[13] for the proposition that a "testator is often far better placed than the Court to make a just assessment of all of the claims on his or her estate", a proposition said to provide a, "very sound reason for the Court to be slow to depart from the testator's testamentary wishes … ."

[103] For the respondents, by reference to *Wolnizer v Public Trustee*[14] and *Collings v Vakas*,[15] it was submitted that Carol had not descended into detail and particularised

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7 The examples cited were *Public Trustee v Brown* (1915) 34 NZLR 951; *Ahearn v Ahearn* [1917] St R Qd 167; *Rose v Rose* [1922] NZLR 809; Re *Schwerdt* [1939] SASR 333; Re *Hatte* [1943] St R Qd 1; Re *Campbell* [1951] GLR 287; *McCosker v McCosker* (1957) 97 CLR 566; Re *Lintern* (1982) 32 LSJS 202; *Re Guthrie* (1983) 32 SASR 86; Re *Leonard* [1985] 2 NZLR 88; See also *Frey v Frey* [2009] QSC 43.

8 (LexisNexis Butterworths, 3rd ed, 2007) at para 3.3.

9 (1983) 32 SASR 86, 96.

10 [2010] QSC 22 at [71].

11 (1979) 143 CLR 134, 146.

12 See also *O'Donnell v Gillespie & Anor* [2010] QSC 22 at [69].

13 [2008] NSWSC 254 at [124].

14 [2001] NSWSC 667 at [24].

or quantified the case she advances as to her need for further provision. It was submitted that she harbours some resentment to her father, in particular in relation to his treatment of the women in the family. It was submitted that she was more distant, both in a literal sense and a figurative sense, from her father than were her brothers. Reliance was placed on the assistance of Dawn (previously discussed) in Carol's acquisition of a house at Karalee. It was submitted that it was realistic to expect Carol to continue to work three days a week to about age 65. It was submitted that if the medical treatments (both for herself and Nicole) on which Carol spends money are not medically indicated as necessary, then "they are tantamount to a luxury item" which ought not to be subsidised by Mervyn's estate (no basis was identified in the evidence to suggest they were not medically indicated as necessary). It was submitted that Carol had failed to demonstrate that the provision of $45,000 under the will was insufficient; and the absence of financial evidence was troubling, and could be a fatal flaw in Carol's case. Reference was made to the financial arrangements between Carol and Adam, which have resulted in Adam's debt in respect of the Purga property being paid off while Carol remains liable for her debt. It was also submitted that financial support provided by Carol for her children should be regarded as "discretionary expenditure", which should not be subsidised by Mervyn's estate.

[104] It was submitted that the respondents had "strong cases of competing need in their own right". Reference was also made to the assistance provided by the respondents to their parents, and the relationship between them and Mervyn (referred to previously).

[105] For the applicant, it was submitted that she faces a bleak future, so far as her health is concerned. Her ability to continue to work as she does at present is in doubt. She has difficulty meeting her recurrent financial obligations, even with her present income. In all of the circumstances (including the competing claims, and Carol's relationship with her father), provision of the sum of $250,000 would be appropriate.

[106] It is necessary to consider, by reference to the circumstances as they were at the time of Mervyn's death,[16] whether or not adequate provision was made from his estate for the proper maintenance and support of Carol. If that question is answered in Carol's favour, it is necessary then to consider whether any, and if so what, provision should now be made for her, taking into account current circumstances.[17]

The competing claims: a financial perspective

[107] It will be apparent from what has been said earlier in these reasons, that at the time of Mervyn's death, Carol's principal assets were her home, her half interest in the Purga property and her superannuation. The value of her interest in the Purga property was slightly greater than the amount of the debt she owed in respect of it. She had been unable to work for substantial periods. She had also made cash withdrawals from her superannuation account in this period.

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15 [2006] NSWSC 393 at [67].

16 See, for example, *Blore v Lang* (1960) 104 CLR 124, 128.

17 See de Groot and Nickels, *Family Provision in Australia* (LexisNexis Butterworths, 3rd ed, 2007) at para 3.3, para 2.26 esp at n 154.

[108] In my view, Carol has provided adequate evidence to demonstrate the likely level of her recurrent financial expenditure. She does that by giving evidence of her actual expenses. Her affidavit material makes plain that some of those expenses are not likely to be regularly incurred. For the 2008 and 2009 financial years, her recurrent financial expenses were of the order of $50,000 and $55,000 (the 2008 expenses not including mortgage repayments for the Purga property). The 2010 expenses, including mortgage repayments, outgoings for the Purga property, and improvements for her home, totalled $99,627. The expenses in these years are generally unparticularised. However, for the year ending 30 June 2011, Carol gave detailed particulars of her expenses. Excluding home improvements and legal fees, they were approximately $74,000. Of this amount $23,270 was for mortgage repayments. In support of the balance of the expenses in this year, Carol exhibited approximately 340 pages of supporting documentation.

[109] In the circumstances, I am satisfied that at the time of Mervyn's death, Carol's likely recurrent annual expenditure was in excess of $50,000 a year. Indeed, taking into account the mortgage repayments on the Purga property, the ongoing annual expenses were likely to be substantially above this figure.

[110] The 2011 expenditure included (in addition to an amount for health and insurance), the sum of $2,056 for doctors, scans and tests, and $3,363 for medications, in each case described as "out-of-pocket" expenses, which I take to mean being in excess of any Government or insurance refund. I do not accept the submission made on behalf of the respondents about Carol's medical expenses. The interruptions to her employment which have resulted from her health difficulties make it, in my view, quite prudent for her to spend money on medical treatment, to limit the effects of her condition, and to enable her to maintain a level of employment. Indeed, it is difficult to think that a wise and just testator[18] would not recognise the need for treatment for a painful and difficult condition, even if the condition had no potential implications for the ability of a child of the testator to support herself. There was also the evidence of Dr Whiting, who was not cross-examined, about the need for treatment; and that the treatment is expensive.

[111] The evidence shows that in 2010 and 2011 Carol provided financial assistance to Nicole, in relation to treatment for myalgic encephalomyelitis. The evidence does not show that Carol met those expenses in 2008 and 2009 (prior to Mervyn's death). Given Carol's financial position in those years, and the fact that Nicole's heart surgery and subsequent depression occurred in 2010, it may be doubted that she did so. Even had Carol provided this financial support in those years, I do not think that the expenditure should be disregarded, given the state of Nicole's health. The current provision of assistance was explained by Carol, unchallenged, on the basis that without the financial support she provided, Nicole would not have been able to cope financially on her salary. There is no evidence to show that, prior to Mervyn's death, Nicole's financial position was materially better than it is now.

[112] The jurisdiction conferred on the Court by s 41 of the *Succession Act* is a jurisdiction which permits the Court to interfere with a testamentary disposition, notwithstanding that the testator is not subject to obligations enforceable under the general law, and the absence of any recognised rights in persons in whose favour the jurisdiction might be exercised. That this is so is reflected by the fact that

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[18] See the description in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 478-479.

reference is made to "moral obligations", "moral duties" and "moral claims" in relation to the exercise of this discretion.[19] In this area, it is difficult to think that expenses met by a child of the testator for the testator's grandchild are always beyond the scope of the considerations which a just and wise testator would take into account.

[113] In the present case, it seems to me that the health and financial position of Nicole are such that some expenditure made by Carol on her behalf might be taken into account in assessing Carol's needs.

[114] In 2008, Carol's net wages were $1,464, and her rental income $7,800. In that year, her income was supplemented by an allocated pension, of $42,167. In 2009, her net wages were $25,401, her rental income was $8,060, and her allocated pension was $26,795. In 2010, she drew down $30,000 from her superannuation, and her allocated pension was $8,510. In 2011 she again drew down $30,000 from her superannuation, and had an allocated pension of $8,675. The evidence does not make clear the effect of the pension payments and drawdowns on her superannuation, though I note that at 13 August 2007, the amount attributed to Carol's allocated pension (after a payment of $65,000 to her) was $537,510.13; and by October 2011, the balance in her superannuation account was $411,229.50. It is unlikely that her drawings and pension can be maintained at these levels in the long term. Even if they were, bearing in mind the fact that Carol could not be expected to work many years into the future, it is unlikely that they would be sufficient to meet her regular expenses, once she ceased employment.

[115] In my view, at the date of Mervyn's death, Carol's financial position was somewhat precarious. Although in employment, she could not meet her recurrent expenses without resort to her superannuation. Her financial position might be improved by the sale of her interest in the Purga property, and the discharge of the debt. However, since she had only a half-interest in the property, that would have been difficult to achieve. Moreover, Adam resided there, and doing so permitted him to earn rent from his other two properties. The financial benefit achieved by paying out the debt would to some extent have been offset by the loss of rent paid to Carol.

[116] In my view, and notwithstanding her recent work history, Carol does not have the capacity to work more than two days a week. She did not commence working three days a week until about the time when Mervyn died. However, in my view, at that time, bearing in mind the state of her health and her recent employment history, there was a real risk that her employment, even for two days a week, was not maintainable.

[117] By contrast, Bruce's financial position was then relatively strong.

[118] By my calculation, the value which Bruce attributed to his assets in 2010 shows a total of $901,250 (including his superannuation). His evidence did not refer to cash in bank accounts at that time, though a figure is given for 2011. Nor did his evidence refer to the value of his motor vehicles, plant, equipment and household contents in 2010, though in 2011 the value of these items approached $60,000.

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[19] See the discussion in *Vigolo v Bostin* (2005) 221 CLR 191 at [13]-[25] per Gleeson CJ; [112]-[121] per Callinan and Hayden JJ; and note the discussion in the joint judgment of Gummow and Hayne JJ at [64]-[73].

[119] Bruce now has no liabilities. There is no suggestion that he had liabilities at the time of his father's death.

[120] Bruce did not give direct evidence of his wife's financial position. An examination of the evidence shows that she has a half-interest with him in a number of assets.

[121] In the absence of any suggestion of a material alteration in Bruce's position between the time of his father's death, and the dates on which he attributed values to assets in 2010, I propose to proceed on the basis that the values in 2010 represent the values of the assets in September 2009. Bearing in mind the value which I attributed to Oakey Creek, and the fact that Bruce plainly had motor vehicles, plant, equipment and household contents at the time when his father died, I find that the value of his assets at that time exceeded $1 million. His wife also had not insignificant assets, although it is difficult to make a finding about their value. Bruce had no liabilities; and there is no suggestion that his wife had any liabilities then.

[122] Bruce's income in 2010 was modest. Nevertheless, it appears to have exceeded his expenses. In any event, his wife had a taxable income which was substantially higher than his, and substantially higher than her share of the living expenses. She was also able to make a substantial superannuation contribution in that year. Bruce not having led any evidence to demonstrate that the 2010 tax return did not reflect his position at the time of his father's death, I propose to rely upon it. I also note that in the period leading up to Mervyn's death, as has been mentioned, Bruce was able to purchase cars for his sons; and to provide them with support, notwithstanding their employment. He is able to work full time, and has more years of his working life ahead of him than does Carol.

[123] There is no satisfactory evidence of Clive's financial position when his father died. His interest in property, including his water allocation, had a value of $595,150. His wife Angela had a half-share in Derri Derra, then valued at $516,250. So far as the evidence goes, it would appear that they owned those assets when Mervyn died. I have previously mentioned the value of plant and equipment shown in the financial statements both for the farming partnership, and Drilling Services. As at 30 June 2010, the value of Clive's superannuation was $61,307.78. In the absence of other evidence, it seems to me likely that at the date of Mervyn's death, the value of Clive's superannuation was no less.

[124] In June 2010, the debts owed by Clive and Angela totalled $424,695.77.

[125] From the limited evidence available, the picture which emerges is that in the period since Mervyn's death, the net value of the assets of Clive and Angela was at least $1,250,000. That is likely to be indicative of their position at the time of Mervyn's death.

[126] Rather surprisingly in view of the submission made on behalf of the respondents in relation to a lack of particularity about Carol's expenses, Clive has not given evidence of his expenses. I have earlier referred to the anomalies relating to his disclosed income, and his apparent financial capacity. There is no reason to think that at that time of his father's death, Clive was not able to meet his regular expenses out of income. Indeed, the evidence suggests that Drilling Services was more successful than is revealed by the financial records available to me.

[127] In discussing the financial position of Bruce and Clive, I have referred to the position of Bruce's wife, and Clive's partner Angela. Given that s 41 operates in the context of family relationships and family provision, I consider it appropriate to do so. I note that in *Re Guthrie*, regard was had to the financial position of the spouses of children of the testator, in determining a claim under analogous legislation.[20]

Carol's relationship with her father

[128] It was submitted for the respondents that Carol was distant from her father, in both the literal sense and the figurative sense. I do not accept that submission.

[129] Carol's evidence was that she spoke to her father on the telephone approximately once a month. These conversations usually lasted for about an hour. That evidence was not challenged in cross-examination. Moreover, Carol saw her father when he came to Marie's place annually for a family reunion.

[130] In an affidavit affirmed on 21 May 2010, Carol gave evidence that when either her mother or her father came to Brisbane for medical treatment, they would stay with either Marie or her for care and recuperation. Although Bruce provided a detailed response to this affidavit, he did not take issue with this evidence. Carol also gave evidence that her father came to Brisbane from time to time when he was unwell, including for treatment in relation to cataracts on his eyes. On one occasion when he was in Brisbane around December 2000, he suffered a heart attack which resulted in bypass surgery. Carol visited him daily over the 10 day period when he was in hospital, bringing things for his comfort. On discharge, he initially stayed with Marie, but from the second week of January until about mid May, he stayed with Carol. The only challenge to this evidence was from Bruce, who said that Mervyn returned to Mundubbera at the end of March. Carol also gave unchallenged evidence that, on an occasion in January 2009, she and Marie drove to Nanango to collect Mervyn, who had to come to Brisbane for a doctor's appointment. At this time, Clive was estranged from his father. It would appear that Bruce was not prepared, or not in a position, to drive his father to Brisbane on this occasion. Again, this evidence was unchallenged. I accept Carol's evidence about these matters.

[131] Carol also gave evidence, which I accept, about her interest in her father's health, particularly in 2009, and about occasions when she contacted him more frequently, and otherwise investigated matters relating to his health.

[132] Carol gave evidence that she was always aware that her father did not value his daughters as equal children to his sons. Notwithstanding that, I accept, on the basis of Carol's evidence, that her relationship with her father remained good throughout his life.

The testator's capacity to make a just assessment of all claims

[133] Reference has been made earlier to the statement made in *Kay v Archbold*[21] to the effect that a testator is often far better placed than the Court to make a just

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20 See also the analysis in de Groot and Nickels, *Family Provision in Australia* (LexisNexis Butterworths, 3rd ed, 2007) in Table 4.9, pp 135 ff,

21 [2008] NSWSC 254 at [124].

assessment of all of the claims on his estate. While it may be accepted that this proposition is in general correct, it does not follow that it is applicable in every case.

[134] Mervyn's will reflect his intention, expressed in 1994, to leave land only to his sons; and his view that his daughters "were not Augustines". Indeed, the pecuniary legacies reflect a promise he made to his wife that Marie and Carol would receive what remained of Dawn's superannuation.

[135] I consider that a decision not to leave an interest in valuable assets to daughters of a deceased person because they did not bear the family name reflects a deliberate decision not to give the consideration of a wise and just testator to the competing claims of his children. In my view, the proposition relied on from *Kay* is no barrier to Carol's success in her application.

Did the will make proper provision for Carol's maintenance?

[136] As I have indicated, at the time of Mervyn's death, Bruce was in a sound financial position. I make the same finding in relation to Clive's financial position; indeed, it may have been stronger than Bruce's. On the other-hand, Carol's financial position was precarious. I note in particular that in the four years leading up to Mervyn's death, Carol had worked on a full-time basis for not more than about six months; and in this period, she did not work at all for periods totalling more than two years. These factors, together with her past history of health difficulties, should have made it plain that her employment future was quite uncertain. The extent of her difficulties is further demonstrated by the fact that she made withdrawals from her superannuation fund in this period. There was no rational basis for thinking that Carol's financial position, or her health, might improve.

[137] As indicated, I find that Carol had a good relationship with her father up to his death. She was in regular contact with him; and provided support and assistance to him when he came to Brisbane. In her early years, she had also contributed to the welfare of the family. I accept that Bruce and Clive were, in general, in more frequent contact with their father, and provided him with a substantially higher level of support than had Carol. However, there is some evidence to suggest that they (particularly Clive) received some financial benefit from activities carried out on the family farm. Both were able to live at home for a time after finishing school; although they paid board. Carol, on the other hand, had to support herself entirely once she finished school. Bruce and Clive also had the benefit of their father's frequent companionship, and no doubt at times guidance, benefits less available to Carol because she did not live close.

[138] In particular in view of Carol's significantly greater needs, I am satisfied that Mervyn's will did not make adequate provision for her proper maintenance and support. The amount she was entitled to receive out of the estate was, by my calculation, a little under $77,000; while the value of the interests left to Bruce and Clive exceeded (together) $1,100,000 (no evidence having been provided as to Marie's financial position, I have assumed that she had no claim to a greater amount than was provided for her by the will).

What orders should be made?

[139] Carol seeks an order for $250,000 out of the estate. That amount is almost equal to the debt she owes in respect of the Purga property. Should she choose to pay that debt out, it would avoid the need to continue to make repayments on that loan; and would mean that her own home could be discharged from the mortgage. It would then be likely that she would not need to work more than two days per week (though I note that she may at present receive a tax deduction related to her mortgage repayments). In the circumstances, and in particular, in light of her financial position, it might be thought she has shown some restraint in quantifying her claim.

[140] It is convenient at this point to refer to the question whether an order in Carol's favour might require the sale of estate land. Excluding land, I calculate the net value of the estate currently to be $224,284.61. It is clear, therefore, that the order sought by Carol would require the sale of land, or the provision of cash from some other source. That would be particularly true, if the usual orders are made in respect of the costs of this application; and if the order in Carol's favour was not to affect the amount which would otherwise have been paid to Marie. These are matters about which I intend to seek further submissions.

[141] I note that the properties are not now (if they ever were) of sufficient size and quality to support a viable farming operation. I also note that Bruce is not a farmer, and has not engaged in farming for many years; and that Clive has conducted a water drilling business for much of his working life (in his oral evidence, when asked about his contribution to his farming partnership with Angela, he said, "When it comes to cattle I'm a great driller, or I was a great driller.") Under the will, the land, excluding Oakey Creek, was left to Bruce and Clive jointly. There was no suggestion that they would conduct a joint farming operation on this land. There is an obvious prospect that some or all of it would be sold. Bearing in mind Carol's need, the fact that estate land might be sold does not seem to me to be an impediment to an order in Carol's favour.

[142] For reasons stated earlier, Clive's financial position is obscure. It may be accepted that he is now unable to work. However, it would appear that his life expectancy has been significantly reduced.

[143] There is no evidence to suggest that Bruce's financial position has altered substantially since the time of his father's death.

[144] I have previously discussed the relationship of Carol, Bruce, and Clive, with their father, and the contributions each made to his support, and the operation of the family farm.

[145] It will be apparent that I do not consider that their claims are sufficiently strong to defeat Carol's application. I shall not further discuss the effect of an order in favour of Carol, and in particular, whether it should be borne equally by Clive and Bruce, or take effect in some other way. I have indicated I would hear further submissions on that question, if I decided to grant Carol's application.

Conclusion

[146] I am prepared to make an order for the provision to Carol of the sum of $250,000 out of the estate. I shall hear further submissions relating to consequential orders, including costs.