

DISTRICT COURT OF QUEENSLAND

CITATION: *Menzies & Anor v Menzies* [2019] QDC 243

PARTIES: **ROBYN LEA MENZIES**
(first applicant)

and

GLENN DONALD MENZIES
(second applicant)

v

**SHELLY GAYE MENZIES as Executor of the Estate of
the Late Donald Menzies**
(respondent)

FILE NO/S: BD4064/16

DIVISION: Civil

PROCEEDING: Family provision application

ORIGINATING
COURT: Brisbane

DELIVERED ON: 4 December 2019

DELIVERED AT: Brisbane

HEARING DATE: 6, 7 and 8 February 2019

JUDGE: Sheridan DCJ

ORDER: **1. Pursuant to s 41 of the *Succession Act 1981* (Qld) further and better provision be made for the proper maintenance and support of the first applicant, Robyn Lea Menzies, and the second applicant, Glenn Donald Menzies, from the estate of Donald Menzies (deceased) by reading and construing the will of the deceased dated 17 December 2015 (the Will) so as to amend clause 3 of the Will:**

“(a) to delete the words “for the said SHELLY GAYE MENZIES for her own sole use and benefit absolutely.”; and

(b) to insert in lieu thereof the words:

(i) 60 per cent to my daughter, Shelly Gaye Menzies;

(ii) 20 per cent to my daughter, Robyn Lea Menzies; and

(iii) 20 per cent to my son, Glenn Donald

Menzies.”

- 2. The applicants file any submissions as to costs by 4.00pm, 9 December 2019.**
- 3. The respondent file any submissions as to costs by 4.00pm, 13 December 2019.**
- 4. The applicants file any submissions in reply by 4.00pm, 16 December 2019.**
- 5. The parties have liberty to apply.**

CATCHWORDS: SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY CHILDREN – where the applicants applied pursuant to s 41 of the *Succession Act 1981* (Qld) for proper maintenance and support out of the deceased’s estate – where respondent is sole beneficiary of estate – where respondent opposes applications – whether the applicants have been left without adequate provision – whether court ought to make order giving provision out of estate for the applicants

District Court Act 1976 (Qld), s 68

Succession Act 1981 (Qld), s 41

Uniform Civil Procedure Rules 1999 (Qld), r 700A

Baker v Baker (No 2) [2019] QDC 140, cited

Bosch v Perpetual Trustee Co (1938) AC 463, cited

Goodman v Windeyer (1980) 144 CLR 490, cited

King & Anor v Condon & Anor [2009] QSC 67, cited

Singer v Berghouse (1981) 181 CLR 201, applied

Stojanovska v Stojanovski (No 2) [2019] QDC 198, cited

Sweaney v Bailie [2017] QDC 295, cited

Vigolo v Bostin (2005) 221 CLR 191, applied

COUNSEL: Fraser A for the applicants
Ivessa R for the respondent

SOLICITORS: Bennett Carroll Lawyers for the applicants
CNG Law for the respondent

- [1] The applicants, Robyn Lea Menzies and Glenn Donald Menzies, are two of the children of Donald Menzies, deceased (the **testator**). Each applicant seeks an order under Part IV of the *Succession Act 1981* (Qld) for adequate provision out of the estate of their late father.
- [2] The respondent to the applications, Shelly Grace Menzies, is the executor of the estate of the deceased and the sole beneficiary of the estate. Shelly Menzies, who is also a child of the testator, opposes the applications.

- [3] In the course of giving these reasons, the family members shall be referred to by their Christian names for ease of reference.

Relevant principles

- [4] Each application is brought pursuant to s 41(1) of the *Succession Act 1981* which provides:

Estate of deceased person liable for maintenance

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

- [5] As the applicants are not seeking to be awarded provision from the estate of a value in excess of \$750,000, this court has jurisdiction to make an order pursuant to s 68(1)(b)(vii) of the *District Court Act 1976* (Qld).
- [6] The approach to be adopted in determining applications of this type has been explained by the High Court in *Singer v Berghouse*.¹ In *Singer*, the majority of the court, in referring to the equivalent New South Wales Act, said:

It is clear, under these provisions, the court is required to carry out a two stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out the deceased's estate for the applicant.²

- [7] In *Singer*, the majority of the court said in relation to the two questions:

The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.

The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In

¹ (1994) 181 CLR 201 (*Singer*).

² Ibid, 208. The equivalent New South Wales Act refers to inadequate provision for "the proper maintenance, education and advancement in life".

saying that... there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance.³

- [8] The first stage has been described as the jurisdictional question. The second stage only arises if the jurisdictional question is satisfied.
- [9] The precise nature of the jurisdictional question has been the subject of some debate, with it often being said that references to “moral claim” and “moral duty” provide no useful assistance⁴ and amount to a gloss on the actual statutory language.⁵
- [10] Irrespective as to the relevance of any such references, the focus should be on the words ‘adequate’ and ‘proper’ as used in the statute. In *Vigolo*, Gummow and Hayne JJ in approving the test as being that indicated in the joint judgment in *Singer*, as quoted above, referred to the statement of Gibbs J in *Goodman v Windeyer*:
- [T]he words ‘adequate’ and ‘proper’ are always relative. There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards.⁶
- [11] For the present application, adopting the approach in the joint judgment in *Singer*, in considering the first stage of the process of particular importance will be the needs of the applicants and the totality of the relationship of each with the testator weighed against that of the respondent.
- [12] It is well established that the first stage requires the court to look at the position obtaining at the date of death of the testator and assess whether the testator made adequate provision for the applicant. In making that assessment, it is accepted that it is appropriate to allow for subsequent circumstances that are reasonably foreseeable.⁷
- [13] In making the final orders, regard must be had to the circumstances of each at the time of the trial.

General background

- [14] The testator died on 13 January 2016 aged 87 years. His wife, Ivy, died three months before him on 8 November 2015.
- [15] The testator left behind three children: the applicants, Robyn who was born on 12 August 1955 making her 60 at the date of death and Glenn who was born on 19 April 1961 making him 54 at the date of death, and the respondent, Shelly who was born on 10 April 1971 making her 44 at the date of death.

³ Ibid, 209-210.

⁴ *Singer*, 201, per Mason CJ, Deane and McHugh JJ.

⁵ *Vigolo v Bostin and Others* [2005] 221 CLR 191, 217-218 (*Vigolo*).

⁶ (1980) 144 CLR 490, 502.

⁷ *King & Anor v Condon & Anor* [2009] QSC 67, per de Jersey CJ.

- [16] None of the children are in good health. All children are in receipt of disability support pensions and the evidence before the court is that none of the children are considered likely to be able to work in the future.

The terms of the deceased's will

- [17] The father's last will and testament was dated 17 December 2015. It was executed within six weeks of his wife's death.
- [18] By its terms, the testator appointed Shelly as the sole executor and left the entire estate to Shelly, without any provision being made for, nor mention of, Robyn and Glen.
- [19] That will cancelled the testator's previous will dated 19 October 2006, which left his entire estate to his wife, and if that gift failed, left the house, land and household effects to Shelly upon payment of \$25,000 to each of Robyn and Glenn and the residuary of the estate to Robyn and Glenn.
- [20] There were 1990's wills which provided equally for all three children.

The estate

- [21] The principal asset of the estate is the family home that the deceased and his wife resided in until their deaths. Shelly was also residing in the home at the time of the testator's death and continues to reside there. The family home is valued at \$800,000. The parties agree that allowing for the usual amount of commission and only doing the bare necessities to ready the house for sale would result in outlays of around \$25,000 to \$27,000.
- [22] As at the date of death of the testator, the only other assets of the estate were an amount of cash at bank of \$83,846.50 and a motor vehicle valued at \$2,100.00.
- [23] By the date of the trial an amount of \$45,962.50 had been spent by way of expenses of the deceased's estate. An amount of \$62,244.48 was said to have been spent by the respondent in legal costs of the proceedings to June 2018; though that amount was not particularised.
- [24] I assess the net value of the estate as at the date of death as approximately \$860,000, and as at the date of trial as approximately \$815,000.

The testator's assessment

- [25] There is a statement allegedly signed by the testator and witnessed by a Ms Tara Hart, enrolled nurse, and dated 21 November 2015. The opening paragraph of the letter says the statement is to explain why he and his wife chose to leave the house to Shelly. The statement refers to Shelly's health conditions requiring specific living conditions and says, "if these were not met, she would suffer harm and long-term worsening of her conditions and her life would be jeopardised". The letter refers to the health conditions of her siblings as such that they can be managed by diet and lifestyle changes; and does not require certain living arrangements. The letter refers to the assistance Shelly has given to her parents over the previous 12 years.

- [26] I do not propose to place much weight on this statement. My reasons for not placing much weight on the statement are to do with the testator's medical condition, prior to and at the time of the statement, and the influence which it is apparent Shelley had over the testator at the time. Both matters are apparent from evidence independent of Robyn and Glen and admissions from Shelley.
- [27] It would seem from progress notes from the Greenslopes Hospital that the testator was admitted to the hospital on 20/10/15 at 23.25. Unfortunately, the full progress notes for that admission were not tendered and the purpose of the admission to hospital is unclear. There is a reference in a letter from Dr Nielsen dated 2 November 2015 to the testator being under his care for a left hip problem. On the other hand, the progress notes are suggestive of a cancer diagnosis.
- [28] A Greenslopes Private Hospital progress note made on 21 or 27 October 2015 refers to a conversation with the testator's general practitioner, Dr Fletcher. The notes record that:
- Both PT [patient] and DTR [daughter] have rigid mentality and belief
- Self-medicate
 - Naturopathy
 - DTR and PT believe pain is allergy to perfumes and preservatives/additives in food.
- Overall Dr Fletcher believes he has schizophrenic personality and beliefs.
- [29] There is a separate entry on 27 October 2015 at 0700. The entry states that the note was made in retrospect. The note records the following:
- Had a phone call from GP around 7.00pm last night.
Details:
- Patient is very much at borderline
 - Has very strict beliefs and daughter is much the same
 - Unlikely to accept any oncological intervention
 - Has refused psychiatric input
 - Has not been coping at home
 - Has refused all home help.
- Is happy to be called re: further explanation.
- [30] Shelly agreed that she and her father sometimes shared the same views about perfumes, pesticides, preservatives and things of that nature. She also agreed that they shared the same views "sometimes, not always" about the way his medical conditions should be treated.
- [31] The father was in Greenslopes Private Hospital at the time of the mother's death on 8 November 2015 and the father remained in hospital until 30 November 2015.
- [32] The testator was subsequently admitted to be under the care of the palliative care team at St Vincent's Private Hospital. In the letter from Dr Sirmis, Palliative Care Specialist, St Vincent's Private Hospital dated 18 December 2015, the testator's diagnosis is stated as "Metastatic Sarcoma of unknown origin" and it is said, "Donald and Shell[e]y are keen to prevent hospital admission in future and would prefer that he die at home." The letter states, "we have organised oral medications for pain and nausea today and discussed their use in detail should their current approach with natural medications not be effective."

- [33] In the St Vincent's Private Hospital notes for the period from December 2015 to 13 January 2015, being the date of death, the entry on 29/12/15 states, "Has not tried the medications at all – Family very reluctant to take any advice but do have all contact numbers."
- [34] In cross-examination, when first asked Shelly agreed that she told the Palliative care team that Robyn and Glenn had had no contact with her parents for years. In subsequent answers, Shelly said she could not recall what she actually said and she added, it depends what sort of contact you are talking about: "just receiving a few cards, or actually seeing them in person and having a relationship."
- [35] A complete copy of the notes created by St Vincent's Private Hospital were not tendered but in Robyn's affidavit sworn 8 February 2018 and Glenn's affidavit sworn 23 February 2018, both make reference to having obtained and read their father's medical records from St Vincent's Palliative Care and Greenslopes Private Hospital. Both comment that the records show their father to have been malnourished, with moderate muscle wastage and a severely limiting home diet regarding his dietary energy/protein intake. They refer to the notes recording Shelly's control of the diet of their mother and father and the fact that Shelly regarded her knowledge as greater than the health care professionals. They were not challenged in relation to this evidence in cross-examination.
- [36] The testator could not type, and the inference is that the statement was typed by Shelly. The testator was 87 years old at the time. As at the date of the statement, he was in Greenslopes Private Hospital and in poor health; dying two months later. The date of the statement was 13 days after the death of his wife.
- [37] Shelly had remained home and living with her parents for most of her life. She had been constantly back living at the house since about 2003 and she says that from about 2011 she controlled her parents' food intake. The contents of the statement have the appearance of being self-serving by her.
- [38] In these circumstances, it is impossible to put any weight on the statement as an expression of the testator's view of whether adequate provision is made for the other children.

Relationship of the respondent with the testator

- [39] Shelly says she had a typical, loving relationship with her parents as a child. She says her father suffered a workplace accident when she was about 3 years old.
- [40] Shelly said that her father was diagnosed with thyrotoxicosis around this time, was unable to work and was home all the time. She said that meant they spent a great deal of time together when she was growing up.
- [41] Shelly lived with her parents most of her life. She had limited periods away from the family home; from 1989 to 1991 when she moved to Toowoomba for study, from 1997 to 1998 when she lived on the Gold Coast for about one year to further her university studies and 2002 and 2003 when she lived at Norman Park, a short distance from her parents.
- [42] Some of Shelly's long term boyfriends moved into the family home to live. There was evidence of three long term boyfriends; Matty for a period of four years, Ben

for a period of eight years from 2006 to 2013 and Trent from about July 2015. Trent has been acting as Shelly's carer since March 2016.

- [43] Both Robyn and Glenn referred to Shelly not living an independent life and to her involving her parents in all of her battles and problems; particularly her battle with the University of Queensland in attempting to obtain registration as a neuropsychologist.
- [44] Shelly's evidence was that by 2006, she was providing her father with regular, daily assistance with household chores and helping him care for her mother. She said the level of care increased between 2007 and 2010 as her father suffered various illnesses. She said that by 2014, she was caring for her father 24 hours a day, 7 days a week.
- [45] Shelly said that from around 2010 she kept an extensive medical history sheet for her father. The document is not exhibited to her affidavit.
- [46] Shelly's evidence was that in around December 2011, her father was diagnosed with lymphocytic colitis. She said that required "a drastic change in diet" which she said she was "pivotal for overseeing and maintaining". This statement is consistent with the father's hospital records.
- [47] Indeed, as is apparent from the hospital notes and as will be apparent later in these reasons, it is clear that Shelly not only controlled the testator's diet, but his health care generally and his contact with Robyn and Glenn.

Robyn's relationship with the testator

- [48] Robyn lived with the testator at the family home until the age of 16 when she left home and moved into the nurses' quarters of what later became the Wesley Hospital where she completed her nursing qualifications. She married at the age of 20 and was married for 31 years until she separated from her husband in July 2006, divorcing in 2007.
- [49] Upon leaving her marital home in 2006, Robyn became a boarder in a house owned and occupied by a person named Gordon Torrens. Gradually, while living at the house, the friendship with Mr Torrens developed into a romantic relationship. Her recollection was that the romantic relationship started about six months after moving in; so in late 2006, early 2007.
- [50] Robyn says that they was never any formal engagement and that "Gordon never asked [her] to marry him". She admitted to having an engagement ring which she wore to her parents' house on visits. She said the testator was "pushing that he would like to see me married."
- [51] Robyn says the romantic relationship is not continuing but there is still a good friendship. It was difficult to tell from her answers in cross-examination as to when the sexual relationship ended. In cross-examination, she accepted that they love each other in a platonic way and that Mr Torrens cares about her "a great deal". Mr Torrens lives in a place of his own at Samford and Robyn continues to spend time at that house. As she has become more unwell, she has stayed more often at that house and Mr Torrens has been caring for her. She otherwise resides in a house at Banksia Beach which she owns as tenants in common with Mr Torrens.

- [52] Mr Torrens has filed an affidavit in these proceedings and was called to give evidence. In cross-examination, Mr Torrens explained that Robyn and he had met in 2000; he explained that his wife had died and Robyn had helped him through a very difficult period in a professional way. He agreed the romantic relationship probably started in late 2006/2007. Whilst he did not accept that in a platonic, non-romantic way that he still loves her, he described his permitting her to reside rent free in the house “as a debt of gratitude”.
- [53] The precise nature of their current relationship is somewhat unclear but Robyn was supported in her answers by Mr Torrens that the sexual relationship had ended.
- [54] Robyn described having a typical childhood, with herself and her brother helping around the house and her father teaching them many practical skills. Robyn said her father suffered an injury at work in 1970, when she was 15, her brother was 9 and prior to Shelly having been born. That injury resulted in her father being in pain, and suffering from vertigo. Her father sued his employer but the proceedings were discontinued with her father being required to pay costs. Robyn recalls this was a very stressful time. Her father did not work again in paid employment.
- [55] Robyn said this greatly affected her father’s temperament and his mental state until the belated discovery of a fractured cervical vertebra and the diagnosis in 1976 of thyrotoxicosis. She said her father’s medical conditions meant he had a short fuse and that arguments were “part of a normal life in her family.”
- [56] Robyn said that things started to change in 2006. She said that her mother was diagnosed with early stage dementia in approximately 2004 – 2005. She arranged for ACAT⁸ to attend the family home in 2006. Robyn had concerns as to the manner in which her mother was being treated by both her father and Shelly.
- [57] Robyn continued to remain in regular contact with her parents at this time; she visited regularly and had weekly phone calls with her mother. In November 2009, Robyn completed her MBA and her parents attended her graduation ceremony.
- [58] The “terrible rift”, as she described it, began from mid-2010. In mid-2010, she said after her parents had listened to an ABC radio programme about wills, her parents had phoned her. She said the programme had raised concerns for them. She said her parents wanted advice about their wills. Robyn denied she knew any actual details of the wills.
- [59] She said that her mother, father and Shelly were present for the conversation. She said that was a situation that often happened in her family on the phone at that time. She said her mother was crying and “there was a lot of domination in the background from Shelly and her father.” She did not accept that she had an argument. She agreed that at the other end of the phone, the conversation was “getting more and more heated.”
- [60] That phone conversation resulted in Robyn writing a letter to her parents, which she delivered to them. She said, she wrote the letter because her mother had asked her to write down “what I had to say.”

⁸ Aged Care Assessment Team.

- [61] The letter was lengthy but largely concerned the manner in which estates should be distributed. Robyn gave evidence that the letter related to her intention for her own will rather than her parents' wills, although she conceded that the information may be useful to her parents in considering their will.
- [62] While the content of that letter may have, to some extent, concerned Robyn's own will, it plainly also concerned the content of Robyn's parents' wills.
- [63] Submissions were made on behalf of Shelly that in considering the relationship between Robyn and the testator a fact of significance was the 2010 letter. It was submitted on behalf of Shelly that the letter was written to persuade her parents to change the 2006 wills.
- [64] That submission must be accepted. What follows from that conclusion is more complicated.
- [65] In cross-examination, Robyn mostly denied that her purpose was to persuade her parents to change their wills. She also on multiple occasions denied that she knew her parents had executed wills that did not give equal treatment to the children. As submitted on behalf of Shelly, those denials are implausible given the contents of the letter.
- [66] It is unclear as to why Robyn denied that she knew that new wills had been executed or that the purpose of the letter was to get her parents to change the effect of their wills. It is possible that Robyn was concerned that the letter reflected poorly upon her or that she knew that she would be criticised for writing the letter and that it would be used against her to defeat the application. It is certainly likely that Robyn was one of those witnesses who were reluctant to admit the obvious to a cross-examiner. In any event, her answers to those questions do not lead me to reject other parts of her evidence.
- [67] Robyn accepted the letter provoked a negative reaction from the testator and Shelly but Robyn said her father's reaction was caused by the fact that he was very unwell, referring to what she considered were his mental health issues which she described as his psychological instability and paranoia. Robyn referred to his strange beliefs about food and the environment and the risk of harm as a result of toxicity.
- [68] By way of example, Robyn recalled one occasion when she had been to the RNA Showgrounds and the next week she invited her parents and Shelly to her birthday lunch. Her father accused her of trying to kill him by exposing him to influenza and declined the request.
- [69] Her father often expressed the views that visitors to the home carried germs and illnesses and that poisons were contained within chemicals and smells, including shampoo, hand creams, perfume, deodorants, washing detergents and the like. Tradespersons who came to the home risked being abused if they wore deodorants.
- [70] Her father had also expressed to her the view that bananas and certain other healthy food stuffs were contaminated with radiation and were unsafe to eat.
- [71] Her father believed that the air around him was highly polluted and was even worse if it came from an air conditioning unit. He considered water sources were contaminated. He considered the only "pure" water was that that came from the

- Dragonfly machine that Shelly purchased. That water was rationed and became the only water that she believed her father would drink.
- [72] On one occasion, her father was convinced that a ‘water thief’ had stolen the water from his water tanks. Robyn said this incident tormented him for weeks.
- [73] On another occasion he had considered a rash to his leg had been caused by the chemicals used by the greenkeeper at the local bowls club. Her father made a complaint and her father told her that as a result he was directed not to return to the club.
- [74] Robyn was not challenged in cross-examination with respect to her examples of her father’s increasing paranoia. Robyn’s evidence is supported by the evidence of her friend and once long term partner, Mr Torrens, and her daughter, Rebecca Schaumuller.
- [75] Nevertheless, Robyn continued to make efforts to maintain a relationship with the testator following 2010.
- [76] Both the testator and Robyn’s mother attended the wedding of Robyn’s daughter in November 2011. Robyn recalled a conversation with her father at the wedding, where her father said to her, “I know you love me, Robyn.”
- [77] Robyn sent cards, photographs and letters to her parents, particularly to mark special occasions. Robyn said these were not acknowledged, which she said was out of character for both her father and (earlier) her mother.
- [78] Increasingly, however, Robyn says that her phone calls were monitored, the phone was usually answered by Shelly and she could often hear Shelly in the background instructing her parents what to say and on occasions Shelly would be in the background making derogatory comments. Gradually, the phone calls went unanswered and messages left were not responded to. Robyn was stopped by Shelly from being allowed to spontaneously visit the house.
- [79] On 6 June 2015, Robyn sent a letter to Shelly, stating she was writing “out of a deep concern for our parents and what appears to be an inability for family to contact them especially by phone”. The letter raised a number of concerns and in particular concerns as to the health of her parents and their emotional wellbeing. The letter attached a brochure regarding “elder abuse”.
- [80] Shelly responded to that letter by letter dated 26 June 2015 in which she stated that her parents were well and said that Robyn and others were welcome to contact them at any time.
- [81] Shelly accepted that, despite stating in that letter that her father was safe and well, he had been hospitalised on 21 June 2015 for a “pneumonic infection”. Shelly did not accept that the statement in her letter that her father was safe and well was not true, but clearly it was not true.
- [82] Robyn’s letter in response to Shelly’s letter dated 7 July 2015, requested an opportunity to meet up with her mother outside the home and of her desire to visit with her father “after the initial breaking of the ice with her mother”. Robyn refers to her hope that for her 60th birthday she could have a visit. She said she would appreciate any help that Shelly could provide to achieve that outcome. Robyn refers

to “the love” that she has for both parents and her wish to “just spending a little time with them”. She says that relationship will never change “regardless of recent interferences and distortions of the truth resulting in fall outs”.

- [83] It would seem that the letters then resulted in a typed written letter being sent to Robyn dated 24 July 2015. The letter ended with “Regards, Mum and Dad”, and with their type written names underneath. The handwriting above the name “Ivy Menzies” is very neat, very small and is signed, “I J Menzies”. The uncontested evidence of Robyn is that her mother was diagnosed with early stage dementia in approximately 2004/2005. Glenn, in his evidence confirmed that diagnosis. Robyn accepts that it is the signature of her father but does not accept that the letter was signed by her mother.
- [84] The letter commences, “We (your mother Ivy and father Donald)”. The letter refers to the letter from Robyn to Shelly dated 6 June 2015 and is stated to refer also to “your letter dated 26 June 2015”. There is no letter from Robyn to Shelly dated 26 June 2015. It is likely that the reference to a letter dated 26 June 2015 is a reference to the letter from Shelly to Robyn and perhaps the reply being referred to is Robyn’s further letter to Shelly of 7 July 2015. It can be assumed that the letter of 24 July 2015 was written after Shelly would have received the letter of 7 July 2015.
- [85] In the letter of 24 July 2015, it is said that, “You know very well we made [it] clear to you we wanted no more to do with you after the last phone call between us several years ago where you kept harassing and threatening us about our wills and had your mother Ivy in tears.”
- [86] It was submitted on behalf of Robyn (and Glenn), that the letter had been written and sent whilst the testator was under the influence of Shelly. Shelly accepted that she typed up the letter for her father but denied that she had input into the contents of the document. In cross-examination, Shelly said she also had written instructions, though no document was disclosed.
- [87] I do not find Shelly’s denial of having input into the letter persuasive. Shelly was living with her parents at the time and, as is demonstrable from the medical records and Robyn and Glenn’s observations of those records, clearly overseeing what her father was doing.
- [88] Further, the 2010 letter sent by Robyn does not seem an unreasonable response to the news that the estate was to be divided unequally nor of itself would it be one that would amount to conduct that could be described as “a horrible thing to write to your parents”, as suggested by counsel for Shelly.
- [89] It is certainly not apparent from the 2010 letter that Robyn had been unduly forceful during the conversation in 2010 with her parents. Whilst that seems to be the implication from the 24 July 2015 letter, as I have found, it is probable that the contents of that letter were sent under the influence of Shelly and does not represent the true position as regards the conversation in 2010.
- [90] In any event, after those incidents, Robyn made efforts to continue a relationship with her parents and the evidence, which I accept, is that these efforts were largely stymied by Shelly and Robyn’s offer to help were rejected.

- [91] Robyn's evidence as to her attempts to contact her parents and the efforts by Shelly to exclude her from contact was not challenged in cross-examination and her evidence was independently supported by the evidence of her daughter and Glenn.
- [92] In giving her evidence, Shelly said that Robyn had limited contact with her parents in 2011, she could not remember about 2012 and denied that Robyn had contact in 2013 or 2014.
- [93] Shelly is supported in her evidence by the evidence of Ben Devine, her long term boyfriend who lived in the family home from 2006 to 2013. Mr Devine stated, however, that he had been shown the affidavits of Shelly, Robyn and Glenn prior to swearing his affidavit and he accepted that he had been influenced to some degree by what he read in Shelly's affidavit. In those circumstances, I do not give any significant corroborative weight to the evidence given by Mr Devine.
- [94] Shelly failed to contact Robyn or Glenn when both parents were hospitalised in October 2015, only making contact after their mother had already slipped into a coma. On phoning on that occasion she did not disclose the true state of their mother. Robyn, who was staying that night at Samford, immediately attended at the hospital. Glenn was not told he needed to rush from Armidale but was rung later the same morning to say that his mother had passed away.
- [95] Neither were told by Shelly of their father's cancer diagnosis and each were only told of his death two or three days after. Neither were allowed to assist with any funeral arrangements and Shelly proceeded to cremate their parents in the absence of them both.
- [96] These facts support the other evidence of Robyn as to Shelly's impact on her relationship with her father.

Glenn's relationship with the testator

- [97] Glenn is the adopted son of the testator. He describes his relationship with his father as having been good. He says he was friendly but firm with him as a child and that he taught him many things in his formative years.
- [98] He refers to his father having been injured in a workplace accident and that the accident occurred in 1973. His father was not able to return to work after that.
- [99] Glenn's evidence was that he left school at about the age of 15 and commenced work in order "to provide an income for our family".
- [100] Glenn says he provided financial assistance to the family and assisted his father with repairs, renovations and maintenance to the family home and with maintenance works for the father's and Shelly's motor vehicle.
- [101] After leaving home, and while Glenn remained living at Scarborough, he visited his parents at their home weekly, or fortnightly. This continued until Glenn moved to Tasmania in 2002 and from there, moved to Armidale in 2008, where he currently still resides.
- [102] Glenn continued to call his parents during this period "at least fortnightly, often weekly." He said he would call or they would call him. He said they would often speak to his children.

- [103] Glenn said that growing up he had a good relationship with both Robyn and Shelly. He would describe his relationship with his sister, Robyn, as having remained that of any ordinary brother and sister. He said he would describe his relationship with Shelly as hostile. He said that relationship has been that way since 2010 and probably began to deteriorate after 2006.
- [104] Glenn considered that his father changed “a great deal in the last ten years of his life or so”. He gave as an example his father in 2008 installing a water filter because he had said to Glenn that the Brisbane City Council by adding fluoride to the water supply was trying to “poison Brisbane residents”. His father installed a water filter and insisted that guests drink from a particular tap.
- [105] In cross-examination, Glenn was taken to a statement in his affidavit (sworn 1 October 2016) where he had said his father would not allow white ant treatment to be used in the house “for fear of poisoning through exposure to chemicals” and it was said, he had described that as a bizarre idea. In response, Glenn said, “Because I’d known my father for 40 years previously to that. I knew what he would actually do for white ants, for other treatments, for pest control. I was also very well aware of all the toxins and chemicals he’d worked with throughout his entire life.” He said, “I have a historical knowledge of my father.” Glenn said that, in discussing the matter with his father, he had used Shelly as his reasoning for not doing the treatment. Glenn said that conversation probably occurred while he was still living in Tasmania. Glenn said he did not expect giving his father that advice would cause him to react negatively as he said, they had always had a “pretty open” relationship: he said he wasn’t that thin-skinned and they would usually each say what they thought was relevant. Glenn did not accept that his father would have taken his comment as an attempt to preserve his inheritance.
- [106] Glenn also observed a change in his father’s manner. He described him as becoming “quite angry, aggressive and bullying towards my mother”. He says that was quite different to how he was in the decades he had known him. Glenn considered that his father formed a very odd co-dependent relationship with Shelly and “formed a distorted view of the world”.
- [107] Glenn said his contact with his parents changed as a result of a telephone conversation in June 2010. He said he had a telephone conversation with his father on 7 June 2010. He could remember the date because he wrote a letter to his father the next day.
- [108] In his affidavit sworn 23 February 2018, Glenn said he initiated the conversation “after his mother had a discussion with my sister Robyn about their wills having been changed.” In cross-examination, Glenn said he could not remember whether Robyn had said that the wills had been changed or their parents were going to make changes. He did not accept that his evidence had changed in order to support Robyn’s evidence.
- [109] Glenn also referred to a conversation with his mother. He said that his mother either said to him they had changed their wills or were intending to make changes. Glenn referred to his mother sometimes getting confused, explaining that she was an 80 year old lady suffering from dementia.
- [110] Glenn said the change he had been made aware of was to permit Shelly to stay in the house for a year or so after his parents had died. He did not accept in cross

examination that he had known at the time of the phone call that the wills had been changed. He said he did not know what was in the 2006 wills until after his father died.

- [111] He did not accept that, in the conversation, he made any reference to being disinherited in some way because he said he didn't know that. He accepted he did make reference to the subject of will changing, and in answer to a question in cross examination said that resulted in his father saying to him, "all [he] wanted was his money, that they'd taken me off the street, given me his name. And then I raised the subject of his will, and he used quite a number of profanities, in essence, telling me that I wasn't worthy of the family name, Menzies, that I, in essence, should have been left on the street."
- [112] In his affidavit, he refers to his father becoming aggressive and verbally abusive towards him when he raised his concerns regarding Shelly's behaviour. In his affidavit, he referred to "Shelly's potential manipulation of my late parents."
- [113] He did not accept that he used foul language towards his father or that he was yelling down the phone at his father. He said his father called him a "liar" and a "bull shitter". In his affidavit, he said his father slammed the phone down when he suggested to his father that as Robyn was his biological child he would need "to provide an equal amount of support to her".
- [114] Glenn said he called back as "he did not wish to leave this conflict without some form of resolution". He spoke to Shelly. He did not accept that he "started screaming" at her nor that he threatened to "destroy her professional career". He said that Shelly's fight with the University of Queensland in relation to her qualifications in neuropsychology had caused real stress to his parents.
- [115] The next day Glenn wrote a letter to his father. He said he was very hurt by the things his father had said. Glenn said that his father never responded to the letter.
- [116] In cross-examination Glenn was shown a handwritten letter addressed, "Dr Menzies (Glenn Donald)." Glenn accepted that it was his father's handwriting but said the letter had never been sent to him. He said that some of the letter "aren't words or language that he usually used."
- [117] He said he and his father did not speak for some 15 months. He saw his father at Robyn's daughter's wedding in November 2011 but was unable to speak to him because he was being "guarded" by Shelly. He said he spoke to his mother on that occasion and that she had expressed to him her concerns regarding the 2006 will change, saying she felt continually stressed by that.
- [118] Glenn said that he then phoned at Christmas 2011. His father never mentioned the argument again. He said, "we were back talking ...as if nothing had happened." He said, out of respect and love for his father, he said, "No, okay. He's forgotten about it, we've moved on."
- [119] Glenn said that contact recommenced after that in the period from 2011 through to 2015. He said he visited his parents at their home with his son in 2013. Glenn said his wife was in hospital and he and his son, just turned up at the door. He said, his father was happy and gave him a hug.

- [120] However, he said maintaining contact became increasingly difficult. He said, after about 2012, the phone would often go unanswered, or the person who picked up the receiver would often hang up. He said, if you left messages, none were returned.
- [121] Glenn said there was a lack of communication from Shelly about his parents. Glenn said, “Shelly had made herself the gatekeeper within the family, monitoring contact between our parents and others, and controlling all communication extending to my parents’ last days.”
- [122] As stated earlier in these reasons, Glenn was not informed by Shelly about the declining health of his parents. He was given about 60 minutes’ notice of each parent’s cremations when Shelly knew he lived in Armidale; a 7 hour drive away. He says he was never informed as to his father’s diagnosis of terminal cancer and was not told of his death until two days after. Shelly had described her father’s hospitalisation at the time of his mother’s passing as him undergoing hip replacement surgery.
- [123] He also gives as an example of Shelly’s control, the references in doctor’s records of Shelly’s control of his father’s diet.
- [124] Glenn, like Robyn, expressed the view that his parents could not have typed the letter allegedly sent by his parents to Robyn dated 24 July 2015. He said neither of his parents had used a word processor or computer. He said he believed the signature of his mother was forged.
- [125] Glenn also referred to the statement allegedly signed by his father and bearing the date 21 November 2015. In referring to this alleged statement, Glenn recalled a conversation with Shelly in his home at Scarborough in the late 1990’s when Shelly had said to him that the parent’s home would one day be hers. He believed it was Shelly’s plan to take advantage of the father’s changing mental health.
- [126] Glenn, like Robyn, was not cross-examined about this conversation with Shelly or his efforts to maintain contact with his father. In her evidence, Shelly denied that Glenn had any contact after 2011. Mr Devine said the same thing, but again, for the reasons referred to above, it is difficult to give any corroborative weight to the evidence of Mr Devine.
- [127] The evidence of Glenn was compelling and reliable. It is clear that Shelly sought to exclude her siblings from having a relationship with the testator, and all of her evidence has to be considered in that light.

Robyn’s financial position

- [128] Robyn’s only source of income is a disability support pension. She is now 64 years old and due to medical difficulties is unlikely to engage in paid employment again in her lifetime. Her conditions include Refractory Coeliac Disease Type 1, Fibromyalgia and Megacolon which cause complex health issues.
- [129] The letter from her general Practitioner dated 17 January 2017 refers to her main issue being the Refractory Coeliac Disease which is an inflammatory disease affecting multiple organs. The letter says this condition will significantly reduce life expectancy. The letter also says over the next few years it is likely to be very

expensive as her condition cannot be managed within the Public Health Care System.

- [130] Robyn's says her health has improved with the use of the drug, Joncia, but she is concerned that she may not be able to continue to meet the cost of Joncia as it is a non PBS medication.
- [131] Robyn's net asset position is approximately \$329,000. This figure comprises a half share of a property at Banksia Beach, superannuation of approximately \$13,000, a bank account of approximately \$6,000 and personal property of approximately \$13,700. Robyn's only liability is an \$8,775 HECS debt which she is unlikely to ever be required to repay.
- [132] Robyn's income exceeds her expenses by a small margin; though that does not take into account the likelihood that her medical expenses will increase with time. It is clear, by reference to Robyn's monthly expenses, that Robyn lives very frugally.
- [133] Robyn resides in the property at Banksia Beach. Robyn lives in the property alone. Robyn and Mr Torrens were previously in a romantic relationship and while their evidence is that the relationship has formerly ended, there is an informal agreement between them permitting Robyn to continue to occupy the house rent free. While Robyn admits that Mr Torrens is in a sound financial position and Robyn and Mr Torrens maintain a close relationship, there is no continuing obligation on Mr Torrens to honour the informal arrangement.
- [134] Given their continuing friendship, it is likely the current arrangement will continue during Mr Torrens' lifetime. The real uncertainty is as to what will happen when Mr Torrens dies, assuming Robyn outlives him.
- [135] Robyn estimates that the value of her interest in the property is approximately \$305,000. The Respondent argued that this figure was on the low estimate of the April 2017 appraisal of \$635,000 to \$650,000. I accept Robyn's estimate of the value of her interest taking into account the fees associated with any future sale of the property.
- [136] Robyn estimates that she will have significant medical expenses in the future arising out of her existing conditions including \$20,000 in surgery and medication costs as well as care needs.
- [137] Robyn estimates that, in the event that she was required to relocate from her current residence, she would require \$225,000 in order to be in close vicinity to her family or previous care givers.

Glenn's financial position

- [138] Glenn's disability support pension has been his only source of income since 2004. He is now 58 years and due to medical difficulties is unlikely to engage again in paid employment in his lifetime.
- [139] He has been diagnosed with severe coronary heart disease and has suffered a Non-ST-elevation myocardial infarction. This diagnosis appears to have arisen following two heart attacks, the first of which occurred in May 2017 and the second in September 2018; these events occurred after the testator's death. He may require future open heart surgery, depending on whether his organs would survive the

trauma of this surgery. He also suffers from type 2 diabetes (and associated illnesses), chronic kidney disease secondary to diabetes, pancreatic pseudocyst, hypertension and peripheral vascular disease.

- [140] He requires ongoing medical treatment and surgery for his conditions. He attends a wound clinic twice a week for the management and dressing of wounds. He has had previous amputations. At present, Glenn's medical care has been largely publicly funded.
- [141] Glenn is married to Tracy Menzies and they have two adult children, a daughter Emma, and a dependent son Ashley. Glenn, Tracy and Ashley live at the family home in Armidale which Glenn and Tracy own. Tracy's only source of income is a carer's pension which she is paid for the care of their son. She has been in receipt of this pension since 2006.
- [142] Glenn and Tracy's joint net asset position is approximately \$457,000. This figure principally comprises the family home in Armidale valued at \$265,000 and superannuation in an amount of \$164,403.71.
- [143] The applicant submits that Glenn's "share" of the joint assets would be around \$230,000 in the event of a separation. The respondent submits that Glenn's asset position should be assessed at "somewhere in the middle" of the total marital asset position. Glenn and Tracy married when Glenn was in his late 20s and there is no evidence to suggest that divorce is likely. On the other hand, obviously some account should be taken for his wife's separate interest.
- [144] Glenn and Tracy intend to relocate from Armidale to Newcastle to have better access to greater medical and community support for their family. The evidence was that Glenn would require funds in the vicinity of \$350,000 in order to relocate as the cost of housing in Newcastle is greater than Armidale.
- [145] In his affidavit sworn 1 February 2019, Glenn and Tracy's expenses exceed their income by approximately \$234 per month. That calculation takes into account their joint marital income of a disability pension and a carer's pension and the costs of providing for their dependent adult child.
- [146] In cross-examination, a question was raised as to his entitlement to NDIS. Whilst his dependent son is in receipt of NDIS, his evidence was that when he raised it three years ago, he received a letter back to say that his needs are medical and he was not eligible.
- [147] Glenn's estimate the cost of the medical aids he may require in the future to assist in activities of daily living would be between \$66,100 to \$109,100.
- [148] Glenn also estimates that in the future he will require professional home care and assistance.

Shelly's financial position

- [149] Shelly receives a disability support pension and is also unlikely to engage in paid employment in the future due to her medical conditions. Shelly has a net asset position, excluding her HECS debt, of \$27,000. Her only asset is superannuation, of around \$42,000, which amount is said to be reduced by a personal loan to a long time friend of \$15,000.

- [150] In her affidavit sworn 26 September 2017, Shelly deposes to her weekly expenses being \$772.85. That figure included medical expenses of \$274.23 and food and groceries of \$250. Shelly's evidence is that her expenses exceed her income by \$1400 per month. Shelly has not provided a monthly expenditure table. She was cross-examined as to her expenses by reference to her credit card statements and it was suggested to Shelly, and denied by Shelly, that she did not spend the amounts claimed.
- [151] Shelly's boyfriend Trent Heseldon has been in receipt of a Carer Support Pension since March 2016. Shelly gave evidence that Trent performs approximately 80 hours per week of caring duties for her, although there is some variation from week to week. A similar estimate is contained in the medical reports from Dr Catton dated 18 September 2017 and 4 February 2019.
- [152] Dr Catton's report appears to have been prepared on the basis of self-reporting by Shelly. The basis for any of his conclusion or opinions is not evident from the report. The report lists nine separate diagnoses including myalgic encephalomyelitis since late 2004, post traumatic fibromyalgia arising from back injury in 2003, multiple chemical sensitivities, chronic musculoskeletal pain and impaired functioning and oestrogen dominance and ovarian cysts. The further report from Dr Catton states that Shelly's myalgic encephalitis symptoms have deteriorated but again there is no objective proof provided as to that diagnosis.
- [153] The report lists a number of allergies and severe sensitivities including all fluorinated drugs, chlorine, "fragrance" and products like perfume, air fresheners and laundry and cleaning products.
- [154] The report states, "It is to be noted Shelly has not suffered from any psychological or psychiatric condition."
- [155] There is no evidence in the report in making these diagnoses of any objective testing by way of X-ray, blood tests, MRI's or allergy testing. There is no evidence of any psychological assessments having been performed or any opinion having been obtained from a psychiatrist.
- [156] There is a reference to certain diagnoses which pre-date her attendance at the practice but again there is no identification as to the basis for any knowledge in relation to those.
- [157] The report includes a list of medicines and supplements which might be described as mostly naturopathic medicines. The report does not disclose any scientific base for their use or consumption.
- [158] Trent and Shelly have been in a relationship for some four years. Shelly says they do not live together. Trent's financial records were provided. Trent's source of income is the carer's pension and it does not seem that he has any significant assets. I accept that Trent is not in a position to support Shelly financially.

Contribution to the estate

- [159] For the majority of her life, Shelly lived with her parents and was dependent on their support. Shelly's evidence was that, despite her own health issues and to the detriment of her own health, she provided care for her parents, particularly in the

last five or so years of their lives. She took them to their medical appointments, kept their house and did their shopping and cooking.

- [160] I accept that Shelly did those things, though the extent to which she did them and the manner in which she did them may be open to conjecture. There seems no doubt that Shelly controlled her father and that they appeared to have a close relationship. Glenn described it as a co-dependency. The father appeared to adopt the belief system of Shelly and developed a rigidity, like Shelly.
- [161] Her belief system impacted the care she provided, and in particular her parents' diet and it meant, in the father's last weeks, he was not provided the care including the level of pain relief recommended by health professionals.
- [162] Shelly's personal circumstances meant that she was not in a position to contribute significantly to the financial costs of the running of the household. She did not pay regular rent over the period she lived in the house as an adult and what rent she did pay, seemed to come from a government subsidy. Any financial contribution was on a sporadic basis. Likewise, any contribution by the long term boyfriends, who were permitted to live at the house, was on a sporadic basis and in amounts that would have been unlikely to cover expenses.
- [163] Robyn and Glenn moved from the family home to live their own independent lives. Robyn left home at the age of 16 to gain her nursing qualifications. Except for the last five years, apart from the usual gifts, there is no evidence of Robyn contributing in a financial way to the estate.
- [164] It appears that Glenn left school at 15 in order to gain work for the purposes of helping to financially support the family. Glenn also gave evidence of performing physical tasks around the house and helping to maintain the parents' and Shelly's motor vehicles. The performance of such tasks by Glenn appears to have largely ceased once Glenn moved to Tasmania in 2002.
- [165] Given the circumstances of each child, it is not said that any were in a position to build up the estate or to make significant contributions to the improvement of the family home or to have purchased significant furniture for use in the home.

The jurisdictional issue

- [166] No provision was made from the estate for the maintenance and support of Robyn and Glenn. This is in circumstances where both applicants were on a disability support pension and each had assets in the region of \$300,000 and the estate had net assets, as at the date of death, of some \$860,000.
- [167] In determining the question as to whether "inadequate provision" had been made from the estate for their "proper maintenance and support", in accordance with *Singer* the factors to which I must have regard, amongst other things, are the size and nature of the estate, the totality of the respective relationships of each potential beneficiary with the testator and the circumstances and financial positions of each potential beneficiary. The approach is to consider what provision a "just and wise" testator in the position of the deceased would have made in the circumstances.⁹

⁹ *Singer*, 209 per Mason Deane and McHugh JJ quoting Salmond J in *In Re Allen (Deceased)*; *Allen v Manchester* (1921) 41 NZLR 218, 5; see also *Bosch v Perpetual Trustee Co* (1938) AC 463, 479; *Worlidge v Doddridge* (1957) 97 CLR 1, 11; *Goodman v Windeyer* (1980) 144 CLR 490, 497.

- [168] Each adult child has a clear financial need. As at the date of death, each child was in receipt of a disability support pension and their declining health meant that it was unlikely they would be able to work again.
- [169] Neither applicant is in a comfortable financial position. Robyn lives extremely frugally and her income exceeds her expenses by the smallest of margins. Glenn also lives frugally but he has a dependent adult child. His household monthly expenses exceed the household income by an amount of \$234 per month.
- [170] However, given Shelly's asset position, I accept she has the greatest financial need. Unlike, Robyn and Glenn, she has no property to live in, aside from the estate property where she has lived for most of her life and continues to live.
- [171] The respective health conditions of each means they are each likely to incur increasing medical expenses in the future. The actual quantum of their future needs is difficult to determine because it is not possible to predict the life expectancy of each and any reference to average life expectancy tables would provide little guidance.
- [172] In considering the totality of the relationship with the testator, it was not suggested by the respondent that the conduct of either of Robyn or Glenn was such as to disentitle them to relief. Rather, it was submitted that the totality of the relationship of Robyn and Glenn with the deceased was poor and the totality of Shelly's relationship with the deceased was very loving and close. It was submitted that Shelly contributed significantly to the estate.
- [173] Whilst it is accepted that Shelly lived with her parents and provided care to her parents, Shelly attempted (and succeeded in the last five years of the testator's life) in keeping her siblings away from the testator. The evidence of Robyn and Glenn, as supported by the evidence of Robyn's daughter, all of which I accept, is that any continuing contact with their parents was made very difficult, and at times impossible, by the actions of Shelly.
- [174] That evidence is consistent with the fact that Shelly deliberately withheld information from Robyn and Glenn as to the health of their parents and did not inform Robyn and Glenn that their father had terminal cancer and did not tell them of the death of their father until two or three days after and did not give them proper notice of the intended cremation of either parent and the cremations took place without a formal ceremony and without any family and friends in attendance.
- [175] Shelly's contribution to the estate must be viewed having regard to the control which, I accept, she exercised over the testator, including the adoption by the father of her belief system and rigidity and the impact Shelly's belief system had on the care provided to her parents.
- [176] In all the circumstances, a just and wise testator would have made provision for the maintenance of all children.
- [177] The testator failed to make any provision for the proper maintenance and support of the applicants and an order should accordingly be made for one out of the estate.

Further provision

- [178] The question then becomes as to what provision should be made.

- [179] In considering each of their financial positions, Shelly's need is greatest as she has no assets and needs a place to live. A relevant factor in assessing the appropriate provision to be made will be Shelly's dependence on financial support from her parents.
- [180] Apart from this fact, it is not clear that there is much difference between the financial circumstances of the three children.
- [181] Shelly's stated monthly expenses allegedly exceed her income by an amount of some \$1400, but given the lack of substantiation and my view of her evidence generally, I do not accept Shelly's evidence as to the level of her expenses and I am not satisfied that level of those expenses are necessarily associated with her medical conditions.
- [182] Robyn and Glenn have each provided details as to possible future expenses. Shelly has provided scant evidence as to her future costs.
- [183] Unfortunately, the estate is not large enough to provide for the future needs of Robyn and Glenn in the amounts claimed and at the same time to make adequate provision for Shelly to enable her to obtain a property in which to live.
- [184] In assessing the appropriate division, from the current value of the estate, an allowance for the legal costs incurred by each party in these proceedings is likely to be deducted. The evidence is that Shelly has paid an amount of \$62,244.48 in legal costs and will be required to pay an additional amount in the vicinity of \$45,000 for legal costs to the end of trial. The applicants' joint legal costs is said to be in an amount of approximately \$181,277.30 to the end of trial. If full allowance is made the payment out of the estate of those costs, the residual value of the estate could be in the order of \$530,000.
- [185] On behalf of the applicants, it was submitted that provision should be made to the effect that Shelly receive 50% and Robyn and Glenn each receive 25% of the net estate. That could potentially leave Shelly with only an amount of approximately \$265,000.
- [186] In my view, an appropriate provision would be for Shelly to receive 60% of the net estate and for each of Robyn and Glenn to receive 20% of the net estate.

Costs

- [187] In his written submissions, counsel for the respondent has requested to be entitled to make short written submissions on the question of costs following the delivery of judgment. It would be sensible for the applicants to be given the same opportunity. Subject to any submission the parties may wish to make otherwise, I direct that the applicants file and serve any submissions on costs by 4.00 pm, 9 December 2019, the respondent file and serve any submissions on costs by 4.00 pm, 13 December 2019 and the applicants file and serve any submissions in reply by 4.00 pm, 16 December 2019.
- [188] In terms of any award for costs, this court has stated on a number of occasions its concerns about the level of costs in family provision applications.¹⁰ It has

¹⁰ *Stojanovska v Stojanovski (No 2)* [2019] QDC 198; *Baker v Baker (No 2)* [2019] QDC 140; *Sweaney v Bailie* [2017] QDC 295.

commented on the particular obligations on the parties to litigate efficiently and to minimise the costs of the litigation, and the function of r 700A of the *Uniform Civil Procedure Rules 1999* (Qld). The smaller the estate, the more important it is that the costs of the proceedings be minimised.

- [189] In making submissions on costs, these observations should be borne in mind and it would be preferable that any award of costs be fixed and in an amount that is reasonable in all the circumstances, particularly having regard to the size of the estate.
- [190] If the parties should require additional time to fully address the amount of costs to be awarded then I will extend the time periods ordered.

Orders

- [191] Accordingly, the court makes the following orders:
1. Pursuant to s 41 of the *Succession Act 1981* (Qld) further and better provision be made for the proper maintenance and support of the first applicant, Robyn Lea Menzies, and the second applicant, Glenn Donald Menzies, from the estate of Donald Menzies (deceased) by reading and construing the will of the deceased dated 17 December 2015 (the **Will**) so as to amend clause 3 of the Will:
 - “(a) to delete the words “for the said SHELLY GAYE MENZIES for her own sole use and benefit absolutely.”; and
 - (b) to insert in lieu thereof the words:
 - (i) 60 per cent to my daughter, SHELLY GAYE MENZIES;
 - (ii) 20 per cent to my daughter, ROBYN LEA MENZIES; and
 - (iii) 20 per cent to my son, GLENN DONALD MENZIES.”
 2. The applicants file any submissions as to costs by 4.00pm, 9 December 2019.
 3. The respondent file any submissions as to costs by 4.00pm, 13 December 2019.
 4. The applicants file any submissions in reply by 4.00 pm, 16 December 2019.
 5. The parties have liberty to apply.