Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Chapple v Wilcox [2014] NSWCA 392**
Hearing dates:	22 October 2014
Decision date:	18 November 2014
Before:	Basten JA at [1]; Barrett JA at [29]; Gleeson JA at [150]
Decision:	1. Appeal allowed. 2. Set aside the order 1 made by Pembroke J on 21 February 2014 and the orders made by Pembroke J on 17 April 2014 and order instead as follows: "(1) Order that the proceedings brought by the first plaintiff be dismissed. (2) Without prejudice to interlocutory costs orders previously made, order that the first plaintiff pay one-half of the costs of the defendant up to and including 10 February 2014 and the whole of the defendant's costs thereafter." 3. Order that the respondent pay the appellant's costs of the appeal and that a certificate under the Suitors' Fund Act 1951 (NSW) be granted to the respondent. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	SUCCESSION - family provision - application for family provision order under Part 3 Succession Act 2006 (NSW) - application by adult grandson - deceased left whole estate to his only child (applicant's mother) - estate consisting principally of the deceased's interest in a grazing enterprise part owned by the sole beneficiary - primary judge ordered payments totalling $387,000 to applicant grandson - failure to articulate any cogent basis for departing from the testator's scheme of benefaction in

	favour of his only child - no such basis available on the evidence - evaluative judgment miscarried - principles relevant to family provision claims by grandchildren discussed - PROCEDURE - costs - costs in family provision cases - principle that costs follow the event generally applicable - unsuccessful applicants should not expect that, as a general rule, the costs discretion will be applied so as to exempt them from liability for costs.
Legislation Cited:	Civil Procedure Act 2005 (NSW) Family Provision Act 1982 (NSW) Succession Act 2006 (NSW) Suitors' Fund Act 1951 (NSW) Supreme Court Act 1970 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Andrew v Andrew [2012] NSWCA 308; 81 NSWLR 656 Bladwell v Davis [2004] NSWCA 170 Bowditch v NSW Trustee and Guardian [2012] NSWSC 275 Bowyer v Wood [2007] SASC 327; 99 SASR 190 Daniels v Hall (No 2) [2014] WASC 272 Diver v Neal [2009] NSWCA 54 Durham v Durham [2011] NSWCA 62; 80 NSWLR 335 Hampson v Hampson [2010] NSWCA 359 House v The King [1936] HCA 40; 55 CLR 499 Jvancich v Kennedy (No 2) [2004] NSWCA 397 MacEwan Shaw v Shaw [2003] VSC 318; 11 VR 9 McCosker v McCosker [1957] HCA 82; 97 CLR 566 McCusker v Rutter [2010] NSWCA 318 O'Dea v O'Dea [2005] NSWSC 46 Permanent Trustee Co Ltd v Fraser (1995) 38 NSWLR 24 Phillips v James [2014] NSWCA 4; 85 NSWLR 619 Re Fulop Deceased; Fulop v Public Trustee (1987) 8 NSWLR 679 Sassoon v Rose [2013] NSWCA 220 Sayer v Sayer [1999] NSWCA 340 Simons v Permanent Trustee Co Ltd; Estate D Hakim [2005] NSWSC 223 Singer v Berghouse [1993] HCA 35; 67 ALJR 708 Singer v Berghouse [1994] HCA 40; 181 CLR 201 Slack v Rogan; Palffy v Rogan [2013] NSWSC 522; 85 NSWLR 253 Tobin v Ezekiel [2012] NSWCA 285; 83 NSWLR 757 Tsivinsky v Tsivinsky [1991] NSWCA 269 Verzar v Verzar [2014] NSWCA 45
Category:	Principal judgment
Parties:	John Francis Chapple as executor of the estate of Patricia Anne Wilcox (Appellant) Robert William Wilcox (Respondent)
Representation:	Counsel:

	Mr B J Skinner (Appellant) Respondent in person Solicitors: Newnhams Solicitors (Appellants) Respondent in person
File Number(s):	CA 2014/85147
Decision under appeal Citation:	[2012] NSWSC 1138; [2014] NSWSC 88; no citation
Before:	Pembroke J
File Number(s):	2010/426690

HEADNOTE

[This headnote is not to be read as part of the judgment]

This appeal concerned a claim for a family provision order brought under Chapter 3 of the *Succession Act 2006* (NSW) by the respondent in respect of the estate of his deceased grandfather. Under the will, the whole estate consisting largely of a grazing property and pastoral business passed to Mrs Wilcox, the deceased's only child (and the respondent's mother). She was the sole executrix. The primary judge ordered that provision be made for the respondent by an immediate payment of $107,000 and seven annual payments of $40,000 commencing after two years.

The respondent had the training and skills to earn $100,000 per year but preferring instead to make a subsistence living by operating a tree lopping business. He had no assets to speak of and owed $107,000 to the Australian Taxation Office. The respondent's father had recently won $1.3 million gambling and expressed some willingness to give him some financial support. There had been limited contact between the respondent and the deceased since early 1993. Mrs Wilcox, the deceased's only child, had devoted a large part of her life to his pastoral business of which she was a part owner. She assisted her father in both business and personal matters, assumed sole responsibility for him in his old age and was a caring and dutiful daughter. The pastoral business was "borderline viable" and beset by the usual problems that attend such businesses, such as drought and unpredictability. There was no practical scope to raise money by selling off part of the land and the limited borrowing capacity that did exist needed to be devoted to the financial requirements of the enterprise itself.

On the basis of these facts, the primary found that community standards and expectations required that provision be made for the respondent out of the estate and ordered provision to the extent of $387,000 by the instalments referred to above. The primary judge also ordered that the respondent's costs be paid out of the estate.

Mrs Wilcox initiated an appeal which was continued by her executor. The appellant submitted that the primary judge failed to give adequate reasons and erred in his statutory discretion in the making of the family provision order. The appellant also challenged the costs order made by the primary judge.

The issues for determination on appeal were:

(i) Whether the primary judge erred in his discretion to order provision pursuant to s 59 of the *Succession Act 2006* (NSW) in light of the factual circumstances.

(ii) Whether the primary judge erred in ordering that the respondent's cost be borne by the estate.

The Court, in allowing the appeal and thereby rejecting the respondent's application for provision, held:

In relation to (i)

1. Per Barrett JA at [62]-[64] (Gleeson JA agreeing) and Basten JA (at [11]-[12]) (Gleeson JA agreeing): When determining whether an order for provision ought to be made pursuant to Chapter 3 of the *Succession Act 2006* (NSW), it is appropriate to have regard to "perceived prevailing community standards of what is right and appropriate". This may be an imprecise, variable and contestable standard.

Andrew v Andrew [2012] NSWCA 308; 81 NSWLR 656 at [12] and [16] applied. *Permanent Trustee Co Ltd v Fraser* (1995) 38 NSWLR 24 at [46], *Slack v Rogan; Palffy v Rogan* [2013] NSWSC 522; 85 NSWLR 253 at [125]-[127] cited.

2. Per Barrett JA at [65]-[67], [96]-[99] (with Gleeson JA agreeing) and Basten JA at [17]-[21] (with Gleeson JA agreeing): When determining whether "community standards" indicate that provision ought to be made for a grandchild pursuant to Chapter 3 of the *Succession Act 2006* (NSW), guidance may be taken from the following matters enumerated by Hallen J's in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [133]: Generally, a grandparent does not have a responsibility to make provision for a grandchild. That responsibility is not enlivened because a grandparent contributes to a grandchild's education or bestows considerable largesse on him or her. Something more than the existence of normal family relations and affections is required. The conferral of particular care and affection by a grandchild and his or her legitimate expectations of inheritance may be relevant to determining whether such an obligation exists.

Bowditch v NSW Trustee and Guardian [2012] NSWSC 275 at [113], *Andrew v Andrew* [2012] NSWCA 308; 81 NSWLR 656 applied. *Tsivinsky v Tsivinsky* [1991] NSWCA 269*, Sayer v Sayer* [1999] NSWCA 340, *MacEwan Shaw v Shaw* [2003] VSC 318; 11 VR 9, *O'Dea v O'Dea* [2005] NSWSC 46 and *Simons v Permanent Trustee Co Ltd; Estate D Hakim* [2005] NSWSC 223 cited.

3. Per Barrett JA at [64] (with Basten and Gleeson JJA agreeing): Other matters to be taken into account may include: the size and nature of the deceased's estate, the relationships between the applicant and the deceased and other persons who have legitimate claims upon his or her bounty and the circumstances and needs of those other persons.

Verzar v Verzar [2014] NSWCA 45 at [39]; *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [70]; *McCosker v McCosker* [1957] HCA 82; 97 CLR 566 at 571-572; *Singer v Berghouse* [1993] HCA 35; 67 ALJR 708 at 210; *Vigolo v Bostin* [2005] HCA 11 at [16], [75], [112] cited.

4. Per Barrett JA at [102]-[104] (with Basten and Gleeson JJA agreeing) and Basten JA at [14]-[15] (with Gleeson JA agreeing): In light of the factual circumstances outlined above, there was no basis for the primary judge's view that community standards and expectations required and countenanced the making of any provision for the respondent out of the estate of the deceased such that a Court could be justified in interfering the testator's clearly stated testamentary wishes. In terms of *House v The King* (1936) 55 CLR 499, the decision was, on the facts, unreasonable or plainly unjust in such a way that there had been a failure properly to exercise the judicial discretion.

In relation to (ii)

1. Per Barrett JA at [119]-[123], [137]-[143], [147] (with Gleeson JA agreeing) and Basten JA at [25]-[28] (with Gleeson JA agreeing): The additional discretion conferred on a Court by s 99 of the *Succession Act 2006* (NSW) does not qualify the general principle that subject to the rules of court, the *Civil Procedure Act* itself and any other Act, costs are in the discretion of the court. As a general rule, costs will follow the event unless it appears to the Court that some other order should be made.

Succession Act 2006 (NSW) s 99(1), *Civil Procedure Act 2005* (NSW) ss 98(1), Uniform Civil Procedure Rules 2005 (NSW) rr 42.1, 42.20.

Singer v Berghouse [1993] HCA 35; 67 ALJR 708 at 709, *Jvancich v Kennedy (No 2)* [2004] NSWCA 397, *Daniels v Hall (No 2)* [2014] WASC 272 at [32] approved. *McCusker v Rutter* [2010] NSWCA 318 cited. *Bowyer v Wood* [2007] SASC 327; 99 SASR 190 distinguished.

The Court allowed the appeal with costs.

JUDGMENT

1 **BASTEN JA**: I agree with Barrett JA that the appeal in this matter should be allowed and the judgment below set aside.

2 The claimant (now the respondent) sought an order from the Court for provision in his favour from the estate of his maternal grandfather. The grandfather left his estate to his daughter, the claimant's mother.

Making a family provision order

3 The Court has a discretionary power to interfere with a testamentary disposition if satisfied that the requirements set out in s 59 of the *Succession Act 2006* (NSW) have been met. Being a grandchild of the deceased, the claimant was an "eligible person", entitled to apply to the Court for a family provision order: *Succession Act*, s 57(e)(ii).

4 The primary category of eligible people are spouses, including those in a de facto relationship with the deceased at the time of death and a child of the deceased. Other eligible persons (a category including the claimant) are required to satisfy the court that "having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application": s 59(1)(b). The claimant must also satisfy the court that at the time when the court is considering the application, adequate provision for his proper maintenance, education or advancement in life has not been made by the will of the deceased: s 59(1)(c).

5 Subsection (1)(c) assumes that some provision should have been made for the claimant by the will of the deceased; subs (1)(b) treats the primary category of eligible persons as naturally satisfying that assumption, whereas the secondary category (into which the present claimant falls) need to justify the assumption: see, in relation to relevantly identical provisions in s 9 of the *Family Provision Act 1982* (NSW), *Re Fulop Deceased; Fulop v Public Trustee* (1987) 8 NSWLR 679 at 681 (McLelland J).

6 That approach obtains support from the provisions of Ch 4 of the *Succession Act* dealing with intestacy. Those primarily entitled to a distribution from the estate of an intestate are a surviving spouse (ss 110-113) and the deceased's children (s 127). A grandchild has an entitlement, but only a presumptive share of a child of the intestate who predeceased his or her parent: s 127(4).

7 Section 60 of the *Succession Act* spells out the matters which the Court may have regard to in determining whether the claimant "is an eligible person" and whether to make a family provision order: s 60(1). Most of the factors listed in s 60(2) will be irrelevant in relation to whether the applicant is an eligible person, a matter largely dependent upon the language of s 57. The matters set out must be available considerations in relation to both limbs of s 59(1) dealing with a family provision order, namely par (b) and par (c). Section 60 provides no assistance in relation to the different considerations which may arise in respect of each paragraph of s 59(1). The factors are also relevant to the determination of the "nature of any such order", which presumably includes the discretionary element to be found in s 59(2): s 60(1)(b).

8 If there were some relevant obligation on the deceased to make some provision for the claimant in his will, there are a number of factors which would support the making of an order, including:

(a) the provision of assistance with the claimant's education expenses in the past;

(b) the relative impecuniosity of the claimant in the present, and

(c) the expectation of the testator that the claimant would receive some interest in the farming properties which he owned or controlled, in due course.

9 Countervailing factors included the lack of liquid assets in the estate, the undesirability of selling or transferring any particular part of the land owned by the testator and the natural expectation of the claimant's mother to the estate or at least a significant part of it.

10 The balance of these factors, absent some error of principle in the reasoning of the primary judge, is not an exercise in which this Court should readily interfere.

11 The critical issue, not clearly addressed in the reasons of the primary judge, was why a generation-skipping order for provision was appropriate. In *Andrew v Andrew* [2012] NSWCA 308; 81 NSWLR 656 at [12] Allsop P stated:

> "Accepted and acceptable social and community values permeate or underpin many, if not most, of the individual factors in s 60(2) and are embedded in the words of s59, in particular 'proper' and 'ought'. That such values may be contestable from time to time in the assessment of an individual circumstance, or that they may change over time as society changes and grows can be readily accepted."

12 Referring to the judgment of Sheller JA in *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24 at 46, Allsop P noted that the appropriate order should be made by reference to "perceived prevailing community standards of what is right and appropriate": at [16]. He acknowledged that this was an imprecise, variable and contestable standard, as did White J in *Slack v Rogan; Palffy v Rogan* [2013] NSWSC 522; 85 NSWLR 253 at [125]-[127].

13 One way of considering the present matter is to inquire what social, domestic or moral obligation the deceased had to provide for the claimant whilst still alive. The trial judge rejected a claim that there was an agreement or legally enforceable representations made by the deceased to the claimant (and his brother) that they would obtain the properties on his death. There was no suggestion at all that they would obtain them during his lifetime. Further, the statements made as to the grandsons obtaining the properties on the testator's death appear to have focused on their obligation to look after their mother, by managing the properties. The fact that in wills executed in 1987, before the claimant's parents separated and in 2002, 10 years after the separation, left the estate to the claimant's mother is a clear indication of the testator's own view as to his responsibilities and obligations.

14 There may be circumstances in which widely held community standards might expect a grandfather to make some provision for his grandchildren, for example where they had maintained a strong relationship and where there was reason to doubt the willingness or the ability of the parents to make adequate provision for their children. However, such considerations will always be influenced by the fact that the grandchildren are themselves mature adults. In the present case, relevant community values will be affected by the nature of the estate. Quite particular values might operate with respect to farming properties which are subject to fluctuations in relation to debt and revenue depending on natural events and particularly drought. They may also be affected by the financial viability of an estate and its capacity to support those owning or managing it, if broken up and part disposed of.

15 It was a failure to give adequate consideration to these matters which was, in my view, the critical error on the part of the primary judge. Once those matters are taken into account, it is not possible to identify any social, domestic or moral obligation on the part of the testator to provide for the claimant. In other words, there were no sufficient factors to warrant the making of the application for the purposes of s 59(1)(b) and the application should have been dismissed.

16 The appellant did not deal with this issue in the manner described above. Rather, it was addressed, at least in oral argument, by reference to the amounts claimed, including questions as to affordability and the interests of the testamentary beneficiary. Although nothing ultimately turns on that difference in approach, as a matter of principle the appellant's approach elides separate considerations.

17 In the circumstances of this case, the first step in the reasoning is to address the matters identified by Hallen AsJ in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [113]:

> "In relation to a claim by a grandchild, the following general principles are, in my view, relevant and should be remembered:
>
> (a) As a general rule, a grandparent does not have a responsibility to make provision for a grandchild; that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition.
>
> (b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes *in loco parentis*, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.
>
> (c) The mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created in a particular case by reason, for example, of the care and affection provided by a grandchild to his, or her, grandparent.

> (d) Generosity by the grandparent to the grandchild, including contribution to the education of the child, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent. It has been said that a pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.
>
> (e) The fact that the deceased occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the deceased for the purposes of the Act.
>
> (f) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents."

18 There are two qualifications to be made to that statement of principle: the first by reference to the judge's own qualification at [117], which was in the following terms:

> "I make it clear that I do not intend what I have described as 'applicable legal principles' or other 'general principles', to be elevated into rules of law or the discretion, at the second stage, to be constrained by statements of principle found in dicta in decisions on similar facts. I identify them merely as providing useful assistance in considering the statutory provisions the terms of which must remain firmly in mind."

19 Those precautionary statements should be accepted. However, the real provenance of the "principles" is that they constitute a reflection of community values, being a factual matter, but one as to which reasoned findings of judges with experience in these matters may well provide valuable guidance.

20 The second qualification is that the discussion in *Bowditch* follows the proposition that "what is adequate and proper provision is necessarily fact specific": at [110]. It appears that the "principles" then set out (including at [113]) are intended to operate with respect to s 59(1)(c) of the *Succession Act*. As suggested above, that provision appears to assume a pre-existing finding (or assumption), at least in the case of the second category of eligible person, that there are factors which warrant the making of the application. It seems clear that the matters set out by Hallen AsJ go as much to that question as to the question of what is adequate and proper provision.

21 With those two minor qualifications, I would accept the guidance provided in *Bowditch* at [113]. Although it is not necessary to set out the further principles stated at [111] in relation to a claim by an adult child on a parent, those principles also inform the correct approach to a claim by an adult grandchild. That is, community values would support (and in some circumstances arguably require) that grandparents accept the responsibility of parents for their own children and would not seek to skip a generation.

22 Whether this exercise is undertaken as an antecedent question, or by reference to the actual amounts sought and awarded, there is a failure on the part of the trial judge to accord proper weight to these considerations. When that is done it is clear that the factors relied upon by the claimant do not warrant the making of the application.

23 For these reasons, in addition to those given by Barrett JA, I agree that the appeal should be allowed and the orders made by the trial judge set aside.

Costs

24 The foregoing conclusion results in the summons brought by the respondent being dismissed. To the extent that the respondent brought claims based on representations and estoppel, those were dealt with under the general law. There was no good reason why costs should not have been ordered against the respondent in respect of that relief. (In the course of the hearing, the respondent made submissions opposing adverse costs orders on the basis that he was impecunious: that, however, is not a relevant reason not to award costs: *Sassoon v Rose* [2013] NSWCA 220 at [10] (Meagher JA, Gleeson JA agreeing).)

25 The costs of the trial and the appeal should be considered separately. With respect to proceedings under the repealed *Family Provision Act*, this Court accepted that s 33(1) of that Act conferred a broad discretion as to costs payable out of the estate, not constrained by the general rule that costs follow the event: *Diver v Neal* [2009] NSWCA 54; 2 ASTLR 89 at [75]-[78]. If the new Act applied, *Diver v Neal* said that s 99(1) of the *Succession Act* provides a general power, not confined by the considerations identified in s 33: at [81].

26 Neither s 99, nor its predecessor, apply to costs as between party and party, as opposed to costs to be paid out of the estate. However, in *Singer v Berghouse* [1993] HCA 35; 67 ALJR 708 at 709, col 1, Gaudron J said (in dealing with an application for security for costs):

> "Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under the [*Family Provision Act*] which, in s 33, makes special provision in that regard, costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position .... And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate."

27 Whether or not an unsuccessful applicant should be allowed to litigate without expense to the estate will depend on a variety of circumstances. There is always a discretion in the Court when making an order pursuant to s 98 of the *Civil Procedure Act 2005* (NSW). The discretion conferred on the Court by that provision is subject to the rules of court (s 98(1)) and thus to r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW), which provides that costs will follow the event unless it appears to the Court that some other order should be made. That rule is not disapplied in relation to family provision orders. Nor should applicants for such orders have any expectation that, as a general rule, the discretion will be applied so as to exempt them from liability for costs incurred by an estate in the case of an unsuccessful application. In some cases applicants will already be beneficiaries of the estate and may thus have some incentive to ensure that the costs of litigation are kept within tight bounds. However, that is not always the case. Where an applicant is entirely unsuccessful, an order that he or she should pay the costs of the estate may well be the appropriate order.

28 The appeal to this Court was brought by the executor of the estate. She has been entirely successful and the estate is therefore entitled to its costs, absent some basis for a different order. The orders with respect to costs proposed by Barrett JA should be made. The respondent should have a certificate under the *Suitors' Fund Act 1951* (NSW).

29 **BARRETT JA**: This appeal concerns orders made on 21 February 2014 and 17 April 2014 in proceedings brought in the Equity Division of the Supreme Court by Robert William Wilcox (to whom I shall refer as "the respondent") in respect of the estate of his maternal grandfather, Ian Francis Sanderson, who died on 17 January 2010 aged 89 years.

30 There were two plaintiffs in the Equity Division. They were the respondent (first plaintiff) and his brother, Benjamin Ian Alexander Wilcox (second plaintiff). The defendant was their mother, Patricia Anne Wilcox ("Mrs Wilcox"). She was the only child of the deceased and the sole executrix of his will.

31 By that will, the deceased gave the whole of his estate to Mrs Wilcox. Had she not survived her father, his estate would have passed under the will to the respondent and his brother in equal shares.

32 The respondent and his brother brought two claims in a single suit. First, they alleged that a promissory estoppel arising from representations made by the deceased during his lifetime operated to require that pastoral properties owned by him be transferred to them. The second claim was an alternative and, in a real sense, subsidiary claim. It was brought under Chapter 3 of the *Succession Act 2006* (NSW) which empowers the court to make family provision orders. It is useful to set out ss 59(1) and 59(2):

> "(1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:
>
> (a) the person in whose favour the order is to be made is an eligible person, and
>
> (b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of 'eligible person' in section 57 - having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and
>
> (c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.
>
> (2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.
>
> Note : Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 73). Part 3.3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order."

33 Section 60 sets out matters to which a court may have regard for the purpose of determining whether to make a family provision order and the nature of any such order. These include any "other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered": s 60(2)(p). The present appeal does not raise any particular issue in relation to the s 60 matters.

Proceedings

34 The proceedings brought by the respondent and his brother were heard and determined by Pembroke J. His Honour delivered three judgments. The first (*Wilcox v Wilcox* [2012] NSWSC 1138) was given on 12 October 2012 after a hearing on 8 and 9 October 2012. It dealt with the promissory estoppel claim (which was dismissed) and, to a certain extent only, with the family provision claims. A further hearing took place on 10, 11, 12 and 13 February 2014. On the second of those days, the family provision claim made by the respondent's brother was settled. In the second judgment (*Wilcox v Wilcox (No 2)* [2014] NSWSC 88), given on 21 February 2014, the primary judge dealt fully with the respondent's family provision claim and ordered that provision be made for him out of the estate of the deceased by payments totalling $387,000. The third judgment (*Wilcox v Wilcox (No 3),* 17 April 2014) concerned costs.

35 Mrs Wilcox, the defendant in the Equity Division, filed a notice of appeal on 20 May 2014. She later died and an order was made on 22 September 2014 substituting as appellant John Francis Chapple to whom probate of her will had been granted. References in these reasons to "the appellant" are references to Mr Chapple as executor.

36 The respondent was served with the notice of appeal but did not file an appearance. He nevertheless attended the hearing of the appeal and, there being no objection, addressed the Court.

The first judgment

37 The deceased controlled extensive pastoral holdings in the Walgett district. Part of the land was owned by him, part by a company wholly owned by him and the balance by companies owned partly by him and partly by Mrs Wilcox. Parcels of land totalling more than 50,000 acres made up a single grazing enterprise. The land, plant, machinery and livestock owned by the deceased and the shares he held in landowning companies passed under his will to Mrs Wilcox who thereby became the sole proprietor of the grazing enterprise.

38 The primary judge made a finding that the deceased left his estate to Mrs Wilcox in the expectation that she, in turn, would leave the properties to her sons (the respondent and his brother). There was also a finding that the deceased was a dominant and powerful influence and that he had acted as a father figure to the respondent and his brother and "groomed them for what he expected would be their eventual inheritance".

39 Another finding made by the judge was that the respondent and his brother "developed an unhealthy sense of entitlement" and that they had "deluded themselves into thinking" that they had "a right to their grandfather's properties", whereas the grandfather's intention was that his daughter, Mrs Wilcox, should inherit.

40 In dealing with the promissory estoppel case advanced by the respondent and his brother, the primary judge expressed reservations about their credibility and made disapproving observations concerning their "adversarial approach" which was "in marked contrast to the dignity displayed by their mother and the frank and direct answers which she gave". That aspect of the proceedings was disposed of by findings that the deceased had never made clear and unequivocal representations of the kind that might ground a promissory estoppel.

41 In approaching the family provision claim, the judge began with some general observations about grandchildren - in essence, that "they have no claim as of right to the beneficence of grandparents" and that, as a general rule, "a grandparent has no responsibility to make provision for a grandchild". After observing that s 57(1)(e) of the *Succession Act* causes a grandchild who was, at any particular time, wholly or partly dependent on the deceased to be an eligible person who may make application for a family provision order, his Honour said that a number of illustrations of the principles and limitations governing claims by grandchildren are set out in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [113] and that there was no need to repeat these.

42 The judge then said that he was satisfied that the respondent and his brother were eligible persons within s 57(1)(e), having been, during their lives, at least partly dependent on the deceased.

43 Having made that finding, the judge moved to the question posed by s 59(1)(b) of the Act, that is, whether, having regard to all the circumstances of the case (past and present), there were factors warranting the making of the application for a family provision order. After referring to *Re Fulop Deceased; Fulop v Public Trustee* (1987) 8 NSWLR 679 and stating that the respondent and his brother were "penurious and have not made a success of their lives", the judge said that "most observers would regard the plaintiffs as natural objects of the testator's testamentary recognition" and expressed himself "satisfied that there are factors which would warrant to making of the application". That conclusion is not challenged on appeal but, as Basten JA points out (at [15]), there was no sufficient basis for it and it was erroneous.

44 The primary judge then turned to s 59(1)(c) of the Act and the central question whether the deceased's will made "adequate provision for the proper maintenance, education or advancement in life" of each of the respondent and his brother. The judge placed emphasis on the words "adequate" and "proper" and said that the questions they pose "must be addressed having regard to the relativities, in particular, the effect of an order on their mother", that is, Mrs Wilcox. He then said (at [19]):

> "I have to say that the precise resolution of the question in this case is not immediately obvious. And it has not been assisted by the presentation of the plaintiffs' case or the poverty and paucity of the evidence that was adduced. The necessary evaluative process was, I think, lost sight of by the plaintiffs and their legal advisors, who conducted the litigation until the second day of the hearing, as if their only claim, and corresponding entitlement, were to the whole of the testator's estate. There was no considered evidentiary analysis of the plaintiffs' ongoing financial needs; no attempt to resolve what should be regarded as "adequate provision" for the "proper maintenance, support, education or advancement in life" for each of them; no consideration of alternatives other than receiving some or all of the testator's pastoral properties; and no proper consideration of the position of their mother."

45 Reference was made to the fact that Mrs Wilcox had been associated with the grazing properties all her life and, since 2002, had effectively operated and managed the grazing enterprise and derived her livelihood from it. The respondent, by contrast, had had no involvement with agriculture since 2001, had not lived on the Walgett properties since 1992, had not set foot in his grandfather's home since 2004 and was, at the time of the hearing in October 2012, 43 years old and unemployed and had "virtually no assets", although he was in receipt of "unspecified compensation" for a workplace injury.

46 After referring again to the significance of the words "adequate" and "proper" and to the need for the court to interfere with freedom of testamentary disposition only to the extent made necessary by the statutory language, the judge discussed a so-called "new claim" by the respondent and his brother - a claim that they should be given three specified properties, "Allawa", "Uno" and "part Barwon Vale". His Honour expressed a concern that the court had no information as to whether those three properties would be viable in their own right or as to the effect that the disposal of those properties would have on the economic soundness of the remainder. Concern was also expressed about the fact that there had been no attempt to demonstrate how or why an order that the brothers should have the three properties would represent adequate provision for their proper maintenance, having regard to their circumstances and to the position of their mother and any hardship that she would suffer. The judge continued (at [27]-[28]):

> "27 Further still, there was an assumption in the plaintiffs' case that only the transfer to them of some or all of their grandfather's agricultural properties would do. They did not, and would not, consider a monetary award which might enable them to provide for their future and to purchase a home in Sydney or elsewhere. This must be part of any consideration of what is adequate and proper. I do not rule it out. And I have misgivings about the ability of the plaintiffs, by themselves, to make a success of a grazing enterprise.

> 28 But on any view, it is not possible for me to make an informed decision in accordance with the statutory criteria and the exposition of principle explained by the High Court of Australia in *Vigolo v Bostin* and *Singer v Berghouse* [1994] HCA 40; (1994) 181 CLR 201, without adequate financial information. Counsel for the defendant is in the same unfortunate position as I am. The 'financial needs' of the plaintiffs both present and future represent one of the most important considerations. But I have been left to guess at what they really are. What is the ongoing cost of Ben's disability? What is a realistic assessment of the damages to which he is entitled? What is Robert's prognosis? What are his employment prospects? Most importantly, I have been left in the position of having no means of knowing, and no opportunity of assessing, whether the transfer to the plaintiffs of the three properties of their choice, will achieve the statutory objective, let alone be practical. A wise and just testator would expect nothing less. After all, there is no point setting up the plaintiffs in an agricultural enterprise that is doomed to fail."

47 Then, at [29], his Honour said:

> "I have reached the conclusion that the plaintiffs are entitled to a family provision order pursuant to Section 59(1) of the Succession Act."

48 Having thus made clear his conclusion that a family provision order should be made in favour of each of the respondent and his brother, the judge said that a further hearing would be necessary to address "the unanswered questions to which I have referred in these reasons" and to deal with "the sole remaining issue in the proceedings, namely the nature and size of the plaintiffs' entitlement". The proceedings were adjourned accordingly.

The further hearing

49 The order adjourning the proceedings was made on 12 October 2012. The matter next came before the judge for substantive hearing on 10 February 2014. In the meantime, his Honour had taken steps with the agreement of the parties to commission a court appointed expert under rule 31.46 of the Uniform Civil Procedure Rules 2005 (NSW). This was done by means of a letter addressed by the judge to the person concerned (Mr Peart, an agricultural and rural consultant) to which the judge appended his signature and affixed the seal of the Supreme Court.

50 Upon resumption of the hearing on 10 February 2014, the judge received further evidence in addition to Mr Peart's report to the court. Some of this evidence went to issues of costs and may be ignored for the moment. Beyond that, further affidavits of the respondent were read and he tendered letters received by him from his grandfather (some undated, others bearing dates in the late 1990s), documents concerning his training and employment history, his income tax returns for the years to 30 June 2011 and 2012, some personal banking records and financial statements prepared by an accountant reflecting the respondent's assets and liabilities at 30 June 2011 and 30 June 2012 and income and expenditure for those financial years. Mrs Wilcox also tendered further evidence, including an affidavit sworn by her and affidavits of Mr Harland, the manager of the properties who was also Mrs Wilcox's de facto spouse. This evidence dealt mainly with matters concerning the grazing properties.

51 The second hearing occupied four days. Mr Peart was extensively cross-examined. There was also further cross-examination of the respondent and Mrs Wilcox and cross-examination of Mr Harland.

The second judgment

52 In the second judgment (21 February 2014), his Honour referred to findings in the first judgment, noted that the claim of the brother had been settled and said in relation to the respondent's claim that it had "limited merit" but that a conclusion had been reached "that it is appropriate to make some order". As I have said, that conclusion had been stated at the end of the first judgment in relation to both applicants.

53 The judge referred to the appointment of Mr Peart as an expert witness and to the matters that had been referred to him for opinion: in essence, matters going to the value and financial performance of the deceased's pastoral assets and the question whether any particular division of the properties "would be economically feasible and workable", bearing in mind certain matters. Mr Peart expressed a negative opinion on the question of division. That, the judge inferred, was the reason why the respondent, in draft orders proposed towards the end of the second hearing, did not press for transfer of any part of the rural holdings to him, preferring ultimately to seek orders for the payment of money only. The judge therefore did not proceed to deal in any explicit way with the issue on which Mr Peart's opinion had been obtained.

54 His Honour turned his attention to the question of appropriate orders and made the following findings and observations:

The respondent was an unimpressive witness.

His "ultimate inheritance of some of the grazing properties may or may not come to pass in the fullness of time".

The grazing properties were owned, as to some parts, by the deceased and, as to others, by Mrs Wilcox and corporate entities, one of which was wholly owned by the deceased while the others were partly owned by him, the co-shareholder being Mrs Wilcox.

The properties were "all heavily mortgaged and cross-collateralised", the debt being of the order of $2.565 million and the interest expenses being almost $200,000 per year.

Mr Peart predicted that the rural enterprise would generate a profit of $106,688 for the year ended 30 June 2014 and $65,691 for the following year.

Mr Peart's inspection had shown a "run down farm" requiring significant expenditure.

The respondent had negligible assets and, "like many an expectant heir before him, he has not made the most of his opportunities, imprudently assuming that he and his brother would inherit their grandfather's estate".

The respondent's father, who lived in Lightning Ridge and with whom he was in contact, had recently won about $1.3 million playing Keno.

The respondent had operated several businesses in the past but said that these had become "too hard". He had skills in connection with agricultural machinery and, on his own estimation, could earn $100,000 per annum net as an employee in that field.

There was, however, no evidence of the respondent's having tried to obtain employment. His "delusional insistence on his entitlement to own and operate his grandfather's pastoral properties" had, the judge suspected, "operated as a self-imposed impediment to his advancement in life".

The respondent's modest income came from contracting work in the eastern suburbs of Sydney, principally tree-lopping, lawn mowing and hedge trimming. Income for the years ended 30 June 2012 and 30 June 2011 was $64,983 and $76,454 respectively, "from which he employed sub-contractors, hired equipment and expended not inconsiderable amounts on advertising".

The respondent had no debts except a debt to the Australian Taxation Office of about $107,000 which had been outstanding for some time.

The respondent had "a wholly unrealistic belief in his ability to own and operate an agricultural property" and "could not shake his deeply ingrained sense that he was destined to take over some or all of his grandfather's grazing enterprises".

The orders and the reasons for them

55 At [15] of the second judgment, the primary judge outlined the order he proposed making. As ultimately pronounced, the order was:

> "Order that provision be made out of the estate of the deceased (Ian Francis Sanderson) in favour of the first plaintiff by the payment to the first plaintiff of $387,000, which sum should be paid as follows;
>
> (a) $107,000 within 90 days of this order;
>
> (b) $40,000 by seven annual instalments commencing on 21 February 2016.
>
> (c) (It is accepted that paragraph (b) should be understood to refer to "seven annual instalments each of $40,000")

56 An important observation was made by the judge at [20] of the second judgment:

> "A key aspect of this case is that the testator was, in my view, quite reasonably entitled to take the view that his daughter should receive the entirety of his estate in the first instance and that any further disposition of that property should be left to her judgment. After all, she is a part owner of some of the properties, a shareholder in some of the companies, and an equal partner in the pastoral business. Despite the grandfather's expectation that his grandsons would one day take over the grazing enterprise, things change, life moves on and nothing remains static. The second plaintiff, for example, now has a disability that makes it impractical for him to conduct any grazing operation. One might well think that the best person to judge what is in the best interests of the grandsons, at the appropriate time, is their mother."

57 The judge went on to refer to negative and pessimistic opinions expressed by Mr Peart about the state of the properties and the pastoral business. His Honour then said, at [34] and [35]:

> "In these circumstances, I think that a wise and just testator, with knowledge of the circumstances at the date of hearing, would make some limited provision for his grandson. He would prefer to see the debt of $107,000 to the Australian Taxation Office discharged. And, without detracting from the core intention to leave his interests in the companies and pastoral properties to his daughter, he would, I think, wish to ensure that his grandson received a modest income supplement to assist him with the expenses of his life and work. Robert Wilcox himself proposed that, if he were to receive a payment from the estate in the nature of an annuity, its commencement could be deferred for up to two years - in recognition of the harsh drought conditions that currently afflict the pastoral business which his mother is continuing to run. I propose to adopt that suggestion with the additional qualification that the term of the annual payments not be indefinite but that the payments run for seven years from the commencement date.
>
> This will result in Robert Wilcox being debt free. In addition, if he continues in either business that he has conducted over the last decade, or obtains work in an employed capacity, the annual payment of $40,000 will constitute a modest, yet secure, safety net for a number of years until he is approximately fifty-five years of age. By that stage, his mother, if alive, will be almost eighty years old and his father, if alive, will be older still. I would hope that the damage to family relations would by then have been repaired and that Robert Wilcox's future financial prospects will be improved"

58 The judge considered that orders in the terms set out at [55] above "were affordable". He noted that significant expenses would be incurred by the estate through the litigation ($228,000 having already been paid) and that those expenses "are and will be greater than" the "capital sum" of $107,000 awarded to the respondent and the deferred annual payments of $40,000. Any need that the estate had to sell property to meet expenses "will not be simply because of" the payments to the respondent. His Honour then said (at [37]):

> "The evidence of Mr Peart satisfies me that the sale of a small portion of the land on which the pastoral business is conducted could be achieved without detracting from the core profitability of the business. Given the considerable expenses which the estate is facing, I have no doubt that the necessity of such a sale is under active consideration."

The case on appeal

59 The appellant contends that, in making the orders in respect of the initial sum of $107,000 and the seven annual payments each of $40,000, the judge failed to give adequate reasons and erred in the exercise of the statutory discretion. Central to that contention are two uncontroversial propositions: first, that, the question whether a testator has made adequate provision for an applicant is is a question of objective fact the determination of which involves an evaluative judgment (*Singer v Berghouse* [1994] HCA 40; 181 CLR 201 at 210-211; *White v Barron* [1980] HCA 14; 144 CLR 431 at 434-5; 443); and, second, that the role of an appellate court is constrained by principles referred to in *House v The King* [1936] HCA 40; 55 CLR 499 at 504-505, both as to whether adequate provision has been made for the applicant and whether a family provision order should be made: *Singer v Berghouse* (above) at 212; *Vigolo v Bostin* [2005] HCA 11; 221 CLR 191 at [82]-[83]; *Hampson v Hampson* [2010] NSWCA 359 at [73]-[74]; *Durham v Durham* [2011] NSWCA 62; 80 NSWLR 335 at [82]; *Phillips v James* [2014] NSWCA 4; 85 NSWLR 619 at [55].

60 The appellant maintains that the primary judge made a decision that, having regard to the evidence and his factual findings, had no foundation and was unreasonable and plainly unjust. That characterisation is advanced in relation to both the aspect of the decision involving an immediate payment of $107,000 and the aspect involving annual payments of $40,000 for seven years.

61 The appellant also challenges the costs orders made by the primary judge.

Legal principles

62 It is unnecessary to dwell on the precise nature of the judicial task in cases in which a family provision order under s 59 is sought by an eligible person. As I have said, an evaluative judgment must be made. In *Andrew v Andrew* [2012] NSWCA 308; 81 NSWLR 656, Allsop P said at [16]:

> "[T]he Court in assessing the matter at s 59(1) and the order that should be made under s 59(1) and (2), should be guided and assisted by considering what provision, in accordance with perceived prevailing community standards of what is right and appropriate, ought be made. This, Sheller JA said, referring to Mahoney JA in *Kearns v Ellis* (New South Wales Court of Appeal, Glass, Mahoney and McHugh JJA, 5 December 1984, unreported), involved speaking for the feeling and judgment of fair and reasonable members of the community. It is to be emphasised that s 59(1)(c) and s 59(2) refer to the time when the Court is considering the application and the facts then known to the Court. The evaluative assessment is to be undertaken assuming full knowledge and appreciation of all the circumstances of the case. This is another consideration which makes the notion of compliance by the testator with a moral duty (on what he or she knew) apt to distract from the statutory task of the Court."

63 All three members of the Court in *Andrew v Andrew* placed emphasis on the central role played by "community standards" or "community expectations" in any decision whether to take the significant step of overriding the expressed wishes of a testator.

64 What Allsop P called "the feeling and judgment of fair and reasonable members of the community" falls to be ascertained according to the circumstances of the particular case. Matters to be taken into account in making the relevant assessment are the applicant's financial position, the size and nature of the deceased's estate, the relationships between the applicant and the deceased and other persons who have legitimate claims upon his or her bounty and the circumstances and needs of those other persons: see *Verzar v Verzar* [2014] NSWCA 45 at [39]; *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [70]; *McCosker v McCosker* [1957] HCA 82; 97 CLR 566 at 571-572; *Singer v Berghouse* (above) at 210; *Vigolo v Bostin* (above) at [16], [75], [112]. As Macfarlan JA pointed out in *Verzar v Verzar* (above) at [39], such an assessment is necessary because of the inter-relation between "adequate provision" and "proper maintenance". His Honour also said:

> "Whilst the inquiry as to what is 'adequate'directs particular attention to the needs of the applicant, what is 'proper' requires regard to all the circumstances of the case, and in particular the size and nature of the estate and the needs of the other beneficiaries or potential beneficiaries. As was observed by Sackville AJA in *Foley v Ellis* [2008] NSWCA 288 at [88], a court cannot consider the propriety and adequacy or inadequacy of any testamentary provision for an applicant in isolation from the resources and needs of the other claimants on the deceased's bounty."

65 Guidelines for claims made by grandchildren were suggested by Hallen J in *Bowditch v NSW Trustee and Guardian* (above), as briefly mentioned by the primary judge. Hallen J said (at [114]):

> "In relation to a claim by a grandchild, the following general principles are, in my view, relevant and should be remembered:
>
> (a) As a general rule, a grandparent does not have a responsibility to make provision for a grandchild; that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition.
>
> (b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes in loco parentis, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.
>
> (c) The mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created in a particular case by reason, for example, of the care and affection provided by a grandchild to his, or her, grandparent.
>
> (d) Generosity by the grandparent to the grandchild, including contribution to the education of the child, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent. It has been said that a pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.
>
> (e) The fact that the deceased occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the deceased for the purposes of the Act.
>
> (f) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents."

66 Hallen J said that these principles were derived from *Tsivinsky v Tsivinsky* [1991] NSWCA 269*, Sayer v Sayer* [1999] NSWCA 340, *MacEwan Shaw v Shaw* [2003] VSC 318; 11 VR 9, *O'Dea v O'Dea* [2005] NSWSC 46 and *Simons v Permanent Trustee Co Ltd; Estate D Hakim* [2005] NSWSC 223. He was careful to add that the stated principles should not be treated as rules of law and that the discretion under s 59 of the *Succession Act* cannot be constrained by principles drawn from decisions on similar facts. He saw the several principles "merely as providing useful assistance in considering the statutory provisions the terms of which must remain firmly in mind".

67 Hallen J was, of course, correct to emphasise that preconceptions are dangerous in this area. In *Bladwell v Davis* [2004] NSWCA 170, this Court disapproved the notion accepted in several earlier first instance decisions that a widow's claim was, of its nature, paramount or deserving of precedence over competing claims. As Bryson JA there said, referring to the equivalent process of evaluation under former legislation, "[p]reconceptions and predispositions are likely to be the source of inadequate consideration of the process required by the *Family Provision Act 1982*". More recently, in *Phillips v James* (above), Basten JA (at [113]) cautioned against too ready acceptance of any assumption that children should be treated broadly equally. While the facts of every case are obviously unique, Hallen J's guidelines do, in my respectful opinion, provide a useful touchstone that may be applied with circumspection by judges called upon to ascertain and apply "the feeling and judgment of fair and reasonable members of the community" in cases of the present kind.

Central elements of the primary judge's decision

68 At the end of the first hearing, the primary judge was of the view that the outcome of the respondent's application was "not immediately obvious" and that the search for an answer had not been assisted by the presentation of his case or the "poverty and paucity of the evidence that was adduced". After the second hearing, his Honour saw fit to award $387,000. The resolution of the initially perceived difficulty can only have been the product of the supplementation of the evidence at the second hearing.

69 Yet the totality of the evidence ultimately before him was seen by the judge as consistent with the assessment he expressed at [20] of the second judgment, that is, that the deceased was "quite reasonably entitled to take the view that his daughter should receive the entirety of his estate in the first instance and that any further disposition of that property should be left to her judgment", and that "[o]ne might well think that the best person to judge what is in the best interests of the grandsons, at the appropriate time, is their mother". The expectation that a grandparent might, in a real sense, reasonably rely on the judgment of the intervening generation when it came to the welfare of grandchildren was clearly recognised.

70 Key findings have already been mentioned: that Mrs Wilcox had been associated with the rural properties virtually all her life, owned some of the assets that made up the enterprise and had, since 2002, operated and managed the enterprise with the deceased's consent and derived her livelihood from it; and that the respondent, having been encouraged and assisted by his grandfather to undertake training relevant to operation of the enterprise and "groomed" for eventual inheritance of the family landholdings, had had no involvement with agriculture since 2001 and had not lived on the properties since 1992.

71 What was it, then, that caused the judge to reach the conclusion that a "wise and just testator" in the position of the deceased would have decided that his grandson should receive a legacy of $387,000 according to the schedule of payments for which the orders provided? As to the initial payment of $107,000, the judge merely said that such a hypothetical testator "would prefer to see the debt of $107,000 to the Australian Taxation Office discharged". As to the seven annual payments of $40,000 commencing two years after the making of the orders, the judge confined himself to the observation that the "wise and just" testator would "wish to ensure that his grandson received a modest income supplement to assist him with the expenses of his life and work".

72 Apart from observations about the respondent's impecuniosity, the fact that the initial payment was set at a level equal to the respondent's tax debt and an observation that the orders in favour of the respondent (and the costs of the proceedings) could be funded by sale of "a small portion of the land on which the pastoral business is conducted", the judge did not refer to any aspect of the evidence in undertaking whatever process of evaluation it was that caused him to arrive at his conclusion.

Submissions on appeal

73 The appellant contends that the evidence as a whole points very clearly to the conclusion that the evaluation made by the judge is unsupportable and unreasonable.

74 Submissions in support of that contention concentrated first on the $107,000 element and the judge's apparent assumption that the respondent should be put into a position from which he could immediately pay that debt. Various aspects of the evidence should be noted in that connection. The debt arose, in large measure, from the respondent's failure to lodge income tax returns for a period of four years before 2005. Interest accrued on the original debt but, according to the respondent, interest ceased to run when he was granted Newstart allowance, with the whole debt being written off at that point but reinstated if and when Newstart allowance was no longer paid. At the time of cross-examination of the respondent in February 2014, such a suspension was in place.

75 The respondent was asked in cross-examination why he thought that the tax debt should be paid by his grandfather's estate. He replied, "It's not going straight from the estate to a tax bill". The cross-examination continued (the document referred to in it being a draft of orders handed up by the respondent's counsel):

> "Q. But you are seeking a payment of $107,000 so you can pass that payment on to the Tax Office?
>
> A. Part of.
>
> Q. Aren't you?
>
> A. Yeah, part of.
>
> Q. Well, it is not part of it, the tax debt is $107,000 we have been told?
>
> A. Yep.
>
> Q. And you want the estate to pay all of that tax debt, don't you?
>
> A. Not all of it.
>
> Q. Sir, let me read to you what clause 5(c) says, 'The plaintiff is to be paid a lump sum, $107,732 to be paid by the defendant within twelve months of the date of this judgment'. Now what does that figure of $107,000 represent?
>
> A. The deposit on a unit, some of the tax bill, maybe a decent car so I can earn some more money.
>
> Q. Sir, is that a serious answer?
>
> A. Yes."

76 At an earlier stage of his cross-examination, the respondent gave evidence about his relationship with a woman that had subsisted for ten years. They did not live together but he said that if he were able to get a parcel of land, he would "settle down and get on with it"; also that, if he received a lump sum payment, he would "try and buy a unit or a house somewhere, where we could live together".

77 The respondent was also cross-examined about the proposal that he be paid $40,000 a year from the estate. When asked why the estate should make such payments, he referred in general terms to his connection with the properties and the fact that he had been "groomed" to take them over and had undertaken training in accordance with his grandfather's wishes to enable him to do so. The cross-examination continued:

> "Q. And you left the property in 1993 when you were aged 25; correct?
>
> A. 6? 7? Somewhere around there, yeah, mid 20s.
>
> Q. And you are now 46?
>
> A. Yeah. I have been back quite often though.
>
> Q. You haven't been back quite often, Mr Wilcox, in a working capacity, have you?
>
> A. Yes, I have.
>
> Q. What happened in 1993 when you left the property? Were you ever invited back?
>
> A. I came to Sydney - I was back there three months later.

Q. Since 2001 you have been self-employed?

A. Yes.

Q. And that has got nothing to do, that is, your employment has got nothing to do with these rural properties since then, has it?

A. Apart from the times I went back there working for my grandfather.

Q. So the claim for $40,000 a year is really a claim because you knew your grandfather, you spent time there?

A. Grew up there.

Q. You grew up there; that's it, isn't it?

A. And was being groomed to take the property over.

Q. Yes, but it didn't happen, did it?

A. Well--

Q. It just didn't happen, did it? Answer please?

A. Well, I - yeah, I was supposed to. We were, as I said"

78 The respondent was then asked what the term of the annuity should be. He said that that was one of the "finer details" that would have to be worked out later but that he would expect the payments to continue so as to enable him to "pay a lease on a vehicle, it will pay my rent, it will take my capital expenses out so I can get a bit of traction, get a bit of wheel spin going". The respondent then answered questions put by the judge:

"Q. . . . [W]ere you contemplating the need for a $40,000 payment for five years or until the end of your mother's life or what were you proposing? What are you proposing?

A. Well, the finer details would be worked out I am hoping, but I was thinking 40,000 isn't a big burden on a huge property like that, 60,000 acres, and, you know, in the light that I was being groomed to take the place over, it would help me get on my feet and get going. I don't know a timeline. What your Honour would find appropriate.

Q. Mr Wilcox, you did say earlier that you would accept the deferred commencement of any such annual payment?

A. Absolutely.

Q. Out of consideration for the hardship that your mother is suffering at the moment during the drought?

A. I am not out there working next door at Youendah because of the drought. I'd be earning a thousand bucks a week doing that and there is no wheat crop.

Q. So you would accept that it would be reasonable if there were to be such a payment that you at least wait two years to enable the current drought conditions to be overcome?

A. Absolutely."

79 The submission made on the basis of this evidence is that the judge had no foundation for any opinion that, having received $107,000 from the estate, the respondent would in fact choose to free himself from the tax debt rather than use the money in other, vaguely defined, ways; also that there was no foundation for any opinion that the respondent stood in need of the annual payments of $40,000 over a period of seven years beginning two years after the making of the orders. Reference was made to earning capacity that the respondent possessed but chose not to exploit.

80 It is also submitted that the decision of the judge ignored the opinion evidence of Mr Peart that subdivision of the holdings was not economically feasible, that proceeds of any sale of part of the land would be taken by the bank to reduce debt and that such limited borrowing capacity as there was could only cater for the needs of the business itself. Mr Peart described the properties as "borderline viable".

Discussion

81 It is necessary to make an appraisal of the facts that emerge from the evidence that was before the primary judge, noting that there were no seriously contested factual issues.

82 The respondent, encouraged and financially supported by his grandfather, received secondary schooling as a boarder at The King's School, Parramatta, to Year 10 and then spent two years at a rural college in Queensland. He later took advantage of opportunities to obtain trade qualifications. He said that he did this in order that he might fulfil the role of ultimate inheritor of his grandfather's pastoral holdings. He worked for his grandfather from completion of the college course in 1986 until 1993, during which period he obtained wool classing qualifications.

83 Mrs Wilcox gave evidence that she had asked the respondent to leave the property at the time of her separation from her husband - in fact that she had insisted that her husband and both sons should leave. She described her marriage as "dead in the water" and said that she had made earlier requests that her husband leave but he refused to do so. After her mother's death on 27 December 1992, Mrs Wilcox received medical advice that, if she and her husband did not live apart, she would have a mental breakdown "or my health would go". She also said in oral evidence:

> "I told the three of them to leave the property. They came up to Dad's place a week after my mother was buried and started a terrible row. . . . So I ordered them to leave. I knew if my father told the boys to go, he would never let them come back. I thought if I said it, I could get them back."

84 From early 1993, therefore, the respondent had no real connection with the pastoral enterprise that was, at the time of his departure, operated by his grandfather and came to be managed by his mother as his grandfather aged. Such livelihood as the respondent thereafter enjoyed was derived from pursuits other than pastoral pursuits.

85 On advice from his grandfather, the respondent undertook an apprenticeship as a plant mechanic in August 1994 and spent about four years as an employee in the machinery field with Caterpillar in Sydney, in the Hunter Valley and at Gunnedah. He worked as a mechanic at Cubbie Station for about a year in 1998 and then worked from November 1998 to February 2000 as a fitter maintaining machinery for Macmahon Contractors on a gold mine project in the Northern Territory.

86 In 2001, however, the respondent chose to live in Sydney where he established a tree lopping and tree surgery business. At the time of his further cross-examination in February 2014, he had pursued that activity for some 12 years, with an interruption of about two months from October 2012 occasioned by a broken rib (which, in February 2014, he described as "a bit sore" but "not really" imposing any limit on his activities) and, he said, some visits to his grandfather's property. As at October 2012, he was living in a garage without a bathroom, slept in a swag on the floor and was in the habit of visiting a 24-hour gymnasium to shower. As at February 2014, he was living in a boarding house with shared bathroom facilities, had a motor vehicle he estimated to be worth $500 (another, better, vehicle had been stolen and was not insured) and owned a small quantity of plant and tools associated with the tree lopping business. He had no other assets and was unemployed.

87 Income from the tree lopping business in 2011 and 2012 was very modest indeed. It may have been somewhat more substantial in years before 2005, given that a tax debt amounting to $107,000 (after the addition of several years' interest) had resulted from failure to lodge income tax returns for four years. The respondent saw no pressing need to attend to payment of that debt. When cross-examined as to what he would do with $107,000 if that sum were awarded to him, the respondent said that a part (which he did not quantify) would be spent on reducing the debt and the rest would be spent in other ways.

88 It is obvious that the respondent had, over the period from 2001, chosen not to deploy his skills as a mechanic or fitter which, on his own estimation, could have generated an income of $100,000 net per year. He preferred to eke out a subsistence living in a field that did not involve the application of the skills he had acquired through training undertaken as a young man. He expressed, at the age of 44, a desire to settle down with a woman with whom he had been in a relationship for ten years; but he showed no sign of taking any steps of his own to obtain the financial ability to do so.

89 The respondent said in his evidence that he had enjoyed a good relationship with his grandfather even after his mother ordered him off the property in 1993. He spoke of going back on occasions to help his grandfather in the pastoral business. These occasions, however, were infrequent. He put into evidence a birthday card and five handwritten letters he had received from his grandfather. Two of the letters were undated. The dates on the other three were in 1995 and 1999. The letters were mainly short letters of thanks for cards and presents that the respondent had sent. They conveyed nothing beyond general news of activities on the property and in the district.

90 The primary judge found that the respondent did not set foot in his grandfather's home after 2004. That finding should be accepted.

91 The deceased spent his life on the Walgett property. He worked initially for his father and, in due course, took over from him and eventually brought his daughter into the business. He was, of course, aware of the circumstances in which she had expelled her husband and sons. He was present when she ordered them to leave. He must also have been aware of the stresses that had caused her to take that drastic step and her fears for her health should she not make a break with them. She was the deceased's only child. She was also a part owner of his business. Shares in one landowning company had been given to her by her own grandfather (the deceased's father) for her twentieth birthday in 1962. She stayed on the property when her husband and sons left and, as the years passed and the deceased's ability to run the enterprise waned, Mrs Wilcox took an increasing role in the business, along with the manager, Mr Harland. She took over from her father completely in about 2006. In the closing years of the deceased's life, Mrs Wilcox held his power of attorney, looked after all his business and personal affairs and attended to his needs. She arranged a live-in carer for him for two or three days a week after he found it difficult to cope in his own home and before he moved to a nursing home.

92 Mrs Wilcox gave evidence that, as at January 2012, her only assets (apart from her inheritance from her father) were shareholding interests in two companies that owned distinct parts of the pastoral property, furniture and personal effects, a Toyota Prado, a Ford Falcon and about 300 shares in Westpac Banking Corporation. She had a mortgage debt of $1.25 million to the ANZ Bank.

93 Mr Peart, the expert witness commissioned by the primary judge, was of the opinion that division of the several landholdings was not economically feasible. He noted that the profit margin of the business was already very small and that any reduction in livestock carrying capacity would reduce income and the capital base. He also noted that the whole of the land was mortgaged to the ANZ Bank which "would refuse any reduction in their security" so that, if some part were sold, the whole of the sale proceeds would be retained by the bank to reduce debt. Mr Peart was also of the opinion that returns on capital were small and unable to service any further debt. Mrs Wilcox gave evidence that the ANZ Bank had indicated a willingness to lend money to carry out essential repairs on a bore but was otherwise not prepared to extend further credit.

94 The respondent remained in touch with his father after their expulsion from the property in early 1993. The evidence disclosed little about the father. The respondent said in evidence in February 2014 that he had, at some point, asked his father for help in paying the tax debt and that the father had declined to assist; also that the father had, at some later time, won $1.3 million playing Kino and that, in response to a very recent request, the father had indicated willingness to become a guarantor if the respondent were given part of the property and needed to raise a bank loan.

95 The factual circumstances in light of which the primary judge was required to make an evaluative assessment of the feeling and judgment of fair and reasonable members of the community may be summarised as follows:

1. The respondent, on his own admission, had training and skills that could command $100,000 net per year but had, from 2001, declined to pursue such opportunities, preferring a precarious career in tree lopping that yielded very little income, caused him to subsist in basic accommodation and left no scope for him to pursue any plan to establish a family of his own.

2. The respondent had no assets to speak of, owed $107,000 to the Australian Taxation Office and saw no pressing need to attempt to clear that debt.

3. The respondent's father had, at some time shortly before February 2014, had a gambling win of $1.3 million and had expressed some willingness to provide the respondent with financial support despite earlier refusal to assist with payment of the tax debt.

4. There was little contact between the respondent and the deceased after early 1993.

5. Mrs Wilcox, the deceased's only child, had devoted a large part of her life to his pastoral business and was a part owner of the business assets. She assisted her father in both business and personal matters and took over sole responsibility in his old age. She was a dutiful and caring daughter.

6. The pastoral business was far from prosperous. It was "borderline viable", to use Mr Peart's words, and beset by the usual problems of drought and its unpredictability. There was no practical scope to raise money by selling off part of the land and the limited borrowing capacity that did exist needed to be devoted to the financial requirements of the enterprise itself.

Conclusion on the substantive issue

96 It is instructive to return to the guidelines stated by Hallen J in *Bowditch v NSW Trustee and Guardian* set out at [65] above and to assess the decision of the primary judge against them.

97 The first such guideline (item (a)) is that, as a general rule, a grandparent has no responsibility to make provision for a grandchild. Some factor positively indicating such responsibility must therefore be found. Hallen J's item (b) identifies one such factor, namely, the role of the grandparent as a substitute parent. Item (b) refers to the provision of care and affection by grandchild to grandparent as another factor that might indicate some expectation of benefaction by the grandparent. His Honour obviously had in mind circumstances of special closeness entailing a bond beyond the affection naturally occurring in such relationships. Otherwise, the guidelines emphasise that the ordinary characteristics of family relationships are not of themselves the source of any such expectation. Those characteristics include generosity by the grandparent to the grandchild (item (d)) and the making of gifts by the grandparent (item (e)).

98 Having acknowledged these guidelines, the primary judge did not pay any attention to them. Had he done so, he would necessarily have noted that the deceased had never stood in *loco parentis* to the respondent who had, until his parents separated in early 1993, lived as part of their household except when away at boarding school and college; also that, while there was a close relationship between the deceased and the respondent (who looked up to his grandfather as an authority figure, mentor and example), it did not involve the bestowing of any special care or affection by the respondent, as contemplated by Hallen J's item (c). The findings that were made about the deceased's financial support in relation to education and training (a matter within Hallen J's item (d)) did not indicate anything beyond the frequently encountered situation of financial assistance to an adult son or daughter in meeting family expenses, particularly those related to children's maintenance and education. None of these matters supports a conclusion that the deceased, according to community standards and expectations, should have given anything to the respondent by will.

99 It was incumbent upon the primary judge to explain why the scheme of testamentary benefaction adopted by the deceased should be altered - in substance, why the gift of the whole estate to the deceased's only child should be countermanded by diversion of $387,000 to a grandson in circumstances where that only child had been a caring and dutiful daughter, was a part owner of the deceased's scarcely viable business and, under his will, came to own all of it; and where the grandson had the capacity to earn $100,000 net per year by applying skills as a mechanic and fitter he had acquired with the deceased's encouragement, had chosen not to exploit that earning capacity, preferred to seek no more than a bare subsistence living and was not at all motivated to make efforts to clear a substantial tax debt that had been hanging over him for several years or to provide for his own future.

100 The judge accepted and acknowledged Mr Peart's evidence that division of the landholdings was not economically feasible and that, if some part were sold, the bank would take the sale proceeds in reduction of its debt. In the face of that evidence, the judge concluded that sale of a "small portion" of the land could raise the initial $107,000 payable under the orders as well as very substantial sums needed for legal costs.

101 The judge also accepted and acknowledged that the deceased was "quite reasonably entitled to take the view that his daughter should receive the entirety of his estate in the first instance and that any further disposition of that property should be left to her judgment" (see [69] above). Having done so, however, his Honour proceeded virtually at once, without any explanation save reference to "a wise and just testator", to the conclusion that the gift that the deceased was "quite reasonably entitled" to make should be reduced to the extent of $387,000 by a legacy and annuity for the respondent.

102 The factual circumstances left no room for any view that community standards and community expectations required or countenanced the making of any provision for the respondent out of the estate of the deceased. Given the resources and needs of Mrs Wilcox as the principal claimant on the deceased's bounty - a central factor in the necessary assessment - it was not open to the judge to conclude that relegation of the respondent to the position of one of two substitute beneficiaries in the event that Mrs Wilcox died before her father was otherwise than proper and adequate. The scheme of benefaction that clearly accorded with community standards and community expectations was that which the testator himself chose to adopt, with the whole estate passing to his only child, if living, and provision being made for the respondent and his brother only if their mother predeceased the testator.

103 This case is, as described in *House v The King* (above) at 505, one in which it does not appear from the primary judge's reasons how he has reached the result embodied in his order but, on the facts, the order is unreasonable or plainly unjust in such a way that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. It was for the respondent, as plaintiff, to establish an affirmative case for displacement by the court of the testator's clearly stated testamentary wishes. And it was for the judge, having decided that the respondent had discharged that onus, to disclose the process of reasoning by which that decision had been reached. He did not do so. The appraisal of the material before him that the judge should have made pointed decisively against exercise of the discretion in the respondent's favour.

104 It follows that the appeal should be allowed and the family provision order made by the primary judge in favour of the respondent should be set aside.

Costs at first instance - the judge's orders and their context

105 I turn now to the aspect of the appeal concerning costs. The primary judge's costs judgment (17 April 2014) was as follows:

> "1. This is an application by the defendant for a special costs order. But for her counsel's request, I would, when giving judgment, have made the usual order for costs that is generally applicable in a case such as this. It should not be overlooked that, despite my criticisms of the first plaintiff, he was ultimately modestly successful. There were, it is true, a number of unsatisfactory features of the conduct of the proceedings and it should not have been necessary for there to be two separate hearings.
>
> 2. Indeed, it could have been worse. Not only was the plaintiffs' case inadequately presented for the first hearing, but after the second hearing had been fixed, the first plaintiff requested and obtained an adjournment and vacation of the date. Then, when the second hearing on a new date was underway (and not before it commenced), the first plaintiff's counsel requested an adjournment of that hearing as well.
>
> 3. There are already a number of interlocutory costs orders against the first plaintiff that I do not propose to disturb. However, despite my displeasure, I do not feel that, on the unique facts of this case, I should deprive the first plaintiff of his prima facie entitlement to costs because of matters for which his legal representatives were largely responsible. He may not have been well-served but, given his circumstances, I do not wish to impose any greater hardship on him. And the blame is not entirely one-sided.

> 4. For those reasons, and subject to all existing interlocutory costs orders already made against the first plaintiff, I make the following orders:
>
> (1) I order that the first plaintiff's costs, calculated on the ordinary basis, be paid out of the estate of the deceased.
>
> (2) The quantum of the amount due pursuant to the existing interlocutory costs orders against the first plaintiff should be set off against the amount to which he would otherwise be entitled from the estate of the deceased pursuant to Order 1."

106 The appellant says that the judge's discretion as to costs miscarried. The oral submissions made by counsel at the end of the second hearing are not available to this Court. The primary judge excused the court reporter immediately the evidence of the last witness concluded. This Court does, however, have counsel's written submissions on the particular matter of costs. It is to those that I now turn.

Costs at first instance - Mrs Wilcox's submissions at trial

107 Counsel for Mrs Wilcox (defendant) submitted to the primary judge that, given the history of the proceedings and the conduct of the respondent, a costs order should be made against the respondent (first plaintiff). In detailing the chronology relied upon, counsel for Mrs Wilcox pointed out that the statement of claim was filed on 24 December 2010; that a registrar made an order of dismissal for want of prosecution on 22 February 2011 which order was, however, set aside on 31 March 2011 by Brereton J who directed that an amended statement of claim be filed; and that the amended statement of claim was not filed until 1 November 2011. Counsel for Mrs Wilcox went on to point out that, as the primary judge noted in his first judgment, there was failure by the respondent to comply with practice note requirements concerning evidence of a family provision applicant as to financial resources and financial needs. The primary judge did not have before him at the first hearing material allowing him to make any family provision order in favour of the respondent - and the claim by him for such an order was, in any event, a subsidiary claim advanced only against the contingency that the promissory estoppel case might fail (as it did). In any event, the only form of family provision order that was sought up to the end of the first hearing was one that saw each grandson receive some part of the deceased's land; and that claim was not articulated until the third day of the first hearing.

108 Counsel for Mrs Wilcox went on to detail the following sequence of events after the first judgment (I quote from the written submissions made at the end of the second hearing):

> "A. On 26 October 2012 Pembroke J made the following Orders and Directions by consent:-
>
> (a) Plaintiff's to serve Affidavits on which they rely by 7 December 2012.
>
> (b) Defendant to serve Affidavits in Reply by 21 December 2012.
>
> (c) Defendant to serve Expert Evidence by 1 February 2013.
>
> (d) Matter listed for further Directions at 9.30am on 8 February 2013.

(e) Liberty to restore.

B. By letter dated 30 November 2012 the Plaintiff's solicitor requested the List Clerk to relist the proceedings before Pembroke J. pursuant to the liberty to restore order made on 26 October 2012. The proceedings came before Pembroke J. on 7 December 2012 when the following Orders and Directions made by consent:-

(a) The parties to undertake Mediation on or before 5 March 2013.

(b) The Mediator is to be Mr Graham Berecry or, if he is unavailable, any other Mediator agreed between the parties.

(c) Plaintiffs to serve lay Affidavits upon which they rely by 21 December 2012.

(d) Plaintiffs to serve Valuation Expert Report on or before 31 January 2013.

(e) Defendant to serve lay Affidavits by 31 January 2013.

(f) Plaintiffs to serve Affidavits in Reply by 14 February 2013.

(g) Plaintiffs to provide list of documents alleged to have not been produced or outstanding (pursuant to a Notice to Produce dated 31 August 2012) by 21 December 2012.

(h) Defendant to produce those documents or to provide a reply to the documents specified in the previous order by 31 January 2013.

(i) Liberty to apply on two days' notice.

(j) Matter listed for further Directions on 15 March 2013.

C. On 21 January 2013 an Affidavit sworn on that day by the First Plaintiff was served upon the Defendant's solicitors.

D. On 31 January 2013 a Valuation Report dated 29 January 2013 was served by the Second Plaintiff's solicitor.

E. On 15 March 2013 Bergin J. made the following Orders, Directions and Notations by consent:-

(a) I note these proceedings are listed for private Mediation on 29 April 2013.

(b) Orders for service of evidence are vacated.

(c) The proceedings are listed before Pembroke J. for further Directions on 3 May 2013.

(d) Liberty to restore.

F. Mediation before Mr Berecry on 29 April 2013 was unsuccessful.

G. On 3 May 2013 Pembroke J. made the following Orders and Directions by consent:-

(a) First Plaintiff file and serve a further Affidavit setting out estimates of the value of monetary amounts of the items in paragraph 23 of his Affidavit of 21 January 2013 in accordance with Practice Note No SC Eq7, by 24 May 2013.

(b) Second Plaintiff to file and serve an Affidavit in accordance with Practice Note No SC Eq7, by 24 May 2013.

(c) Defendant to provide updated Schedule J Affidavit and documents referred to in Bedford Tetley letter dated 13 March 2013 and serve documents in relation to enterprise by 24 May 2013.

(d) Defendant have leave to produce expert evidence on the issue of the impact of the monetary claims made by the Plaintiffs on the financial position of the estate including the farming enterprise conducted by the Defendant.

(e) Defendant to serve expert evidence and further evidence (including her financial circumstances if she is putting her financial circumstances in issue) upon which she intends to rely by 21 June 2013.

(f) Subpoena and Notice to Produce be returnable on 29 May 2013.

(g) Vacate listing on 10 May 2013 and list for Directions at 9:30am on 28 June 2013.

H. On 23 May 2013 an Affidavit sworn on that day by the First Plaintiff was served on the Defendant's solicitor. On 21 June 2013 a Notice of Motion seeking orders that proceedings be struck out was filed on behalf of the Defendant. The Notice of Motion was returnable at first instance before the Registrar at 9:00am on 1 July 2013.

I. On 28 June 2013 Pembroke J. made the following orders:-

(a) I vacate the listing of the Notice of Motion (strike out) on 1 July 2013.

(b) I have not dismissed that (strike out) Motion.

(c) Matter listed for further Directions on 26 July 2013.

J. On 26 July 2013 Pembroke J. made the following Orders and Directions:-

(a) I stand over the proceedings for further Directions before me on Friday 9 August 2013.

(b) I appoint Mr Graham Peart of RMS Accounting Services Dubbo, as a Court appointed Expert pursuant to Rule 31.46.

(c) I will fix the proceedings for the hearing of all outstanding issues before me on 19, 20 and 21 November 2013.

(d) I direct that the parties to submit to my Associate within ten days, proposed draft instructions and assumptions and questions to be addressed by Mr Peart.

(e) I reserve for further consideration all questions of the costs of the Court appointed Expert.

(f) I make it clear that I do not propose to entertain on the present evidence the Defendant's application to dismiss the Plaintiffs' claims.

K. On 9 August 2013 Pembroke J. made the following Orders and Directions:-

(a) I will settle the list of instructions (to Mr Peart) which will be different to all (of the parties). I had in mind a broader but more confined list.

(b) I would like Mr Skinner's instructing solicitor, Mr Maker, to prepare a Schedule with columns of the real estate by reference to Folio Identifiers and Mortgages.

(c) Proceedings adjourned to 23 August 2013 for further Directions.

(d) I will leave it to the parties to collaborate.

L. On 23 August 2013 Pembroke J. made no Orders. His Honour made the following observations:-

(a) The parties have contacted Mr Peart.

(b) Mr Maker on behalf of the Defendant has provided two volumes of material which the Expert is likely to need.

(c) Mr Nagle for the First Plaintiff and Mr Maker to appear to be ad idem.

(d) I will contact Mr Peart as the Court appointed Expert.

(e) I will settle the Letter of Instructions to Mr Peart in Chambers.

(f) I will make appropriate Orders and Orders for Costs in Chambers.

(g) The Report will need to be available by mid October.

(h) If any of the parties wish to raise any questions they are at liberty to do so however, I hope that will not be necessary."

109 Counsel for Mrs Wilcox next referred to the fact that the relief ultimately sought by the respondent by way of family provision order (that is, the payment of money) was not articulated until the third day of the second hearing (12 February 2014) and that this was despite the clear invitation to do so at [29] of the first judgment. It was the articulation on 12 February 2014 that first disclosed the contention that the respondent should receive, as part of the award in his favour, a sum sufficient to enable him to pay his tax debt. Until that point, the respondent's contention (in the face of Mr Peart's opinion that division of the properties was not economically feasible) had been that there should be an order giving him "Allawa", "Uno" and "part Barwon Vale". It was also the articulation of 12 February 2014 that first brought to light the claim for an annuity, a possibility that the judge had raised on the preceding day.

110 Against the background just outlined, counsel for Mrs Wilcox made submissions at trial, as follows:

1. The first hearing had concentrated largely on the promissory estoppel claim and only to a limited extent on the family provision aspect; and the specific claim for three parcels of land had not been articulated until near the end of that hearing. That circumstance, coupled with the fact that the evidence adduced to that point did not enable the judge to decide the family provision claim, ought to result in an order that the respondent bear the costs of the October 2012 hearing.

2. As to the period 12 October 2012 to 19 November 2013, the respondent should not be awarded any costs and should be ordered to pay Mrs Wilcox's costs incurred in consequence of the vacation of the November 2013 hearing dates, with those costs being assessed on the indemnity basis.

3. Because the respondent did not, as it were, unveil his real family provision claim until the third day of the second hearing, he should not be awarded any costs for the first two days of the second hearing.

4. All costs orders made against the respondent in the course of the proceedings and been appropriately made and should stand.

Costs at first instance - the respondent's submissions at trial

111 Counsel for the respondent, in his written submissions at the end of second hearing, disputed certain aspects of the chronology presented by counsel for Mrs Wilcox and said that, if the court were minded to make orders on the basis of the history of the conduct of the proceedings, there should be a grant of leave for evidence to be presented so that "proper findings" could be made. It was also said that deficiencies in the provision of evidence as required by the practice note could also be laid at the feet of Mrs Wilcox.

112 As to the argument that, up to the end of the first hearing, the predominant effort was directed towards the estoppel case, counsel for the respondent said that the evidence the parties had presented was common to both matters and that it would be impossible to attribute a portion of costs to any particular claim, with the result that an issues based approach would not represent a proper exercise of the costs discretion.

113 It was pointed out on behalf of the respondent that the making of costs orders against him as sought would take away the benefit that the he received through a family provision order.

114 The ultimate submission was that the respondent's costs (assessed on the ordinary basis) ought to be paid out of the estate. There was acceptance of the proposition that Mrs Wilcox's costs should be paid out of the estate on an indemnity basis.

Costs at first instance - factual issues

115 As I have noted, counsel for the respondent, without being specific, took issue with the procedural chronology which was set out in the submissions of Mrs Wilcox's counsel and is reproduced at [108] above. Such transcript as this Court has before it, supplemented by reference to orders recorded on the Supreme Court's database, supports the version of events given in the chronology, but only to a certain extent. In particular, the following aspects of the chronology cannot be verified from those sources: B (first sentence); C; D; H; I(b); K(a), (b) and (d); L (all but the first sentence).

116 This Court does, however, have the transcript of the hearing before the primary judge on 15 November 2013 which resulted in vacation of the hearing scheduled to commence on 19 November 2013. Mr Peart's report had been received by the parties only a short time beforehand. Mr Peart had been commissioner by the judge's letter of 10 September 2013. This followed a directions hearing on 26 July 2013 at which the primary judge fixed the substantive further hearing for 19, 20 and 21 November 2013 and made directions relevant to the settling of Mr Peart's instructions with input from both sides. It may be inferred that formulation of those instructions took longer than had been expected and that while, on 26 July 2013, it had appeared that the expert's report could be expected to be available in good time before a hearing beginning on 19 November 2013, circumstances proved otherwise. For reasons that do not appear from the material before this Court, the letter of instruction to Mr Peart was not signed and issued until more than six weeks after the hearing on 26 July 2013.

117 When, on 15 November 2013, the judge vacated the impending hearing, counsel for the respondent asked that "the costs of the adjournment be reserved or be costs in the cause". The judge said:

> "What I think what I will do is make it quite clear that I am very unhappy about having to vacate the hearing date and I will not at the moment make the usual order that the parties seeking the vacation pay the costs thrown away, I will reserve the position and I may make a more onerous order when I have made a final determination in the proceedings and that may include costs at a higher level than just the ordinary basis, but I would like to see how it all pans out."

118 At the start of the second day of the second substantive hearing (11 February 2014), it was announced that the claim of the co-plaintiff (the respondent's brother) had been settled (a consent order for dismissal with no order as to costs was made as between the brother and Mrs Wilcox on 26 February 2014 when the primary judge made orders disposing of the respondent's claim). After the settlement was announced, counsel for the respondent sought leave to call expert evidence and also applied for an adjournment. Both applications were refused and the respondent was ordered to pay the costs of the applications. A like application made on the morning of the third day was also dismissed with costs.

Costs at first instance - legislation

119 Section 98(1) of the *Civil Procedure Act 2005* (NSW) provides that, subject to the rules of court, the *Civil Procedure Act* itself and any other Act, costs are in the discretion of the court. Rule 42.1 of the Uniform Civil Procedure Rules states that costs should follow the event unless it appears to the court that some other order should be made as to the whole, or any part, of the costs. Rule 42.20(1) provides that if the court makes an order for the dismissal of proceedings then, unless the court orders otherwise, the plaintiff must pay the defendant's costs of the proceedings to the extent to which they have been dismissed.

120 Section 99(1) of the *Succession Act* makes special provision as follows in relation to proceedings under Chapter 3:

> "The Court may order that the costs of proceedings under this Chapter in relation to the estate or notional estate a deceased person (including costs in connection with mediation) be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit."

121 Similar provision was formerly made by s 33 of the *Family Provision Act 1982* (NSW), but with a proviso that allowed costs to be paid out of the estate in certain cases only if the person claiming costs had been successful in proceedings under the Act or special circumstances made it just and equitable that the estate bear the costs. Among the cases dealt with by the proviso were those in which the applicant for provision had "eligible person" status only because of dependency on the deceased at some time or as a grandchild who had been at some point a member of the deceased's household. No similar restriction operates in relation to s 99 of the *Succession Act*.

122 In *Singer v Berghouse* [1993] HCA 35; 67 ALJR 708 at 709, Gaudron J said in relation to cases arising under the former legislation:

> "Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under the Act which, in s 33, makes special provision in that regard, costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate."

123 In *McCusker v Rutter* [2010] NSWCA 318 (a case under the former legislation), this Court made it clear that the question of costs in family provision matters is to be determined by reference to the discretion conferred by s 98 of the *Civil Procedure Act 2005* (NSW), but with the added discretion made available by the special provision also available to be deployed.

Costs at first instance - issues raised on appeal

124 The appellant contends that, even if the substantive decision of the primary judge is upheld, the costs discretion miscarried because the judge

(a) ignored his finding in the first judgment that the estoppel claim had not been established;

(b) ignored his findings stated on 15 November 2013 at the time of vacating the hearing that was to begin on 19 November 2013; and

(c) failed to take into account that the terms of the relief sought by the respondent shifted throughout the hearing.

125 Of course, the fact that, on my assessment, the claim for a family provision order should have been dismissed adds a further dimension to any decision as to the proper order regarding costs at first instance.

Costs at first instance - discussion

126 In the light of the outcome before the primary judge, the question of costs of the Equity Division proceedings as between the respondent and Mrs Wilcox fell to be determined by reference to the following facts:

1. The respondent's estoppel claim failed.

2. The respondent's family provision claim was successful.

3. The first hearing was largely devoted to the estoppel claim and, while the primary judge did, at the conclusion of that hearing, say that a case for the making of a family provision order had been made out, the evidence before the court did not enable him to formulate or quantify any award of relief.

4. The respondent and his brother were given an indulgence in the form of the judge's decision to allow the adducing of further evidence in support of the family provision claim and to appoint a further hearing. With the onus resting with the respondent as plaintiff, the court could quite properly have dismissed the proceedings as a whole upon delivery of the first judgment.

5. On the application of the respondent and his brother (and against opposition by Mrs Wilcox), the judge vacated the hearing originally scheduled to commence on 19 November 2013 and foreshadowed an order that the successful applicants for adjournment pay costs thrown away.

6. Having been granted the indulgence of the further hearing, the respondent was able to make good the claim to a family provision order that he had failed to establish at the first hearing.

7. Until the second day of the second hearing, the respondent's brother was a co-plaintiff. To give effect to a settlement announced at that point, consent orders were in due course made dismissing the proceedings as between the brother and Mrs Wilcox with no order as to costs.

127 The judge's order that the respondent should have the whole of his costs out of the estate did not recognise that the principal claim based on estoppel had failed. There was no family provision aspect to that claim. Section 99 of the *Succession Act* did not apply.

128 The judge's order also did not recognise that, on the evidence the respondent had seen fit to put before the court initially, he also failed on the family provision claim. The judge found that the material presented did not permit an order to be made. The respondent was very fortunate that the judge did not simply dismiss the family provision claim after the first hearing. The transcript of that hearing does not include counsel's closing addresses, with the result that one cannot know whether counsel for Mrs Wilcox submitted that the proceedings should be dismissed. It would be very surprising if he had not. There is nothing to suggest that the parties were put on notice before delivery of the first judgment that a further hearing might occur. Evidence had been led on both sides and the cases of both the plaintiffs and the defendant had been closed before counsel addressed. The idea that there should be a further hearing was, it may safely be inferred, something that emerged from the judge's consideration of the matter after he had reserved judgment. The further hearing was, in a very real sense, a significant indulgence to the respondent and his brother.

129 In his costs judgment, the primary judge identified as one of "a number of unsatisfactory features of the conduct of the proceedings" the fact that "it should not have been necessary for there to be two separate hearings". The second hearing was not "necessary". It occurred only because the judge, apparently of his own motion, decided to allow the respondent and his brother to attempt to repair the deficient case they had presented. There is clear merit in the submission made on behalf of Mrs Wilcox at the end of the second hearing that it was plainly unjust that the respondent should have an order that the whole of his costs of the entire proceedings be paid out of the estate.

130 There is then the question of the costs thrown away by reason of the 15 November 2013 orders vacating the then impending second hearing. It is true that the judge foreshadowed, at that point, costs orders against the respondent and his brother on whose application the adjournment had been granted. That foreshadowing implied that the adjournment had been brought about by some delinquency on their part or, at least, that they were being granted an indulgence. The transcript, however, does not indicate what any perceived delinquency might have been. Rather, it suggests that the judge accepted the need for time in which to consider Mr Peart's report, both in order to prepare for cross-examination of him and to decide whether an application for leave to adduce further expert evidence should be made.

131 The judge's letter commissioning Mr Peart had been sent to him on or immediately after 10 September 2013. His report does not appear to be dated. The judge referred to it in the second judgment as "dated October 2013". At the hearing on 15 November 2013, the judge referred to the respondent and his brother as having had the report "for the last week to ten days". It may be inferred that they received it very late in October 2013. In addition, the judge said that if they "have been blind-sided, in effect, by Mr Peart's conclusions and need to re-group to consider their position", he was "inclined to think that fairness dictates they be given the opportunity to do so".

132 In these circumstances, failure of the judge ultimately to make the foreshadowed costs orders against the respondent and his brother did not represent any miscarriage of the discretion with respect to costs. The parties were acutely aware that Mr Peart had been appointed by the court. Neither side had any control over the commissioning process. For reasons which, on the material available, cannot be laid at the feet of the parties, Mr Peart's report became available only about two weeks before the scheduled re-opening of the hearing. It was not unreasonable for an adjournment to be sought by parties who took the view that the content of the report necessitated the obtaining of advice from another source in order to prepare for cross-examination and perhaps to seek to introduce a competing opinion. The appropriate course was that which the judge ultimately took, that is, to allow the costs flowing from the adjournment to become costs in the cause.

133 The next matter for consideration is that the respondent did not identify with precision the family provision order he sought until near the end of the second hearing. That, it is said, should have reflected in a costs order against him, even though he was the successful party.

134 I am not persuaded that this is so. It is by no means uncommon in cases of this kind for successful claimants to make what are, in the light of the award eventually made, exorbitant claims. By this I mean only that what is given is often much less than what is sought and may not correspond in form with what is sought. The court has a broad discretion. In contradistinction to many other types of case, it is not the task of the claimant to establish an entitlement to particular and specific relief. Rather, he or she must show only that circumstances are such that proper and adequate provision has not been made. It is then for the court to balance competing merits and to decide, as a matter of discretion, whether an order should be made in favour of the claimant and, if so, in what terms.

135 In my opinion, the substantive conclusion reached by the primary judge, had it survived on appeal, would have attracted appellate revision in one respect only. The respondent's costs up to the end of the first hearing should have been excluded from the order the judge made in his favour. There was no rational basis on which those costs were properly made payable by the estate of the deceased which was merely the defendant in a suit seeking equitable relief. To the contrary, the respondent and his brother, having failed to make good their promissory estoppel claim and to put before the court material enabling it to make any family provision order in their favour, should have been ordered to pay Mrs Wilcox's costs up to delivery of the first judgment. An adjustment would, however, have been required because it was eventually ordered by consent that there should be no order as to costs as between the brother and Mrs Wilcox. Given that the respondent and his brother presented a united front and had common representation up to delivery of the first judgment, that aspect would appropriately have been dealt with by limiting the order against the respondent to half the costs incurred by the estate. The order that was in fact made as to the respondent's costs (that, as costs of a successful family provision claimant, they be paid out of the estate on the ordinary basis) would have been apt in relation to costs incurred after the delivery of the first judgment.

Costs at first instance - allowing for the outcome on appeal

136 On the view I have taken on the substantive issue of the respondent's entitlement to a family provision order, however, the costs outcome described in the immediately preceding paragraph is not appropriate. Rather, the prima facie position is that costs as a whole should follow the event and the respondent should be ordered to pay Mrs Wilcox's first instance costs in full, although again with an adjustment to deal with the agreed resolution between the brother and Mrs Wilcox and the circumstance of common representation of the plaintiffs until delivery of the first judgment. That prima facie position does, however, need to be tested in the light of the additional discretion that s 99 of the *Succession Act* puts at the disposal of the court and the fact that family provision claims do, in some ways, raise issues with respect to costs that differ from those in other litigation.

137 In *McCusker v Rutter* (above), the plaintiff made an unsuccessful claim under the *Family Provision Act* and the trial judge decided that there should be no order to costs. On appeal, Young JA said (at [29]-[33]) that "the authorities show that it is relatively rare that a court should make such an order . . ." but that "[a] series of decisions at first instance show that there is some more flexibility where there has been an unsuccessful claim made under the *Family Provision Act*". Young JA then quoted what had been said by Gaudron J in *Singer v Berghouse* (see [122] above) and continued (at [34])

> "Examples of situations where courts have thought no order should be made against an unsuccessful plaintiff are afforded by *Sherborne Estate (No 2): Vanvalen v Neaves*(2005) 65 NSWLR 268 per Palmer J and *Moussa v Moussa* [2006] NSWSC 509 per Barrett J. Whilst it is clearer in a case where if an order for costs is made against an unsuccessful plaintiff he or she will instantly become impecunious and so may be able to make a fresh application under the Act so that it is counter-productive to make an order as to costs against such a plaintiff, what Gaudron J said in *Singer* shows that it is not only in such cases that it may be inappropriate to make an order for costs against an unsuccessful plaintiff under the Act."

138 In *Bowyer v Wood* [2007] SASC 327; 99 SASR 190, the Full Court of the Supreme Court of South Australia (Debelle J; Nyland and Anderson JJ concurring) was of the view (at [68]) that, according to the authorities, there will usually be no order as to costs where the application is unsuccessful and that "the cases also suggest that the court may in its discretion order an unsuccessful applicant to pay costs where the claim was frivolous or vexatious or made with no reasonable prospects of success or where the applicant has been guilty of some improper conduct in the course of the proceedings". In Western Australia, it was recently said by E M Heenan J, in a discussion of the notion that a costs order should not be made against an unsuccessful applicant if it would have a detrimental effect on that applicant's financial position, that "in more modern times, particularly with principles of modern case management, the tendency has been to move away from that position in favour of the more general principle of costs following the event but with attendant liberality and discrimination before adopting such a position in any particular case": *Daniels v Hall (No 2)* [2014] WASC 272 at [32].

139 That "more modern" approach seems to me to reflect the position in New South Wales. Where the application for a family provision order is dismissed, the *prima facie* principle with respect to costs is as stated in rules 42.1 and 42.20(1) of the Uniform Civil Procedure Rules - that is, there should be an order that the unsuccessful plaintiff pay the defendant's costs. In *Jvancich v Kennedy (No 2)* [2004] NSWCA 397, Giles JA observed (with Handley JA and McColl JA agreeing) that, in circumstances of that kind, the "overall justice of the case" - the expression employed by Gaudron J in *Singer v Berghouse* - is "not remote from costs following the event". There is, of course, discretion to depart from the prima facie principle for good reason, even to the extent of ordering that the unsuccessful plaintiff's costs be paid out of the estate; and the court should apply the "liberality and discrimination" to which E M Heenan J referred.

140 The question in this case, therefore, is whether there is any demonstrated reason for departure from the principle that costs should follow the event. The only potentially relevant factor is the respondent's unfavourable financial position (assuming that it has continued after the death of his mother) and, as referred to by Young JA in *McCusker v Rutter* (above), the circumstance that, if an order for costs is made against him, he "will instantly become impecunious".

141 Generally speaking, of course, a litigant's financial position is irrelevant when it comes to the exercise of the costs discretion, particularly where that litigant is a plaintiff. Having subjected the defendant to court proceedings and lost, a plaintiff without means will generally not be able to resist a costs order just because he or she cannot pay. That general principle may be subject to some relaxation in family provision cases by application of "liberality and discrimination" - but only, I think, where the claim, although ultimately unsuccessful, had merit and involved a genuine question whether the scheme of testamentary benefaction in fact applying was, in the particular circumstances, one reflecting community standards. In *Jvancich v Kennedy (No 2)* (above), Giles JA recognized an analogy, as to costs, between family provision cases and probate proceedings. He noted that, in probate cases, departure from the rule that costs follow the event is often recognized as appropriate where the testator has been the cause of the litigation - where, for example, the will is ambiguous. In such cases, the costs of unsuccessfully opposing the executor may be ordered to be paid out of the estate. It may be said, in the same way, that if the testator has been the cause of family provision litigation by failing to make some disposition that he or she arguably should have made in accordance with community standards, the costs burden should fall on the estate, even if the ultimate decision of the court does not accommodate that disposition.

142 This is not such a case. There was very little merit indeed to the respondent's contention that he should, to some extent, supplant his mother - the deceased's only child - to whom the whole estate had been given. Applying the probate analogy, the testator was not the cause of the litigation.

143 The "overall justice" of the present case, even after applying "liberality and discrimination", requires that the costs of the respondent's family provision claim be borne by him, not by the estate. There is no factor that warrants departure from the consequences prescribed by rules 42.1 and 42.20(1). There remains, however, the point that the estate was defending family provision claims brought by both the respondent and his brother and that the brother's claim was settled at the start of the second day of the second hearing on the agreed basis that there should be no order as to costs. That should be accommodated by requiring the respondent to bear one-half of the estate's costs of the family provision proceedings up to the end of the first day of the second hearing and the whole of the estate's costs thereafter.

Costs at first instance - decision

144 For reasons stated at [135] above, the respondent should be ordered to pay one-half of the costs of the estate up to and including 9 October 2012, the second day of the first hearing. For reasons stated at [143], he should be ordered to pay one-half of the estate's costs of the family provision proceedings up to the end of the first day of the second hearing and the whole of its costs thereafter. The overall result, therefore, should be an order that the respondent pay one-half of the estate's costs of the proceedings up to the end of the first day of the second hearing and all of its costs thereafter.

Costs of the appeal

145 A threshold question in relation to costs of the appeal is whether s 99 of the *Succession Act* applies to appeal proceedings such as the present.

146 The section is, in terms, concerned with "proceedings under this Chapter in relation to the estate or notional estate of a deceased person", that is, as referred to in s 58 and s 59, proceedings in which a family provision order is sought. The appeal now before this Court is not of that kind. It is an appeal brought under s 101(1) of the *Supreme Court Act 1970* (NSW) against the making of a family provision order. By virtue of s 75A of the *Supreme Court Act*, the appeal is by way of rehearing and, pursuant to s 75A(6), the Court of Appeal has "the powers and duties of the court, body or other person from whom the appeal is brought" - but only, I think, when it comes to conducting the rehearing and reforming the decision below or otherwise arriving at the result that should have been reached at first instance. When it comes to costs of the appeal, s 98 of the *Civil Procedure Act* and related provisions of the Uniform Civil Procedure Rules apply of their own force to the separate proceeding that is the appeal. On that basis, s 99 of the *Succession Act* has no direct application.

147 In practical terms, however, the fact that s 99 has no direct application is relatively unimportant. I say this because it has been recognised in many cases over a long time that the general approaches to first instance family provision cases are also to be borne in mind when determining the costs order that should be made in a family provision appeal. A conspectus of the case law may be found in the judgment of Giles JA in *Jvancich v Kennedy (No 2)* (above) at [7]-[15]. While the cases there mentioned refer to several different orders as "the usual order" or as reflecting "the practice of the court", it is not possible to discern any guiding principle beyond the starting point laid down by the legislation referred to at [119] above, that is, that, unless the appeal court has good reason to think that some other result is more appropriate, costs should follow the event.

148 There is no such good reason here. The respondent should be ordered to pay the appellant's costs of the appeal.

Proposed disposition

149 I propose orders as follows:

1. Appeal allowed.

2. Set aside the order 1 made by Pembroke J on 21 February 2014 and the orders made by Pembroke J on 17 April 2014 and order instead as follows:

"(1) Order that the proceedings brought by the first plaintiff be dismissed.

(2) Without prejudice to interlocutory costs orders previously made, order that the first plaintiff pay one-half of the costs of the defendant up to and including 10 February 2014 and the whole of the defendant's costs thereafter."

3. Order that the respondent pay the appellant's costs of the appeal and that a certificate under the *Suitors' Fund Act 1951* (NSW) be granted to the respondent.

150 **GLEESON JA**: I agree with the orders proposed by Barrett JA and with his Honour's reasons. I would add that had the appellant challenged whether there are factors which warrant the making of the application by the respondent, which is the anterior question raised under s 59(1)(b) of the *Succession Act 2006* (NSW), then I agree with Basten JA for the reasons given by his Honour that there was a failure on the part of the primary judge to accord proper weight to the relevant considerations, and the factors relied upon by the respondent did not warrant the making of the application for a provision order. I also agree with the additional reasons given by Basten JA which support the costs orders proposed by Barrett JA.

****

Decision last updated: 20 November 2014