

SUPREME COURT OF QUEENSLAND

CITATION: *McDermott v McDermott & Anor* [2023] QSC 163

PARTIES: **CHRISTOPHER MARTIN MCDERMOTT**
(applicant)
v
SHONA ELIZABETH MCDERMOTT (Executor)
(first respondent)

and

HELEN MARY CHISHOLM BUCHANAN (Executor)
(second respondent)

FILE NO/S: BS 7289 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 20 July 2023

DELIVERED AT: Brisbane

HEARING DATE: 7 to 9 September 2022 and 23 September 2022. Further submissions received 23 December 2022.

JUDGE: Brown J

ORDER: **1. The proceedings are dismissed.**
2. The parties make any submissions as to costs, limited to three pages, within 28 days.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY CHILDREN – where the applicant applies for an order that adequate provision be made for his maintenance and support than was made under his father’s Will and Codicil – where the applicant contends that the provision made for him by his father is insufficient to meet the expenses of maintaining the family home and allowing him to meet personal expenses which were formerly met by his father – whether the Court should make additional provision for the applicant than was made under his father’s Will and Codicil

Succession Act 1981 (Qld)

Albury & Anor v Sammut [2019] QSC 105

Anderson v Teboneras & Anor [1990] VR 47
Bosch v Perpetual Trustee Co Ltd [1938] AC 463
Carrington v Wallace [2019] NSWSC 1301
Chan v Chan [2016] NSWCA 222
Coates v National Trustees Executors and Agency Co Ltd
 (1956) 95 CLR 494
Daley v Barton & Anor; Barton v Daley [2008] QSC 228
Goodman v Windeyer (1980) 144 CLR 490
Hartley v Hartley [2022] QCA 96
Higgins v Higgins (2005) 2 Qd R 502
Hills v Chalk [2008] QCA 159
In re Goodwin [1969] 1 Ch 283
O'Brien v McCormick [2005] NSWSC 619
Perpetual Trustees Queensland Limited v Mayne [1992]
 QCA 417
Perrin v Morgan [1943] AC 399
Pizzino v Pizzino [2010] QSC 35
Pontifical Society for Propagation of Faith v Scales (1962)
 107 CLR 9
Re Adamow (1989) 97 FLR 410
Re: Alleyn (deceased) [1965] SASR 22
Singer v Berghouse (1994) 181 CLR 201
Tanev v Tanevski [2017] NSWSC 1301
Vigolo v Bostin (2005) 221 CLR 191
White v Barron (1980) 144 CLR 431

COUNSEL: The applicant appeared on his own behalf
 RT Whiteford for the respondents

SOLICITORS: The applicant appeared on his own behalf
 Merthyr Law for the respondents

- [1] William Terence Chisholm McDermott died on 6 October 2017. He was survived by his three children, Shona McDermott, Helen Buchanan and Christopher McDermott, the applicant. All three children benefited under William’s Will dated 17 July 2015 and Codicil dated 3 October 2017. The question is whether the Court should make additional provision for Christopher than was made by William under his Will and Codicil.
- [2] By his originating application filed 6 July 2018, Christopher seeks by way of further provision under s 41 of the *Succession Act 1981* (Qld) (“*Succession Act*”), that the Will is read and construed as if:

- (a) Unit 2/19 Bank Street, West End was given to the trustee of Christopher Martin McDermott's Testamentary Trust ("CMMTT"); and
 - (b) Unit 8, Kenmore Medical Centre was "shared" by Shona and the trustee of the CMMTT as the Court determines.
- [3] Shona and Helen are the executors under their father's Will and respondents to this application.
- [4] Without any disrespect, I will refer to each family member by their first name.
- [5] This matter has a long and protracted history with many delays complicated by Christopher acting for himself. In particular, after the hearing of this matter was complete, Christopher sought to put in further evidence and submissions. While he was told he would need to seek to relist the matter and make an application in respect of any evidence, the Court finally listed the matter to ascertain what Christopher was seeking to do and made orders to allow him to provide further authorities he wished to rely on and for the respondents to reply.
- [6] The Court's determination in family provision cases requires a two-step process:
- (a) first, the Court must determine whether the disposition of the estate by the Will made adequate provision for the proper maintenance and support of Christopher; and
 - (b) secondly, if satisfied that adequate provision was not made, the Court must then determine what provision should be made to make adequate and proper provision for Christopher.
- [7] During the course of the hearing, Christopher wished to raise many allegations, particularly in respect of the executors' conduct after William's death, which I determined were not relevant to the family provision application. Christopher was therefore not permitted to pursue those allegations at the hearing. He did, however, wish to raise a question in relation to the construction of the Will and the ejusdem generis rule. I will consider that matter as it is relevant to determining what provision was made for him under the Will.

Relevant factual background

Assets

- [8] William was a retired dentist. He appears to have made sound investments during his lifetime and when he died his assets were as follows:

59 Lather Road, Moggill	\$1,075,000.00
Unit 11 Kenmore Medical Centre, 2081 Moggill Road, Kenmore	\$446,000.00
Unit 8 Kenmore Medical Centre	\$446,795.00
Unit 2/19 Bank Street, West End	\$1,050,000.00
Cash	\$86,613.45
1400 Telstra shares	\$4,632.60
Ford Laser Motor Vehicle (228-REZ)	<u>\$ Nominal</u>
	\$3,109,041.05
Less tax	\$42,595.80
	\$3,066,445.25

- [9] As at the time of hearing, the assets and liabilities of the estate were estimated to be:

59 Lather Road, Moggill	\$1,200,000.00
Unit 11 Kenmore Medical Centre, 2081 Moggill Road, Kenmore	\$600,000.00
Unit 8 Kenmore Medical Centre	\$575,000.00
Unit 2/19 Bank Street, West End	\$1,100,000.00
Cash	\$222,609.83
1400 Telstra shares	\$5642.00
Ford Laser motor vehicle (228- REZ)	<u>\$ Nominal</u>
	\$3,703,251.83

Less:

Tax (2022)	\$2,200.10	
Legal fees/admin costs for trial and completion of administration	\$108,300.00	
Statutory interest on legacies to grandchildren	<u>\$18,800.00</u>	<u>\$129,300.01</u>
		\$3,573,951.73

Any other assets?

- [10] Two issues were raised at the hearing about the extent of William’s assets and whether they were part of the estate.
- [11] Christopher contended that a pouch containing silver coins was kept by his father at the family house. He sought to contend, or at least infer, that the coins had been removed by one of his sisters. I accept both respondents’ evidence that if such coins existed, they were unaware of them. According to Christopher, the coins cannot be found. I cannot on the evidence before me determine whether such coins existed or what happened to them, but I am not satisfied that at the time of William’s death they still existed or that they were removed after his death. They are therefore properly not included as part of the assets of the estate for the purposes of this application.
- [12] A further question arose during the hearing in relation to monies given by William to two of his grandchildren, Kesley and Dorian, which had not been repaid at the time of his death. It was uncontentionous that William had made such loans and they had not been repaid. A spreadsheet found in William’s financial papers, which was identified as being in his writing, had a notation beside Kesley and Dorian’s debts suggesting they had been “written off”. I accept that the spreadsheet was created by William. That the loans were recorded as “written off”, which given the figures applied to both loans, accorded with what William had told his daughter Shona over coffee in relation to his intention. Shona and Helen interpreted the spreadsheet as indicating that William had forgiven those debts and were treating them as such. Ultimately, Christopher did not contend that those debts remained outstanding.¹

¹ See page 15 paragraph (a) of Christopher’s Closing Submissions.

William's Will and Codicil

- [13] Under the Will and Codicil, William, amongst other things:
- (a) appointed Helen and Shona as executors. Probate was granted to them on 19 February 2018;
 - (b) left \$20,000.00 to each of his grandsons: Kesley, Dorian (Shona's sons) and Jack (Helen's son);
 - (c) left Unit 2/19 Bank Street, West End (**Unit 2**) and one-third of the residuary estate to Helen;
 - (d) left Unit 8 Kenmore Medical Centre, 2081 Moggill Road, Kenmore (**Unit 8**) and one-third of the residuary estate to Shona;
 - (e) left 59 Lather Road, Moggill (the **Moggill Property**), which had been the family home, to Gilbert May (or if that appointment failed to Jason May) as trustee to permit Christopher to live there for life, but having power, at Christopher's request or if the trustee deemed appropriate, to sell the Moggill Property and buy another residence for Christopher including by paying the entry fee into a care facility;
 - (f) directed that any surplus money remaining from the proceeds of sale of the Moggill Property after the purchase of alternative accommodation for Christopher be given in equal shares to Helen, Shona and a trust established under the Will for Christopher, the CMMTT;
 - (g) provided that, on Christopher's death, the Moggill Property (or the alternative accommodation) was to fall into the residuary estate;
 - (h) established the CMMTT with Gilbert May (or if that appointment failed, Jason May) as trustee thereof and under cl 9(e) provided for Unit 11 Kenmore Medical Centre (**Unit 11**) and one-third of the residuary estate to form part of the trust fund to be held by the trustee of that trust;
 - (i) nominated Christopher, Helen, Shona and any lineal descendant of each of them as beneficiaries of the CMMTT;
 - (j) cl 8(a) of the Will was amended by the Codicil to provide that:

“... Upon the receipt of the net lease income derived from the lease of Unit 11, Kenmore Medical Centre my trustees will pay, after the commission provided for in clause 16, all expenses associated with the maintenance and upkeep of the Moggill house including but not limited to the rates, levies and taxes imposed on the house and land, the premiums on any insurance policies taken out by my trustees on the house and the costs associated with the upkeep of the residence;”

- (k) the CMMTT was to hold the assets of that trust “upon the terms set out in clauses 10 and 11”. Clause 9(e) of the Will provided that the CMMTT:

“... pay a regular allowance from the trust fund to **Christopher** for his use and benefit for his lifetime ...”

- (l) by cl 11(c) gave the trustees of the CMMTT discretion to distribute trust income and capital of the trust fund to one or more of the beneficiaries of the trust until the vesting date (80 years from the date of the deceased’s death or such other date as the trustee appoints); and
- (m) provided that on the vesting of the CMMTT, the trust capital be divided between the beneficiaries then living in equal shares.

[14] Three provisions in the Will sought to explain the disposition made by William to Christopher and his intention in doing so, namely cls 2, 8(f) and 15 which are in the following terms:

2 My will has been drafted to complement the plan and structure of my estate and financial affairs. I have determined that my son **CHRISTOPHER MARTIN MCDERMOTT** (“**Christopher**”) should take his inheritance to a testamentary discretionary trust created by this will ...

8(f) My intention is to ensure **Christopher’s** well-being as he suffers from a medical condition which has precluded him from being gainfully employed for many years and in respect of which he has been receiving the disability support pension. He has difficulty with saving money and cannot budget ...

15 The primary purpose for creating “Christopher Martin McDermott’s Testamentary Trust” is to provide or promote the maintenance and well-being of **Christopher** during his lifetime and I accordingly express the wish that the capital of the trust fund of “Christopher Martin McDermott’s Testamentary

Trust” be preserved as much as is practicable and income only be drawn upon.

[15] Christopher seeks, by way of further provision under *Succession Act* that the Will is read and construed as if:

- (a) Unit 2/19 Bank Street, West End was given to the trustee of CMMTT; and
- (b) Unit 8, Kenmore Medical Centre was “shared” by Shona and the trustee of the CMMTT as the Court determines, although in his closing submission he stated that he needed “half of Unit 8 to fix up all of the damage caused by the White Ants”.

What provision was made for Christopher?

[16] Thus, under the Will, Christopher is a beneficiary of the CMMTT from which provision can be made for him to have a regular allowance. The Moggill Property is also held on trust. Provision is made under the Will for Christopher’s accommodation. The trustee must permit Christopher to live at the Moggill Property or, in the event the property is sold, purchase another property for Christopher’s accommodation with any sale proceeds not used to fall into the residuary estate in the terms set out above. The expenses of the Moggill Property were to be met, at least in part, by the trust fund of the CMMTT.

[17] One of the difficulties in this application is the fact that Christopher approached it as if the CMMTT was already set up. It has not been set up, as the executors were, quite properly, awaiting the outcome of this application.

[18] Another difficulty is the scope of what expenses the trustee is to meet when the CMMTT is established. As it effects the scope of what provision has been made for Christopher, it is necessary for the Court to consider the issue, although it will be for the trustees to determine whether or not expenses fall within cl 8(a) of the Will.

[19] In respect of cl 8(a) of the Will, there was some controversy between the parties as to what fell within “my trustees will pay all the expenses associated with the maintenance and upkeep of the Moggill [Property]” and “including but not limited to the rates, levies and taxes imposed on the house and land, the premiums on any insurance policies taken out by my trustees on the house and the costs associated with the upkeep of the residence”.

- [20] The first point of issue is whether, as Christopher contends, cl 8(a) of the Will provides for the trustees to pay any expenses associated with Christopher living at the Moggill Property, including Christopher’s electricity, telephone and internet charges. Christopher contends they are expenses associated with the maintenance and upkeep of the Moggill Property.
- [21] The respondents contend that those costs are costs for services consumed by Christopher personally and are not costs associated with the maintenance and upkeep of the Moggill Property, nor are they rates, levies and taxes imposed on the house and land. The respondents contend that Christopher’s personal expenses are provided for under cl 8(e) of the Will,² which provides for Christopher to be paid “a regular allowance from the trust fund for his use and benefit for his lifetime”.
- [22] Clause 8(a) is broad in its terms but is directed to those expenses which are needed to preserve³ the Moggill Property by ensuring all statutory taxes or levies which arise from the fact of ownership of the land are met, that insurance policies to insure the house are maintained, and that the property is maintained in a good condition.⁴ The respondents give examples of expenses that are likely required to be paid by trustees such as the cost of maintaining structures connected to or providing access to the house such as water pipes on the septic tank.
- [23] Christopher also contends that cl 8(a) extends to the cost of maintaining the land namely mowing, removing rubbish from the yard and gardening, being costs relating to the “maintenance and upkeep of the Moggill [Property]” and “costs associated with the upkeep of the residence”.
- [24] In construing wills, the plain or common meaning of words must be used, unless the testator has used technical legal words. The will must be considered as a whole in determining the testator’s intention. In that regard, the question is not what the testator meant to do when making the will but what the written words used mean in their context.⁵

² Wrongfully referred to as cl 8(c) in the respondents’ submissions.

³ The Australian Oxford Dictionary (2nd ed, online at 18 July 2023) defines ‘maintain’ to include “preserve” and “provide for the preservation of (a building, machine, road, etc) in good repair”.

⁴ The Australian Oxford Dictionary (2nd ed, online at 18 July 2023) defines ‘upkeep’ to mean “maintenance in good condition”.

⁵ *Perrin v Morgan* [1943] AC 399 at 420. See also *Carrington v Wallace* [2019] NSWSC 1301 at [57] citing GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis, 2nd ed, 2018) at [8.4].

- [25] The usual or ordinary meaning of the word “residence” is “the place, especially the house, in which one resides; dwelling place; dwelling”.⁶ That would extend to the immediate surrounds of the house. Where a property includes, as in the present case, a large amount of land, it is unlikely that a person would be regarded as residing in bush surrounds, although some work may need to be done in those areas to maintain the residence from time to time.
- [26] In some cases, where a particular class is spoken of and general words follow, the class mentioned is to be taken as the most comprehensive and the general words treated as referring to matters “ejusdem generis”, that is, “of the same kind”. The rule was applied by Hogarth J in *Re: Alleyn (deceased)*.⁷ In that case, his Honour held that a bequest of “all my shares, bonds &c I have” did not include money on fixed deposit because “&c” was to be read as referring to property ejusdem generis with shares and bonds.
- [27] However, if a clause construed in the context of the entire will reveals a contrary intention, the words take the ordinary meaning and the ejusdem generis rule will not apply so that the words will not be confined by the narrower class.
- [28] In the present case, it does not appear to me to be necessary to revert to the ejusdem generis rule given the meaning of the words are apparent from the context in which they appear. The words of cl 8(a) of the Will, while of a broad nature, pertain to those costs and expenses with respect to the maintenance and upkeep of the Moggill Property or upkeep of the residence. On any natural reading, notwithstanding the use of the phrase “including but not limited to”, the expenses in respect of maintenance or upkeep of the house or residence do not extend to personal expenses that may be incurred while residing at the house and which rely on personal consumption albeit connected to the house such as an internet connection or telephone. Similarly, electricity also depends on personal consumption albeit connected through the house. This is consistent with the Will when read as a whole, particularly given the provision for Christopher to be paid a regular allowance for his use and benefit. To the extent that “rates, levies, and taxes imposed on the house and land, the premiums on any

⁶ *Macquarie Dictionary* (online at 29 June 2023) ‘residence’ (def 1). See also *Australian Oxford Dictionary* (2nd ed, online at 18 July 2023), which defines ‘residence’ to include “the place where a person resides; an abode”.

⁷ [1965] SASR 22 at 24–26.

insurance policies” identifies a class, it is a cost imposed by a regulatory authority or a cost to preserve the house and its immediate surrounds. The class does not extend to expenses relating to personal usage. It does not, therefore, extend to things such as electricity, telephone, and the internet. In this case, the residence has a pool which would require a pool filter for which electricity would be necessary. It may be that if the trustees consider that the pool requires the pool filter to be run to maintain it, they need to contribute to the electricity. It is not appropriate for me to decide that question as part of this application.

- [29] There was also a dispute as to whether the mowing man’s expenses fall within the meaning of the “upkeep of the residence”. The upkeep of the residence would at least extend to the land immediately surrounding the house and would include mowing. However, it is unlikely that maintenance or upkeep of the broader area surrounding the house would constitute such an expense, at least on a regular basis, unless it impacted on the residence. That would be a judgement needed to be made by the trustees.
- [30] There is, however, some misconception on Christopher’s behalf insofar as he appears to believe that cl 8(a) of the Will in terms of the upkeep of the yard and house at the Moggill Property would require the trustees to undertake any work which he considers should be done, which may or may not be necessary for the upkeep of the residence. Christopher may, of course, request that certain works be done, and no doubt, because he is living at the Moggill Property, give valuable input to the trustees as to what needs to be done. It is however the trustee’s decision, not Christopher’s decision, to determine what is necessary for the maintenance and upkeep of the Moggill Property.
- [31] While the executors have been meeting costs in relation to the house and garden, albeit not to the extent Christopher thinks necessary, that has been done in their role as executors and not as trustees of the nominated trust. Thus, to the extent that Christopher complains that costs have not been met as required under the terms of the CMMTT, that complaint is misconceived.

Christopher's regular allowance

- [32] As to the construction of a “regular allowance ... for [Christopher's] use and benefit”, that is an allowance to be provided from the income of Unit 11 and one-third of the residue of the estate in the event the Moggill Property is sold. The allowance is within the trustee's discretion, having regard to the fact that there is also an obligation to meet the expenses of the Moggill Property out of CMMTT property. The trustee will also have to take into account the fact that pursuant to cl 15 of the Will, the purpose of the CMMTT is to “provide or promote the maintenance and well-being of Christopher during his lifetime” with the expressed wish “that the capital of the trust fund of [CMMTT] be preserved as much as is practicable and income only be drawn upon.” The reference to “allowance” in the context of that clause means an amount of money paid regularly to a person to meet needs or expenses.⁸ In the context of it providing for the allowance to be paid regularly, it is a sum to be used by Christopher as he considers necessary to meet his needs and expenses, not a payment for each and every expense incurred by him. Given that Christopher had not worked for some time prior to the Will being made and was on a disability pension, one can infer that the allowance was intended to supplement any government support he received such as a disability pension, a matter which was acknowledged in cl 8(f) of the Will.
- [33] The respondents' counsel framed the intent of the Will to be to provide Christopher with accommodation and contribute towards his other expenses but also that Christopher pay his own way after William's death. In my view, the correct characterisation of William's intention reflected from the terms of the Will as a whole and its structure is slightly different. It is clear from the terms of the Will that William intended to benefit all those he considered had a legal claim on his estate, which was primarily his children and to a lesser extent his grandchildren. In Helen and Shona's case, he determined that they would have the benefit of Unit 2 and Unit 8 absolutely when the estate was distributed. While they are each entitled to one third of the residuary estate, that entitled will not arise until after Christopher's death or when the Moggill Property is sold and there is surplus after the purchase of accommodation for Christopher. His grandchildren were given a specific gift. As to Christopher, William wished to ensure that Christopher had accommodation for the rest of his life and the

⁸ The Australian Oxford Dictionary (2nd ed, online at 20 July 2023) ‘allowance’.

means of paying for the incidental expenses associated with having a property. If Christopher wished to stay at the Moggill Property, then William recognised the costs of being able to maintain the property by providing for its expenses to be met from the trust fund. In that regard, William provided for Unit 11 to be placed into the CMMTT. Christopher was not the only beneficiary but provision was made to allow the trustee to pay him a regular allowance out of the trust fund which would supplement his disability pension, or if the Moggill Property was sold his share of the residuary estate which was surplus after the property was sold. The amount available is subject to the trustee meeting the costs and expenses of the Moggill Property as provided under cl 8(a) of the Will. It is evident, however, that it was not William's intention that the trustees had to meet every cost and expense of Christopher under the CMMTT.

Principles for determining whether adequate provision for the proper maintenance and support of Christopher was made under the Will

[34] Sections 41(1), (1A) and (2) of the *Succession Act* provide that:

41 Estate of deceased person liable for maintenance

- (1) If any person (the *deceased person*) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.
- (1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.
- (2) The court may—
 - (a) attach such conditions to the order as it thinks fit; or
 - (b) if it thinks fit—by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or

- (c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

[35] Section 41(1) of the *Succession Act* requires the Court to undertake a two-stage process, as was set out in the joint judgment of Mason CJ, Deane and McHugh JJ in *Singer v Berghouse*:⁹

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

[36] The majority further described what was involved in the determination of each stage:¹⁰

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

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

[37] The Queensland Court of Appeal in *Hartley v Hartley*¹¹ recently reiterated the two-stage approach to be adopted by a court in determining a family provision application,

⁹ (1994) 181 CLR 201 at 208–209.

¹⁰ *Singer v Berghouse* (1994) 181 CLR 201 at 209–210 affirmed in *Vigolo v Bostin* (2005) 221 CLR 191 at 207 [37], 218 [74] and 220 [82]–[83].

¹¹ [2022] QCA 96.

adopting the observations of Mullins J (as her Honour then was) in *Pizzino v Pizzino*:¹²

“[50] The first stage of the process or the jurisdictional question is one of fact determined at the date of the hearing, even though it involves the making of value judgments on whether the applicant has been left without adequate provision for his proper maintenance and support, as at the date of the deceased’s death: *Singer* at 209-211. The factors that will be considered on the jurisdictional question include the applicant’s financial position, the size and nature of the estate, the totality of the relationship between the applicant and the deceased and the relationship between the deceased and other persons who have legitimate claims on her bounty: *Singer* at 210. The nature of the enquiry undertaken by the court on the jurisdictional question was analysed in *Hills v Chalk* [2008] QCA 159 at [39]-[41] (per Keane JA), [128]-[139] (per Muir JA) and [212] (per Fraser JA).

...

[53] If it is necessary to proceed to the second stage of the process, it involves similar considerations to the jurisdictional question (*Singer* at 210) and s 41(1A) of the Act is applicable. In addition to the matters specified in s 41(1A) of the Act, the respondents and applicant’s sons also rely on the application of s 41(2)(c) of the Act.

[54] In determining the second stage, the court exercises its discretion on whether to make an order in favour of the applicant by reference to the circumstances as they exist at the date of the order: *White v Barron* (1980) 144 CLR 431, 444.

[55] The jurisdiction under provisions such as s 41(1) of the Act does not entitle the court to rewrite the will in accordance with its own ideas of fairness or justice: *Hughes* at 146.”

[38] As to the first stage and determining the question of jurisdiction, the phrase “adequate provision for the proper maintenance and support” means “maintenance and support ... at a level or degree appropriate to the applicant in all of the circumstances of the case.¹³ The concept is a relative one, with no fixed standards, and the Court is left to form opinions upon “the basis of its own general knowledge and experience of current

¹² [2010] QSC 35 at [49]–[55].

¹³ Anthony Dickey, *Family Provision After Death* (Law Book Co, 1992) at 102.

social conditions and standards.”¹⁴ According to the Privy Council in *Bosch v Perpetual Trustee Co Ltd*, the amount to be provided is not to be measured solely by the need of maintenance, otherwise the Court would only be concerned with adequacy.¹⁵ The Privy Council in particular noted that the use of the word “proper” is of significance and “proper maintenance” required the Court to take into consideration the size of the estate left by the deceased. If the estate is a large one, the Court will be justified in meeting contingencies that might have had to be disregarded if the estate was small.

[39] In *Hills v Chalk*, Keane JA stated:¹⁶

“Judicial statements of high and longstanding authority explain that the evaluative assessment whether ‘adequate provision’ has not been made for the ‘proper maintenance and support’ of an eligible person must be made from the perspective of the deceased person on the assumption that the deceased was alert to the considerations relevant to the making of ‘adequate’ provision for the ‘proper maintenance and support’ of the claimant. In *Bosch v Perpetual Trustee Co*, Lord Romer, delivering the advice of the Judicial Committee of the Privy Council said that ‘in every case the Court must place itself in the position of the testator, and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.’ There have been expressions of doubt as to the validity of supporting the postulate of the wise and just testator or testatrix by referring, as Lord Romer did, to the ‘moral duty’ of the testator or testatrix. In *Singer v Berghouse*, Mason CJ, Deane and McHugh regarded the introduction of notions of ‘moral duty’ or ‘moral obligation’ as a gloss upon the language of the Act. Neither these observations in *Singer v Berghouse* nor the discussion of the point in *Vigolo v Bostin* cast doubt on the continuing validity of approaching the determination of whether ‘adequate provision’ has been made for the ‘proper maintenance and support’ of an eligible claimant by reference to the postulate of a wise and just testator or testatrix.” (footnotes omitted)

[40] In considering the question of adequate provision, the Court must look to what is “necessary or appropriate prospectively from that time”, namely the time of death, including events which are contingent as well as those which are more certain or

¹⁴ *Goodman v Windeyer* (1980) 144 CLR 490 at 502.

¹⁵ [1938] AC 463 at 478.

¹⁶ [2008] QCA 159 at [40].

likely.¹⁷ Unusually, hindsight may be taken advantage of provided the subsequent occurrences fall within the range of reasonable foresight.¹⁸

- [41] As is apparent from the authorities cited above, the Court must take into account all relevant circumstances including the applicant's financial position, the size and nature of the estate, the relationship between the applicant and the deceased and between the deceased and others with a legitimate claim upon the estate, whether the person is able-bodied, and the effect of inflation.¹⁹ The standard of living of the applicant during the deceased's lifetime is also relevant, as is the amount necessary for the applicant's maintenance and survival.²⁰
- [42] In making its determination, the Court must take into account those with competing claims on William's estate. Those claims are the claims of persons who would expect to be benefited under a deceased's will, even if those persons would not be eligible to make a family provision claim by virtue of their circumstances.²¹ In the present case, it is the claims of William's three children and grandchildren to which the Court has regard. It was not in dispute that William's grandchildren should receive the benefit of their legacy under the Will regardless of the outcome of this application.
- [43] The Court's role in determining the family provision application is not to seek to achieve a "fair" or "equitable" disposition of the deceased's estate.²² Nor is the purpose of the legislation to ensure that siblings are treated equally.²³
- [44] Christopher's contention is that the provision made for him by his father is insufficient to meet the expenses of maintaining the Moggill Property and allowing him to meet personal expenses which he contends were formerly met by his father.
- [45] The question of whether or not Christopher was left without adequate maintenance must be answered at the date of William's death.²⁴

¹⁷ *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494 at 508 (per Dixon J).

¹⁸ *White v Barron* (1980) 144 CLR 431 at 441 (per Mason J).

¹⁹ *Pontifical Society for Propagation of Faith v Scales* (1962) 107 CLR 9 at 19.

²⁰ *Daley v Barton & Anor; Barton v Daley* [2008] QSC 228 at [150].

²¹ *Albury & Anor v Sammut* [2019] QSC 105 at [74].

²² *Perpetual Trustees Queensland Limited v Mayne* [1992] QCA 417; GE Dal Pont, *Law of Succession* (LexisNexis, 3rd ed, 2021) at [15.14] and the cases cited therein.

²³ See, for instance, *Higgins v Higgins* (2005) 2 Qd R 502 at [46].

²⁴ *Hills v Chalk* [2008] QCA 159 at [47] referring to Barwick CJ in *White v Barron* (1980) 144 CLR 431 at 437.

[46] In December 2022, Christopher provided some 12 pages of case and text references which he considered were relevant to the present case. I have reviewed that list of authorities and to the extent that I could determine they are relevant I have considered them. In particular, Christopher referred to cases in relation to able-bodied sons and to the fact that in some cases a person can show that their earning powers are impaired by a disability such that they have a special need for maintenance and support.²⁵ That of course is relevant. The fact that someone is an able-bodied son does not exclude them from being able to make a claim for a family provision, although earlier authority suggested otherwise. A testator may have a moral obligation to an adult son. In the present case, William recognised Christopher's impairments and limitations which meant that he could not be employed and recorded them in the Will. They are clearly part of the circumstances which the Court considers in determining whether adequate provision has been made for Christopher, as is Christopher's relationship with William and his living arrangements with William prior to his death.

Relevant position of each of the beneficiaries

Christopher

[47] At the time of William's death in October 2017, Christopher was 59 years of age. He was and is single and has no children. He has been unemployed and receiving a disability pension for some years. Christopher lived with William for several years prior to William's death. It was not in contention that Christopher has no assets of significant value.

[48] Notwithstanding the numerous affidavits and the clear effort that Christopher has made, the evidence presented by Christopher is disorganised, prolix and difficult to navigate in order to identify the evidence that is relevant to his application. The respondents did not undertake an exercise of going through each affidavit to isolate the evidence that was relevant and object to that which was not due to the size and cost of the task. Christopher's evidence was particularly focussed on what he considers needs to be carried out at the Moggill Property, particularly in respect of damage caused to the Moggill Property by white ants since 2020, the need for more lawnmowing and removal of trees and roots, and some plumbing issues.

²⁵ For example, *Anderson v Teboneras & Anor* [1990] VR 47.

- [49] At the time of his father's passing, Christopher was receiving a disability pension and evidently had not been employed for a number of years. In his 2019 affidavit, Christopher referred to receiving \$933.40 a fortnight. He provided a Centrelink statement from 12 December 2019 which showed he received a disability support pension of \$850.40, an energy supplement of \$14.10 and a pension supplement of \$68.90, and indicated that he had \$1,000 worth of assets.²⁶ Christopher estimates that he now receives some \$987.60 per fortnight from the disability pension paid by Centrelink, which is an increase from the amount which Helen used in estimating his income and expenses to assist the Court.
- [50] The evidence available in relation to Christopher's debts was scant. On 10 January 2020, Christopher had credit card debts of about \$1,700 and a SPER debt of approximately \$2,500. According to Christopher's submissions, he has paid off those debts. He provided Bank of Queensland statements identifying visa card transactions and his NAB statements.²⁷ Christopher drives William's 1991 Ford Laser, which has been transferred into Christopher's name by the executors.
- [51] Christopher appears to suffer from an unidentified psychological condition. There is some suggestion by Christopher of Obsessive-Compulsive Disorder and observations of anxiety in medical reports at different times. Christopher has had a number of investigations in the past, particularly in 2010, which show he has had issues with respect to his shoulder, hip, spine (with mild spondylosis reported) and an injury to his knee.²⁸ Christopher indicates that some of those issues are ongoing such that, for instance, he needs a car for shopping. He states he had Ross River fever in the past and needs a special blood test which is not paid for by Medicare. There was, however, no evidence before the Court as to how these matters actually affected Christopher in his day-to-day functioning, any ongoing medical needs or any long-term effects, save for a letter from Kenmore Medical Clinics indicating Christopher was suffering from low back, back, neck and foot pain on 16 December 2021 which would take some seven months to settle.²⁹ The respondents accept that Christopher suffers from conditions which cause pain and limitation in the movement of his neck, back and

²⁶ Exhibit CMM-40 to the Affidavit of Christopher Martin McDermott affirmed 30 December 2019 (CFI 9).

²⁷ Affidavit of Christopher Martin McDermott affirmed 10 January 2020 (CFI 12).

²⁸ For which there was a further radiology report dated 16 March 2020. See Exhibit 2 to the Affidavit of Christopher Martin McDermott affirmed 10 August 2022 (CFI 37).

²⁹ Exhibit 13 to the Affidavit of Christopher Martin McDermott affirmed 16 May 2022 (CFI 34).

knees and may have limitation of movement of the tendons of both hands and Ledderhose disease of the feet.

- [52] Christopher also had a significant car accident after William's death in which he suffered some significant injuries.
- [53] Christopher was educated up until Grade 12 and did a university course in accounting for one year but did not complete it.
- [54] When Christopher lived with William, he lived rent free. It was uncontentious that a number of the household expenses and some of Christopher's additional expenses were paid by William, although the particularisation of those expenses is fairly scant. Christopher provided a schedule and some invoices which he stated was incomplete and sporadic rather than allowing the Court to come to any view about his average annual expenses.
- [55] As to the expenses for maintaining the Moggill Property, Christopher amongst other things relies on a schedule prepared by his father.³⁰ The schedule has "2015" in the right-hand corner but "2015" was crossed out and replaced with "2017". According to Christopher, the schedule demonstrates that at least \$27,000 is needed to maintain the Moggill Property. The schedule is headed "Possible Expenses and Income". It refers to rent of \$40,000 excluding GST and a pension of \$24,400. It further refers to "Expenses" including rates of \$4,140, insurance of \$1,600, electricity at \$4,000, "repairs-mowing etc" of \$5,000, "car reg" of \$700, pool of \$1,000, car repairs of \$800, and phone/internet of \$2,000. Those expenses total \$19,000. The schedule also refers to "Surgery B/C fees" of \$1,500 and rates of \$4,500, which presumably relate to the surgery at the Kenmore Medical Centre, as well as "tax/accounting" and 5% to the trustee at \$2,000. All expenses recorded in the schedule total \$27,000.
- [56] Christopher asserts that there is no provision for long-term maintenance. He refers to needing a cleaner and states that William had once a fortnight. Christopher states his father paid for the phone, internet, car expenses, dentistry, some medical treatment, and electricity. According to Christopher, his father told him everything would stay the same and all expenses would be taken care of after his death. Christopher has

³⁰ Exhibit CMM-42 to the Affidavit of Christopher Martin McDermott affirmed 30 December 2019 (CFI 9).

provided an affidavit of costs which show a snapshot of things which he paid for in 2019, 2020 and 2021,³¹ which mostly includes personal consumables or costs but also some car maintenance, vehicle registration and insurance, dental costs, plumbing repairs, computer service and equipment, and carpet cleaning.

[57] Christopher has provided numerous quotes for matters which he considers need to be repaired or household items which will need to be replaced in the future. These include matters such as repairs of walls, absorbent trenches, a chimney sweep, repairs of carport roof, roof cleaning, installation of solar systems, installation of air-conditioning, interior and exterior painting, curtains, double-glazed windows, repair of the driveway, repair and installation of fencing, installation of a new hot water system, installation of new carpet for six bedrooms, the hall and lounge and dining rooms, a four-car garage at Banksia St, re-pointing and cleaning of brickwork, and adjustments to drainage to ensure the toilet does not leak.³² He also includes quotes for cleaning and pool cleaning, termite inspections, a salt water chlorinator, and lawn and ground maintenance.

[58] Christopher makes reference to the executors ceasing payments after he made the family provision application. It is generally accepted, however, that a prudent executor should refrain from distributing any part of the estate after an application is made save in particular circumstances.

[59] Christopher is now 64 years old. There is no suggestion that Christopher lacks capacity or cannot live independently. Christopher stated he and William had a good relationship. The respondents did not suggest otherwise, and I accept that Christopher and William had a good relationship.

Shona

[60] Shona provided affidavit evidence. Shona was 60 years of age at the time her father died and is now 65 years old. She is single and has two adult children who live independently, Kesley and Dorian.

³¹ Affidavits of Christopher Martin McDermott affirmed 7 August 2022 (CFI 38, 39 and 40). While invoices were not attached, no issue was taken. The exercise was not completed.

³² See, eg, Affidavit of Christopher Martin McDermott affirmed 9 January 2020 (CFI 10).

- [61] Shona's most recent statement of total assets indicates that her assets are estimated to be valued at \$503,412.54. Her assets consist of:
- (a) a unit valued at \$440,000;
 - (b) savings of approximately \$55,000;
 - (c) a 2012 Hyundai motor vehicle estimated to be worth \$8,000;
 - (d) approximately \$248,000 in superannuation which pays her a pension of approximately \$435 per month; and
 - (e) an annual income of about \$13,771.
- [62] Her expenses estimated on an annual basis were \$38,330.43, which includes rent of an apartment at Kirra for several months. She states she uses cash savings when her income does not cover her expenses.
- [63] Shona works intermittently as a part-time cleaner. She has no significant liabilities.
- [64] Christopher makes allegations in his closing submissions about Shona owning a property overseas in India. Shona was not asked about this in cross-examination and there is otherwise no evidence of the existence of such a property. I therefore do not take into account the possibility of such a property.
- [65] Shona gave evidence that she had a close relationship with the deceased, particularly after she returned from New South Wales and saw him on regular occasions, up to every second day and at lunch up to twice weekly. In his closing submissions, Christopher suggested that this was not the case, and that Shona and William met no more than once a week. Shona was not challenged about her evidence in cross-examination and I therefore accept her evidence. In any event, whether they met once or twice a week is of little moment. I accept Shona and William had a close relationship. I accept that William also had a close relationship with Shona's two children, now both adults, particularly once Shona was separated and had moved back to Brisbane to bring up the two boys.
- [66] Shona has arthritis in both hands and bilateral carpal tunnel syndrome which limits her ability to work. She had a significant operation in 2008 for cancer.

[67] Shona does not support Christopher's application because she considers that her father left sufficient assets in trust for Christopher's maintenance and support and that her father's testamentary wishes should be respected.

Helen

[68] Helen and her husband, Robert Buchanan, provided affidavit evidence as to their financial position and personal circumstances which had to be corrected at the outset of their oral evidence.

[69] Helen is the youngest child. She was 56 years old at the time her father passed away and is now 61 years old. She is married and has one child, Jack. Jack is 21 years of age and a university student. He presently lives at home and is financially dependent on his parents. He will graduate in the next two years, all going to plan.

[70] Robert has his own business and is a director of Rob Buchanan Electrical Pty Ltd. Helen works in that business providing administrative support.

[71] Helen and Robert have combined assets estimated to be worth over \$2.4 million. Those assets and liabilities include:

- (a) a unit at West End worth approximately \$750,000;³³
- (b) a house at Mt Crosby worth approximately \$960,000;
- (c) some cash in the bank;
- (d) shares in the family company worth \$73,625; and
- (e) a motorbike worth approximately \$12,500.

[72] Their liabilities consist of a mortgage of \$619,661 which is held by a company owned by Robert's brother, a personal loan of \$69,316.18 and credit cards debts of approximately \$15,000, providing a net position of \$1,116,447.40.

[73] Helen's evidence in relation to her superannuation required correction, as did her husband Robert's, due to their failure to take into account the fact that the proceeds of the sale of a property were paid into their respective superannuation accounts.

³³ Unit 1, which she had owned as joint tenant with William but repaid his contribution prior to his passing.

Helen has superannuation of about \$571,863 and her husband has superannuation of about \$1,098,154.

- [74] Taking into account her superannuation, Helen's net asset position³⁴ would be approximately \$1.67 million.
- [75] Robert's net asset position,³⁵ taking into account his superannuation, would be approximately \$1.6 million.
- [76] Helen and Robert each earn an annual income from Robert's electrical business. Between 2017 and 2021, Helen's income varied from \$40,068 up to \$83,134 while Robert's varied from \$34,487 up to \$76,310. Robert now earns \$82,000 per annum after tax. According to Robert, in recent times they had downsized their company.
- [77] Helen and her family had a close relationship with William. He dined and stayed overnight with them weekly, and they took several holidays together.
- [78] In recent times, Helen has suffered anxiety and depression which have apparently increased as a result of this litigation.

Was adequate provision made?

- [79] The first question is whether the deceased made adequate provision for the proper maintenance and support of the applicant. The onus lies on the applicant, Christopher, to satisfy the Court that in all of the circumstances, the Will fails to make adequate provision for his proper maintenance and support. If the provision is found to be inadequate, then the jurisdiction of the Court to make an order for further provision under Part 4 of the *Succession Act* is invoked. The relevant time for the considering the reasonableness of the provision made is the date of death of the deceased. The test is an objective one.³⁶
- [80] As is set out above, provision for Christopher was made by establishing two trusts, one in respect of the Moggill Property and the CMMTT. Unit 11, which was designated trust property, was and is income producing. By his Will, William

³⁴ Excluding her annual income, estimated to be \$50,443 net although it varies year to year, with joint expenses with Robert of \$61,781.14.

³⁵ Excluding his annual income of \$82,000 per annum with expenses of \$88,727.33.

³⁶ *In re Goodwin* [1969] 1 Ch 283 at 287–288.

provided for Christopher to be assured of accommodation rent free and a means to pay the expenses and upkeep of the Moggill Property as well as for the trustee to pay a regular allowance to Christopher.

- [81] It is relevant for the Court to take into account the fact that Christopher was in receipt of the pension.³⁷
- [82] One of Christopher's principal contentions is that William did not make adequate provision for his proper maintenance and support because the CMMTT was not provided with sufficient funds for long-term maintenance issues and replacement of old household goods.
- [83] It is evident from the terms of the Will that William gave careful consideration to providing for Christopher and his well-being in circumstances where Christopher had lived with him for a number of years as an adult and had benefitted from his father meeting the expenses of the house and land and it appears buying sufficient groceries for both he and Christopher. William was also aware of the reasons Christopher could not work and at least his assessment was that Christopher had difficulty saving money and budgeting. Although Christopher challenges that assessment, it does appear to be supported by the fact that Christopher only has personal assets and the lifestyle he enjoyed is as a result of the receipt of the disability pension and his father's support.
- [84] Christopher contends that adequate provision was not made under the Will in order for him to continue to reside at the Moggill Property and for his ongoing expenses on the basis that:
- (a) since William has died, the Moggill Property has been affected by white ants and there is evidence of white ant damage which requires significant repair;
 - (b) the Moggill Property has to be mowed with greater regularity than the executors have been having it mowed and sufficient provision has not been made for its maintenance;
 - (c) sufficient provision has not been made for Christopher's expenses under the Will given that William paid for a number of household expenses, purchased grocery items which he shared and paid for car expenses;

³⁷ AA Preece, *Lee's Manual of Queensland Succession Law* (Thomson Reuters, 8th ed, 2019).

- (d) he considers provision should be made for cleaning of the house and pool given that was done by him prior to William's death and he has physical limitations preventing him from doing so;
- (e) he has identified a number of items which require repair or replacing and the house and household items are becoming aged and may need replacement in the future for which provision has not been made.

Evidence as to matters in dispute

The Moggill Property

- [85] The evidence took some three days. A number of factual issues were, however, not in dispute or were the subject of concessions. Christopher, Shona and Helen were all cross-examined. Ms Hajnal Ban, a friend of Christopher, gave evidence but was not cross-examined. Robert also gave evidence. The real dispute in terms of whether adequate provision has been made arises from Christopher's assertion of what work needs to be done on the Moggill property or household items purchased and whether and to what is the extent of that work which needs to be done for adequate provision to be made for Christopher's proper maintenance and support.
- [86] Christopher gave evidence. While I found him to be a generally honest witness, though prone to exaggeration and conspiracy theories such that I did not consider that his evidence was reliable in all respects. Christopher's evidence therefore had to be treated with considerable circumspection and was of limited weight. In particular, Christopher sees the present case in a vortex of what he considers should be the outcome of his application. Notwithstanding Christopher had lived at the Moggill Property for several years, most recently with his father, I did not find his evidence about the state of the property and what needed to be done to be reliably informing the Court as to the state of repair of the Moggill Property at the time of William's death and what was needed to provide him with a house that was adequate for his proper maintenance and support. I found that Christopher formed his views of what is required to be done at the Moggill Property based on a wish list of matters which he would like done, rather than identifying matters which reasonably needed to be addressed in order to make provision for him. This is reflected by the quotes he

obtained, for example to re-carpet the lounge, dining room, hall, and all six bedrooms of the house.

[87] Putting to one side the difficulties that Christopher experiences as a self-represented litigant, his evidence was skewed to accord with his view of what he considers should be done and to advance his case. He lacked objectivity, given he believes his sisters have not acted in the proper way in acting as executors, and sought to raise serious allegations against them with little thought. While Christopher appears to have limitations which have affected his ability to be employed, Christopher appeared to have a view that he was entitled to a greater share of his father's estate which was not just based on need but by comparison to what his sisters had compared to him.³⁸ He showed little appreciation for the fact that his sisters had competing claims to his father's estate, particularly Helen, although in his mind what he sought was partly justified by the fact that improvements to the Moggill Property would benefit all of them because it was part of the residuary estate.³⁹

[88] While some criticisms as to the respondents delay in responding to matters Christopher raised may have been justified, a number of those delays arose because of Helen and Shona disagreeing with Christopher as to whether things needed to be done or due to Christopher's unrealistic view of the time things should take. When Christopher was told in evidence by Helen that she had been told by a contractor that they did not wish to return to do work on the Moggill Property, he spent considerable time arguing that it could not have been due to anything he had done, notwithstanding Helen said she was not there and that was just what she had been told. While William met a lot of household's expenses, I also considered Christopher was expanding the list as the case progressed to improve his claim, rather than necessarily identifying what is needed for his proper maintenance.

[89] Regular visitors to the Moggill Property were Ms Ban and another gentleman, Mr Stephen Galowski. Ms Ban gave some evidence as to her observations of the white ant damage.⁴⁰ Her evidence did not add greatly to the other evidence already given

³⁸ Other beneficiaries do not have to justify a testator's decision as to what they have left in respect of the estate: *Re Adamow* (1989) 97 FLR 410 at 415.

³⁹ For example, Christopher regarded Unit 2 as being something which he should have the benefit of, which included provision being made for him to build additional garages which he considered necessary to accommodate the tenants.

⁴⁰ Ms Ban's affidavits affirmed 22 December 2019 (CFI 11, 31 and 42) were largely ruled inadmissible.

and related to the extent of termite damage. She clearly was giving evidence to assist Christopher's case. Christopher asked her several leading questions with which she readily agreed, even though she had appeared to have no independent recollection of the matter earlier in evidence. To the extent her evidence was corroborative of other evidence given, I have had regard to it but otherwise gave it little weight. Mr Galowski was not cross-examined but his evidence did not add significantly to other evidence save to the extent that his observations of the Moggill Property which post-dated William's death supported some of Christopher's observations.⁴¹

[90] Notably, Ms Ban did not notice any white ant damage in 2017 when William was alive and had only noticed the damage since that time. She could not remember when she observed the deterioration in the house, but it appeared to be when Christopher started to raise issues about it which was, particularly on Christopher's evidence, at the end of 2020. Christopher's evidence was that he had not observed white ants before that time. Ms Ban was not cross-examined.

[91] Helen's recollection of events since her father's death was at times, on her own evidence, confused. That said, it was clear that she was confused by some of Christopher's questioning, which fell into him telling her about events from his perspective rather than establishing whether Helen knew about the event or whether that was Helen's recollection. Generally, she made appropriate concessions.

[92] Robert also gave evidence of his financial affairs, including by more accurately stating the state of his loans. While he resisted making any concessions, his cross-examination did not take the matter much further, although there was an inconsistency between his and Helen's evidence as to the pool lights. Helen thought the lights had been disconnected by Robert but he stated he had not done so. Given the fact was that the pool lights had been disconnected during William's lifetime, not much turns on the point which requires resolution, but I accept the evidence provided by Christopher evidenced by an electrician's invoice that the pool lights had not been disconnected in the proper way. Of some concern was the omission, by both Helen and Robert in their affidavits deposing as to their assets, of the sale of a house in February 2020 for \$660,000, the proceeds of which were divided equally between their superannuation

⁴¹ Affidavit of Stephen Galowski filed 11 June 2021 (CFI 22) part of which was excluded for admissibility.

and resulted in their asset position being understated. The correct position was, however, clarified at the outset of their giving evidence in Court. I do not conclude that the omission was dishonestly done, however, it shows a level of carelessness in the preparation of the evidence such as to affect its reliability to some extent.

[93] Shona, while at times becoming exasperated with Christopher, gave proper concessions about the fact that photographs that Christopher presented in some respects showed that repairs were needed. There was not any real dispute that some repairs are needed to the house. However, the extent of those repairs required was in dispute, as was the state of the Moggill Property when William died.

[94] I generally found that Shona and Helen gave candid evidence, although the weight of some aspects of their evidence was diminished at times as it was affected by exasperation with Christopher in his questioning and some resentment as a result of his bringing the claim, especially with the assistance of Ms Ban about whom they held suspicion. I approached their evidence with some circumspection given they were also beneficiaries under the Will. Overall, I preferred their evidence to Christopher's in relation to matters of which they had knowledge. Both had only been to the Moggill Property on limited occasions since their father's death and in particular since Christopher brought his application.

[95] As to the state of the Moggill Property in more recent times, I could only rely on Christopher and Ms Ban's evidence, Mr Galowski's limited evidence, the photographs attached to Christopher's affidavit (bearing in mind my comments above as to weight), and to some reports such as the report of Mr Timothy Sambel from Epest insofar as they identified particular problems. Christopher attempted to subpoena Mr Sambel. I ultimately set that subpoena aside. Mr Sambel's report was however in evidence and explicitly stated the limitations in relation to the inspection and that he could not comment on structural damage. The matters identified by Christopher that he was wished to ask Mr Sambel were not probative of the matters the Court must decide.

[96] It is uncontroversial that up until his death, albeit that he was 89 years of age, William was responsible for maintaining the Moggill Property. Christopher does not suggest that he contributed greatly towards maintaining the house but did odd jobs from time to time. Mowing was done by an external contractor. Notwithstanding his advanced

age, William cleaned the pool. Christopher contends that he was unable to clean the pool with the skimmer box because of problems with his legs and thus provision should have been made for a pool cleaner.

[97] According to Shona and Helen's evidence, the Moggill Property was in a reasonable state of repair at the time of William's death. At that time, both had visited their father at the property, although since that time their attendance on the property has been limited. Helen in particular gave evidence of having assisted her father in doing things around the house in terms of cleaning, so had some awareness of the state of repair of the house. Christopher has identified multiple things which he considers need doing or will need doing in the future. A number of those things are the result of events which took place subsequent to William's death, although the underlying cause such as an apparent problem with the pipes and levels or a pipe which flows into the river have always been present. Other things identified such as nails becoming disconnected from the wood to which they were secured are the obvious effect of time on a house over 60 years of age. While Christopher obtained quotes in relation to a number of those matters, he has not provided a report as to the state of repair of the house with some proximity to William's death.

[98] Christopher contends that adequate provision should include an amount for the repair of white ant damage. It is unclear what he contends should be the precise amount of that provision and the quotes he has provided mix a number of different items, but he contends the damage is extensive and any repair work will be significant. The quotes Christopher has provided indicate that the repair costs could be sizeable (to the extent that the cost of the repair work can be gleaned). The presence of the termite damage is something that only became apparent some three years after William's death, although they had been found at the house earlier.

[99] The question is whether, at the time of his death, William in failing to include an amount to meet a contingency such as termite damage to the house and surrounding structures at the Moggill Property failed to make adequate provision. It is uncontroversial that the Moggill Property had been affected by termites in 2016 but that William had arranged to have a termite treatment carried out at the time. After William's death in October 2017, no termite inspections were carried out until after Christopher discovered evidence of termites at Christmas 2020. Christopher stated

that he had not seen termites prior to this time and Helen and Shona gave evidence that they were not aware of the presence of termites. While Christopher suggests that Helen and/or Shona should have arranged to have termite inspections carried out on an annual basis, that is not to the point in the present application in terms of whether William should have provided for such a contingency to be met. Moreover, while photographs do not generally lie, they can only tell a limited story. Christopher has relied heavily upon such photographs, as well as the Epest report, to not only prove the fact of termite damage but the extent of it. It is clear some photographs show some damage which could have been inflicted by termites. Others are equivocal. In any event, what the photographs do not show is what repairs need to be carried to repair any damage and the reasonable cost of that work. Nor can it be inferred on the basis of the quotes presented.

[100] In any event, for the reasons below, if the scale of the cost to carry out repairs exceeds the provision made on the basis that Christopher continue to reside at the Moggill Property, that contingency has been provided for by the provision that the trustee can in the circumstances set out sell the property and purchase alternative accommodation. The failure to provide increased funds to be available in respect of the Moggill Property is not a failure to make adequate provision for Christopher's proper maintenance and support.

[101] After Christopher's discovery of termites in 2020, the executors arranged for a termite inspection and a report to be provided by Mr Sambell. There is no real dispute that the Moggill Property has suffered termite damage. That is evident from the photographs produced by Christopher, which were generally accepted by Shona and Helen as showing termite damage, although there was some dispute as to whether the photographs all showed damage that could be attributed to termites. The August 2021 report of Mr Sambell stated that the termite damage was extensive but that he could not comment on the extent of structural damage, which he stated was outside his expertise.⁴²

[102] There is no doubt that the Moggill Property has been damaged by white ants and will require at least some repair. However, what occurred was not a contingency reasonably foreseeable at the time of William's death. I find that given William had

⁴² Exhibit 2 to the Affidavit of Christopher Martin McDermott affirmed 16 May 2022 (CFI 34).

been responsible for maintaining the Moggill Property up until his time of death, that he had maintained the Moggill Property in a reasonable state of repair and that adequate provision for the proper maintenance of Christopher, assuming he would be living at the Moggill Property after William's death, did not require William to provide a contingency fund to meet an extraordinary occurrence such as an infestation of termites which appears to have caused significant damage.

Other matters for which a contingency should have been provided for the Moggill Property

- [103] In one of his affidavits,⁴³ Christopher identified a multitude of matters through quotes which he contends require work to be carried out to repair and maintain the Moggill Property.
- [104] Helen and Shona rejected the suggestion that the Moggill Property was in a state of poor repair at the time of William's death. However, they both accepted in cross-examination that there was some work which needed to be carried out, but not to the extent contended for by Christopher, and attributed a number of matters which Christopher considered showed that the house was in a considerable state of disrepair to fair wear and tear or lack of cleaning. On a number of the photographs, that was an interpretation open and in the absence of further evidence from someone with expertise, particularly a builder, I cannot adopt a contrary view.
- [105] Helen prepared a detailed schedule in her affidavit sworn 3 February 2021 seeking to identify and respond to the matters that Christopher asserted needed to be repaired or maintained.⁴⁴ Helen's review was not based on her having inspected the Moggill Property in 2021 but rather on her prior knowledge, mostly from at the time when her father died. The Court's assessment of whether adequate provision has been made is to be determined on the basis of the circumstances at the time of William's death, so Helen's evidence is probative in that regard. I accept Helen's evidence that she and her husband Robert helped William with maintenance issues at the house from time to time, such as cleaning the roof and the sandstone around the pool.

⁴³ Affidavit of Christopher Martin McDermott affirmed 9 January 2020 (CFI 10).

⁴⁴ CFI 14 responding to the matters in Christopher's affidavits affirmed 18 December 2019 (CFI 9), 9 January 2020 (CFI 10) and 10 January 2020 (CFI 12).

[106] Helen did not consider that Christopher's complaints were generally well-founded in terms of requiring any action at present. Helen conceded, however, that the question of an extended sewerage system and protective piping to go with the absorption trench was one which required consideration and for which a quote had been received from Express Plumbing for \$16,636, but which the executors had not actioned in light of this litigation. Helen noted that the pipe on the riverbank had been there well prior to her father's passing. She did not, however, agree that it required tree removal. Helen also indicated that air-conditioning was being considered by the executors. She stated that taps and various plumbing repairs had been tended to as required and that yard maintenance was done on a regular basis. To the extent there were delays, Helen explained there had been difficulty in getting contractors to go or return to the Moggill Property. She considered that the carpet was in a reasonable condition. It was evident that Christopher was referring to the state of repair of the house from 2020 when he first prepared his affidavits, given he relied on a photograph said to show that the carpet was damaged but which had occurred from an event after William's death due to the toilet leaking. Helen conceded that items such as the oven and stove top were original from the time that the house was built in 1958. She did not agree that the house needed painting based on its state when William died. Notably, Christopher put to Helen photos taken after William's death, particularly in 2021, to refute her views in her affidavit as to the state of repair. While those photos did show paint in some rooms peeling, they were taken some years after William's death and at a different point in time from that which Helen was commenting upon.

[107] Generally, I accept Helen and Shona's evidence as to the state of repair of the Moggill Property at the time of William's death but concessions that there are matters which may be required to be addressed in the future. That was considered by William and provided for in cl 8(a) of the Will. The question of whether he made adequate provision to ensure Christopher's proper maintenance and support is a different question.

[108] Neither Helen nor Shona suggested that there are no repairs or maintenance that must be carried out in relation to the Moggill Property, nor that repairs or maintenance will not have to be done in the future. Indeed, amounts have been spent by the executors carrying out repairs in the past. They do not agree to the extent of matters which Christopher considers should be repaired, replaced or maintained.

- [109] A number of concessions were, however, made either in evidence by Helen and Shona or in final submissions, including that:
- (a) the Goanna Plumbing Report did show work that would have to be considered and the accuracy of other reports such as the Epest report; and
 - (b) the fact that a number of photographs did show termite damage.
- [110] Christopher had a number of photos depicting nails having become detached from beams and doors coming off their hinges, which were generally conceded by Shona to need repair. Those matters, however, are part of the ordinary wear and tear of the house.
- [111] I accept, as did the respondents in final submissions, that the fence between the Moggill Property and the adjoining property requires replacing. The estimated cost of that repair was between \$9,600 and \$12,622.50.⁴⁵ Half of that cost will need to be shared.
- [112] The question of whether proper provision had been made for mowing was raised by Christopher. In particular, he contended that the amount needed to be paid for mowing and garden maintenance was greater than what was being paid for by the executors at present. In reality, it is a dispute as to what is required for the reasonable maintenance and upkeep of the Moggill Property, which will be a matter for the trustees. It is, however, appropriate to consider it insofar as adequate provision for Christopher's proper maintenance and support may require mowing to be done in respect of the Moggill Property.
- [113] It would appear that the amounts spent in relation to garden maintenance for the years 2020 and 2021 are on the low side, given there were gaps of some months between occasions on which the property was mowed. There were conflicting views as to why that was so. Christopher considered it was because there were tree roots which needed to be removed which the mowing man had asserted were damaging his mower. Helen asserted that the change of mower men and the gaps between the occasions on which the property was mowed was due to the fact that the mower men did not wish to return as they felt harassed by Christopher. The evidence does not allow me to determine

⁴⁵ Exhibits to the Affidavit of Christopher Martin McDermott affirmed 9 January 2020 (CFI 10) at pages 30 and 110.

the issue either way. On the present evidence, I am not satisfied that the tree roots need to be removed in order to carry out the mowing safely.

- [114] The Moggill Property is a large two-acre block. Mowing was carried out regularly during William's lifetime, although the extent of the mowing carried out on each occasion is unclear. I am satisfied that the upkeep of the residence does require that mowing be done on a regular basis, although given the size of the block it may not require that the entire block be mowed regularly as the evidence shows that the surrounding acreage goes well beyond the house and driveway and is not an area that requires regular mowing to provide for Christopher's proper maintenance. I do accept that the immediate area around the house would be required to be mowed regularly to reasonably maintain the residence.
- [115] Christopher contends that a figure of at least \$5,000 is needed for mowing and other repairs, a figure which had been referred to by William in a schedule prepared in 2017.⁴⁶ He contends that the work that has been done by mowers employed by the executors has been inadequate. In particular, Christopher contends that the mowing man did not whipper snip or clear vents of leaves.
- [116] As to how much is required for mowing, Christopher provided a number of quotes which range up to approximately \$12,000 per annum.⁴⁷ William, in his calculation of expenses, estimated a figure of \$5,000 for repairs and mowing.⁴⁸ The highest amount paid by the executors in the financial year July 2018 to June 2019, which did not have the gaps of the subsequent years, was \$1,100.50. While there is a significant difference between the payments by the executors and the quotes obtained by Christopher, there is also a significant difference between what William estimated for repairs and mowing even accepting the increase in costs. Nor on their face do the quotes obtained by Christopher demonstrate that the work is necessary to maintain the property in a reasonable state. For instance, it would appear the quotes include mowing the entire two acres, whipper snipping and weed kill.⁴⁹ While further

⁴⁶ Exhibit CMM-42 to the Affidavit of Christopher Martin McDermott affirmed 30 December 2019 (CFI 9).

⁴⁷ Exhibits to the Affidavit of Christopher Martin McDermott affirmed 9 January 2020 (CFI 10) at pages 129–132, 135.

⁴⁸ Exhibit CMM-42 to the Affidavit of Christopher Martin McDermott affirmed 30 December 2019 (CFI 9).

⁴⁹ Exhibits to the Affidavit of Christopher Martin McDermott affirmed 9 January 2020 (CFI 10) at pages 129–132.

maintenance may be required to be carried out in relation to the garden at least that area immediately around the house than is presently being carried out I am not satisfied that the quotes obtained by Christopher reasonably reflects the work that needs to be carried out to maintain the residence in a reasonable state.

[117] I am satisfied that there are some matters for which costs need to be incurred to ensure that the Moggill Property is maintained in a reasonable condition and make adequate provision for Christopher's maintenance and support, namely:

- (a) twelve monthly termite inspections and any updating of termite protection; and
- (b) mowing but not to the extent contended for by Christopher.

[118] Some of the issues which Christopher raised were present throughout his time living at the Moggill Property with William. It is possible that those issues may require work in the future in terms of the maintenance or upkeep of the house or residence, which will be a matter to be determined by the trustees at the time. Helen and Shona accepted that most of the issues would have to be considered, including:

- (a) the lack of ventilation for the shower (although the consequence may be that if it is not addressed, given the presence of termites, further damage to the house may occur which will require repair);
- (b) the apparent lack of fall in the levels with respect to the sewerage identified in the Goanna Plumbing Report. As Shona and Helen accept, it may be work that is necessary to carry out, although it may be in part due to root penetration. No evidence of cost has been provided. To the extent it may be included in the quote contained in Exhibit 15 there is a quote for \$6,985; and
- (c) an extended sewerage system and protective piping to go into an absorption trench for which the Express Plumbing quote was \$16,636.

[119] Some matters identified by Christopher may or may not reasonably require repair in the future as part of fair wear and tear but the evidence does not presently establish what needs to be done or what the reasonable cost of the work is. Those matters include:

- (a) painting the exterior of the house, in relation to which I accept Helen's evidence that painting was done in 2017 and there is no evidence suggesting it needs to

be done in the foreseeable future, but I refer to concessions made in relation to painting by the respondents above;

- (b) painting the interior of the house, save that there may be parts of the house which require it due to the termite damage, as is evident from Christopher's photos;
- (c) a hot water system;
- (d) carpets. While there may have been some water damage to part of the carpet as Christopher claims, I am not satisfied the evidence demonstrates that replacement is necessary;
- (e) wood rot under the house. I accept that there is some evidence of wood rot but there is no evidence that it is presently necessary to repair or fix it in order to maintain the house;
- (f) electrical wiring in the house, in relation to which I accept Helen's evidence as to work done and its state of repair at the time of William's death. The evidence does not suggest that the position is now different;
- (g) fencing, save in respect of the fencing agreed by Shona and Helen as needing to be done;
- (h) gal water line, in relation to which I accept Helen's evidence as to its condition at the time of William's death. The evidence does not suggest that the position is now different;
- (i) curtains, in relation to which I accept Helen's evidence as to their condition at the time of William's death. The evidence does not suggest that the position is now different;
- (j) the chimney, as to which I accept Helen's evidence as to its condition and use. The evidence does not suggest that the position is now different;
- (k) tree stump removal, as to which I accept Helen's evidence. The evidence does not suggest that the position is now different. In that regard, I do not accept that mowing cannot occur because of the tree roots or that tree stumps or trees need to be removed to effect any absorption trench;

- (l) brick wall repair and cleaning, as to which I accept Helen's evidence as to the work done and its condition. The evidence does not suggest that the position is now different;
- (m) cleaning or repair of the roof or garage roof, as to which I accept Helen's evidence. The evidence does not suggest that the position is now different.
- (n) the driveway. While I accept that Christopher (supported by Mr Galowski) has demonstrated there is cracking, there is nothing to suggest that it raises any issue which will necessarily need to be addressed in the future;
- (o) pool equipment;
- (p) new water softener; and
- (q) repair of sandstone around the pool, as to which I accept Helen's evidence and do not accept that Christopher's photos demonstrate any requirement for repair.

[120] Other matters which Christopher identified are matters which may require cleaning including the sandstone around the pool and the pool itself. He also raises that any mould in the house will require cleaning and that rubbish will need to be cleared. While I accept Christopher has physical limitations, the evidence does not demonstrate he is incapable of carrying out these matters and that provision needs to be made for that work to be done.

[121] The pool lights have been disconnected for some time, albeit it appears incorrectly, but there is no evidence that they are required to make adequate provision for the proper maintenance and support of Christopher.

[122] While William cleaned and maintained the pool, it appears that Christopher has at least been putting the pool chemicals in. While he claims he would have some difficulty in cleaning the pool, there is no medical evidence to bear that out. While adequate provision does require that the expenses for the purchase of the pool chemicals and salt continue, it does not extend to the cleaning of the pool. There is no evidence that repair or replacement of the pool equipment is reasonably required.

[123] There are a number of matters which Christopher no doubt would like to be done, such as double glazing to windows, outbuilding renovation, and installation of window and sliding doors and solar panels, but those matters are improvements and

there is no evidence suggesting they could be reasonably required for the maintenance or upkeep of the house or residence and are necessary to make adequate provision for proper maintenance. Christopher would also like a new shed if Unit 2 is provided for his benefit. That is not relevant to adequate provision or proper maintenance.

[124] I have reviewed all the quotes which Christopher provided in support of his application and in particular the over 200 pages of quotes attached to his affidavit affirmed 9 January 2020.⁵⁰ It is not possible based on the face of the quotes alone to conclude that the work referred to is reasonably necessary for the maintenance of the Moggill Property in a reasonable state nor that the quotes are reasonable.

[125] After the evidence had closed but before closing submissions, I allowed Christopher to admit a quote from Image Homes Queensland Pty Ltd for termite damage repairs and maintenance including replacement of the existing range stove and rangehood, washing machine and refrigerator. The quote also referred to the supply and fit of double doors to the pool shed, yard work, repairs to a green shed, replacement of a front fence, and installation of a new front gate. The total cost of those works was estimated at \$254,964.34.⁵¹ That amount was not itemised. Although the quote describes the job as “Termite damage repairs and maintenance”, it goes well beyond any work that could be connected to those matters, given it includes matters such as the provision for new kitchen appliances, three sliding timber doors, double doors for a pool shed, removal of the terrazzo floor, shaping the back yard so water is dispersed away from the house and changing the pitch on the roof, when there was no evidence to support the fact that these were reasonably necessary. The quote mixes all items so it is not possible, even if there was evidence suggesting that work may be reasonably required, to determine what costs relates to that work, let alone whether the quote is reasonable. Apart from the fact that the respondents did not have the opportunity to cross-examine anyone in relation to the invoice, it is of no weight in resolving the present issues as it stands.

[126] I also allowed Christopher to tender a quote from Murphy Plumbing and Gas for the replacement of sewer drainage, which included provision for the supply of four cubic metres of topsoil and use of an excavator to fill a large hole in back yard due to the

⁵⁰ Affidavit of Christopher Martin McDermott affirmed 9 January 2020 (CFI 10).

⁵¹ Exhibit 15.

danger it presents to ride-on lawn mowers. The total amount quoted was \$6,985.⁵² The quote appears to traverse the same work as the Goanna Plumbing Report, which deals with root penetration to pipework and as well as the fall of the underground pipe. It was conceded by the respondents' counsel that that penetration has occurred.

[127] In addition, Christopher was also permitted to tender quotes for the removal and stump grind of 14 trees, removal of three additional trees and pruning and stump grinding in the sum of \$13,500, with an alternative quote provided of \$10,224 for removing various trees and stump grinding.⁵³ The necessity for that work to be done was, again, not the subject of evidence. What the matters in Exhibit 15 demonstrate, save for the Murphy Plumbing and Gas quote, is that Christopher is engaging in a misconceived process of seeking to identify every possible thing in respect of the Moggill Property that he would wish to fix or change to restore the property to near new condition, not which could be described as necessary to provide adequate provision for his proper maintenance and support.

[128] There is a fundamental difficulty for Christopher in the way he has conducted the case, taking into account he was self-represented and doing the best he could. That is that he has not established what work is reasonably required and the reasonable cost of any such work. He sought in closing submissions to refer to matters he was told but that is simply hearsay and of no weight. Christopher has also acted upon a misconception that he was in a position to state what repairs are required and what would be sufficient, even though he lacks the relevant expertise. While there are reports that have been put in evidence, such as in relation to termites, they are limited and do not establish the connection between damage done or broken items, the need to fix it and the reasonable cost of doing so. While Christopher has gone to the trouble of obtaining many quotes, they do not establish either the relevant connection or the reasonable cost of the work to be done. In many cases the quote was for the work that in effect restored the property to a new condition not a reasonable state of repair.

⁵² Exhibit 15.

⁵³ Exhibit 15.

Christopher's personal expenses

- [129] William appeared to pay for expenses arising from day-to-day living at the Moggill Property such as electricity, rates, telephone and the internet. William occasionally met expenses associated with Christopher's computer. He also appeared to pay for some of Christopher's medical and dentistry expenses.⁵⁴
- [130] According to Christopher, William also paid for car registration and repairs of the 1997 Ford Laser that was in William's name. While Christopher was able to use that car, it was still William's car which he used.⁵⁵ William also bought some grocery items such as milk, vegemite, spaghetti, baked beans, oranges or bananas, orange juice and toilet paper.
- [131] According to Christopher, he used his pension to pay for petrol, study guides, his own food such as vitamins and minerals, legal books and some clothes. In closing submissions, he said he paid for 95 per cent of his food but William paid for 5 per cent and that was what he was seeking.⁵⁶ He stated he wanted to be in the same position as when William was alive.
- [132] In closing submissions, Christopher stated amongst other things that the amount that he thought he needed was around \$4,000 or \$5,000 to meet his car and personal expenses in addition to his pension.⁵⁷
- [133] Christopher was paid \$4,160 by the executors on 23 March 2019. Shona had calculated the amount based on \$160 per fortnight taking into account the limits of additional amounts that could be received with the pension. Christopher agreed with Mr Whiteford that there have been a number of expenses which he has had to pay since his father's death, which had been paid by his father before his death but are not being met by the estate. He stated he has been able to afford those expenses out of his own resources but was struggling.
- [134] Christopher also stated that he needed a cleaner once a month based on the fact that William had a cleaner, although he said that he cleaned the kitchen when William

⁵⁴ Although Christopher required physiotherapy after his car accident, there is no evidence that he suffers from any physical or psychological condition which requires any ongoing treatment.

⁵⁵ After he no longer practised.

⁵⁶ T4-61/15-20.

⁵⁷ T4-66/45-46.

was alive and does do at least some cleaning now, using toilet paper, and doing vacuuming. While Christopher talked about some difficulties in lifting things, and I accept he has some physical afflictions, the evidence does not bear out that Christopher is unable to do cleaning such that adequate provision for his proper maintenance should ensure he has a regular cleaner. The fact William employed a cleaner does not demonstrate that a cleaner is required for Christopher's proper maintenance and support.

[135] As stated above Christopher has provided a snapshot of evidence as to expenses he has incurred but they do not give any proper basis to determine with any precision an average annual amount of Christopher's expenses or the expenses paid by William. One potential yard stick of Christopher's expenses is to consider the amount which he received for the pension and the amount paid in respect of his expenses by the executors in 2018, and his pension and the amount paid to him in 2019, which given that he does not appear to have saved any amounts suggests he spends all the money he is paid. That characteristic of Christopher appeared to give rise to his father's concern which led him to structure his Will as he did. Using that approach as a rough guide, Christopher's expenses would in 2018 and 2019 have been between \$30,500 and \$31,100 respectively.⁵⁸ Helen's estimate of Christopher's expenses, which includes some significant medical expenses, was \$35,404 of which \$23,400 was for groceries, usual monthly expenses, credit card fees, SPER payments, psychology and personal items (rounded annually – est. \$900/fortnight). However, the difficulty is that little is known as to what Christopher was spending the amount she attributes to general expenses. No evidence was provided demonstrating what medical and dental costs Christopher may incur in the future or the present state of his health.

[136] While Christopher sought to set out detailed schedules showing his expenses,⁵⁹ which he had put a lot of work into setting out from various invoices he located, they do not provide a yard stick by which to measure his expenses as the expenses are set out in a piecemeal way. His expenses do not include any amount for matters such as holidays but nor according to Christopher's evidence was that something he enjoyed in recent years while living with his father as an adult. According to Shona's evidence,

⁵⁸ \$933.40 per fortnight plus \$4,160 (2019) and \$933.40 per fortnight plus \$5,404 (2018) with the figures rounded up.

⁵⁹ Exhibited to the Affidavit of Christopher Martin McDermott affirmed 7 August 2022 (CFI 38) and the Affidavit of Christopher Martin McDermott affirmed 7 August 2022 (CFI 39).

she and Helen agreed that they would pay Christopher \$160 per fortnight as an allowance.⁶⁰ While Helen made reference to an allowance of \$450 per week and to a supplement of \$150 per quarter to assist Christopher to meet his electricity account,⁶¹ she subsequently indicated that the reference to \$450 was a figure which she and Shona considered was the rental benefit he was receiving for living at the Moggill Property rent free. It would appear that she had calculated Christopher's allowance on the same basis as set out by Shona, given that she referred to Christopher being paid an allowance of \$4,160 as an annual sum, which is the equivalent of \$160 per fortnight.

[137] While Christopher provided an invoice for his electricity in the sum of \$1,123 for the period from 12 May 2022 to 15 August 2022, it was not evident what was the subject of that electricity usage or that it represents the average. It does appear extraordinary on its face rather than presenting an average, since his average daily usage well exceeded the average daily usage for one person in that area.⁶² More relevantly, it does not show that was reflective of his usual electricity bill.

[138] Christopher also contends that his motor vehicle expenses should be paid and that provision be made for the purchase of a new car. While William allowed Christopher to use his car, William's payment of the associated expenses flowed from the fact that he owned the car. According to Christopher, there is a bus close by which provides a regular service. In those circumstances, a wise and just testator would not have regarded it as his duty to pay for the car expenses in order to provide adequate and proper maintenance for Christopher. William has, as is set out above, provided for the trustee to pay a regular allowance to Christopher if the trustee exercises his or her discretion to do so. It appears from Christopher's evidence that he has been able to meet the costs of his car registration since William passed away.

Consideration

[139] There is no issue that Christopher has standing to make a family provision application.

⁶⁰ Affidavit of Shona Elizabeth McDermott sworn 5 February 2021 (CFI 16) as corrected in Shona's evidence-in-chief.

⁶¹ Affidavit of Helen Mary Chisolm Buchanan sworn 3 February 2021 (CFI 14).

⁶² Exhibit 3 to the Affidavit of Christopher Martin McDermott affirmed 26 August 2023 (CFI 44).

- [140] Christopher has limitations which would be considered by a wise and just testator in making provision for Christopher. It is uncontentious that Christopher suffers from some physical afflictions which limit his mobility and appear to cause him some pain. It also appears to be uncontentious that Christopher has some type of psychological condition which appears to affect his ability to be employed. It is apparent that he was not employed for many years and should be regarded as incapable of employment. There was otherwise no evidence identifying that psychological condition and the extent to which or how it affects Christopher. William certainly acted on the basis that Christopher was incapable of obtaining employment but would be supported by a disability pension and that he was incapable of managing money properly in terms of budgeting. Shona and Helen did not seek to suggest otherwise. While Christopher lived with his father for several years, there is no evidence that he cannot live independently and care for himself.
- [141] I find that at the time of William's death, the Moggill Property was in a reasonable state of repair having been maintained by William either himself or by contractors who did the mowing and yard maintenance.
- [142] The evidence suggests that Christopher did very little towards maintaining the Moggill Property. In closing submissions, Christopher claimed that he helped his father all the time at home. His evidence did not extend that far, with him identifying that he did odd jobs for William such as picking up things for the pool or delivering things for repair. While Christopher in closing also stated that he suggested his father buy Kenmore Medical Centre and he helped him clean the units out he again did not give evidence to that effect. But even accepting that to be the case, I do not find on the evidence before me that Christopher made any significant contribution to his father's estate.
- [143] Since William's death there has been some deterioration of the Moggill Property beyond normal wear and tear and maintenance issues. That has at least in part occurred as a result of white ant damage and in all likelihood by Christopher not doing much towards the everyday requirements of keeping a house such as cleaning.
- [144] At the time of William's death:

- (a) Christopher had been living rent free with William for some time, had the use of William's car, and had a level of financial dependence upon William;
- (b) the house was in a reasonable state of repair and in a habitable condition, having been maintained by William;
- (c) Christopher suffered from some psychological condition which William considered meant he was unable to obtain employment, which I accept to be the case;
- (d) Christopher was on the disability pension, which William considered would remain the case in the future;
- (e) William had a good relationship with all three of his children. William had supported Shona and her two sons over the years and had a close relationship with Helen and Robert, with whom he spent holidays and who provided assistance to him from time to time with maintaining the house such as cleaning the sandstone around the pool;
- (f) William assessed Christopher as not being capable of budgeting and managing money but otherwise capable of independent living. William wanted to make arrangements for Christopher's continued well-being;
- (g) William knew the costs of maintaining the Moggill Property and of the ageing nature of the property and that it would require ongoing maintenance and repair;
- (h) William knew that Christopher had little or no assets and was unlikely to generate any savings given he was not employable and at least from his point of view could not budget;
- (i) William had two other children, three grandchildren and a reasonably sized estate but not a large estate in terms of providing for the competing claims of his children; and
- (j) William carefully thought out how best to provide for each child and grandchild in his Will, including by providing for a trust to be established in Christopher's favour to provide for his needs.

- [145] William clearly knew that the Moggill Property was an ageing one and would require money to be spent to maintain it in a reasonable state of repair. What William did not know was that the Moggill Property may require substantial repair due to the recurrence of white ant damage, if that is in fact the case. There is no doubt that the house has been damaged by white ants. However, none of the evidence before me identifies what is reasonably required to repair the house to a reasonable condition. It is evident that what is required for Christopher's proper maintenance and support is quite different to what Christopher considers is needed. Christopher demonstrated throughout the case that he has some unrealistic expectations and wished to have repairs carried out to make the Moggill Property what he would ideally want it to be, not what was reasonably needed to ensure his proper maintenance in terms of the accommodation.
- [146] William was clearly conscious of Christopher's limitations and his lack of any assets. Proper maintenance and support of Christopher entails consideration of his health, that he has not been employed and is unemployable, that he lacks savings and his only income is a disability pension, and that he has an inability to budget and manage money, that he can live independently and care for himself, and that he does not have the means to enjoy stable accommodation.
- [147] By the terms of his Will, William shows that he was conscious to make proper provision for Christopher through accommodation, provision for payment of property expenses, and an allowance.
- [148] In considering the above, the Court must give due weight to the testamentary wishes of William. As was said in *Tanev v Tanevski* by Parker J:⁶³

“It must also be recognised that the Court is rarely in as good a position as the testator to assess and weigh the relevant factors. Thus, unless it appears that the testator was labouring under some unreasonable state of mind, or the circumstances which existed at the time of the hearing were not foreseeable by the testator, the Court should be reluctant to depart from an apparently reasonable judgment by the testator: *Slack v Rogan*; *Palffy v Rogan* [2013] NSWSC 522; (2013) 85 NSWLR 253 at 284–285 [127]; *Stott v Cook* (1960) 33 ALJR 447 at 453–454.”

⁶³ [2017] NSWSC 1301 at [158].

- [149] In the above circumstances, a wise and just testator would make adequate provision for Christopher to have accommodation and the means to stay in that accommodation by providing for the expenses of maintaining the Moggill Property, such as rates, taxes and insurance, for necessary repairs to be carried out from time to time, the mowing of the property, as well as some income to supplement Christopher's pension to accommodate his day-to-day expenses. The question is whether there is enough provision made.
- [150] Pursuant to the terms of the Will, real property estimated to be valued at \$1.521 million at the date of William's death and residue worth approximately \$16,000 were placed on trust for Christopher's benefit. That is approximately 50 per cent of William's estate at the date of his death available to be used for Christopher's benefit, although upon sale the proceeds of the Moggill Property would, after a property was purchased for Christopher's accommodation, be divided between Shona, Helen and the CMMTT.
- [151] The Will provides Christopher with rent free accommodation at the Moggill Property or at an alternative property purchased by the trustee if Christopher requests it or the trustee determines it appropriate.
- [152] While William's primary wish was that Christopher remain at the Moggill Property for as long as he wants, which must be taken into account by the trustee, he did consider that was an absolute position which would remain unchanged in the future. By the terms of his Will, William ensured that Christopher would have a home to live in, by providing he would live rent free at the Moggill Property and that that was to remain Christopher's home unless Christopher wished to sell it or the trustee deemed it appropriate.
- [153] The trustee must have regard to those wishes pursuant to cl 8(a) of the Will. Assistance to stay at the residence has been provided by providing for the net lease income derived from the lease of Unit 11 to be used by the trustees to pay all expenses associated with the maintenance and upkeep of the Moggill Property. As set out above, those expenses and charges are those which attach or pertain to the house and land and do not extend to costs of those matters which depend on personal consumption such as telephone, electricity and internet costs, notwithstanding the use of the phrase "but are not limited to". However, as discussed above, I consider that cl

8(a) does extend to the costs of maintaining the land at least in the area immediately adjacent to the house which is part of the residence and has such “costs associated with the upkeep of the residence”. This extends to matters such as mowing and other incidental costs required to maintain the area in the immediate surrounds of the house, although it would not generally extend to wider bush surrounds.

[154] The Will also provides for the trustee of the CMMTT to pay Christopher “a regular allowance ... for his use or benefit”. The clause does not equate to a provision to pay all of Christopher’s expenses given that:

- (a) it refers to an allowance, not to payment of all of Christopher’s expenses. The reference to allowance suggests that it is the payment to a person to meet needs or expenses but that it is for the person, in this case Christopher, to determine what those needs and expenses are;
- (b) the payment is provided subject to the exercise of the trustee’s discretion to distribute trust income rather than being obligated to do so to meet the allowance; and
- (c) the CMMTT was also to be used to pay the Moggill property expenses such that the amount of available income for an allowance will vary. Notwithstanding that cl 15 of the Will expressed William’s desire to preserve the capital.

[155] William clearly considered Christopher’s position in making provision for him to be an object of discretionary trust, the CMMTT. William set out his wishes in relation to how money should be applied for Christopher’s benefit to ensure his well-being. In creating a discretionary trust, the trustee has some flexibility in how monies are applied. Christopher is not the sole beneficiary, but any trustee must take account of William’s stated wishes. William provided an ongoing source for the trust by providing that Unit 11 was to become trust property of the CMMTT which would, assuming it continued to be leased, provide a constant income stream.

[156] As a beneficiary of a discretionary trust, Christopher only has the power to compel the trustee to exercise his discretion conferred by the trust instrument. However, a fixed interest trust may have jeopardised his pension. Conversely, it prevents

dissipation of the beneficiary's share of the estate consistent with William's concern that Christopher was unable to save money and budget.

- [157] Christopher raised the prospect of the trust becoming a fixed trust in his final oral submissions and contended that the Will should be read so that the profit received from Unit 2 and at least half of the profit of Unit 8 should become part of the CMMTT. As the respondents contend, he had plenty of time to agitate a case to remove the discretionary element of the trust prior to that. In any event, the creation of the discretionary trust is consistent with William's concern stated above that Christopher would waste money⁶⁴ and can only manage limited amounts. It is not a punishment of Christopher but rather reflects the understanding of a father who had lived with and supported Christopher for a number of years. No evidence was placed before the Court by Christopher countering that concern. The creation of the discretionary trust also recognises that Christopher's income is derived from a disability support pension, which was explicitly referred to by William in his Will, where an asset test applies. I am not satisfied that by providing for Christopher to be the object of a discretionary trust, the form of the Will does not make adequate provision for Christopher.
- [158] In assessing whether adequate provision has been made, the Court has regard to the financial needs of the person in question, including their financial resources. The adequacy of the provision is not to be determined simply by a calculation of financial needs. The background to any consideration of the applicant's needs requires determination of the size of the estate and the claims of others on the beneficence of the testator.⁶⁵
- [159] As to whether the amount provided in respect of Christopher is sufficient, there is provision for rent free accommodation (save if some identified circumstances in the Will arise) and an available income stream from Unit 11 of between \$25,000 and \$31,000 depending on the rental and expenses for Unit 11 to meet the designated costs and expenses of the Moggill Property and to provide him with an allowance. Christopher's pension was approximately \$24,268.40 per annum shortly after his father's death.

⁶⁴ Cf *Pizzino v Pizzino* [2010] QSC 35 at [68].

⁶⁵ *Chan v Chan* [2016] NSWCA 222 at [22].

- [160] On the figures used by William in his schedule, there was a surplus after expenses were paid from the estimated rent income of \$40,000 of approximately \$13,000. That of course is a rough estimate and not of great weight.
- [161] In an email said to have been sent to Christopher in March 2018, Helen gave an indication of expenses for the Moggill Property, which made reference to electricity, rates, water and taxes, but not fuel, health, mowing and maintenance, to be about \$26,358.⁶⁶ She stated that was not anything precise but a rough estimate. That does appear to be the case when regard is had to the expenses paid in 2018 and 2019 for the Moggill Property. It is of little weight.
- [162] Looking at the financial years following William's death, the rental income for Unit 11 in 2018 and 2019 was \$40,957 and \$40,643 respectively, which net after tax and expenses was an amount of \$31,967 and \$30,707 respectively.⁶⁷
- [163] The expenses paid for the Moggill Property totalled \$13,967.00 and \$13,658.00 in 2018 and 2019.⁶⁸ That indicates there was a balance for those years of \$17,160 and \$17,049 respectively. Some of those monies were used to pay some expenses on behalf of Christopher.
- [164] The estimated surplus after the payment of Moggill Property expenses for the period from 2018 to 2022 is estimated to be approximately \$77,200.⁶⁹ That demonstrates that there would be a surplus in the trust fund of the CMMTT to meet other significant expenses that may arise from time to time for the maintenance and upkeep of the Moggill Property, although not on the scale that Christopher proposes. It would be sufficient to meet costs the subject of the quotes that Christopher has obtained for air-conditioning, the plumbing work quoted by Murphy Plumbing and Gas, fencing and the absorption trenches, which are matters which the executors indicated were under consideration by them in the event they determined they were expenses properly incurred either as executors or trustees. There is a surplus which could meet additional costs, such as additional mowing, if the executors or trustees consider it is necessary.

⁶⁶ Exhibit 7 to the Affidavit of Christopher Martin McDermott affirmed 10 August 2022 (CFI 37).

⁶⁷ Exhibit HMCB-6 to the Affidavit of Helen Mary Chisholm Buchanan sworn 3 February 2021 (CFI 14).

⁶⁸ Exhibit HMCB-15 to the Affidavit of Helen Mary Chisholm Buchanan sworn 5 December 2019 (CFI 4) which appeared to include electricity and some car expenses

⁶⁹ Based on the table at [31] of the respondents' closing submissions.

Clearly it would not meet the cost of major renovations to the house such as those proposed by Christopher. Whether it would be sufficient to meet repairs for the termite damage depends on the work necessary to repair the damage which presently has not been identified and is not the subject of a specific quote.

[165] In 2019, Helen calculated the amount paid for the Moggill Property, with a dividend to Christopher of \$4,160⁷⁰ including paying for electricity, to be \$18,043.45.⁷¹ With that payment to Christopher and the payment of electricity that, would still leave a balance of \$12,664.

[166] As to the submission that all of the expenses paid by William should now be met through provision under the Will, Christopher deposed to his father having told him that everything would continue on after his death as it did when he was alive. That was not challenged. William's statement must also be seen in context, namely that William was also paying the costs and expenses relating to the Moggill Property as well as electricity, telephone and internet charges, groceries and a cleaner for his own benefit. William was not just paying those costs and expenses solely for Christopher's benefit. Christopher was able to share the benefit of that because he was living at home. William expressly stated his intentions in the Will. That is similarly the case in relation to his payment of expenses for the car which Christopher used but which has now been transferred to him by the executors. William clearly intended that Christopher be responsible for his own personal expenses in making provision for the trustee within his or her discretion to pay Christopher a regular allowance while ensuring he lived rent free and providing for the CMMTT to be able to meet the costs of maintaining the property and its upkeep including all the associated charges and taxes. William was also aware that his estate was finite and of his two daughters and grandchildren with competing claims, albeit that they are in a different position from Christopher and in a stronger financial position, without the particular needs that Christopher has which William recognised. However, William's relationship with both his daughters was also close. Shona also has some particular needs arising out of health issues and limited employment opportunities.

⁷⁰ Affidavit of Helen Mary Chisholm Buchanan sworn 3 February 2021 (CFI 14).

⁷¹ Exhibit HMCB-1 to the Affidavit of Helen Mary Chisholm Buchanan sworn 3 February 2021 (CFI 14).

- [167] Christopher has not established that adequate provision has not been made for his proper maintenance and support by the Will providing for him to be paid an allowance albeit within the discretion of the trustee. William's calculations and the fact that Christopher was able to survive with the additional amount of money paid to him of \$4,160 and expenses being met by the estate in 2019, albeit that he was struggling, indicate that adequate provision has been made for him.
- [168] That amount available for an allowance is, however, affected by the amount of costs and expenses which the trustee pays in respect of the different charges imposed in respect of the Moggill Property, namely the insurance premiums to preserve the property and the costs and expenses for its maintenance and upkeep.
- [169] William was familiar with what was required to maintain the Moggill Property as provided under his Will, given he had been living at the property, had paid for its expenses and had done his own calculations. He was also familiar with the ageing nature of some of the appliances and the house and with the nature of the lease income from unit 11 which could be variable. There has been a surplus of income available in each year since 2018 from the income of Unit 11 after the payment of Moggill Property expenses. The surplus is approximately \$77,200, which is some evidence which supports William's own workings in his 2017 spreadsheet that after payment of the expenses of Unit 11 and the Moggill Property, there would be monies that would remain available in the CMMTT for the costs of other repairs and maintenance work if needed as well as providing for an allowance for Christopher.
- [170] Christopher's concern that the house is ageing is not unreasonable. Clearly some repairs and maintenance will reasonably be required to ensure the house remains in reasonable condition as it was when William died. While that is primarily for Christopher's benefit while he is living there it is also of benefit to the respondents who are residuary beneficiaries.
- [171] No doubt repairs will need to be carried out to maintain the Moggill Property and provide for the upkeep of the house and surrounding yard. Provision is made for that under the Will to ensure the Moggill Property remained in a reasonable state of repair. Some things can be done over a period of time as funds become available.

[172] There are not, however, sufficient funds for an overall renovation and upgrade. Adequate provision for Christopher's proper maintenance and support does not require that Christopher be able to spend money to upgrade the Moggill Property to what he would like it to be as opposed to it providing reasonable accommodation. William's estate is not of a sufficient size to provide for large capital sums to be expended on repairs and renovations and to provide for competing claims on the estate.

[173] At the time of William's death, I find that the house on the Moggill Property was in a reasonable state of repair and at the time adequate for Christopher's proper maintenance and support. He had happily lived there for some years with William. Of course, matters will arise with a house, particularly one of significant age, which require money to spent as part of the maintenance and upkeep of the property. Christopher, however, has identified a multitude of matters which he contends need to be repaired, upgraded or changed. While he seemed to suggest that the list of matters was less than his list originally identified, a number of those matters having been discussed above and which are also summarised at paragraph 29(e) of the respondents' submissions, the quote he provided as part of Exhibit 15 still encompassed wide ranging work and upgrades being made to the house as I have addressed above. Some of those matters were addressed by the respondents as executors, some have been conceded as matters which will need to be done in the future, and some are matters of fair wear and tear which need to be addressed, but not to the scale proposed by Christopher through his quotes such as painting. Christopher has not satisfied the Court that at the date of William's death, adequate provision was not made for his proper maintenance and support given the state of the Moggill Property and the provision made under the Will.

[174] However, there is no contingency for extraordinary costs such as major repairs which may be required for termite damage or if the costs for the maintenance and property increase so there is no amount left for the income stream.

[175] It should not be assumed that the termite damage, although it appears extensive, is necessarily going to require large scale structural repairs. Certainly, there are matters which will need to be addressed to rectify the termite damage. That much can be seen through the photos taken by Christopher. However, there is no structural report or

even quotes which specifically identify the work that needs to be done by which the Court can determine what needs to be done to restore the house to a reasonable state of repair and that there will be insufficient funds to do so, even if some repairs need to be carried out over time.

[176] If, however, the costs well exceed the funds available in the CMMTT, that contingency has been provided for under the Will insofar as the Will provides for the trustee to be able to sell the Moggill Property if deemed appropriate and use the funds to buy alternative accommodation for Christopher. That would be difficult for Christopher and naturally that is not what Christopher wishes to occur. It would only be able to properly occur after the trustee took account of the relevant considerations set out in the Will, including Christopher's wishes, although the decision would be one for the trustee.

[177] While Christopher has an attachment to the Moggill Property and it holds many attractions for him, including the ability to see rainbows, William did provide a mechanism by which Christopher could still be assured of accommodation that makes adequate provision for his proper maintenance and support and ensures there are funds in the CMMTT to provide Christopher with an allowance. As was submitted by the respondents, Christopher's attachment to the property does not establish that he has needs which require him to live only at the Moggill Property. Nor is there evidence that a suitable alternative could not be found for Christopher which he may also enjoy. While he refers to needing a pool for physiotherapy exercises, there was no evidence supporting that and it may well be that alternative premises could have proximity to a pool or a pool within the complex. No doubt if this eventuality arises some sensitivity will be required.

[178] It may be that the trustees will not have sufficient funds to maintain the Moggill Property or to provide Christopher with a sufficient allowance even if they utilise all of the income of Unit 11. However, that does not satisfy Christopher establishing that adequate and proper provision has not been made for him under William's Will because there is provision for the Moggill Property to be sold and alternative accommodation to be purchased for Christopher with reduced expenses and for one-third of the surplus to be placed in the CMMTT.

- [179] I did consider whether, in the event of such a sale of the Moggill Property and purchase of alternative accommodation, adequate provision has not been made for Christopher's proper maintenance and support as there is no specific provision for payment of rates, levies and taxes to be paid by the trustee for the new accommodation. However, upon further consideration, such a provision is not necessary. In this event, the property purchased would be trust property and the trustee would still have a trust fund from the income for Unit 11 and one third of any surplus of sale proceeds after the purchase of the alternative accommodation. The trustee would therefore have the funds to meet those costs.
- [180] Christopher's proposal is that he be provided with the income from Unit 2, which is to be left to Helen, as well as half the income from Unit 8 which under the Will is to be gifted to Shona. Shona is unable to work full-time and has several medical conditions. Helen is younger, still able to work in the family business and in a better financial position than Shona but is also close to retirement age and also shared a strong relationship with William. While Christopher points out that work improving the Moggill Property will benefit Shona and Helen as well, given they are to each receive one third of the surplus proceeds after its sale and the purchase of alternative accommodation, the effect of Christopher's proposal is that Shona and Helen would be deprived of any benefit under the Will for Christopher's lifetime, unless the trustees determined to distribute some money held on the CMMTT in their favour. Christopher also seeks to exonerate some part of the estate from being sold by the executor or the trustees, namely the Moggill Property and Unit 11. For the reasons set out above, the provision for the sale of the Moggill Property is to ensure that if the trustee in his discretion considers it appropriate, he can sell the property but must purchase Christopher alternative accommodation. It may be that Unit 11 does not generate significant income as time goes on and it is not practicable for the trustee to retain it and only draw on the income. In those circumstances, it may be in Christopher's interest for the property to be sold and the proceeds placed in the CMMTT.
- [181] In formulating his Will, William acted as a wise and just father in making provision for Christopher's proper maintenance and advancement in life.

[182] In all of the circumstances, the evidence does not establish that adequate and proper provision has not been made for Christopher under the terms of the Will. The Court does not have jurisdiction to make further provision and the application should be dismissed.

Other matters

[183] A significant number of the arguments raised by Christopher in his closing submissions are irrelevant to the present application. As a result, I have not dealt with each and every argument raised where it is not relevant to do so. Dealing briefly with some of the arguments which Christopher raised:

- (a) there is no suggestion that Christopher lacks capacity or that William acted on that basis in formulating his Will;
- (b) if the coins were found they would form part of William's estate and are not "household chattels" for Christopher's use;
- (c) I do not find that the lack of termite inspections between William's death up until February 2021 formed part of any deliberate plan to sell the Moggill Property. The possibility of selling the Moggill Property is provided for in the Will and its sale would not constitute a change of Will. Nor would an order under s 41 of the *Succession Act* constitute a resettlement. It would arise as a result of a statutory right;
- (d) the storage of other people's possessions at the Moggill Property is not relevant to the present application. The present application is not for the sale of the Moggill Property but has been raised by the respondents in the context of the provision in the Will;
- (e) there is no evidence that Christopher has a medical condition which requires a swimming pool;
- (f) the money in the estate's bank account contains rent for the properties left to Shona and Helen. It belongs to the devisees of those properties and is not part of the residue of the estate;⁷²

⁷² *O'Brien v McCormick* [2005] NSWSC 619 at [38]–[39].

- (g) the first stage of the two-stage inquiry in Queensland involves determining whether the Court has jurisdiction to hear the application as at the date of death of the deceased. The second question is to be determined upon the circumstances as at the date of trial;⁷³
- (h) section 41(2)(c) of the *Succession Act* refers to disentitling conduct of the applicant for family provision and does not apply to the respondents. The respondents are not seeking an order in their favour but merely an order that upholds the Will;
- (i) Christopher's wishes and his father's wishes that Christopher live at the Moggill Property are matters which are part of the consideration of the application. They are not the only considerations in terms of whether adequate provision has been made for Christopher's proper maintenance. There is no medical evidence supporting any health reasons requiring Christopher to live at the Moggill Property. There is no evidence about alternative accommodation to draw the comparisons which Christopher seeks to make with the Moggill Property; and
- (j) based on the reasonable expenses and providing for an allowance for Christopher, there remains some surplus for contingencies to replace some ageing items such as a household appliance. The white ant damage in the way that it has occurred was not reasonably foreseeable by William and a contingency that a wise and just testator would have provided for after there had been treatment for white ants in 2016.

Orders

[184] In the circumstances the appropriate orders are:

- (a) the proceedings are dismissed;

⁷³ While the Court of Appeal in *Hartley v Hartley* [2022] QCA 96 referred to the decision of Mullins J (as her Honour then was) in *Pizzino v Pizzino & Anor* [2010] QSC 35, where her Honour referred to the two-stage process which is accepted as the proper approach to adopt, it was by reference to the High Court case of *Singer v Berghouse* (1994) 181 CLR 201 which originated in New South Wales not Queensland such that s 9(2) of the *Family Provision Act 1982* (NSW) applied. Mullins J in *Pizzino v Pizzino & Anor* [2010] QSC 35 at [61] determined the question of jurisdiction as at the date of the deceased's death.

- (b) the parties make any submissions as to costs, limited to three pages, within 28 days.