

Not Restricted

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TESTATORS FAMILY MAINTENANCE LIST

S CI 2018 02204

IN THE MATTER of the estate of CARL ALBERT JOHN SCHLINK (also known as CARL JACKSON), deceased

-and-

IN THE MATTER of Part IV of the *Administration and Probate Act 1958*

LEE ANNE KEANE Plaintiff

v Defendant

LOIS ALDA CORNS (who is sued in her capacity as the executor of the estate of the abovenamed deceased)

JUDGE: McMillan J
WHERE HELD: Melbourne
DATE OF HEARING: 19 February 2020
DATE OF JUDGMENT: 15 April 2020
CASE MAY BE CITED AS: Re Schlink; Keane v Corns
MEDIUM NEUTRAL CITATION: [2020] VSC 180

FAMILY PROVISION – Application for further provision by adult daughter of deceased – Where moral obligation to plaintiff conceded – Deceased bequeathed legacy of \$50,000 to plaintiff – Residuary estate left to defendant – Whether deceased satisfied his moral obligation to the plaintiff – Whether further provision to the plaintiff appropriate – Relief sought in the form of a *Crisp* order – *Administration and Probate Act 1958* (Vic) ss 91, 91A.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr JD Catlin	Armstrong Legal
For the Defendant	Mr RC Wells	Jansen, Walsh & Grace

HER HONOUR:

Introduction

- 1 Carl Albert John Schlink died on 24 August 2017. He is survived by his adult daughter ('the plaintiff') and his partner of some 20 years ('the defendant').
- 2 Probate of the deceased's will dated 16 June 2016 was granted to the defendant on 13 December 2017. Pursuant to the will, the deceased bequeathed a legacy of \$50,000 to the plaintiff and left the residue of his estate to the defendant.
- 3 The value of the estate is modest. It comprises the deceased's real property at Landscape Drive, Boronia ('the Landscape Drive property') and a share portfolio, valued in the inventory of assets filed for the grant of probate at \$585,000 and \$110,326.58 respectively.
- 4 At trial, the share portfolio was valued at \$118,303.53. The value of the Landscape Drive property was in dispute, with the plaintiff's valuation between \$780,000 and \$840,000 and the defendant's valuation between \$650,000 and \$715,000.

Plaintiff's application

- 5 By originating motion filed 12 June 2018, the plaintiff seeks further provision from the estate pursuant to Part IV of the *Administration and Probate Act 1958* ('the Act').
- 6 In final submissions, the plaintiff sought further provision as follows:
 - (a) from the sale of the Landscape Drive property, a lump sum payment initially stated at between 30 to 50 per cent of the net value of the estate, and in final submissions at 35 per cent, plus payment of her costs; or
 - (b) deferred provision in the form of a freehold interest in the Landscape Drive property, subject to a life interest in the property in favour of the defendant.

Defendant's position

7 The defendant submitted that the provision of the \$50,000 legacy to the plaintiff discharged any moral obligation of the deceased to make adequate provision for her proper maintenance and support. This was on the basis of the limited size of the estate, the nature of the estate assets, the strength of the defendant's competing claim, the deceased's wish to provide financial security to his long-term partner in the form of a freehold interest in the Landscape Drive property and that the plaintiff's needs primarily relate to her providing for her two children.

8 In regard to the children, the defendant submitted that their father is the person primarily responsible for them. He pays child support to the plaintiff and contributes to the school fees of the children. One of the children also receives financial support through the National Disability Insurance Scheme ('NDIS'). The defendant submitted that, having regard to all of these matters, it was unlikely that the needs of the children would not be able to be met in the future.

Background

9 The deceased was born on 9 September 1945. He married the plaintiff's mother in 1970. The plaintiff was born on 5 September 1972, and is now aged 47 years. The deceased and his wife separated before the birth of the plaintiff. They divorced in 1978. Upon their separation the deceased's wife moved to Albury. The deceased remained living in Melbourne.

10 At the commencement of the trial, it was suggested by the plaintiff's counsel that the deceased had another child with whom he had no relationship. A second child of the deceased was not mentioned in any of the evidence filed in the proceeding.

11 Despite living in separate states, the plaintiff and the deceased maintained regular contact by telephone and in person. Between 1988 and 1997, the plaintiff resided with the deceased from time to time. Throughout that period the plaintiff also spent time living in Gosford in New South Wales; Margaret River in Western Australia; South Yarra in Victoria; and in Trinidad and Tobago. In 1998, the plaintiff returned

to live in New South Wales. She currently resides in Lismore.

- 12 In September 1992, the deceased purchased the Landscape Drive property, having sold his property in North Blackburn.
- 13 In 1995, the defendant met the deceased through an internet chat room. At that time, the defendant lived in Canada. In January 1998, the defendant emigrated to Australia and lived with the deceased at the Landscape Drive property. From that point onwards, the defendant and the deceased pooled their assets in a single bank account from which they paid the mortgage over the Landscape Drive property, bills and other living expenses, and made investments. The defendant and the deceased remained in the relationship until the deceased's death in August 2017.
- 14 In 2000, the plaintiff married Kim Keane. They separated at first in 2006, then reunited and separated permanently in 2009. They have two children: Levi, born in 2008, and Sierra, born in 2012. Levi and Sierra are now aged 12 and 8 years respectively.
- 15 Following her separation from Mr Keane, the plaintiff moved into a unit in Lismore. Around that time, the deceased provided some minimal financial assistance to the plaintiff in the form of clothing, groceries, cleaning supplies, and car tyres.
- 16 After the birth of Levi in 2008, the plaintiff stayed with the deceased and the defendant for four days. Although she maintained telephone contact with the deceased, the next time the plaintiff saw the deceased in person was some eight years later, in 2016, after the defendant informed her of the deceased's serious illness and his diagnosis with bowel cancer.
- 17 Between 2016 and 2017, the plaintiff made a number of trips to Melbourne to visit the deceased. Her evidence was that she borrowed money from her mother and grandmother to make the trips. On 21 July 2017, the deceased entered respite care and died on 24 August 2017.

Evidence

- 18 The plaintiff relied on her two affidavits, sworn 3 August 2018 and 13 February 2020, and gave evidence at trial.
- 19 The defendant relied on two affidavits, affirmed 30 November 2018 and 4 July 2019, and also gave evidence at trial. The defendant also relied on an affidavit of her neighbour, Lisa Marie Whitelaw, affirmed 24 October 2019, and an expert report of Dr Robin Filshie, a haematologist at St Vincent's Hospital, Melbourne, dated 24 October 2019.
- 20 Ms Whitelaw deposed to her relationship with the defendant and the deceased over many years, and that she observed the plaintiff visiting her father and the defendant when his illness 'became dire'.
- 21 Dr Filshie's report detailed the care and treatment of the defendant since her diagnosis of Diffuse Large B cell lymphoma in February 2018. The background to the report being filed was that, at the time the proceeding was set down for trial, the plaintiff sought an order that the defendant file a medical report setting out the state of her health. The basis for this appeared to be that, if the defendant's death was imminent, then she would have less need for the estate assets and greater provision could be made for the plaintiff. No orders were made by the Court. Subsequently, the defendant filed Dr Filshie's report to the effect that the defendant's treatment for lymphoma had been effective and she was in complete remission.

Plaintiff's financial position

- 22 The plaintiff owns her home in Lismore, which she valued at approximately \$400,000 and described as being in poor condition. Her other assets comprise savings of approximately \$200, a motor vehicle valued at approximately \$8,000 and other chattels valued at approximately \$5,000. The plaintiff also has superannuation entitlements of \$26,631.92.
- 23 The plaintiff's liabilities total approximately \$111,839.87. Of that amount, the sum of \$82,422.40 is owed by way of mortgage secured on her home. She has other

outstanding liabilities including council rates, utility bills, school fees and personal loans of \$4,200 from her mother and of \$5,195 from her grandmother.

24 At the date of trial, the plaintiff was not working in paid employment. In the past, she worked as a secretary in a law firm, but was made redundant sometime in 2019. She has been diagnosed with agoraphobia, panic attacks, major depressive disorder and severe anxiety as set out in a Centrelink medical certificate dated 21 October 2019. A report from the plaintiff's medical practitioner was not tendered as evidence. Although the plaintiff said she made some effort to re-enter the work force, she maintained that her diagnosis impacted on her ability to find work.

25 The plaintiff's weekly income is \$538.05 comprising the family tax benefit of \$172.98 and child support payments of \$365.07. She said that if her income increased, whether by employment or government assistance through the Newstart allowance or a disability pension, her child support payments would reduce. It was unclear whether any such reduction would result in a net increase or decrease in her weekly income.

26 The plaintiff's weekly expenses as listed below total \$658, leaving a deficiency between her weekly income and expenses of \$119.95:

Expense	Amount (\$)
Mortgage repayments	150
Food / groceries	200
Telephone / internet	40
Fuel	40
Vehicle repairs / servicing	25
Council rates	46
Water bills	16
Electricity bills	29
Motor vehicle insurance	14
Clothing and shoes	17
School expenses and fees	58
Medical expenses	8
Pharmaceutical expenses	15
Total	658

27 Levi suffers from level 2 Autism Spectrum Disorder, Oppositional Defiance Disorder, Attention Deficit Hyperactivity Disorder and anxiety. The plaintiff said

that these conditions gave rise to significant health care needs, which were not currently met as a result of her financial position. Counsel for the plaintiff initially stated that no funding from the NDIS was available to Levi, however, in cross-examination the plaintiff's evidence was that such support was received in the amount of \$14,000 in 2018, \$9,000 in 2019 and she expects to receive \$7,000 for the coming year. These amounts were not referred to by the plaintiff in her affidavits. The funds from the NDIS are paid directly to the service providers, rather than to the plaintiff. The plaintiff said that she does not receive additional support from Levi's father to assist with managing Levi's disabilities.

28 In her affidavit sworn 13 February 2020, the plaintiff exhibited an occupational therapy functional capacity report by Ms Jessica Doyle dated 21 November 2019. Ms Doyle detailed Levi's treatment needs and indicated that he required additional and ongoing psychological support, occupational therapy, speech and language support, and intensive psychological intervention. Ms Doyle provided no detail of the likely cost of those services or whether such support might be funded by the NDIS. Ms Doyle did not give viva voce evidence at trial, and the plaintiff did not provide any further evidence on those topics. Ms Doyle did not refer to the expert code of conduct in making her report. In the circumstances, little or no weight can be given to her views.

Applicable principles and legislation

29 Pursuant to s 91(2) of the Act, the Court must not make a family provision order under s 91(1) unless it is satisfied that:

- (a) an applicant is an eligible person;
- (b) in the case of certain types of 'eligible person', that the person was wholly or partly dependant on the deceased for their proper maintenance and support;
- (c) at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support; and

- (d) the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person.

30 The dispute between the parties is whether the legacy of \$50,000 to the plaintiff fails to make adequate provision for the plaintiff's proper maintenance and support and, if so, what would constitute adequate provision. There is inevitable overlap between those two stages of analysis. It was said of this overlap by the High Court in *Singer v Berghouse*:

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.¹

31 Adequacy of current provision is determined by reference to matters that were known, ought to have been known, or were reasonably foreseeable to the deceased at the time of death.² By contrast, the Court's discretion in determining the quantum of further provision is exercised by reference to the parties' circumstances at the time of trial.³ The plaintiff bears the onus of proving the extent of any provision that should be granted to an applicant for provision.⁴

32 The determination of what provision should be made for the plaintiff, in light of all the relevant circumstances, must be answered by reference to the touchstone of a wise and just testator. The Court must place itself in the position of such a testator and consider what he or she ought to have done in all the circumstances of the case.⁵ The Court must be mindful to interfere with the terms of a will only where a testator has failed in his or her moral duty.⁶

¹ (1994) 181 CLR 201, 210 (Mason CJ, Deane and McHugh JJ).

² *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494, 507–8 (Dixon CJ).

³ See, eg, *Blore v Lang* (1960) 104 CLR 124, 130 (Dixon CJ); *Prosser v Twiss* [1970] VR 225, 232 (Lush J); *Slack v Rogan* (2013) 85 NSWLR 253, 285 [127] (White J).

⁴ *Ibid.*

⁵ *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 478–9 (Lord Romer), citing *Re Allardice* [1911] AC 730, and cited in *Grey v Harrison* [1997] 2 VR 359, 364–5 (Callaway JA); *Collicot v McMillan* [1999] 3 VR 803, 818–20 [43]–[45] (Ormiston J).

⁶ *Forsyth v Sinclair* [2010] VSCA 147, [60] (Neave JA, Habersberger JA agreeing); *Lee v Hearn* (2005) 11 VR 270, 273–4 [6] (Callaway JA); *Grey v Harrison* (n 6) 365 (Callaway JA, Tadgell and Charles JJA).

33 Pursuant to ss 91(4)(a) and (b) of the Act, in determining the quantum of any provision, the Court must take into account the degree to which, at the time of death, the deceased had a moral duty to provide for an applicant, and the degree to which the distribution of the estate fails to make adequate provision for the proper maintenance and support of that applicant. In the case of adult children who do not suffer from a disability, the Court must also consider the extent to which they are not capable by reasonable means of providing for their own proper maintenance and support.⁷

34 In making a family provision order, s 91A(1) provides that the Court must have regard to:

- (a) the deceased's will, if any;
- (b) any evidence of the deceased's reasons for making the dispositions in the will; and
- (c) any other evidence of the deceased's intentions in relation to providing for the eligible person.

35 Section 91A(2) of the Act provides that the Court may also take into account:

- (a) the relationship between the deceased and the eligible person, including, if relevant, the nature and length of the relationship;
- (b) any obligations or responsibilities of the deceased to the eligible person, any other eligible person, and the estate's beneficiaries;
- (c) the size and nature of the estate;
- (d) the current and foreseeable future financial resources, including earning capacity and financial needs, of the eligible person, any other eligible person and any beneficiary;

agreeing).

⁷ *Administration and Probate Act 1958* (Vic), s 91(4)(c).

- (e) any physical, mental or intellectual disability of any eligible person or any beneficiary;
- (f) the age of the eligible person;
- (g) any contribution of the eligible person, otherwise than for adequate consideration, to building up the estate or to the welfare of the deceased or the deceased's family;
- (h) any previous benefits provided to the eligible person or any beneficiary;
- (i) whether the eligible person was being wholly or partly maintained by the deceased, and if so, the extent and basis of such maintenance;
- (j) the liability of any other person to maintain the eligible person;
- (k) the character and conduct of the eligible person or any other person;
- (l) the effect that a family provision order would have on the amounts received from the deceased's estate by other beneficiaries; and
- (m) any other matter the Court considers relevant.

36 In relation to all claims, pursuant to s 91(5)(a) of the Act, the amount of provision must not provide for an amount greater than is necessary for an applicant's proper maintenance and support.

37 In determining whether the deceased has fulfilled his or her moral duty, and the extent of any provision, the Court must have regard to the relative concepts of 'adequate' and 'proper'. Adequacy is assessed by reference to the Court's inherent knowledge and inquiry into current social conditions and standards.⁸ In this context, it is necessary that an applicant demonstrate need in order to be successful

⁸ See, eg, *Goodman v Windeyer* (1980) 144 CLR 490, 501–2 (Gibbs J); *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ). See generally, GE Dal Pont and KF Mackie, *Law of Succession*, (LexisNexis Butterworths, 2nd ed, 2017) 607 [17.86].

in his or her claim; mere proof of a moral duty is not in itself adequate.⁹ However, an applicant is not required to show that his or her circumstances are destitute and, as such, the need is 'not restricted to the requirements of basic necessity or sustenance.'¹⁰

38 The nature and content of what is adequate provision is a flexible concept, and involves a broad evaluative judgment not constrained by preconceptions and predispositions.¹¹ Relevant constraints or limiting factors may be that further provision should be made only if, and to the extent that, it is necessary to alter the will to make adequate provision for an applicant's proper maintenance and support,¹² or that any further provision must be limited by balancing the needs of an applicant against the proper claims that a testator recognised needed to be satisfied out of his or her estate.

39 Where there are competing claims, the Court's enquiry necessarily involves a balancing exercise between the claims of other beneficiaries, the needs of an applicant and the size of the estate.¹³ The appropriateness of proposed solutions depends on all the facts and circumstances of the case, including the moral obligation owed by the testator to an applicant for provision.

40 When considering a small estate, it may be necessary for the Court to give greater weight to some claims over others. In *Salloum v Assouni*, the Court stated:

Although the value of the estate is relatively small, consisting in effect of one asset only, the Court is still required to consider all the relevant circumstances before a decision is made - there is no 'bottom limit' on the application of the Act. The smallness of the estate is significant in that, in some circumstances, not all of the claims against the estate can be met. In such a case, the Court necessarily should give weight to the paramount claim.¹⁴

⁹ *MacEwan Shaw v Shaw* (2003) 11 VR 95, 104 [50] (Dodds-Streton J).

¹⁰ *Ball v Newey* (1988) 13 NSWLR 489, 492 (Samuels JA).

¹¹ See, eg, *Camernik v Reholc* [2012] NSWSC 1537, [154] (Hallen J); *Slack v Rogan* (2013) 85 NSWLR 253, 284 [125]-[126] (White J), interpreting the similar legislative regime in New South Wales under s 59 of the *Succession Act 2006* (NSW).

¹² *Grey v Harrison* (n 6), 366 (Callaway JA, Tadgell and Charles JJA agreeing).

¹³ *Ibid* 366-7 (Callaway JA, Tadgell and Charles JJA agreeing); *Friend v Brien* [2014] NSWSC 613, [59] (White J).

¹⁴ [2013] VSC 591, [26], citing *Re Clayton* [966] 2 All ER 370, 371-2 (Ungoed-Thomas J) and *Cropley v*

41 Where the competing claims are those of the deceased's children by their first marriage and of their second spouse, the Courts have recognised that the paramount claim is generally that of the spouse. In *McKenzie v Topp*,¹⁵ Nettle J (as his Honour then was) considered whether there was any responsibility upon a step-parent to provide for step-children, where the entirety of the other parent's estate was left to the spouse. His Honour observed:

[I]t appears to me that the proposition should be accepted, up to a point. For just as community attitudes are the touchstone of adequate provision, so too are they the criterion of responsibility to provide. *Other things being equal, right thinking members of society are likely to accept that the needs of the widow of a second marriage should rank in priority ahead of the claims of the children of a first marriage; although of course it is always a question of fact.* But equally, upon the death of the widow, and as it were in the event of a surplus, most would surely say that the children of the first marriage should rank for their fair share. For once the widow is gone, and therefore no longer in need of provision, her needs no longer warrant that the children rank behind her or thus her chosen successors.¹⁶

42 His Honour also recognised that community standards may prefer that the assets of the deceased revert to their children upon their death:

That said, the point of principle for present purposes is one of modest proportions. If children of a first marriage have stood aside in order that their father might make adequate provision for the widow of a second marriage, and upon her death there are assets in her estate, the amount left by their father to the widow maybe relevant to the question of whether she is responsible to provide for them.¹⁷

Consideration of legislative requirements

Factors that must be taken into account in making a family provision order: s 91A(1) of the Act

43 By his will the deceased provided for both the plaintiff and the defendant. The deceased's intention was to provide primarily for the defendant. He bequeathed a legacy of \$50,000 to the plaintiff and provided that the residue of the estate be paid to the defendant. By providing the residue of his estate to the defendant, the

Cropley [2002] NSWSC 349, [56] (Barrett J).

¹⁵ [2004] VSC 90.

¹⁶ *Ibid* [58] (emphasis added).

¹⁷ *Ibid* [60].

deceased ensured that the defendant had the security of the Landscape Drive property and a small amount of money as a nest egg. The plaintiff did not suggest that the deceased did not intend to benefit the defendant, however, the relief sought by the plaintiff of a lump sum payment after the sale of the Landscape Drive property fails to recognise the deceased's intention to provide a secure home for the defendant. The alternative relief sought by the plaintiff, that the defendant have a life interest in Landscape Drive property, does recognise in part the deceased's intentions but it fails to provide the defendant with independent financial security.

44 The deceased's will provided that, in the event that the defendant did not survive him by 30 days, the estate would be distributed by the payment of two legacies of \$100,000 each and the residue paid to the plaintiff. This provision recognised that the two legatees and the plaintiff were the next most important objects of the deceased's testamentary bounty.

45 There was no other evidence of the deceased's testamentary intentions in relation to the plaintiff.

Factors that may be taken into account in making a family provision order: s 91A(2) of the Act

(a) the nature of the relationship, including the length of the relationship

46 The relationship between the plaintiff and the deceased traversed the entirety of the plaintiff's life. There were lengthy periods in which communication between them was sparse, as well as periods in which the plaintiff and the deceased resided together. The plaintiff did not visit the deceased at all between 2008 and 2016. There appeared to be limited telephone communications throughout that time. Some arguments arose between the plaintiff and the deceased over the telephone, however, the arguments appear to fall within the realm of disputes that might be expected to arise between a parent and child from time to time. The deceased appeared to have limited personal contact with the plaintiff's two children over the years. On balance, the relationship between the plaintiff and the deceased was not particularly close and, although they resided together for a time when the plaintiff

was in her early twenties, they grew apart over the years and their contact was primarily over the telephone.

(b) any obligations or responsibilities of the deceased to the eligible person, any other eligible person and the beneficiaries

47 The plaintiff is the deceased's only child with whom he had any meaningful relationship. The defendant is the deceased's former partner of almost twenty years. The deceased had a moral obligation to provide for both of them. They are the only beneficiaries to the deceased's estate.

(c) the size and nature of the estate

48 The parties agree that the value of the share portfolio at the date of death was \$110,326.58 and has since increased to \$118,303.53 as at 18 February 2020.

49 There is disagreement as to the value of the principal asset of the estate, the Landscape Drive property. The defendant valued the Landscape Drive property in the inventory of assets at \$585,000. At trial, the defendant relied on an appraisal by Ray White Ferntree Gully dated 3 June 2018, which valued the property at between \$650,000 and \$715,000 and noted that a purchaser would need to undertake renovations to the property. The defendant deposed that the Landscape Drive property required significant repairs and future modifications to allow her to continue to reside in it, with those repairs and modifications quoted at approximately \$176,000.

50 The plaintiff relied on an appraisal dated 28 July 2018, obtained by her solicitor from agents who did not view or inspect the property and relied instead on online sales data for their appraisal. These agents were located in Glenroy, an area that is far away from the vicinity of the property. The appraisal of the Glenroy agents valued the property between \$780,000 and \$840,000.

51 The quantitative difference between the appraisals is stark, with \$130,000 at the lower value and \$125,000 at the higher value. In assessing the likely value of the Landscape Drive property, little weight can be placed on the plaintiff's appraisal

given that it was based on online sales data and without an inspection to ascertain the condition and state of repair of the property. The property is in need of repair and renovation. The defendant's appraisal by the local agents is to be preferred as they have experience and knowledge of the real estate in the area and knowledge of the condition of the property.

52 The paid and unpaid liabilities of the estate amount to \$81,260.50. The liabilities principally comprise estate expenses and legal fees of the proceeding. The liabilities have been funded by a loan from the defendant of \$86,626. In addition, the legacy of \$50,000 to the plaintiff is yet to be paid. This means that the net value of the estate after payment of the legacy of \$50,000 and the loan of \$86,626 will be between approximately \$631,000 and \$696,000. Since these figures were provided, further liabilities for legal costs will have been incurred by the estate.

(d) the current and future financial resources, earning capacity and financial needs of the eligible person and any beneficiary

53 The plaintiff's financial resources are set out at [22] to [28] above.

54 The plaintiff's financial position is not as severe or dire as alleged by her. Her mortgage repayment of \$150 per week exceeds her minimum mortgage payments by \$20 or \$30 per week. Her reason for making the higher repayment was that it provided her with security in the event that she becomes unable to make the repayments in the future. If the plaintiff reduced her weekly mortgage payment to the minimum and applied the \$20 or \$30 each week to her weekly expenses, her expenses would reduce by that amount without her mortgage falling into arrears. Further, if she applied her legacy of \$50,000 to reduce the amount of her mortgage currently at \$82,422.40, the remaining debt would be reduced to \$32,422.40 and her minimum repayments would reduce accordingly to approximately \$49 per week. On this basis, the plaintiff would have an extra \$100 per week for her other expenses and her alleged weekly deficit would be virtually met in full. On these figures, the plaintiff's shortfall between income and expenses would fall to approximately \$19.95 per week which could be made up through employment or government support

income.

55 The plaintiff accepted that if she applied the legacy of \$50,000 towards reducing the amount of her mortgage, she would have a weekly shortfall between income and expenses of approximately \$20, but she did not accept that the shortfall could be made up through employment or government support income.

56 The evidence did not disclose whether the plaintiff was employed at the date of the deceased's death. The pay slips exhibited to her first affidavit indicated that, when she was employed, her fortnightly wages were between \$508 and \$719, depending upon on the number of hours worked. At trial, the plaintiff was unemployed. She is not presently receiving any Newstart allowance or other Centrelink benefits or any disability pension. In cross-examination she said she had applied for a Newstart allowance but her application was rejected and she needs a medical clearance to be able to return to work. In due course, it is likely that the plaintiff will receive income from either employment, the Newstart allowance or disability payments if she remains ineligible for the Newstart allowance on the basis that she is medically unfit to work.

57 Although the plaintiff said that any increase in her income would result in a decrease in the child support payments received from Mr Keane, no evidence was provided as to whether her net income would decrease.

58 The plaintiff also said that neither she nor the Court could rely upon further support from her former husband, who is nearing retirement age and does not currently support Levi's special needs beyond his contribution to school fees and child support payments. Mr Keane did not provide any evidence in the proceeding. In cross-examination, the plaintiff said that Mr Keane was retired and had been the manager of the family plumbing business called 'Eagle Plumbing Supplies', which operates around eight stores. She also agreed that he complied with his child support obligations, that he has regular contact with the children once a fortnight, sometimes once a week and that he adores the children.

59 The plaintiff claimed that she owes sums totalling \$5,195 to her grandmother and \$4,200 to her mother. No documentation for the alleged loans was produced, and no details, such as the date by which the plaintiff is required to repay those sums, were provided by the plaintiff. On balance, it may be inferred that these alleged loans are informal arrangements without any legal obligation on the part of the plaintiff to repay the money.

Defendant's financial position

60 The defendant's weekly living expenses total \$738 per week. The defendant's only significant asset is a self-managed superannuation fund of which she and the deceased were members. The current assets of that fund are shares valued at \$305,184.49 and cash of \$149,988.81. The defendant also maintains personal bank accounts with a net credit balance of approximately \$25,000.

61 The defendant no longer works and she remains a Canadian citizen. As such, she is not eligible to receive any Australian age or other pension. She receives a Canadian pension annually of CAD8,016.48.

62 The defendant has advanced the amount of \$86,626.00 by way of a loan to the estate in order to pay the estate liabilities of \$81,260.50 comprising principally legal costs of the proceeding.

63 The defendant is likely to incur significant expenses for the repairs and modifications to be made to the Landscape Drive property, currently quoted at \$176,288.80. If the defendant sold the Landscape Drive property, she would incur costs in selling the property and further costs if she purchased a substitute property.

(e) any physical, mental or intellectual disability of any eligible person or any beneficiary

64 The plaintiff stated that she suffers from anxiety and depression, which has affected her ability to find work. The plaintiff does not currently receive any government benefit in recognition of her mental health conditions.

65 The defendant is aged 73 years and is in complete remission from her diagnosis of

Diffuse Large B cell lymphoma.

(f) the age of the eligible person

66 The plaintiff is 47 years old.

(g) any contributions of the eligible person, otherwise than for adequate consideration, to building up the estate or to the welfare of the deceased or the deceased's family

67 The plaintiff did not make any contribution to building up the deceased's estate or to the welfare of the deceased.

(h) any previous benefits to the eligible person or any beneficiary

68 The deceased assisted the plaintiff from time to time in her younger years with minor purchases, such as clothes, groceries and some household expenses. Otherwise, no material benefits were received by the plaintiff from the deceased during his lifetime.

69 The defendant resided with the deceased for almost twenty years at the Landscape Drive property. At the time of the defendant's emigration to Australia, the deceased still owed money by way of mortgage on the Landscape Drive property and he was unemployed. The deceased subsequently found employment.

70 The defendant worked for the whole of their relationship. The defendant and the deceased paid their earnings over the years into one bank account and from that account, they paid their joint living expenses, including mortgage payments and share purchases.

(i) whether the eligible person was being wholly or partly maintained by the deceased, and if so, the extent and basis of such maintenance

71 Save for the limited financial support provided to the plaintiff in her younger years, the deceased did not wholly or partially maintain the plaintiff.

(j) the liability of any other person to maintain the eligible person

72 No other person is liable to maintain the plaintiff. The plaintiff's former husband

contributes his share of the costs of raising their two children.

(k) *the character and conduct of the eligible person or any other person*

73 There is no evidence by either party that the character and conduct of the plaintiff or any other person is such as to disentitle the plaintiff to relief.

(l) *the effect that a family provision order would have on the amounts received from the deceased's estate by other beneficiaries*

74 An order for further provision in favour of the plaintiff, on the basis of either of the orders sought by her, would affect the entitlements of the defendant. At present, there are insufficient cash funds to pay the plaintiff's entitlement to \$50,000 and the other liabilities of the estate. In order to keep the Landscape Drive property, the defendant has stated that she will likely fund payment of the legacy from her own funds to meet any shortfall between the net value of the shares after the payment of the estate's liabilities and the \$50,000 legacy.

(m) *any other relevant matter*

75 The plaintiff's position included that her son, Levi, requires ongoing support and treatment as a result of his diagnosed Autism Spectrum Disorder. The plaintiff submitted that the costs of Levi's treatment increase the strain on her financial circumstances. The plaintiff failed to include in her affidavits the fact that some of the costs associated with Levi's treatment are funded by the Federal Government through the NDIS. There is no basis to claim that the deceased should provide any funds for Levi or that the deceased owed any moral obligation to provide for him. Levi and his sister are supported financially by their father through child support payments each week. Mr Keane also pays half of the school fees for both of the children.

76 The plaintiff also submitted that the Court ought to take into account that the defendant has no connection to the Landscape Drive house or to Australia, and that she is likely to sell the property and return to live in Canada. The plaintiff said that once they were removed from Australia, the defendant's assets would be lost to the

plaintiff forever. What the defendant chooses to do with any benefits received from the deceased and the likely distribution of her own estate are not relevant to the determination of the plaintiff's claim for further provision. The defendant is not required to justify the benefits she receives pursuant to the will, nor is she required to justify that a life interest in the Landscape Drive property is not suitable to her.

Consideration

77 It was accepted that as an adult child of the deceased, the plaintiff falls within the definition of 'eligible person', as defined in s 90 of the Act and that the deceased owed a moral obligation to the plaintiff. There was no evidence of any conduct or special feature in the relationship between the plaintiff and the deceased that might enhance or diminish the extent of the deceased's moral obligation.

78 The plaintiff's first claim for further provision from the estate of the deceased involves the sale of the Landscape Drive property and payment of a lump sum from the sale proceeds. In closing submissions, the plaintiff quantified the lump sum claimed as being in the vicinity of 35 per cent of the net proceeds of sale plus her costs. By her alternative claim, the plaintiff sought the freehold of the Landscape Drive property, subject to a portable life interest in the form of a *Crisp* order to the defendant.¹⁸ In closing submissions, the plaintiff focussed on the alternative claim as the relief preferred by her.

79 Relief in the form of a *Crisp* order typically arises in circumstances where the Court orders additional provision to enhance the existing life interest of a beneficiary. The order is a practical way of crafting relief which provides for the proper maintenance and support of an applicant in a flexible manner, while also preserving the estate for the remaining beneficiaries. The usual circumstance in which a *Crisp* order may be appropriate in family provision claims is where an applicant for further provision is a surviving spouse or partner of a deceased and the deceased failed to provide

¹⁸ See generally, *Crisp v Burns Philp Trustee Company* (Supreme Court (NSW), Holland J, 18 December 1979); *Thompson v Thompson* [2015] VSC 706; GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2nd ed, 2017), 621-2 [18.10] and the cases referred to therein.

adequately for them. No authority was referred to in which a *Crisp* order has been made as a means of providing further future provision for a claimant and at the same time reducing the entitlements of a surviving spouse or partner of a deceased.

80 The relief sought by the plaintiff in the form of a *Crisp* order is misplaced. The plaintiff's case focussed on her current financial circumstances, by reference to the shortfall in her weekly income and expenses, as well as the immediate financial support required for her son. The relief in the form of a *Crisp* order would not have the effect of satisfying those needs as any provision for the plaintiff is deferred until the death of the defendant. This means that none of the plaintiff's asserted financial need would be satisfied by such an order. On the basis of the defendant's current age and health, the benefit to be received by the plaintiff under a *Crisp* order would be many years away. By that time, the plaintiff's children would no longer be dependent on her and her mortgage would likely be paid out completely, particularly if she applies her legacy to reduce the capital owing. In addition, with the plaintiff's mother still being alive, the plaintiff may expect to receive an inheritance from her estate some time in the future.

81 Further, and in any event, the plaintiff's current financial need as deposed by her affidavits was called into doubt at trial. The analysis of her financial circumstances establishes that the extent of the plaintiff's financial need is not as dire as she maintained in her affidavits. Further, several relevant matters, such as the NDIS funding for Levi, were not mentioned at all. The plaintiff's preferred position for a *Crisp* order supports the conclusion that she is not seeking provision for her immediate needs. On balance, the Court considers that the plaintiff exaggerated her financial need and failed to include all relevant financial information in her affidavits.

82 A *Crisp* order as proposed by the plaintiff would also take away the defendant's freehold interest in the Landscape Drive property and threaten her financial security in the long term. The defendant has the paramount need. She is aged 73 years, is retired and dependent on her superannuation funds for her ongoing living expenses

and long-term financial security. The deceased recognised her need by providing her with the freehold of the Landscape Drive property in which she lived with the deceased and to which she contributed during their relationship of almost 20 years. The sale of the Landscape Drive property or any lesser interest in the beneficial ownership of the property would threaten the defendant's long-term financial security. Her current freehold interest allows her to use the capital value of the home to fund any long-term living and care requirements that may arise.

83 The plaintiff's claim for a percentage of the net sale proceeds of the Landscape Drive property would require the defendant to sell the property. The plaintiff seeks provision in the order of 35 per cent of the net proceeds of sale plus costs. How this quantum for further provision would be justified was not explained by the plaintiff. In any event, provision in such an amount would be to the detriment of the defendant as she would not have sufficient funds to purchase another home, contrary to the deceased's intentions reflected in his will.

84 The deceased's estate is modest. The assets comprise the Landscape Drive property and a small share portfolio. The costs and expenses of the estate thus far at around \$86,000 are substantial. In order to pay the legacy of \$50,000 to the plaintiff, the defendant proposed that she would personally fund any shortfall between the net value of the share portfolio and the legacy. The estate cannot accommodate the plaintiff's first claim unless she sells the Landscape Drive property.

85 In the context of the plaintiff's actual need, the legacy of \$50,000 is not a 'meaninglessly small provision', as was stated in her closing submissions. That amount will go a long way to ease any financial difficulty, in particular, if she paid that amount towards her mortgage debt. In all of the circumstances, the legacy of \$50,000 to the plaintiff was sufficient to discharge the deceased's moral obligation to the plaintiff.

Orders

86 The plaintiff's application for further provision from the estate of the deceased is

dismissed.

87 The parties are to forward short written submissions on the costs of the proceeding.