

DISTRICT COURT OF QUEENSLAND

CITATION: *Temple v Temple* [2023] QDC 145

PARTIES: **MARK TRACEY TEMPLE**
(Applicant)
v
**CARL DAVID TEMPLE AS EXECUTOR OF THE
WILL OF KENNETH GRAHAM TEMPLE
(DECEASED)**
(Respondent)

FILE NO: 4650/19

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 21 August 2023

DELIVERED AT: District Court at Brisbane

HEARING DATE: 24 – 25 July 2023

JUDGE: Loury KC DCJ

ORDER: **The application is dismissed**

CATCHWORDS: SUCCESSION – FAMILY PROVISION – REQUIREMENT OF ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY CHILDREN – where the testator left \$5,000 to the applicant and the balance of the estate to the respondent and his son – whether the applicant was left with insufficient provision as the son of the testator - where the applicant had been estranged from the testator and respondent for many years

LEGISLATION: *Succession Act* 1981, s 41

CASES: *Camernik v Reholc* [2012] NSWSC 1537
Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494
Darveniza v Darveniza & Drakos as Executors of the Estate of Bojan Darveniza and Ors [2014] QSC 37
Nielsen v Kongspark [2019] NSWSC 1821
Singer v Berghouse (1994) 181 CLR 201

COUNSEL: T Naylor for the applicant
A Fraser for the respondent

SOLICITORS: Mobbs Marr for the applicant
The Estate Lawyers for the respondent

Introduction

- [1] The applicant, Mr Mark Temple, seeks an order for provision from the estate of his late father, Mr Kenneth Graham Temple (“Ken”). For the purposes of clarity, I will refer to each of the witnesses by their first name. I intend no disrespect in doing so.
- [2] Ken Temple was married to Barbara. They had two sons, Mark (born on 28 November 1960) and Carl (born 28 September 1965). Carl has one son, James. He was born on 5 April, 1994.
- [3] Barbara was diagnosed with cancer in 2010 and died in 2012. She left her estate to Ken who died on 14 April 2019. Ken left a will, executed in 2017, and over which probate was granted on 19 August 2019. The relevant provisions of that will are as follows:
1. Carl was appointed executor;
 2. \$5,000 was bequeathed to Mark;
 3. The residue of the estate was left to Carl and James in equal shares;
 4. Clause 7 provided: “I RECORD the fact that I have devised a greater amount to my said son Carl David Temple as he has maintained my property and affairs whilst I have been variously away travelling over the years during which time I have not seen my said son Mark Tracey Temple for over 10 years.”
- [4] The application for provision out of the estate is brought by Mark pursuant to section 41 of the *Succession Act* 1981.
- [5] The application requires me to consider firstly whether the provision made was inadequate in all the circumstances and secondly, if the answer to that question is yes, what provision ought to be made. The principles relevant to such an application are helpfully set out in the judgement of Martin J in *Darveniza v Darveniza & Drakos as Executors of the Estate of Bojan Darveniza and Ors*¹ (“*Darveniza*”).
- [6] The first consideration is whether the provision made for Mark was inadequate for what, in all the circumstances, was the proper level of maintenance appropriate for him having regard to his own financial position, the size and nature of Ken’s estate, the totality of the relationship between Mark and Ken and Ken’s relationship to Carl and James.² This is to be determined at the date of Ken’s death.³
- [7] When considering the proper level of maintenance, Martin J in *Darveniza*⁴ said that the following, at least, should be taken into account:
- (a) The applicant’s financial position;
 - (b) The size and nature of the deceased’s estate;
 - (c) The totality of the relationship between the applicant and the deceased;

¹ [2014] QSC 37 at [13] – [18]

² *Singer v Berghouse* (1994) 181 CLR 201

³ *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494

⁴ At [16]

- (d) The relationship between the deceased and other persons who have legitimate claims upon his bounty;
- (e) Present and future needs including the need to guard against unforeseen contingencies.

Ken's estate

- [8] As at 7 October 2019 (six months after his death), Ken's estate was estimated to have a net value of \$865,681.89. As at 14 June 2023, Ken's estate is estimated to have a net value of \$754,586.76 (after an allowance for Carl's legal expenses and potential capital gains tax). The estate is currently comprised of cash in the amount of \$456,145.13; a property in Charters Towers valued at \$360,000; a loan payable by Carl in the amount of \$17,000 and personal effects valued at \$10,000. The liabilities are largely comprised of legal fees, tax liabilities and sale costs associated with the Charters Towers property, including capital gains tax.

Mark's financial position and needs

- [9] Mark was born on 28 November 1960. He is now 62 years of age. He is currently a single man, although has five adult children.
- [10] Mark has deposed that he previously owned a property at Reservoir in Victoria which he purchased for \$100,000. He sold that property in around 2016 for \$1,250,000 and purchased a commercial property, a factory in Thomastown, in 2016 for \$660,000. He deposes that after the purchase of the factory, he had around \$200,000 left of the monies he received from the sale of the Reservoir property. He purchased motor vehicles and paid for his living expenses out of those proceeds. He repaired a truck and spent \$80,000 moving from Reservoir to Thomastown. In his evidence, Mark said that he was still owed \$100,000 from the sale of the Reservoir property. He also agreed that upon the sale of the property in Reservoir, he paid out the mortgage of \$150,000. Whilst Mark could not account for how he otherwise spent the money he received from the proceeds of the sale of the Reservoir property, he said that he might have been left with a "touch more" than \$200,000. Mark currently has no savings.
- [11] Mark deposed in his affidavit of 19 December 2019 that he worked as a self-employed tow-truck driver and also sold scrap metal. He received between \$300 and \$600 per week for that work. In his affidavit of 18 July 2023, Mark deposed that he was no longer receiving as many scrap metal jobs as he previously had, and that his current income remained between \$300 - \$600 per week.
- [12] Mark deposed that he would not be able to operate his scrap metal and repair business if he did not have the factory in which to store the unregistered vehicles and motor bikes which he dismantles. He also uses the factory to store his tow-truck. In his evidence before me, Mark said that the dynamics of the scrap metal industry had changed; that the popularity of it had reduced; and that he was doing less scrap metal work particularly involving large cars and scrap from factories being pulled down. He referred to getting batteries and radios, storing them, and taking them to the scrap metal yards for a refund. Mark maintained, however, that he needed the factory to store his tow-truck. As at the date of Ken's death, Mark owned six vehicles: the tow-truck, one sedan and five utilities

which he stored at the factory. In December 2019, he was living with a friend but did not pay rent or board.

- [13] In his evidence, Mark said that he was living in his factory. His living conditions are properly described as basic. Whilst in his affidavit of December 2019 he said that if provided provision from the estate he would purchase a property, he clarified in his evidence that by that he meant that he wanted to buy a property (and not a house), so that he could be closer to his family. The overall flavour of his evidence was that he did not really want to sell his factory as he would have to find somewhere to store all of his property, or his “junk” as he referred to it. The admissible evidence is that the factory is valued at \$1,200,000. Mark still owns a truck and three utilities. Mark does not have a mortgage securing his commercial property. His only significant liabilities are a loan from his daughter of \$29,605 and a loan from Mark Phillips of \$10,000. His net asset position stands at \$1,184,049.43.
- [14] It became apparent during the course of his evidence at trial, that Mark is owed \$100,000 from the sale of his property in Reservoir. He has taken some steps to recover that money by attending upon a lawyer. He also owns a forklift and other tools which have not been accounted for in his affidavits. The forklift was purchased by Mark for \$5,000. I do not consider that Mark was trying to hide these assets to reduce his overall net asset position. It is uncertain upon what basis Mark states that he is owed \$100,000 from the sale of the Reservoir property. Even ignoring these potential assets, his net position as indicated stands at in excess of \$1.1 million.
- [15] Mark does not have any savings or any superannuation.
- [16] Mark does have some medical problems. When he was 23 years of age (in 1983 or 1984), he was injured in a motor vehicle accident. He deposes that he sustained a compound fracture to his skull as well as neck, back and feet injuries. He was in intensive care for three weeks. Eighteen months later, he was involved in a second motor vehicle accident in which he went through the windscreen. Both his legs were broken, and he sustained head and neck injuries. After a period of rehabilitation, he was able to return to work as a security officer for a period. He otherwise received the Disability Support Pension until around 2003 when he commenced working as a tow-truck driver.
- [17] Dr Jennifer McDowall, a neuropsychologist, interviewed and assessed Mark in June 2020 and in June 2021. She states in her first report that Mark has a significant impairment in his executive functioning, evident in his behaviour and on formal testing. There was evidence of impaired reasoning and judgement. He is described as rigid and inflexible in his thinking. He could not shift his thoughts from preconceived notions. He was verbose and tangential in conversation and easily distracted. He was irritable when attempts were made to redirect his attention. He displayed reduced frustration tolerance when challenged. He was belligerent on occasion when he perceived questions to be irrelevant.
- [18] On formal testing, Mark had difficulties with abstract reasoning. His approach to complex tasks was poorly planned and managed. His novel problem-solving skills were inefficient.

- [19] Dr McDowall opined that the assessment she undertook revealed evidence of a cognitive disability characterised by significantly impaired executive functioning, consistent with a right frontal lobe injury. Mark's medical records relating to the injuries sustained in the motor vehicle accidents have been destroyed.
- [20] In Dr McDowall's third report, she refers to an MRI brain scan conducted in April 2021 which reported a focal region of encephalomalacia (a softening or loss of brain tissue) within the right frontal lobe. Mark's cognitive profile as at June 2021 remained unchanged. He continued to demonstrate impaired executive functioning. He does not tolerate frustration well, and at times can have difficulty regulating his behaviour.
- [21] Mark himself reports suffering from vision impairment in his left eye since childhood. He does not have the use of two fingers on his right hand and his ankles do not flex or twist. He had surgery on his hand in April 2023, however that has made little difference to his hand. He has consulted with a doctor about amputating his fingers. His right hand is in a closed fist position which impacts upon his daily life. The injury to his right hand is impacting his ability to work as a tow-truck driver and fix cars as he is right hand dominant.

Mark's relationship with Ken

- [22] Mark describes his relationship with Ken and Barbara as estranged and dysfunctional. Mark has an impression of his childhood that he was treated harshly and less favourably than his brother, Carl. He describes having been kicked out of home when he was 15 years of age and having to live with his grandmother for a year before he was asked to leave his grandmother's home. He then returned to live with Ken and Barbara. As a young man in his early 20's, he came into conflict with his parents over his "lifestyle". He admitted to being "stoned" at home and that causing conflict, particularly with Barbara.
- [23] Carl deposed that as children, Mark was closer to Ken and he, Carl, closer to Barbara. Ken and Barbara argued throughout Carl's childhood and Barbara used Carl as a go-between in her arguments with Ken. Carl considered that Ken and Mark had a close relationship throughout his childhood, although it began to strain in Mark's teenage years. Carl described Mark coming into conflict with Barbara often. He recalls Mark moving into their grandmother's home for one year before returning to the family home.
- [24] There is some further evidence from Barbara's sister, Eleanore Jones, which outlines some harsh treatment of Mark by Barbara. Ms Jones deposes that Barbara had once told her when Mark was around 18 years of age that she wished he had never been born. Ms Jones and her husband would take Mark on holidays to give him a sense of hope and encouragement when he was living with his grandmother. Barbara's harshness towards Mark was evident to Ms Jones even when Mark was in hospital recovering from one of the motor vehicle accidents.
- [25] It is clear enough that Mark's relationship with Barbara was a very difficult one. He was treated harshly by her. That impacted upon his relationship with Ken. Despite those difficulties, Ken and Barbara did support Mark through his childhood and into at least

his early 20's when he was living with them. It is unsurprising that his decision to use illicit substances created conflict within the family home.

- [26] Whilst Mark's relationship with Barbara and Ken was a difficult one, there was an event which occurred around 2004 or 2005 which was, in my view, the precipitator for the estrangement which then occurred between Ken and Barbara on the one hand, and Mark on the other. This event, which led to the estrangement, occurred after Barbara's mother died in 2004. James (Carl's son) was present, although was around 10 years of age at the time.
- [27] James was close to Ken and Barbara. James lived with his mother after his parents separated until he was in year 12 at school. Ken and Barbara lived nearby and helped care for James. Ken would pick James up from primary school. Ken and Barbara would care for James until his mother finished work. Ken and Barbara also facilitated James having contact with Carl who at one time was living in Canberra. They also would drive James to Carl's house on the weekends which was some considerable distance away. James went to live with Ken upon Barbara's death in 2012 and provided support to him. James remained close to Ken throughout Ken's life.
- [28] James states that during his primary school years when he saw his grandparents daily, he never saw Mark visit them or hear him call them, acknowledge their birthdays or write to them.
- [29] James recalls an occasion between 2004 and 2006 when Ken and Barbara took him to visit Mark at his property in Reservoir. The property was surrounded by a large fence. James remained in the car whilst Ken and Barbara entered through the gate. James could not see what was occurring, however he heard some loud shouting and saw Ken and Barbara "being shoved out of the gate by Mark". Mark was shouting at them to leave. He heard Mark scream "fuck off" to both of them. Mark continued yelling other abuse.
- [30] James describes Ken and Barbara being visibly shaken when they got back into the car, and they apologised to him for what he had seen. James states that Ken and Barbara said that this was the last time that they were going to try and reach out to Mark. Whilst it is conceded by the respondent's counsel that this statement is not admissible as proof of the objective fact which it asserts, it is evidence which shows the state of mind of Ken and Barbara at the time of this happening. Whatever occurred between Mark and his parents on this occasion caused them significant distress such that they expressed a desire to not have further contact with him.
- [31] It is Carl's recollection that after this event, which he recalls occurred in 2005, there was a noticeable change in Barbara, and she ceased actively trying to keep in touch with Mark.
- [32] In Mark's December 2019 affidavit, he described his contact with Ken and Barbara as their visiting him in Melbourne once to twice per year up until his mother passed away in 2012. After Barbara's death, he states that he saw Ken at a series of funerals including Barbara's in 2012, Mrs Elsie Fisher's in 2013, Mark's grandson's funeral in 2016 and his former partner's funeral in 2018.

- [33] Mark deposes in his July 2020 affidavit, that after his grandmother died in 2004, Barbara and Ken visited his home in Reservoir to give him \$5,000. He states that he was speaking to Barbara in the driveway when he expressed dislike at the Christmas gifts she had given his daughters. Barbara started screaming profanities at him. Mark describes it as a heated exchange during which he repeatedly told Ken and Barbara to “get off my property”. He states that he “directed and pushed his parents out the front gates”. Mark told them that he didn’t want them to visit him anymore.
- [34] In his evidence before me, Mark attempted to resile from this position. He said that he escorted his parents to the door. He did not push or shove either of them, he simply “showed them the door”. He said that he may have said “fuck off” to them.
- [35] I did not find Mark’s account in his evidence of this event compelling. It was at odds with what he clearly expressed in his affidavit of 21 July 2020, and was at odds with James’ recollection of this event. James’ evidence is consistent with the account that Mark gave in his July 2020 affidavit. I am satisfied on balance that Mark did push and shove his parents off his property and told them to “fuck off” and not return.
- [36] Mark himself describes Barbara as a spiteful woman in his affidavit of 21 July 2020, and states that his relationship with her was poor and that she drove a wedge between him and Ken. He states that he did not want Barbara around his young children.
- [37] This event in 2005 led to an estrangement which endured over many years. I do not accept Mark’s statement in his affidavit that his parents visited him twice each year up until 2012. If they had been visiting so regularly, I would have expected there to be some account of some of those visits. Mark himself seemed unsure in his evidence that Ken had visited him after 2005. Ken’s attitude towards Mark at Barbara’s funeral is consistent with there having been no contact between them over many years.
- [38] Barbara was diagnosed with cancer in 2010. Carl helped Ken care for Barbara and provided him with respite. Mark did not visit with Barbara despite knowing that she was dying. In his affidavit of 21 July 2020, Mark states that Ken rang him crying “a day or so” before Barbara died. He states that he was not invited to attend at their property and was never told their address. It seems entirely improbable that if Ken, in a state of distress, rang Mark to inform him that his mother was dying, that he would not have been welcome to visit her before she passed. I do not accept Mark’s evidence in this regard.
- [39] Michelle Rowland (Carl’s long-term partner) twice heard Ken expressing deep bitterness towards Mark for failing to contact Barbara when she was dying. It was this that led Ken to express that he wanted no contact with Mark from then on. Carl also states that Ken had expressed to him that he never forgave Mark for how he treated Barbara after she was diagnosed with cancer. Ken’s state of mind, revealed by those comments, is consistent with his conduct towards Mark at Barbara’s funeral and consistent with there remaining a long-standing estrangement. I am satisfied on balance, that Mark deliberately chose not to provide any degree of comfort to Barbara or Ken in Barbara’s dying days.
- [40] Mark did, however, attend Barbara’s funeral with his daughter, Lillian Bilsborow. Mark, in his December 2019 affidavit, deposed that he saw and spoke to Ken at a series of

funerals including Barbara's. The totality of the evidence about Barbara's funeral suggests otherwise.

- [41] James deposes that at Barbara's funeral, he sat next to Ken during the service and travelled with him to the burial site and onto the wake. He did not see Mark speak to Ken. When James pointed out that Mark was present at the funeral, he says that Ken refused to even acknowledge or discuss Mark's attendance at the funeral.
- [42] Carl did not observe Ken and Mark speak at Barbara's funeral. Michelle did not see any contact between Mark and Ken at Barbara's funeral.
- [43] Philip Temple (Ken's nephew) was present at Barbara's funeral. He spoke to Mark at the funeral. He did not see Ken speak to Mark at the funeral. He says that Carl and Ken were sitting on opposite sides of the venue in which the funeral was held.
- [44] Lillian (Mark's daughter) stayed with Mark during the funeral service because she felt uncomfortable. She said hello to Ken at the wake, but he turned away and ignored her. In her evidence, she agreed that Mark was with her when this occurred.
- [45] After Barbara's funeral, Ken made a comment to James that he was finished with Mark, and did not want to see him or speak to him again. Whilst this statement was not led as evidence of the truth of the fact asserted, it is evidence as to Ken's state of mind at the time of Barbara's funeral. A similar statement that Ken made to Carl that he could not forgive Mark for failing to visit Barbara when she was dying was also led as evidence of Ken's state of mind at that time.
- [46] These comments reveal that Ken felt a deep bitterness towards Mark after Barbara's death. These comments and Ken's state of mind is not consistent with Mark's evidence that he tried to reconcile with Ken after Barbara died.
- [47] Ken's state of mind, a deep bitterness towards Mark, as revealed in these statements made to James and Carl after Barbara's death, are not consistent with Mark's evidence that he tried to reconcile with Ken after Barbara died.
- [48] In his evidence before me, Mark agreed that he did not speak with Ken at Barbara's funeral. His memory of the wake was of sitting with Ken's brothers and waiting for Ken to come over and talk to them, which he did not.
- [49] Mark's memory of the series of funerals he attended for family members was understandably poor. There seemed to be some confusion on his part as to what occurred at the various funerals and who was present at them.
- [50] Mark agreed that he did not speak to Ken at Ryder's funeral (his grandson), however he said in evidence that Ken came up to him at the wake and started talking to him and had a couple of drinks.
- [51] James attended Ryder's funeral with Ken. He stood with Ken and Carl throughout the service. He did not see Ken interact with Mark during the funeral. He states that Ken had them sit on the opposite side of the church during the service and on the opposite side of the garden during the burial to maintain distance from Mark.

- [52] Mark, in his evidence, had no memory of his partner's funeral.
- [53] I am satisfied on balance that Ken did not speak to Mark at any of the funerals that he attended where Mark was present, and I am further satisfied that there was no attempt made by Mark to reconcile with Ken at any time after 2005 until Ken was hospitalised in Melbourne on 13 April 2019.

Ken's death

- [54] James states that when Ken was diagnosed with cancer in 2018, Ken sent him a text message on 24 March 2018 in which he said that he did not want Mark to know of his diagnosis.
- [55] Ken left two handwritten notes which recorded his wishes in relation to his funeral. The notes were dated 4 October 2015 and 21 November 2017. In the first of the notes, Ken recorded that he wanted a private funeral with only Carl, Michelle, James, Isabella and Sienna (granddaughter and great-granddaughter) present. Notably he did not want Mark present. He further wanted no death notice to be placed in the paper. In the second of the notes, Ken provided some further instruction. By 2017, he wished for there to be no funeral and that he be cremated, with instructions on what was to be done with his ashes. Ken died on 14 April 2019. Consistent with his expressed wishes, no funeral service was held.
- [56] On 13 April 2019, Carl telephoned Mark. Mark immediately hung up the phone when Carl introduced himself. Carl then sent a text message to Mark advising him of Ken's failing health and that he was in hospital in Melbourne. Carl and Michelle had travelled to Charters Towers where Ken was then living, driven him to Townsville, and then flew with him to Melbourne where he was admitted to hospital at 1.30 am on 13 April 2019. His health had deteriorated over the course of that journey. Michelle described him as becoming increasingly confused. He was not communicative over the course of the journey, although he did say to her "thanks Michelle" when she left the hospital. Those were the last words that he spoke to her.
- [57] Mark visited Ken in hospital late in the evening of 13 April 2019. He sat by Ken's bedside all night before leaving in the morning before Carl arrived at the hospital. According to James, who visited with Ken for a number of hours on 13 April 2019, by 8:30 pm, Ken was not able to speak and was drifting in and out of consciousness.
- [58] Mark states that Ken had lost the ability to speak, but he cried and held Mark's hand which Mark took to be Ken seeking his forgiveness, which Mark gave. There is no evidence as to what Mark said to Ken in those dying hours. Mark has a view of his relationship with Ken in which he considers Ken to be responsible for the estrangement between them. He does not appear to appreciate his own role in causing that estrangement. It is difficult to know whether there was a reconciliation between Mark and Ken in his dying hours. From Mark's point of view, he believes that they had reconciled. His presence over many hours at Ken's bedside is consistent with his belief in that regard. Given the state of Ken's health, it is impossible to know if there truly was some form of reconciliation between them. It is quite possible though that Ken took comfort in Mark's presence during his dying hours.

- [59] I am satisfied that from 2005 until 14 April 2019 (a period of well in excess of 10 years), that Mark had no relationship with Ken. I am satisfied that the reason for that estrangement was ultimately caused by Mark pushing and shoving both Ken and Barbara out of his property and telling them never to return and further contributed to by Mark failing to contact Barbara in her dying days and failing to provide any comfort or support to Ken in his grief.
- [60] Mark made no sacrifices for the benefit of Ken and made no contribution to his estate or his emotional well-being. He denied Ken his love and comfort when he was grieving the loss of Barbara. Whilst Mark might have attended Barbara's funeral, he made no effort in the years that followed to repair his relationship with Ken to any extent.

The relationship between Carl, James and Ken

- [61] Clause 7 of Ken's will establishes that Carl maintained Ken's property and affairs whilst he travelled. Additionally, Carl helped Ken care for Barbara after her diagnosis with cancer and provided respite for Ken. Further, Barbara and Ken lived with Carl for a period of three years between 1996 and 1998. It is clear that Carl and Ken enjoyed a close and supportive relationship throughout the many years when Mark had no relationship with Ken.
- [62] As referred to in paragraph [27], James enjoyed a close relationship with Ken throughout his childhood and adult years. After Barbara's death, Ken supported James financially including when he enrolled in university. Ken and James remained close. When admitted to the Melbourne Hospital, James was named as Ken's next of kin. It is clear that James and Ken had a close and loving relationship throughout all of James' life.

Carl's financial position

- [63] Carl and Michelle have been in a relationship since around 2007. Michelle is a practising solicitor. Not long after the relationship between Carl and Michelle commenced, Carl lost his then job. He was unemployed from 2008 through until 2012. He obtained employment from 2012 until 2014 in a part-time capacity and worked fulltime from 2014 until he was made redundant in 2019. Carl has not been able to secure employment since 2019 despite many applications having been made. Carl is now 57 years of age. Carl also suffers from depression and anxiety and chronic back and neck pain.
- [64] Carl and Michelle have kept their finances separate since they commenced their relationship. They each own properties although they have a joint home loan which is secured by mortgages over each of their properties. There are significant periods of time where Carl has not been employed and thus has not contributed to the payment of the joint loan. It is clear enough from their finances that Michelle has been financially supporting Carl at least since he was made redundant in 2019.
- [65] It is not appropriate, in my view, to treat Carl and Michelle's assets separately for the purpose of these proceedings. It is clear enough that they have been in a long-standing, committed relationship. During that period of time, their finances have, to some extent, been intermingled for the benefit of each other. Each of Carl and Michelle have asserted

that the mortgage payments that Michelle is currently paying (and has been for some years now) will be repaid by Carl when he has the funds to do so. The applicant argues that I should treat this loan as a sham designed to decrease the net value of Carl's assets for the purposes of this litigation. I do not consider Carl or Michelle have acted dishonestly to create a sham of a loan. Michelle is a solicitor, and she has worked throughout the course of their relationship, often times, having to support Carl financially. Carl has deposed that they have kept detailed records of their finances because their relationship is fragile. In the event of their relationship failing, there is a documented account of particularly Michelle's contributions to the joint loan. This seems to me to be a perfectly legitimate reason why they try to keep their finances separate, to protect the party who is having to meet all the mortgage repayments and other living expenses in the unfortunate event that the relationship might fail. I do not consider that either Carl or Michelle have constructed a set of circumstances to reduce the net value of Carl's assets for the purpose of this litigation.

[66] I do consider though that it would be artificial to treat Carl's assets separately to Michelle's. The respondent has conceded that it would be appropriate to treat Carl and Michelle's assets together.

[67] Together they own a property in West Melbourne; a property in the Macedon Ranges and a property in Wimmera. There is a mortgage over the property in West Melbourne and the Macedon Ranges. They each have superannuation. Carl owns two cars; a truck; and a tractor. Michelle earns \$2,250 net per week in her role as a solicitor with the Victorian Government. Michelle is now 57 years of age.

[68] It became apparent through cross-examination that Carl also owned a valuable wine collection. On 1 September 2022, Carl received \$3,800 into his bank account which he accepted was from the sale of some of his wine. Carl accepted that he had not included that wine in his statement of assets and liabilities. He said that the sale of wine was the bulk of his collection, but that there was some left which might be worth \$1,000. I did not gain the impression that Carl was deliberately attempting to hide this asset. That the money received was from the sale of wine was clear enough from Carl's bank records. Carl said that the wine was the last saleable asset that he had left. It is unsurprising that in circumstances where he has not worked since 2019 and has not been able to secure employment despite applying for an extensive number of jobs, that he has had to resort to selling his valuable collection of wine. I do not consider that Carl was deliberately attempting to hide valuable assets. The 1949 tractor he owns is valued at less than the total wine collection, and he certainly did not attempt to hide that asset.

[69] Both Carl and Michelle impressed as honest witnesses.

[70] Considering Carl and Michelle's joint financial position, they have joint assets totalling \$2,159,145 with joint liabilities totalling \$1,018,418. The net value of their joint assets is \$1,140,726. This includes their respective superannuation entitlements.

James' financial position

[71] James is 29 years of age. He has no dependants. He is currently living in New Zealand working full-time for the Green Party of Aotearoa. His assets, including superannuation,

stand at \$60,891. His only liability is his Higher Education Contribution Scheme debt of \$11,000. His net asset position is \$49,891. He is currently earning \$1,345 per week.

Was Mark left without adequate provision for his proper maintenance, education and advancement in life?

[72] Mark is an adult, now of 62 years.

[73] In *Camernik v Reholc*⁵ Justice Hallen summarised the authorities dealing with claims for provision by adult children as follows:

“In relation to a claim by an adult child, the following principles are useful to remember:

- (a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.
- (b) It is impossible to describe in terms of universal application, the obligation, responsibility, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life, such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set his, or her, children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation.
- (c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child’s life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death if he or she is able to do so. But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute.
- (d) If the applicant has an obligation to support others, such as a parent’s obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant. But the Act does not permit orders to be made to provide for the support of third persons to

⁵ [2012] NSWSC 1537 at [159]

whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons.

- (e) There is no need for an applicant adult child to show some special need or some special claim.
- (f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant. In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased.
- (g) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim." (citations omitted)

- [74] Despite the motor vehicle accidents that Mark was involved in and the injuries he sustained, including a brain injury, in the mid 1980's, he has managed to forge a living as a tow-truck driver since 2003. He has invested his money wisely in property which has resulted in him now owning the unencumbered title to a commercial property in Melbourne currently valued at \$1.2 million. There is no suggestion in the evidence that Ken and Barbara needed to financially support Mark in his adult life. Mark was, in fact, in a stronger financial position than Ken at the date of his death, and in at least an equal, if not stronger, financial position than Carl and Michelle and certainly a stronger financial position than James.
- [75] Whilst Mark, in his affidavit, indicated that he wanted to buy a small property to live in for \$700,000, I took from his evidence that he had no desire to move from the factory in which he currently lives. It is others, perhaps neighbours, who want him to move. I gained the distinct impression that it is Mark's choice to live as he does in very basic accommodation in his factory. Indeed, Mark chose to sell his residential property in Reservoir in 2016 and chose to purchase a factory to live and work in.
- [76] It is argued that Mark is in need of adequate provision to allow him to have a financial buffer against the vicissitudes of life to assist him into the future, including obtaining suitable accommodation separate to the factory, to pay for private health insurance and supplement his weekly living expenses.
- [77] Mark chooses to use his factory to run a business which makes him as little as \$300 per week. From his own resources, Mark is able to buy a property to live in if he were to sell the factory. He would also be able to commercially lease the property and receive a greater income, well in excess of the \$300-\$600 per week that he receives from his tow-truck business.⁶ It is argued that if Mark were forced to sell his factory, he would become unemployed. I do not accept that to be so. Mark has the use of a tow-truck which could itself be housed in leased premises. There would be a significant amount of money available to him after purchasing a residential property to enable him to finance his business until it became profitable. Mark could alternatively purchase a smaller tow-truck which he could store at a residential address as he has done in the past.

⁶ Valuation report, 63 Temple Drive Thomastown, page 12

- [78] In terms of Mark’s injuries, there is no evidence before me as to what those injuries mean in terms of financial need. As indicated, Mark’s cognitive disability has been long standing and is permanent. It has not prevented him from working and has not prevented him from acquiring a valuable, unencumbered, commercial property. Mark has recently had surgery on his hand, however there is no evidence as to what further medical treatment he might need into the future which is not presently being met.
- [79] There was a complete breakdown in Mark’s relationship with Ken and Barbara in 2005 and they were estranged from that point onwards. There was fault on Barbara’s part and on Mark’s part for that breakdown. Mark’s conduct in pushing and shoving Ken and Barbara out of his property and telling them to “fuck off” and never come back was a significant contributor to the estrangement which followed. It was Mark’s conduct in not attending upon Barbara in her dying days and not providing any degree of love or comfort for Ken in his grief that led to the continuation of the estrangement from 2012 until Ken’s death.
- [80] The principles which relate to estrangement were summarised by Hallen J in *Nielsen v Kongspark*⁷ as follows:
- “(a) The word “estrangement” does not, in fact, describe the conduct of either party. It is merely the condition that results from the attitudes, or conduct, of one, or both, of the parties to the relationship. Whether the claim of the applicant on the deceased is totally extinguished, or merely reduced, and the extent of any reduction, depends on all the circumstances of the case.
 - (b) The nature of the estrangement and the underlying reason for it is relevant to an application under the Act. In *Palmer v Dolman*, Ipp JA, after a review of the cases, observed, at [110], that:
 - “... the mere fact of estrangement between parent and child should not ordinarily result, on its own, in the child not being able to satisfy the jurisdictional requirement under the Act.”
 - (c) There is no rule that, irrespective of a Plaintiff’s need, the size of the estate, and the existence or absence of other claims on the estate, the Plaintiff is not entitled to “ample” provision if he, or she, has been estranged from the deceased. The very general directions in the Act require close attention to the facts of individual cases.
 - (d) The court should accept that the deceased, in certain circumstances, is entitled to make no provision for a child, particularly in the case of one “who treats their parents callously, by withholding, without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility”.
 - (e) As was recognized by the New South Wales Court of Appeal in *Hunter v Hunter* per Kirby P (with whom Hope and Priestley JJA agreed):

⁷ [2019] NSWSC 1821 at [233] – [235]

If cases of this kind were determined by the yardstick of prudent and intelligent conduct on the part of family members, the appeal would have to be dismissed. If they were determined by the criterion of the admiration, affection and love of the testator for members of his family, it would also have to be dismissed. Such are not the criteria of the Act. The statute represents a limited disturbance of the right of testamentary disposition. It establishes a privilege for a small class of the immediate family of a testator (the spouse or children) to seek the exercise of a discretionary judgment by the Court for provision to be made out of the estate different from that provided by the testator's will.

- (f) Even if the applicant bears no responsibility for the estrangement, its occurrence is nevertheless relevant to the exercise of the court's discretion under s 59(2) of the Act to make a family provision order where the jurisdictional requirements of s 59(1) are met. That the applicant had no relationship with the deceased for some years, and that there did not, therefore, exist between them the love, companionship and support present in "normal" parent/child relationships, during those years, is a relevant consideration.
- (g) The poor state of the relationship between the applicant and the deceased, illustrated by the absence of contact for many years, if it does not terminate the obligation of the deceased to provide for the applicant, may operate to restrain amplitude in the provision to be made." (citations omitted)

[81] The evidence demonstrates to me that Ken was particularly hurt by Mark's failure to visit Barbara when she was dying. Whilst Mark might have attended her funeral, he made no efforts in the years that followed to repair his relationship with Ken to any extent. He provided nothing in the way of love, companionship or support to Ken during the period he was grieving the loss of Barbara. That fell to Carl and to James. Mark's conduct in this regard was, in my view, callous.

[82] Although there is perhaps some evidence of a reconciliation on Ken's deathbed, that in itself, does not mean that it is for me to now determine whether I should order provision from the estate in order to create a more just outcome.

[83] In *Darveniza*,⁸ Martin J said:

"Section 41 does not give a court carte blanche to remake a will in a way that may appear to be more just. It is a power that should be exercised with the restraint dictated by the terms of the section. The predicament in which a court finds itself has been commented upon many times. In *Pontifical Society for the Propagation of the Faith v Sales* Dixon CJ observed that it was never intended by the legislation that freedom of testamentary disposition should be so encroached upon that a testator's decision expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court.

⁸ At [17]

Consideration of these applications must always proceed with the understanding that the capacity of a court to make an assessment is necessarily limited, as the deceased cannot explain his or her reasons for the disposition of the estate or respond to the claims of an applicant.” (citations omitted)

- [84] Mark was living with Ken and Barbara at the time he sustained his brain injury. Ken would have been aware, for at least 20 years (up until the estrangement in 2005), of the impact of that injury upon Mark’s behaviour. It is argued that Ken has held those behaviours against Mark in determining what provision to make for him. I do not accept that is so. Ken was quite aware of precisely what took place between himself, Barbara and Mark in 2005. More significantly, Ken was deeply hurt by Mark’s failure to visit upon Barbara when she was dying. Mark provided no comfort or support for Ken in his grief. Ken was, in my view, best placed to make a just assessment of all the claims on his estate. When the conduct of Mark is looked at from the viewpoint of Ken, it can be seen that Mark’s behaviour was such that Ken considered that he should make only a small testamentary provision for him.
- [85] Taking into account the totality of the circumstances as set out in these reasons, I am not satisfied that Mark has established any financial need for further provision out of the estate. I am also not satisfied that a just and wise testator knowing what I know now about Mark’s financial position, would have considered themselves duty bound to provide for Mark to any greater extent than has been.
- [86] The application is dismissed.