Succession Law Update - The Treatments of Claimants who have been estranged from the deceased for a substantial period

1. Tension has formed, since my last Paper in the area of Succession Law, between the view that even poor quality claims under the Succession Act 2006 (NSW) are likely to be successful and an increasing reluctance of the court to abide by the *'every player gets a prize'* attitude. It is this tension with which it appears that the tides are changing.
2. You will recall that in my 2013 Paper I discussed the cases of *Keep v Burke* and *Andrew v Andrew*. You will recall that in *Andrew* the Deceased gave written reasons for a small legacy to her estranged daughter in saying *"she has not acted a daughter should in our lifetime and should not be remembered as our other children have in relation to the dispersal of our assets".* There was a suggestion in *Andrews* that the reason for the estrangement was in relation to the daughter's sexuality despite this both Plaintiffs in *Andrews* and *Keep* were successful.
3. This should be contrasted with the cases of *Burke* and *Raiola*.

BURKE V BURKE [2014] NSWSC 1015

4. In *Burke*, the Deceased, aged 93 at the time of her death on 30 June 2012, made no provision in her will, dated 23 June 2003, for her eldest son. The Estate had a net value of $1.25 million and was divided between the remaining surviving siblings.

5. By letter dated 25 August 2010, the Deceased set out her reasons for disinheriting her son which I repeat herewith:

> *It has come to my attention that my will dated 23 June 2003, may become the object of a challenge by my eldest son Terry Burke. I am setting down the following remarks, so that it is clear as to why I made the decisions contained within that documents.*
>
> *Shortly after my husband passed away in 1990, Terry (who was residing at my house at 11 Mary Street, Leichhardt after moving to Sydney from rural NSW*

after his divorce) announced that he had asked his girlfriend Anne to marry him and Terry subsequently moved in to her home at Galston NSW

From that time on, there was very little contact between Terry and the rest of the family including his brother Alan and sister Diana and their extended families. I believe that he and Anne were married sometime that year, however no one from the family was invited, nor did we ever see any photographs of the event. In time, he became totally estranged from us all without any explanation. Years later I learned that Terry and Ann [sic] had moved to Queensland.

In 1998 Terry's youngest son David (aged 25) was killed in a motor bike accident in Sydney. His mother Tina chose to have him buried in their original home town of Albury NSW I traveled [sic] to Albury together with my son Alan and daughter Diana to attend the funeral. Terry did not attend his son's funeral.

In the years since it has become quite clear that Terry does not wish to have any contact with his family, however I believe that he occasionally speaks with his only surviving son Stephen who resides and works in the USA.

This estrangement has caused a great deal of pain and upset to the entire family and given the length of time since our last contact I decide to divide my estate to reflect the fact that Terry (through his own choosing) is no longer connected with my life. Because I have not left anything to Terry, I wanted to bequeath a portion of my estate to his son Stephen Burke and the remainder to my son and daughter who have been a constant source of love and support.

After several falls at home, my son Alan and daughter secured accommodation for me at Aldersgate Aged Care Facility, close to my family home in Leichhardt where I currently reside.

In closing; I trust that if you are being petitioned to alter the wishes set down in my last will and testament, that you will take this statement into account when making a decision.

It is quite distressing to think that my wishes would not be honoured.

Yours faithfully,

Beryl Burke

6. Although there was some dispute as to the reason why there was an estrangement, there was no dispute that the estrangement had lasted for a period of approximately twenty (20) years and that the son ("Plaintiff") made no real attempt to patch up the failed relationship with his mother ("Testator").
7. The court eventually made a finding that the Plaintiff made the decision to estrange himself from his mother and the family for this period of time. There was also a question as to whether the Plaintiff provided to the court a full and frank explanation of his financial circumstances. The Plaintiff was found not to have disclosed a pension and money lent to a Mr Richard Coverdale which was being paid back by instalments. The court found that whilst the amounts were not large and would not be likely to preclude a substantial provision being made; the Plaintiff's failure to disclose these matters in his affidavit and unwillingness to provide meaningful information in his cross-examination was a concern and affected his overall credibility. There was no real issue that the Plaintiff had a case for need. He was 69 years old, recently declared bankrupt and had only minimal assets and income.

8. Rein J upheld the Testator's view that the Plaintiff was undeserving of any benefit from her Estate and that the Testator's view that the Plaintiff wanted nothing more to do with the family was made out. The court treated as significant the Plaintiff's conduct in not going to his own son's funeral and the fact that the Testator had left the remaining child of the Plaintiff, a legacy of $100,000.00.

9. I am not aware at this stage if costs were awarded against the Plaintiff.

RAIOLA V RAIOLA [2014] NSWSC 967

10. This decision was handed down by Black J, three days prior to the decision in Burke. The Deceased, a widower, had died leaving three (3) adult children. He left the whole of his Estate to his youngest son Maurizio. The First Plaintiff was the Deceased's eldest son, Massimo, and second Plaintiff was his daughter, Imma. The net estate, after estimates of costs of $77,000.00 and $87,000.00, was thought to be $359,500.00.

Imma's Claim

11. Imma originally claimed $270,000.00 but reduced her claim to around $200,000.00. The Deceased testamentary intentions as contained in clause 11 of his will, gave reasons for excluding Imma as:

    "11. (i) I have not heard from her in 21 years;

    (ii) She does not know if I am still alive;

    (iii) She has lost all contact with me; and

    (iv) She has not for many years respected me as her father."

12. The solicitor who preparing the will gave clear evidence of the deceased having explained to her why he wished to leave his estate to Maurizio rather than to Imma, including that he had not seen Imma for many years. The deceased also told her that Maurizio had looked after him for ten years, did everything for him and took care of him when he was sick.
13. Black J found that Imma had not established a claim for provision given the Deceased's expressed intentions; the length of the estrangement (about 21 years), the change in her position from her affidavit evidence referring to the purchase of a unit to that expressed in cross-examination, the inadequacies in the evidence as to the present state of the property and as to her financial position.
14. Black J said that it was encumbered upon the Plaintiff to appraise the court of the whole picture concerning her financial situation.
15. Although acknowledging that the costs would follow the event in most cases due to Public Policy concerns, Black J acknowledged that in some cases of this nature there could be a departure from the usual principal and eventually made a finding that there be no order for costs in relation to Imma's case. On his Honour's view, Imma's case was reasonably brought and borderline in its prospects although ultimately weakened by gaps in the evidence as to her former husband's financial position and therefore not successful. An order for costs would have had a real adverse impact on her financial position.

    Massimo's claim

16. Massimo's claim was a modest one. He was seeking the value of a 1/9 interest in a Naples unit amounting to $33,140.00 which was fraudulently transferred to Maurizio by the Deceased using Massimo's power of attorney and without consideration. Massimo also sought the sum of $19,474.00 being the amount of the expenditure for his travel to Italy at the Deceased's request to assist the

Deceased and the amount he paid for the Deceased's funeral expenses. The total provision he sought was therefore $52,884.00. It was not in issue that Massimo was financially secure. He conceded in cross-examination that he had substantial combined uncommitted income of $19,000 each month. The Testator set out, in clause 10 of his Will, the reasons for excluding Massimo:

> *"I HAVE SPECIFICALLY AND INTENTIONALLY MADE NO PROVISION IN THIS MY LAST WILL FOR MY SON MASSIMO RAIOLA for the following reasons:*
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> > *(i) He does not respect me as his father;*
> >
> > *(ii) He has not for many years come to my home to visit me or telephone me for my birthday;*
> >
> > *(iii) He does not telephone me or contact me to see how I am feeling despite my health problems. If we speak by telephone it is only me that phones him on occasion;*
> >
> > *(iv) He has an interest in a property in Italy which was attained after the death of my first wife. I have kept up the maintenance and paid the costs of such maintenance and taxes. Massimo has refused to reimburse me for all those expenses and has only paid a portion of those expenses;*
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> > *(v) Massimo has done very well financially in his lifetime and does not need my assistance;*
> >
> > *(vi) On father's day in 2006 I was in hospital due to poor health. Massimo came to visit me and he brought me only a can of coke as a gift;*
> >
> > *(vii) I needed an operation in 2006 and I asked my son Massimo if he could pay for the operation, the sum of $1,500 and he decline and said "do not call me for money";*
> >
> > *(viii) My first wife Massimo's mother died 20 years ago and I have been informed by the Italian authorities that her coffin will need replacing. I asked Massimo to help me with the cost of replacing her coffin. The cost of EUR 2,000.00. He said "I will not pay for that";*
> >
> > *(ix) I have asked Massimo for financial assistance to help me but he has refused. I have been left, at times with no electricity or telephone as I could [not] afford to upkeep these expenses; and*

(x) On 5 December 2008 I had an argument with Massimo as he wanted me to use my home as security for him to purchase a commercial property. I did not agree and he became very abusive towards me and said "fuck you". He also then sent me a text message on 9 December 2008 in which he repeated the same "fuck you"."

17. Black J found that he was not satisfied that an Order should be made in favour of Massimo; notwithstanding that he had observed that the Deceased's conduct in transferring his 1/9 share in the Naples unit to Maurizio without his authority was open to criticism and that Massimo at least had a moral claim to reimbursement in respect of certain expenses that many members of the community would consider ought to have been acknowledged by the estate or by Maurizio. He found that notwithstanding those matters due to (Massimo's financial position, the size of the Estate and the competing demands) he was not satisfied that the Deceased had failed to make adequate provision for Massimo and ordered that Massimo pay the Estate's costs. This was despite the fact that Maurizio conceded in the proceedings that Massimo had paid the funeral costs (Maurizio made a belated offer during the case to refund the funeral costs) and had not been reimbursed out of the Estate, he ultimately found that while Massimo had been treated unfairly by his Father and by Maurizio, the jurisdiction for costs cannot be used as a means to address unfairness of that kind which did not otherwise support an application for a family provision order. He held that Massimo's claim always faced substantial difficulty namely the strength of his own financial position and the capacity to support his family without the need for further provision. In this case he made an order that Massimo pay 50% of the Defendants cost of the proceedings, noting that the costs incurred in Massimo's case were intuitively 50% of the total costs.

WILCOX V WILCOX (2012) NSWSC 1138; WILCOX V WILCOX (No 2) (2014) NSWSC 88; CHAPPLE V WILCOX (2014) NSWCA 392

18. In the decision at the first instance, the Primary Judge Pembroke J delivered two substantive judgments: Wilcox V Wilcox (2012) NSWSC 1138; Wilcox V Wilcox (No 2) (2014) NSWSC 88.
19. The Plaintiff, Robert Wilcox, aged 46 made a claim against his grandfather pastoral properties. He had been financially supported by his grandfather, who met his fees as a boarder at the King's School. He had virtually no assets and a liability

to the ATO of $107,000.00. Although he was qualified and equipped to earn a much greater income he lived off unemployment benefits and a small amount of income received from the tree lopping and tree surgery business. He was held to be an eligible person as he was a grandchild who had been partly dependant on the Deceased earlier in his life. The case initially came before Pembroke J at the first instance who described him as having a highly developed and healthy sense of entitlement and that he and his brother had deluded themselves into thinking they had a right to their Deceased grandfathers property. The Deceased had left the whole of the Estate to his only child Patricia Wilcox. Initially the Plaintiff was successful and Pembroke J concluded that a wise and just Testator would make a limited provision to the Plaintiff , sufficient to discharge the $107,000.00 tax debt and an annual income of $40,000.00 for a period of seven (7) years.

20. In the Court of Appeal, Basten J, Barrett J and Gleeson JJA, held that when considering whether to make a family provision order it was appropriate to have regard to *'perceived prevailing community standards of what is right and appropriate'*. Basten J said at [14]:

> *"There may be circumstances in which widely held community standards might expect a grandfather to make some provision for his grandchildren, for example where they had maintained a strong relationship and where there was a reason to doubt the willingness or the ability of the parents to make adequate provision for their children".*

21. In upholding the appeal and setting aside the provision, the Court of Appeal took into account that the relationship between the Deceased and the Plaintiff, where the Plaintiff had lived and worked on the properties from 1986 until 1993 and had little contact with the Deceased after 1993. The visits being infrequent and ceasing in 2004. On the other hand the Deceased's daughter had been closely associated with the Deceased's rural properties virtually all her life. In later years, she had helped operate and manage the properties and derived livelihood from them as well as attending to the Deceased's needs, she had been a dutiful and caring daughter.
22. The court held that the nature of the Estate, a pastoral business, was also relevant to the courts Assessment. Its viability was borderline and its limited borrowing capacity needed to meet the financial requirements of the enterprise itself. Breaking up the property to meet a family provision order was not feasible.

23. Both Basten and Barrett JJA (Gleeson agreeing) held that none of the factors in the Plaintiffs claim supported the conclusion that the Deceased, according to community standards and expectations, should have given anything to the Plaintiff in the Will so as to warrant an interference with the testamentary intentions.
24. The Court of Appeal also held that, although the discretion as to costs in family provisions matters may be wider than in other cases, the general rule that costs follow the event still applies. The general prima facie principal is that there should be an order that the unsuccessful plaintiff pay the defendants costs, although noting discretion to depart from the rule for good reason. The court ordered that the first Plaintiff pay one half of the costs of the Defendants up to and including the 10th February 2014 and the whole of the Defendants costs thereafter.
25. The Court of Appeal noted that cases where a grandchild is making a claim should be decided by reference to the principles set out by Hallen AJ (as he then was) in *Bowditch v NSW Trustee and Guardian* (2012) NSWSC 275. These principles summarised are:
    a. As a general rule the grandparent does not have a responsibility to make provision for the grandchild, the obligation rests on the parent of the grandchild;
    b. If the grandparent is in loco parentis, these factors would prima facie give rise to a claim by a grandchild to have provision out of the Estate;
    c. The mere fact of a family relationship between grandparent and grandchild does not establish any obligation to provide for the grandchild. A moral obligation may be created in a particular case by reason of the care and affection provided by a grandchild to his or her grandparents;
    d. Generosity by the grandparents to the grandchild including contribution to education does not convert the relationship into one of obligation to provide for the grandchild on the death of the grandparent;
    e. The fact that the Deceased occasionally or even frequently made gifts to or for the benefit of the grandchild does not in itself make the grandchild wholly or partially dependent upon the Deceased for the purposes of the Act;
    f. It is relevant to consider what inheritance or financial support a grandchild might expect from his or her own parents.

26. The Court of Appeal found that these principles are useful guidelines which should not be treated as rules of law and that these principles may equally apply to the questions under section 59(1) if there are factors that warrant the making of the application and what is adequate provision.

UNDERWOOD V GAUDRON (2014) NSWCA 1055

27. In this case the Plaintiff was a daughter of the Deceased and the Defendants were also children of the Deceased. The Deceased left no provision for the Plaintiff; the explanation being given was twenty (20) years of no contact from the Plaintiff with the Deceased. It was a small Estate and the Estate had been distributed and proceedings were not commenced within time, the proceedings were commenced three (3) years later. The Estate had been distributed and issues of notional estate arose.
28. The Deceased was aged 92 years and died on 21 August 2010. There were five children born of the marriage but only three survived the Deceased. Letters of Administration of the Will dated 13 April 2007 was granted on 14 March 2011. The Deceased in her Will at Clause 6 stated:

    "6. In further definition of my wishes under this will I say that I have expressly made no provision for my other daughter MARGARET HELEN GAUDRON as I have had no contact with her since 1990 and our relationship has broken down and I do not have any moral obligation to see to her welfare.
    7. In addition I say that I have similarly made no provision in this my will for my son PAUL EDWARD GAUDRON with whom I had no contact from 1998 until recently. Over the years I have lent him thousands of dollars which he has never repaid and in that year 1998 he received a large compensation payment for a railway accident and I do not have any moral obligation to see to his welfare."
29. The parties agreed that the net notional estate available for distribution, in August 2011, was $321,766 and that it consisted solely of cash held in the trust account of the solicitors acting for the Defendants. There was no actual Estate to be distributed at the date of the hearing.
30. Paul did not commence proceedings but threatened to and obtained $80,000.00 prior to the proceedings being commenced which equated to around one quarter of the net Estate available for distribution. The court noted that there had been

previous proceedings entered into between the Plaintiff and the Deceased in 1987 where the Deceased swore two affidavits that her daughter had occupied the Deceased's home unit for approximately two (2) years and at no time paid rent or occupation fee; paying only for her phone, electricity and food. When requested to leave the Plaintiff refused to do so, the Deceased claimed that there had been abusive language used towards her by the Plaintiff. The Deceased claimed in her affidavit that the Plaintiff had done no housework and that the house was very untidy and dirty. The Plaintiff in her affidavit claimed that she made a financial contribution to the property which was relatively minimal.

31. In the current proceedings the Plaintiff initially denied that she had thrown a half jug of coffee over the Deceased until it was pointed out that she had conceded this in her possession affidavit in the 1987 proceedings. After apparently agreeing to an order for possession, the Plaintiff left the unit and moved to Queensland.
32. Hallen J was satisfied that it was the Plaintiff who chose to place distance, geographical and otherwise, between herself and the Deceased. He found that undoubtedly, the Deceased accepted the position, but it was difficult to know, in the circumstances, how she could have avoided it, if she had wanted to. The Deceased did not take steps to find the Plaintiff and Hallen J found that it did not assist the Plaintiff to say that the Deceased also abandoned the relationship and did not take any steps to resurrect it. It was clear from the evidence that the Deceased did not know directly where the Plaintiff was living because intentionally the Plaintiff did not tell her, nor did the Plaintiff tell the Deceased that she had changed her name both before and after her marriage. He found that this was not a short term estrangement or a case where an otherwise long and loving relationship had been ruptured shortly prior to death. It was not a temporary but a long standing estrangement from about twenty (20) years where there was complete and unequivocal severance of ties between the Deceased and the Plaintiff. He found that this was not a case where there had been some personal or financial sacrifices in caring for the Deceased or contributing to the Deceased's Estate. On the contrary it was the Deceased who took her Plaintiff into her home and allowed her to live there for about two (2) years.
33. In his finding, Hallen J found that the Plaintiff was an eligible person, that no proper provision had been made for her in the Will or in her lifetime and that in other circumstances an additional lump sum for her proper maintenance, education

or advancement in life would be appropriate but taking into account the size of the Estate, the fact that it had been distributed in its totality, the relationship of the Plaintiff and the Deceased, the Deceased's conduct before and after the death of the Deceased, the age and capacities of the other beneficiaries, the claims of each on the bounty of the Deceased (although they appeared to be quite well off), the freedom of Testation were all relevant factors in determining the answers to the question of inadequacy of provision.

34. Eventually he found against the Plaintiff for the following reasons:
    a. There was only notional Estate and it was relatively small;
    b. The Plaintiff had commenced the proceedings some two (2) years after giving notice of her intention to do so and out of time;
    c. The scheme of the will was rational on its face;
    d. The fact that the Plaintiff demonstrated a complete indifference to and neglect of the Deceased for the last twenty (20) years of the Deceased's life;
    e. She was also entitled, in those circumstances, when also considering the nature and value of her estate, and the competing claims of each of the beneficiaries, with whom she had a close and apparently supportive relationship, to conclude that no provision ought to be made for the Plaintiff.
35. Hallen J concludes at [317]-[318]:

    "Remembering, also, that the task of the court is to make a determination "according to the feeling and judgment of the fair and reasonable man in the community, the spokesman of which is, and must be, the court itself", I am of the view that there was no failure, on the part of the deceased, to make proper provision for Helen. I am unable to conclude that adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made, has not been made by the Will of the deceased. That finding ends the matter and must lead to the dismissal of Helen's proceedings

    [318] However, even if I were wrong in coming to that conclusion, the same considerations would, at the second stage, produce the result that, as a matter of discretion, I would not be satisfied that a family provision order ought to be made in favour of [the Plaintiff]."

36. In relation to the application for extension of time at [320] –[325] Hallen J found:

> *"[320] The conclusions, naturally, lead to the view that the strength of [the Plaintiff's] case does not support an order extending time for the making of [the Plaintiff's] application. In fact, the authorities are clear that, if the claim is to be dismissed, there is no purpose in extending the time for the making of the application.*
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> *[321] In any event, I consider that there has not been any satisfactory explanation for delaying the commencement of the proceedings until October 2013. Whilst being unaware of the death of the deceased may have been a relevant consideration to explain why proceedings were not commenced within the 12 month period after the deceased's death, as prescribed by the Act, the reasons for the lack of [the Plaintiff's] knowledge must also be considered. Then, to delay the commencement of the proceedings for almost two years after finding out and making the threat that proceedings would be commenced, whilst keeping the beneficiaries completely in the dark about the continued intention to commence the proceedings, is not satisfactorily explained by [the Plaintiff].*
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> **...**
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> *[325] The fault for the delay, after the letter of 2 December 2011, is wholly on [the Plaintiff's] side: none of the delay, thereafter, can be laid at the feet of the Defendants, or on extraneous factors over which [the Plaintiff] had no control."*

37. My thoughts on this case are that the fact that the court adopted what appears to be the standard practice of not dealing with the Application for leave to extend time until the substantive case was heard is something that has troubled me for some time. Despite what the authorities may say in relation to the premise that it is necessary to hear all the facts and circumstances before deciding on the application to extend time. On its face one would have thought that a case where:

    a. A case was brought three (3) years out of time, two (2) of which was after notification of an intention to make a claim was made;
    b. All the assets of the Estate had been distributed; and
    c. The Estate was small;

    should have been more expeditiously dealt with and saved all parties costs had it been dismissed as a preliminary issue in interlocutory proceedings.

MEAD V LEMON (2015) WASC 71

38. I have included the recently decided case of *Mead v Lemon* in the Supreme Court of Western Australia, judgment delivered 26 February 2015, by means of contrast and to show what the courts view could be in a sizeable Estate.
39. The Plaintiff, Olivia Mead born 3 September 1995, is the 18 year old daughter of Michael Wright, Lang Hancock's business partner **("The Deceased")**, and Elizabeth Ann Mead. The Deceased died on 26 April 2012 aged 74 and was survived by his wife Mary, who he married on 2 May 1997. He was also survived by three adult children (two daughters and a son) born of his earlier marriage to Jennifer Turner.
40. The Second and Third Defendants were the Deceased's daughters and are founders and owners of the successful Voyager Estate winery in Margaret River. At the time of the decision of the case they had received about $400 million each from the Estate. The Deceased's son, who did not appear to be party to the proceedings, was described as a very successful musician. It was not clear as to how he benefited under the Will.
41. It is not clear from the judgment as to what provision was made for the current wife, Mary.
42. The Plaintiff had been estranged from her father who took very little interest in her from age 4 or 6. Contact from age of 6 was described as sporadic and he had little interest in her welfare. The Deceased was consistently late when he picked her up and apart from 1 or 2 nights, the Plaintiff never spent any extended period of time with her father. The fact that she was estranged from her father was of the Deceased's choosing. During her childhood the Deceased provided little to the Plaintiff or her mother by way of material support. He did pay child care a she was obliged to do and paid school fees for a private college and some pocket money. Any gifts were of nominal value and a house was never purchased for the Plaintiff or her mother to live in, despite the fact that they moved a number of times from one rented premises to another. In no sense could it be said that the Plaintiff was spoilt by her father.
43. The Plaintiff was left a $3 million trust in the Will which depended upon the Estate putting the money in the Trust and the Trustee exercising his discretion to make payments to the Plaintiff or on her behalf.

44. Both sides called actuarial evidence as to what the Plaintiff might need to survive through life and buy a house. This evidence was rejected by Master Sanderson as of no assistance to him.
45. The Plaintiff had presented a wish list to the Court which included a $250,000.00 guitar but Master Sanderson correctly observed that if you ask 19 year old to provide a wish list they are obviously going to use their imagination. Master Sanderson found that he was not left with the impression that the Plaintiff was a gold digger or in some way a narcissistic or greedy individual. She was attempting to do a Bachelor of Arts degree with a double major in Media, Marketing and Public Relations and she had some hopes of marrying in two years time. She anticipated having four children. To this, Master Sanderson commented *"of course after one child she may reconsider, most sensible people do.* Master Sanderson made the comment at paragraph 63 *"it is always necessary to remain cautious about reaching a decision in an evidence free zone but it difficult to see in this case what evidence could have been lead and what was not held which may in some way influence the exercise of my discretion"*. He found that the Plaintiff was an honest, level-headed young woman but was subject to all of the vagaries and uncertainties of youth. In the exercise of his discretion he decided he would award the Plaintiff a cash payment of $25 million conditional upon her forfeiting any right or interest in the trust. He made it clear that in exercising his discretion, the one factor that had influenced him most was the size of the Estate which he described as although not completely calculated, as colossal.
46. In his submissions, counsel for the Plaintiff speculated the size of the Estate could be in excess of $1 billion and over $400 million had been distributed to the second and Third Defendants leaving an amount standing in the Estate and undistributed at $45,272,231.18.
47. Master Sanderson stated at [71]-[73] that if he took the moral approach, which he stated had gone in and out of favour and soon to be back in favour, then performing the testators moral duty would result in his decision of $25 million. If on the other hand he adopted the community expectation test, ie what "*... most people would expect the Plaintiff to be more than adequately provided for, given the size of the Estate and lack of limitation of any award....It is difficult to believe that a majority would not see it appropriate to set up the Plaintiff for life. How members of the community would settle on the figure is a rather more difficult*

question. In my view, an award of $25 million would not fall outside the reasonable expectation of most members of the community."

48. Master Sanderson stated at [75] that the Deceased had been diagnosed with cancer six months prior to his death, had a competent solicitor and was aware of what could happen. He had the opportunity of divesting himself of his assets had he chosen to do so but the price for doing that *"would have been millions of dollars in gift duty. The price the deceased paid for passing his assets tax free to his nominated beneficiaries was acceptance of the statutory duty arising under the Act to the Plaintiff."*
49. He concluded at [76]:

    "Finally I would add this. When the $25 million is paid to the Plaintiff the rest of the residuary estate will pass to the second and third defendants. They will get about $10 million each less perhaps $1 million for costs. That is on top of the $400 million they already have; and they can rest easy in the knowledge their half-sister will be financially secure for the rest of her life".
50. One can only speculate that the decision would have been any different if the Plaintiff had deliberately shunned her father for no good reason for most of the years of her life.

CONCLUSIONS

51. The eligible person who has been estranged for a long period without being able to give a satisfactory explanation for the estrangement, and without complete honesty in disclosure, is probably less likely to succeed on the probabilities, although each case with turn on its own facts. In the event of a loss the possibility of an adverse costs order is more likely than not. It follows that when advising an estranged party who does not have convinving evidence showing it was the Testators fault that there had been a breakdown in relationship or there is little to no evidence of attempts by the Plaintiff to bring about a genuine reconciliation during the Deceased's lifetime, one must be cautious in advice as to prospects of success. I am now happy that the case I referred to in my earlier paper was settled during the hearing.
52. The old fear that grandparents that give gifts or help with education expenses risk a claim against their Estate has now been tempered in view of the guidelines set out by Hallen J in *Bowditch v NSW Trustee and Guardian*.

53. Costs orders against the unsuccessful applicant are also likely to be the norm rather than the exception. It is hopeful that the flood of personal injury lawyers into this field of law, on the ‘everyone wins a prize philosophy’ will be diminished as a result.
54. When the Estate is enormous, the rules become more flexible.