

DISABLED BENEFICIARIES AND ELIGIBLE PERSONS
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Balancing testator’s moral obligation to provide for a disabled person and testator’s moral obligation to other eligible persons

- 1 Chapter 3 “Family Provision” provides that the court may make an order for provision for an eligible person if the deceased has not made adequate provision for the proper maintenance, education or advancement in life of the applicant, and an order ought to be made.
- 2 This has been described as a multi-faceted evaluative judgment¹, and the Court should be guided and assisted by perceived prevailing community standards of what is right and appropriate.²
- 3 A disabled eligible person has a strong claim. In *Stern v Sekers*,³ the claimant was the deceased’s daughter who had a 20 year history of schizophrenia, with a history of hospital admissions with psychotic symptoms, who would need to take anti-psychotic medication indefinitely and remain under the care of a specialist psychiatrist.
- 4 Ward J noted counsel’s suggestion that a disabled child’s position was not dissimilar from that of a widow insofar as the disabled child has no capacity to improve her current position unlike her brothers and sisters, so her needs should be accorded primacy to theirs.⁴ Ward J held that the community expectation of the deceased, having a very large estate at his disposal and knowing that his daughter had suffered for many years from a serious psychiatric illness, would be that he would ensure that she was left well provided for and not left at risk of having to fend for herself or at the mercy of the kindness and charity of her family no matter how attentive and well-meaning they might be.
- 5 However, this does not mean that the disabled claimant merely has to list the claimant’s financial needs – the court must still assess what is “proper” provision. In *Walker v Walker* Young J said⁵

“... I reject the approach that all an applicant under this Act [Family Provision Act 1982 (NSW)] has to do is to prove that he or she is an eligible person and that he or she reasonably needs more financial assistance. The cases show that there must be a full investigation into all the facts and circumstances of the matter to see whether the community would expect that a person in the plight of this testator ought to have made provision or further provision for the applicant.”
- 6 In particular, a family provision claim is different from a personal injury claim and does not require the deceased’s estate to provide for all of the applicant’s needs. In *Stern v Sekers* Ward J noted that the court needs to assess “proper” provision and “not an assessment of what might be the compensation to be awarded in a personal injury case”.⁶
- 7 Similarly, in *Oswell v Jones*⁷ Chesterman J distinguished a personal injury claim. The claimant was born with cerebral palsy. She had spastic quadriplegia and athetosis, the involuntary movement of her upper body, head and neck, and limbs and limited use of her hands. She

¹ *Foley v Ellis* [2008] NSWCA 288 at [3] per Basten JA

² *Andrew v Andrew* [2012] NSWCA 308 at [16] per Allsop P

³ *Stern v Sekers* [2010] NSWSC 59

⁴ *ibid* at [331]

⁵ *Walker v Walker* (unreported, 17 May 1996, NSW Supreme Court) at [30]–[31] per Young J

⁶ *Stern* supra n3 at [222]

⁷ *Oswell v Jones* [2007] QSC 384,

was totally dependent upon others and could not wash herself, dress herself, feed herself or get in or out of bed unaided. He said⁸

“The applicant’s solicitors have taken advice from therapists and doctors used to caring for sufferers of cerebral palsy and have obtained from them a list of equipment and services which will benefit the applicant’s physical and psychological health. These services and chattels are then designated as ‘needs’ which must be met from the testator’s estate. The computation of the amount necessary to provide for the satisfaction of those needs has been undertaken as though the proceedings were a claim for damages against a statutory insurer.”

8 And later⁹

“The applicant would probably derive some benefit from all, or most, of the services and equipment described in the schedules. However, it is to make no criticism of the applicant; nor is it a failure to recognise her severe disabilities, to say that the claims are, in the context of the proceedings and the estate, extravagant. It is one thing to say that the testator failed, as he did, to make adequate provision for her proper maintenance: it is another thing altogether to say that the applicant must receive the whole of the estate, save for the parties’ costs and her brothers’ legacies.”

- 9 The court may consider the matters set out in section 60 of the Act to assist in determining the community’s expectations and current social conditions and standards. In *Andrew v Andrew*, Allsop P said that the list of considerations in s 60(2) encompasses many, if not most, considerations likely to be of relevance to the resolving of the broad evaluative task,¹⁰ and Basten JA said at [29] that the listed factors may be taken into account in determining whether adequate provision is made as well as whether an order ought to be made.
- 10 The disabled claimant’s disability and financial needs are factors.¹¹ However, the court must also consider other factors.
- 11 First, the court must consider the competing claims on the deceased’s testamentary bounty.
- 12 The Deceased’s spouse will have a strong competing claim. In *Lancaster v Bray*, McLaughlin ordered provision for a spouse in weak financial circumstances notwithstanding that the Deceased’s son suffered from autism, intellectual retardation, epilepsy and Crohn’s disease, and in *Costigan v Norton*, Byrne J ordered the bulk of the estate to the spouse, notwithstanding that the spouse was employed and had some superannuation and the son had cerebral palsy, mental retardation and epilepsy.
- 13 There have been several cases involving competing claims of a disabled child and a spouse where the courts have only retained the disabled child’s provision by reducing or extinguishing *another child’s* provision rather than reducing the spouse’s provision or dismissing the spouse’s claim - *Lancaster v Bray*¹² (daughter’s share reduced), *Costigan v Norton*¹³ (two sons shares’ extinguished).
- 14 However, even if the competing beneficiaries are *siblings* the court may still not order further provision. In *Bruce v Matthews*,¹⁴ Daly AsJ dismissed the disabled son’s application

⁸ *ibid* at [45]

⁹ *ibid* at [62]

¹⁰ *Andrews* supra n2 at [15]

¹¹ “any physical, intellectual or mental disability of the applicant” – section 60(2)(f); “the financial resources (including earning capacity) and financial needs, both present and future, of the applicant” – section 60(2)(d)

¹² *Lancaster v Bray* [2008] NSWSC 155

¹³ *Costigan v Norton* [2005] VSC 208

¹⁴ *Bruce v Matthews* [2011] VSC 185,

notwithstanding that the case worker gave a detailed report of the disabled son's needs including lifting equipment and shower chair, health and dental care and modified van and taxi expenses. Daly AsJ said that the current legacy covered a new wheelchair and electronic communication devices, and the deceased's two daughter had modest financial circumstances and "in some respects more subject to the vicissitudes of life".

- 15 In *Charlesworth v Herring*¹⁵ [2007] NSW 312, Gzell J dismissed an intellectually disabled son's claim because of the deceased's step-daughter's competing claim, and the smallness of the estate. Mr Charlesworth had a genetic disorder phenylketonuria which causes brain damage. He was intellectually handicapped with the intellectual capacity of a four or five year old, he was on a strict diet, could not read or write, could not care for himself independently and needed 24 hour care. Gzell J said¹⁶

"That Mr Charlesworth is a disable person and son of the deceased weigh heavily in his favour as an expected object of testamentary beneficence. But those factors must be weighed against the claim of Ms Herring. Mrs Herring and Ms Herring constituted a surrogate family of the deceased to whom he owed moral duties. Mr Charlesworth having had no contact with the deceased from the age of six and his mother and his sister having had no contact and having not encouraged Mr Charlesworth to have any contact with the deceased, notwithstanding that their houses were separated by just 13 kilometres, leads me to the view that a wise and just testator would not have made provision for Mr Charlesworth bearing in mind the needs of Ms Herring and the relative smallness of the estate."

- 16 In *Crouch v Zelichowski* [2002] NSWSC 681, McLaughlin J *reduced* the share of a daughter with cerebral palsy, cellulitis eczema and OCD, so as to provide the spouse with the deceased's share of their jointly owned house in circumstances where the spouse made financial contributions towards improving the property and the household outgoings.
- 17 These cases are in contrast to cases such as *Davis v Davis*¹⁷ where Slattery J ordered significant provision for the deceased's intellectually disabled daughter who could not live independently, noting that was "very little evidence of the other claims upon the deceased's bounty."¹⁸
- 18 Second, the court must consider the size of the estate.
- 19 In *Bladwell v Davis*,¹⁹ the NSW Court of Appeal was dealing with a widow's claim in a relatively small estate. Bryson JA (Ipp JA and Stein AJA agreeing) said:²⁰

"As recurringly happens, it is not possible to meet all the claims on the testator's bounty which have been shown to exist. Determination whether there is power to make an order under the Family Provision Act 1982, and also what order should be made, requires the Court to have regard to the assets available for distribution; and the assets available are not sufficient to satisfy all proved needs and claims on the testator's bounty. There can be no truly satisfactory outcome for this litigation. No-one with a claim on the testator's bounty could receive adequate provision in relation to that person's needs except at the expense of making less than adequate provision available for some other such person."

¹⁵ *Charlesworth v Herring* [2007] NSW 312

¹⁶ *ibid* at [33]

¹⁷ *Davis v Davis* [2012] NSWSC 201

¹⁸ *ibid* at [75]

¹⁹ *Bladwell v Davis* [2004] NSWCA 170,

²⁰ *ibid* at [11]

- 20 In fact, the court has *declined* to make further provision for disabled applicants in small estates.
- 21 In *Bruce v Matthews*²¹, Daly AsJ dismissed the application for further provision of a son with cerebral palsy, bipolar disorder with severe physical disabilities in a wheelchair, and who was already entitled to a share of the Deceased's estate. He said²²
- “Accordingly, there is no doubt that Huw has substantial needs and that in an ideal world, substantial financial resources could be devoted to meeting those needs and substantially improving the quality of his life, both in terms of material comforts and enhanced opportunities for social interaction. However, this case highlights the fact that the world is far from ideal.”
- 22 Daly AsJ noted that even if the whole of the estate was paid to the disabled son, the case worker's recommendations could not be implemented, and from a practical point of view, any award of further provision would cause hardship of varying degrees *to his sisters*.
- 23 In *Mikan v Velic*,²³ the deceased died intestate with an estate of \$340,000 and two children, a poor son in Croatia and a disabled daughter in Australia. He dismissed the daughter's application because of her brother's competing needs in a small estate, and because the daughter at least could access social security benefits in Australia.
- 24 Similarly, in *Potet v Banks*,²⁴ Macready J dismissed an application from a child from the first relationship suffering from seizures notwithstanding that the child and first spouse were surviving on food stamps, because of the competing needs of the deceased's current spouse and younger child. Macready J dismissed the child's application because of the second wife and younger child's competing needs in a small estate, and because the second wife had at least obtained the benefit of a property settlement some years ago.
- 25 In contrast, in *Chan v Tsui*,²⁵ Macready M gave the disabled daughter significant provision because the competing claims of the disabled daughter's three sisters could be met out of the available estate and notional estate because of the wealth in the notional estate.
- 26 Similarly, in *Stern v Sekers*,²⁶ Ward J gave the disabled daughter significant provision notwithstanding other competing claims because the estate and notional estate was approximately \$8.5 million. Even so, Ward J ordered “somewhat less than the \$2 million claimed”.²⁷

Interplay between testator's obligation to provide for a disabled eligible person and social welfare

- 27 Generally speaking, the object of the legislation is that a deceased is compelled to make provision for their dependants and not throw maintenance of dependants on the public purse. However, a wise and just testator may take government support into account, particularly in small estates.
- 28 Government support may include

²¹ *Bruce v Matthews* [2011] VSC 185

²² *ibid* at [16]

²³ *Mikan v Velic* [2011] NSWSC 251

²⁴ *Potet v Banks* [2011] NSWSC 1442

²⁵ *Chan v Tsui* [2005] NSWSC 82,

²⁶ *Stern* *supra* n3

²⁷ *Stern* *supra* n3 at [373]

- a. Centrelink - disability support pension,²⁸ carer's allowance,²⁹ mobility allowance,³⁰ rental assistance, telephone allowance,³¹ utilities allowance³², pharmaceutical allowance;³³
- b. Pensioner Concession Card;³⁴
- c. Medicare Safety Net;³⁵
- d. PBS Safety Net – pharmaceuticals;³⁶
- e. Enable NSW (NSW Department of Health)³⁷ – funding for mobility (wheelchairs, bathing and showering, beds and accessories, transfer aids, walkers), compression garments, footwear and orthotics, home respiratory, prosthetic limbs, bathing aids, continence aids;
- f. NSW Department of Family and Community Services; Ageing, Disability, Homecare – group homes, disability advisory services;³⁸
- g. T9 tax offset on medical expenses;³⁹
- h. NSW Department of Housing;⁴⁰
- i. CAPS – Continence Aids Payment Scheme.⁴¹

29 In *Whitmont v Lloyd*,⁴² Bryson J said

“The protection of public funds from claims by indigent persons is not a purpose of Family Provision legislation but they are incidentally protected by the legislation, which was not an Act solely for the protection of private interests and serves public policy... In my opinion, the availability of age pensions and other social benefits is a circumstance which should be regarded, and particularly in smaller estates, it may be appropriate to leave an Applicant wholly or partly dependent on them or to mould the provision made so that their availability is preserved in whole or in part. The acceptance of benefits for which statute law provides is in every way legitimate, involves no social stigma and incurs no disapproval from the Court. It is not the Court's task to be vigilant, to throw burdens off public funds and onto private estates. Still it is true that the legislation has a public policy purpose and it is not appropriate that where there is wealth within the estate, it should be directed away from the less fortunate and successful of the eligible person so as to enhance their claims to social benefits and maximise the resources of others; the Court should not disregard the interest of the public in public funds, which can receive incidental protection from the workings of this legislation. Where wealth is available, it should be used to meet needs for maintenance, education and advancement

²⁸ <http://www.humanservices.gov.au/customer/services/centrelink/disability-support-pension>

²⁹ <http://www.humanservices.gov.au/customer/services/centrelink/carer-allowance>

³⁰ <http://www.humanservices.gov.au/customer/services/centrelink/mobility-allowance>

³¹ <http://www.humanservices.gov.au/customer/services/centrelink/telephone-allowance>

³² <http://www.humanservices.gov.au/customer/services/centrelink/utilities-allowance>

³³ <http://www.humanservices.gov.au/customer/services/centrelink/pharmaceutical-allowance>

³⁴ <http://www.humanservices.gov.au/customer/services/centrelink/pensioner-concession-card>

³⁵ <http://www.humanservices.gov.au/customer/services/medicare/medicare-safety-net>

³⁶ <http://www.medicareaustralia.gov.au/provider/pbs/pharmacists/safety-net.jsp>

³⁷ <http://www.enable.health.nsw.gov.au/>

³⁸ <http://www.adhc.nsw.gov.au/>

³⁹ <http://www.ato.gov.au/content/00313907.htm>

⁴⁰ <http://www.housing.nsw.gov.au/>

⁴¹ <http://www.continence.org.au/pages/continence-aids-payment-scheme-caps.html>

⁴² *Whitmont v Lloyd*, unreported, 31/7/1995

of eligible persons. The significance of social benefits is related to the available resources..."

30 More recently, in *Taylor v Farrugia*,⁴³ Brereton J said at [59]

"The Court's attitude to the eligibility for means tested pension benefits of eligible persons and beneficiaries varies, depending on the circumstances of the case. Ordinarily, a testator makes a will and provides for those who have a claim on the testator without regard to the claimant's eligibility for a pension. However, in a small estate where there are competing claims, a testator, and this Court on an application under the Act may take into account the eligibility of a claimant for a pension as a means of deciding how such limited benefits as are available from the estate should be shared between claimants, and how those benefits might be structured. But this qualification to the principle that the burden of support should be borne in the first instance by an estate rather than by social security arises mainly, if not exclusively in smaller estates [*Parker v Public Trustee* (1988) NSWSC, Young J, 31 May 1998; *Whitmont v Lloyd* (New South Wales Supreme Court, 31 July 1995, Bryson J, unreported); *King v Foster* (Court of Appeal, 7 December 1995, unreported) *King v White* [1992] VicRep 72; [1992] 2 VR 417, 424; *Shah v Perpetual Trustee Company* [1981] 7 Fam LR 97 100; *Gunawardena v Kanagaratnam Sri Kantha* [2007] NSWSC 151; *Chan v Tsui* [2005] NSWSC 82"]

31 In *Mikan v Velcic*,⁴⁴ Hallen AsJ dismissed the disabled daughter's claim and said⁴⁵

"... bearing in mind the size of the estate, I have no doubt that I am entitled to, and should, consider the pension entitlement of Ivanka"

32 In *Bruce v Matthews*, Daly AsJ did not order further provision for a disabled son. He said it was relevant that the son was essentially supported by the State, and the likelihood of him ceasing to receive such support was minimal (although he noted that this may be of limited relevance). He said it was extremely difficult to foresee such a dramatic change in public policy that would result in a person with Huw's disabilities and needs bereft of income or secure accommodation.

33 *Gunawardena v Kanagaratnam Sri Kantha*⁴⁶ involved an epileptic who had two strokes who was fully dependant and lived in high level care in a nursing home. He was given a life estate in the house from his mother's estate, but wanted the house absolutely. Young J accepted counsel's submission that the court may take social service benefits into consideration, at least in cases where estate is relatively small. Young J noted that the son appeared to be able to be properly maintained for the rest of his life out of his pension, and he had a small capital sum of approximately \$33,000 and no capital needs. Young J only ordered a further \$77,000.

34 The court may still consider social welfare benefits even in a large estate. In *Stern v Sekers*, Ward J referred to Young J's comments in *Foster v Lisle* [2003] NSWSC 1243 that it was no answer to the claim that the defendant is entitled to a pension but a wise and just testator may take such income into account. The deceased's estate was approximately \$8.5 million, but Ward J noted that the applicant may still be entitled to a pension if there was a special disability trust, so the order for provision included a *supplement* to the disabled daughter's pension.

Special **disability trusts, Centrelink disability pension means test, National Disability Scheme**

⁴³ *Taylor v Farrugia* [2009] NSWSC 801

⁴⁴ *Mikan* supra n23

⁴⁵ *ibid* at [51]

⁴⁶ *Gunawardena v Kanagaratnam Sri Kantha* [2007] NSWSC 151

- 35 It is prudent to consider the government support framework when drafting wills and crafting settlements.

Disability Support Pension

- 36 A disabled person who is an Australian resident who is over 16 may be entitled to a Centrelink disability support pension.⁴⁷ Generally speaking, a person is entitled to a disability pension if
- a. they are permanently blind or have been assessed as having a physical, intellectual, or psychiatric impairment, and
 - b. unable to work or be retrained to work 15 hours or more per week at the relevant minimum wage within the next 2 years, or participating in a supported wage system, or have been assessed as having a severe impairment or actively participated in a program of support.
- 37 However, the disability support pension is means tested - there is a maximum income threshold and maximum assets threshold where a person no longer receives the full pension, and a maximum income threshold and maximum assets threshold where the pension cuts out all together. The rate of payment is calculated under both the income and assets tests - The test that results in the lower rate (or nil rate) will apply. The thresholds are indexed and updated on 1 January, 20 March and 20 September each year. The current *general* thresholds are set out in the schedules to this paper – a person who is permanently blind may not be subject to the income or assets test, and there are qualifications for those suffering hardship, or in granny flats or retirement villages.

Special Disability Trusts

- 38 Special disability trusts are trusts that are created to pay for the costs of reasonable and accommodation of a severely disabled person. Special Disability Trusts have certain exemptions to the disability support pension asset and income thresholds.⁴⁸
- 39 A Special Disability Trust can have assets up to \$596,500⁴⁹ without these assets impacting on the trust beneficiary's Disability Support Pension. The maximum assets for a single person for the full disability pension would otherwise be \$192,500 for a non-home-owner and \$332,000 for a home-owner.
- 40 A Special Disability Trust must:
- a. have only one principal beneficiary (the person for whom the trust is established), who must meet the eligibility criteria
 - b. provide for the accommodation and care needs of the principal beneficiary
 - c. have a trust deed that contains the clauses as set out in the model trust deed⁵⁰
 - d. have an independent trustee, or alternatively have more than one trustee
 - e. comply with the investment restrictions
 - f. provide annual financial statements and
 - g. conduct independent audits when required.
- 41 The disabled person must meet the definition of severe disability, that is,

⁴⁷ <http://www.humanservices.gov.au/customer/services/centrelink/disability-support-pension>

⁴⁸ <http://www.humanservices.gov.au/customer/services/centrelink/special-disability-trusts>;

<http://www.fahcsia.gov.au/our-responsibilities/disability-and-carers/program-services/special-disability-trusts>

⁴⁹ indexed annually and current as at 1 July 2012)

⁵⁰ <http://www.fahcsia.gov.au/our-responsibilities/disability-and-carers/publications-articles/model-trust-deed-for-special-disability-trusts>

- a. a person who has reached 16 years of age:
 - i. whose level of impairment would qualify the person for Disability Support Pension or who is already receiving a Department of Veterans' Affairs (DVA) Invalidity Service Pension or DVA Invalidity Income Support Supplement
 - ii. who has a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance and
 - iii. who has a disability and is unable to work more than seven hours a week in the open labour market
 - b. a person who has reached 16 years of age
 - i. whose level of impairment would qualify the person for Disability Support Pension or who is already receiving a DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement;
 - ii. who is living in an institution, hostel or group home where care is provided for people with disabilities and funding is provided under an agreement between the Commonwealth, states and territories and
 - iii. who has a disability and is unable to work more than seven hours a week in the open labour market
 - c. a child under 16 years of age:
 - i. who is a person with a severe disability or a severe medical condition
 - ii. who has a carer who has been given a qualifying rating of 'intense' under the Disability Care Load Assessment (Child) Determination for caring for that person and
 - iii. who has had a treating health professional certify in writing that, because of that disability or condition:
 - 1. the person will need personal care for six months or more and
 - 2. the personal care is required to be provided by a specified number of persons
- 42 The trust assets must be used to meet the reasonable care and accommodation needs of the principal beneficiary. This may include medical and dental expenses, private health fund premiums and maintenance on trust property assets. This may also include up to \$10,000 indexed (currently \$10,500) in a financial year on discretionary items not related to the care and accommodation such as wellbeing, recreation, independence and social inclusion.
- 43 A special disability trust may be a testamentary trust. However, there may be advantages in creating a special disability trust while the donor is still alive. Generally speaking, a person on a pension (such as an age pension) who gifts an amount of more than \$10,000 in a year or more than \$30,000 a year is treated as having a "deprived asset" – the deprived asset continues to be included as an asset and deemed to earn income for five years for the purposes of the pension assets test and income test. This means the donor may not qualify for the pension even though they disposed of the asset by gifting the asset. However, a person who is an immediate family member (including a parent, sibling or grandparent) may contribute up to \$500,000 to a special disability trust
- 44 Further, a special disability trust is entitled to tax concessions, including
- a. trust income taxed at beneficiary's personal income tax rate not highest marginal tax rate;
 - b. allow capital gains tax exemption for any asset donated to a Special Disability Trust,
 - c. allow capital gains tax main residence exemption for Special Disability Trusts;
 - d. allow capital gains tax exemption for the recipient of the beneficiary's main residence, if disposed of within two years of the beneficiary's death, and
- 45 The disability support framework is likely to be affected by the National Disability Insurance Scheme. The National Disability Bill 2012 was passed by the Commonwealth House of

Representatives on 29 November 2012 with bipartisan support, and has been referred to a Senate Committee.

appointing a suitable tutor (and a suitable trustee)

- 46 A disabled claimant's financial affairs may be managed by the NSW Trustee and Guardian pursuant to a court order (for example, as part of final orders in a motor vehicle accident claim) or pursuant to a financial management order. The NSW Trustee and Guardian may then commence proceedings as tutor for the disabled claimant.
- 47 If the disabled claimant's affairs are not being managed by the NSW Trustee and Guardian, the claimant's legal representatives should carefully consider who would be the most appropriate tutor and ultimately trustee of any funds.
- 48 At first blush, it may appear that a disabled child's parent is best placed to act as tutor and trustee. However, this may not always be prudent. The disabled child's parent may be the Deceased's ex-spouse. The Deceased's ex-spouse may have their own issues with the Deceased – they may be angry with the Deceased because of the breakdown of their relationship with the Deceased and what they perceive to have been an unfair property settlement, they may be frustrated that they will no longer be paid child support and will now have to support the disabled child alone, and they may have personal issues with the Deceased's new spouse (who may be the executor and may be the Deceased's major beneficiary). This may make it difficult to negotiate a reasonable settlement of the disabled child's claim. If the matter proceeds to trial, the court may consider that the Deceased's ex-spouse is using the disabled child as a proxy for the Deceased's ex-spouse's own interests. In *Oswell v Jones*,⁵¹ Chesterman J said⁵²
- “I could not help but think during the course of the applicant's case that it had a sub-text: that the application, based as it is upon the applicant's admitted need for better provision, is a means by which the testator's estate may be distributed to the members of his family rather than Mrs Margaret Jones' family. An absolute gift of the whole estate goes beyond what is necessary for the applicant's maintenance during her lifetime. Yet the applicant's counsel insisted on such a gift.
- 49 The disabled claimant's legal representatives should also consider whether there may be a potential conflict between the tutor/trustee and the claimant, now or in the future. For example, the tutor/trustee may seek provision to buy a house. This will provide accommodation for the disabled claimant, but may incidentally also provide accommodation for the tutor/trustee. What happens if a social worker later recommends that the disabled person would be better in a group home or supported housing? The tutor/trustee may strongly resist the recommendation, and indeed may genuinely believe that the disabled claimant is better living with the tutor/trustee at home. What happens if the disabled claimant needs to realize funds to pay for their reasonable expenses but the tutor/trustee wants to remain living in the house and does not want to sell the house?
- 50 In *Gunawardena v Kanagaratnam Sri Kantha*,⁵³ the claimant was an epileptic who had a number of strokes and was unable to speak. He was living in a nursing home and had very detailed care requirements. However, “he” was claiming the Deceased's house, on the basis that he could visit the house every now and then, and his former wife and daughters would look after him in the house. Young J said

⁵¹ *Oswell* supra n7

⁵² *ibid* at [63]

⁵³ *Gunawardena* supra at n46

“I am by no means convinced that on the facts the plaintiff would be physically better off going home, that is, going to the testatrix's home and being cared for by his former wife and his daughters. I also do not accept that the trial involving 10 overnight visits is any real indication as to the success of a 7 day a week 24 hour a day care that is available in the nursing home. I accept from Dr Gupta and others that, as a general rule, most people are happier being cared for in their own home, but Mr Gunawardena is in a situation of needing very high care from two people which is just not going to be available to Mrs Gunawardena even if she obtains the anticipated assistance from Commonwealth funds.

Evidence placed before the court

- 51 The disabled claimant is a claimant who has the onus of proof. Therefore, the claimant must provide evidence of their needs.
- 52 In *Davis v Davis*,⁵⁴ the case worker's affidavit gave “an accurate appraisal of Robyn's income and expenditure”. Similarly, in *Bruce v Mathews*, *Oswell v Jones*, *Gunawardena v Kanagaratnam Sri Kantha*, *Cruickshank v Public Trustee*⁵⁵ and *Stern v Sekers*, the applicant's case workers and health professionals provided detailed and costed reports of recommendations.
- 53 The court may also consider actuarial evidence such as the disabled claimant's life expectancy and discount tables. In *Davis v Davis*, Slattery J considered 3% was appropriate⁵⁶, and in *Stern v Sekers*, Ward J considered that the 3% discount tables were more appropriate than 5% and said⁵⁷

“I am of the view that the community would expect a conservative approach to be taken in a case where the testator is looking at the proper provision for a severely disabled daughter. On balance I consider that it is appropriate for the 3% tables to be used on this application.”

- 54 The disabled claimant's needs may include⁵⁸
- a. Reasonable accommodation costs (including, if the person can live alone, a house and furnishings)
 - b. Medical and dental expenses (including health insurance premiums);
 - c. Clothing;
 - d. Companion carers;
 - e. NSWTFG or other trustee management fees;
 - f. Daycare, excursions, holidays and other recreational outings;
 - g. A contingency sum.

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⁵⁴ *Davis* supra n17

⁵⁵ *Cruickshank v Public Trustee* [2005] NSWSC 390

⁵⁶ *Davis* supra n17 at [69]

⁵⁷ *Stern* supra n3 at [365]

⁵⁸ *Davis* supra n17 at [60], *Stern* supra n3 at [211]

SCHEDULE 1 – DISABILITY SUPPORT PENSION - INCOME TEST

<http://www.humanservices.gov.au/customer/enablers/centrelink/disability-support-pension/income-and-assets-tests>

Single

- Under 21, single, no children, 16-17 years (at home)
- Under 21, single, no children, 18-20 years (at home)
- Under 21, single, no children, 16-20 years (independent)

Fortnightly income up to \$152 over \$152

Reduction in payment none – full payment 50 cents for each dollar over \$152

Couple combined

- Under 21, member of a couple, no children, under 18 years
- Under 21, member of a couple, no children, 18-20 years

Fortnightly income up to \$152 over \$152

Reduction in payment none – full payment 50 cents for each dollar over \$152

Single, saved status

- Under 21, single, no children, saved status, 16-17 years (at home)
- Under 21, single, no children, saved status, 18-20 years (at home)
- Under 21, single, no children, saved status, 16-20 years (independent)

Fortnightly income up to \$152 over \$152

Reduction in payment none – full payment 40 cents for each dollar over \$152

Couple combined, saved status

Fortnightly income up to \$268 over \$268

Reduction in payment none – full payment 40 cents for each dollar over \$268

Cut-off points

Disability Support Pension

If you are	payment reduces to \$0 once your fortnightly income reaches this amount
Single	\$1697.20
Couple (combined)	\$2597.60
Illness separated (couple combined)	\$3358.40
Under 21, single, no children, 16-17 years (at home)	\$841.20
Under 21, single, no children, 18-20 years (at home)	\$931.60
Under 21, single, no children, 16-20 years (independent)	\$1210.20
Under 21, member of a couple, no children, under 18 years	\$1210.20
Under 21, member of a couple, no children,	\$1210.20

If you are	payment reduces to \$0 once your fortnightly income reaches this amount
18-20 years	
Under 21, single, no children, saved status, 16-17 years (at home)	\$1013.50
Under 21, single, no children, saved status, 18-20 years (at home)	\$1126.50
Under 21, single, no children, saved status, 16-20 years (independent)	\$1474.75
Couple (combined), saved status	\$2898.00

SCHEDULE 1 – DISABILITY SUPPORT PENSION - ASSETS TEST

<http://www.humanservices.gov.au/customer/enablers/assets>

Chart A - assets test limits for allowances and full pensions

Family situation	For Homeowners	For Non-homeowners
Single	\$192 500	\$332 000
Couple (combined)	\$273 000	\$412 500
Illness separated (couple combined)	\$273 000	\$412 500
One partner eligible (combined assets)	\$273 000	\$412 500

Chart B - assets test limits for part pensions

Family situation	For part pension assets must be less than	
	For Homeowners	For Non-homeowners
Single	\$707 750	\$847 250
Couple (combined)	\$1 050 000	\$1 189 500
Illness separated (couple combined)	\$1 303 500	\$1 443 000
One partner eligible (combined assets)	\$1 050 000	\$1 189 500

Transitional homeowner

Family situation	For Homeowners	For Non-homeowners
Single	\$642 750	\$782 250
Couple (combined)	\$1 000 500	\$1 140 000
Illness separated (couple combined)	\$1 173 500	\$1 313 000
One partner eligible (combined assets)	\$1 000 500	\$1 140 000

Assets test for DSP under 21 (no children)

Family situation	For Homeowners	For Non-homeowners
Single - dependent		
16–17 years	\$422 250	\$561 750
18–20 years	\$452 500	\$592 000
Single - independent		
16-20 years	\$545 250	\$684 750
Couple (combined)		
16-20 years		