[2017] WASC 302

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	LAFFERTY -v- WATERTON [No 4] [2017] WASC 302
CORAM	**:**	ALLANSON J
HEARD	**:**	13-15 SEPTEMBER 2017
DELIVERED	**:**	19 OCTOBER 2017
FILE NO/S	**:**	CIV 1855 of 2013
BETWEEN	**:**	SUSAN JUANITA LAFFERTY Plaintiff AND WILLIAM FRANK WATERTON AND MADELAINE PEGGY JUNGSTEDT IN THEIR CAPACITIES AS EXECUTORS OF THE ESTATE OF THE LATE PEGGY JUANITA WATERTON First Defendant WILLIAM FRANK WATERTON Second Defendant MADELAINE PEGGY JUNGSTEDT Third Defendant

Catchwords:

Equitable estoppel - Where mother assures daughter she will receive one third of her remaining assets - Where mother makes substantial gifts to other children during her lifetime - Whether mother's estate estopped from denying promise - Whether property disposed of during lifetime subject to constructive trust

Equitable estoppel - Where plaintiff asserts she gave up claim for family provision - Whether claim had value

Equity - Constructive trust - Whether property disposed of by mother in her lifetime impressed with trust as to one third of its value - Turns on own facts

Legislation:

Administration and Probate Act 1958 (Vic), pt IV
Evidence Act 1906 (WA), s 79C

Result:

Claim dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr G M G McIntyre SC & Mr A S Meysner
First Defendant	:	No appearance
Second Defendant	:	Mr M N Solomon SC & Mr T J Carmady
Third Defendant	:	Mr M W Fatharly

Solicitors:

Plaintiff	:	Butcher Paull & Calder
First Defendant	:	No appearance
Second Defendant	:	Williams & Hughes
Third Defendant	:	Kott Gunning

Case(s) referred to in judgment(s):

Calverley v Green (1984) 155 CLR 242
Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd [2016] HCA 26
Giumelli v Giumelli (1999) 196 CLR 101
Harrison v Harrison [2011] VSC 459

Hughes v National Trustees Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134
Jones (a pseudonym) v Smith (a pseudonym) [2016] VSCA 178
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705
Martin v Martin [1959] HCA 62; (1959) 110 CLR 297
Sidhu v Van Dyke [2014] HCA 19; (2014) 251 CLR 505
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

1 **ALLANSON J**: Susan Lafferty is one of three children of William and Peggy Waterton, both now deceased. Ms Lafferty claims that she is entitled to one third of her mother's estate and that property her mother gave to the other children is impressed with a trust as to that one third interest. The claim is based on a letter written by Mrs Waterton in about 2004. Ms Lafferty contends that her mother's estate is estopped from acting other than in accordance with the representations made in that letter.

2 In these reasons I will refer to the parents as Mr and Mrs Waterton, and the children by their given names: William, Susan and Madelaine. I mean no disrespect by doing so.

3 When these proceedings were commenced in 2013, Mrs Waterton was the first defendant. She died on 8 August 2015, leaving a will. On 18 January 2016, probate was granted to William and Madelaine as the named executors. On 22 December 2016, the Master ordered that the executors be made parties to the proceedings as the first defendant. The executors abide the decision of the court.

The evidence

4 Susan gave evidence in support of her claim, but called no other witness.

5 Neither William nor Madelaine gave evidence.

6 Susan filed a witness statement, and a responsive statement. Subject to rulings on admissibility, the statements were received as her evidence-in-chief. She was cross-examined.

7 Mrs Waterton had made written statutory declarations on 18 November 2010, 11 August 2011, 5 January 2012, and 20 December 2012. She also made a witness statement, dated 12 May 2015, which she confirmed in an affidavit of the same date. Mrs Waterton had died before trial. The parties agreed the defendants would not rely upon specified paragraphs of those documents; otherwise, they were admitted into evidence under the *Evidence Act 1906* (WA) s 79C.

8 Susan's first witness statement comprised 514 paragraphs. The defendants objected to more than half of them. Counsel conferred before trial, and most of the objections were conceded. Many paragraphs were irrelevant, many were argumentative: there were several instances of inadmissible hearsay. The admissibility of much of it was not reasonably

arguable. Similarly, many of the documents that the plaintiff included in the proposed trial bundle were not even arguably relevant. The witness statement should not have been filed in its original form. Susan may have wanted to ventilate matters that were ultimately excluded. But the practitioners preparing her statements had a responsibility to ensure that her statement and documents included in the trial bundle for tender at trial were confined to matters relevant to the issues to be determined at trial.

The facts

9 Many of the facts were not in dispute on the pleadings. In the following findings, I will indicate those instances where it has been necessary to resolve contests as to the facts.

10 Mr and Mrs Waterton married in 1948, divorced in September 1971, but remarried in February 1973 and remained married until the death of Mr Waterton.

11 Mr Waterton died in the State of Victoria on 3 December 2003. Probate of his will was granted by the Supreme Court of Victoria on 22 July 2004. William was the sole executor of the will.

12 Mr Waterton left the whole of his estate to his widow. Mrs Waterton was then 80 years old. She had not been in paid employment since about 1950, and was wholly dependent on her husband. At the time of their father's death, William was 53, Susan 51, and Madelaine 41. Each of the children was married: Madelaine had one child, Oscar. He was Mrs Waterton's only grandchild.

The estate of Mr Waterton

13 Mr and Mrs Waterton lived in Victoria, and Mr Waterton owned two properties in Gisborne. One was the site of the family home, and was known as Mulguthrie. The other was an area of approximately 7.5 acres of vacant land at 23 Turanga Road, Gisborne.

14 In July 2004, approval was obtained for a subdivision. Both properties were sold the following year. Mulguthrie was sold by a contract dated 11 March 2005 for $1.5 million. The Turanga Road land was sold by a contract dated 11 March 2005, later varied by deed on 27 June 2008 to extend the settlement date and, as consideration, increase the sale price. The ultimate selling price was $1,236,438.36.

15 The value of those properties at the time probate was granted on Mr Waterton's estate is not agreed. There is no other evidence of value

than the sale prices that were later achieved after subdivision approval had been obtained.

16 Mr Waterton owned two aeroplanes, an Aeronca Champ and a DCH 1 Chipmunk. The evidence does not show what they were worth.

17 Mr and Mrs Waterton had antique objects and furniture in their home. There is no issue that Mrs Waterton became the owner of all of them. The question is whether these items were Mr Waterton's personal property and passed to Mrs Waterton under the will, as alleged by Susan, or were jointly owned and passed to Mrs Waterton by survivorship.

18 Personal property may be owned jointly, with the consequence of survivorship on the death of one joint owner. It is a question of fact for each item whether it was acquired as the individual property of one or the other of the parties to the marriage, or was jointly owned, or even owned in common (with no right of survivorship). With general household items, it might be inferred, in the absence of contrary evidence, that they were owned as joint property. The items in question, however, are antiques and such an assumption might not reflect the facts.

19 Neither party has attempted to prove ownership of individual items. With items collected during a marriage of over 50 years it would be very complicated to determine which items were gifts from one spouse to the other, gifts to both, acquired as joint property, or acquired as exclusively the property of one of them. The evidence is that, for most of the marriage, Mrs Waterton was not in paid work. That does not answer the question. A particular item may have been a gift to Mrs Waterton, or to the two of them. It may have been purchased with money which was Mrs Waterton's to use for her own purposes. Items may have been inherited or passed down in families.

20 I can make no finding about who owned individual items before Mr Waterton's death. To the extent that Susan relies on proving that they should be included in the estate of Mr Waterton, she has not proved the necessary facts. It is unnecessary to consider the limited evidence that was adduced to prove the value of particular items, and allow an estimate of the antiques as a whole.

21 Members of the Waterton family also owned two units, Unit 3 and Unit 9 with the accompanying share in common property, at 14 Victoria Avenue, Claremont.

22 The facts regarding Unit 3, with one exception, are admitted on the pleadings. Unit 3 was the former home of Mrs Waterton's mother, who lived there until her death in 1987. The unit was owned by Edgewater Home Units Pty Ltd. Before the introduction of strata title, home unit companies were used to enable shared occupation of apartment buildings. The company owned the land and building, with the ownership of particular shares in the company carrying the right to exclusive occupation of a particular unit, together with the right to enjoy other parts of the development in common with other occupiers.

23 In 1985, Mrs Waterton's mother transferred a half share in her shares in Edgewater Home Units to Mrs Waterton, the other half was transferred to her sister, Judy Balston. Each then owned half of the parcel of shares that entitled the holder to Unit 3. Ms Balston relinquished her interest in 1987. In 1988, it was resolved that Edgewater Home Units be wound up and its assets be distributed in specie to members. In June 1989, Unit 3 was transferred to Mrs Waterton. Those facts are all admitted on the pleadings.

24 Susan alleges that Mr Waterton was the beneficial owner of Unit 3, or an interest in it. She relies on two assertions: first, that he paid money to Ms Balston in consideration of the transfer; second, at least implicitly, that he did not intend the registration in Mrs Waterton's name as a gift to his wife. Those allegations are not admitted.

25 Susan has not established either limb of her contention. There is no evidence that Mr Waterton paid consideration for the transfer of Unit 3, other than stamp duty on the transfer. Even if Mr Waterton did pay for Unit 3, the Unit was purchased in the name of his wife. The fact that he paid raises no presumption of a resulting trust in his favour: see ***Martin v Martin*** [1959] HCA 62; (1959) 110 CLR 297, 303; ***Calverley v Green*** (1984) 155 CLR 242, 247, 256, 265.

26 Unit 9 was purchased in 1999. It is admitted on the pleadings that Mr Waterton paid the purchase price of $360,000; and that William signed the transfer as transferee. The Unit was registered in the name 'William Waterton, of 32 Edsall Street, Malvern'.

27 In 2005, Mrs Waterton moved from Victoria to Western Australia and lived in Unit 9 until her death. In August 2011, William applied to amend the register to show his full name, William Frank Waterton, at his then address of Unit 3, 14 Victoria Avenue, Claremont.

28 Susan questions the circumstances in which William became the registered proprietor of Unit 9, alleging that William held the property in trust for Mr Waterton, Mrs Waterton, or both of them jointly. There is no basis - either on the facts or in any relevant presumption or rule of law or equity - for finding that William held title of Unit 9 on trust for the benefit of his mother or both parents jointly at the time of Mr Waterton's death. Whether William held the property on trust for his father is a question of Mr Waterton's intention at the time of purchase. Where a father purchases property in his son's name, there is no presumption of a resulting trust in favour of the father.

29 There is some evidence consistent with Mr Waterton exercising a degree of control over Unit 9, by permitting Susan to stay there in 2001. There is also evidence in a letter written by William, soon after his father's death, that the outgoings on both units were being met out of the rent on Unit 3.

30 On the other hand, William is the registered proprietor of Unit 9. Mrs Waterton lived in Unit 9 until her death in August 2015. In one of her statutory declarations of 11 August 2011, and in her witness statement of 12 May 2015, Mrs Waterton spoke of an unwritten understanding with William under which she lived at Unit 9, while acknowledging that he was the owner.

31 On all of the evidence, I am not satisfied that it is sufficient to show that Mr Waterton held a beneficial interest in the property.

32 In summary, the property that passed to Mrs Waterton pursuant to her husband's will included the land in Victoria and the two aeroplanes. The estate did not include Unit 3 or Unit 9. The evidence does not permit any detailed finding about the antique furniture and other objects. The plaintiff has not proved which antiques were part of her father's estate, and which were her mother's property or jointly owned.

33 The finding that Unit 3 and Unit 9 were not part of Mr Waterton's estate makes it unnecessary to determine their value at the time of his death. I will, however, briefly comment on one matter of evidence. To establish the value of her father's estate, Susan sought to prove the value of the two units. She called no valuation evidence, but sought to rely on two valuation reports prepared in May 2014. The defendants objected to the reports being tendered. I refused the tender and said I would give short reasons in my final judgment for doing so.

34 The foundation for an expert's opinion must be adequately proved. '[S]o far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way': ***Makita (Australia) Pty Ltd v Sprowles*** [2001] NSWCA 305; (2001) 52 NSWLR 705, 743 - 744 [85]. In seeking simply to tender the reports, Susan led no evidence of the facts necessary to provide a proper foundation for the opinions expressed in them.

35 Further, the evidence of value in 2014, without evidence relating it back to 2004 when probate was granted, could have had no probative value.

The 2004 letter

36 Susan was living in England when her father died. Soon afterwards she wrote to William, an undated letter, in which she asked to be kept informed on any matters relevant to her; she said she should be given the opportunity to have her say before any decision was made.

37 William wrote to Susan on 3 January 2004. It was not a response to her letter - he may not then have received it.

38 On 23 January 2004, he responded with a summary of the present situation. Specifically, he wrote:

> - Dad left everything in his will (which was less than 1 page in length) to Mum (not you, me or Bub).
>
> - There was nothing to leave; there is no money. Regardless of what we may have been led to believe, Dad was literally down to his last few thousands.
>
> - There is significant debt… and the not inconsiderable running costs of Mulgutherie etc. (which as present I am covering, incl. a fortnightly allowance to Mum to top up her pension).
>
> - Mum is entitled to only $453 per fortnight war widow's pension. The rental for No. 3 unit pays for the levies and charges for both units, breaking even almost, any balance after outgoings will go to top up Mum's paltry $453.
>
> - The sub-division: not only is it financially viable and essential, it is a legacy to dad and was his dearest wish before he died. He had Bub walk through the sub-division just days before he died and also bought me up to speed.

39 William outlined some debts and expenses before giving some details about the subdivision. He said of the subdivision, 'If it comes off it will benefit Mum, not you, me or Bub'.

40 William then wrote:

> Your attitude seems to indicate that you are being disadvantaged in some way, which is not the case. Yes, you are a long way away (your choice) and yes, our closer proximity makes it easier to communicate, but you are not being left out because there is nothing to be left out of. Dad has been extremely generous and even handed in helping all of us in our times of need over the years

41 Susan replied - again her letter is not dated. She stated her concerns immediately:

> The point of my letter was very simple. If you and Bub insist of telling me about decisions that you have both made concerning subdivisions and the like, then you should have the courtesy to tell me why you and Bub are making these decisions. As you correctly point out if everything belongs to Mum then it is her business what she does with everything not yours, not mine, and not Bub's.
>
> If dad left all his assets to Mum then why are you and Bub making decisions about what happens to those assets? Mum is quite capable of making her own decisions and if she needs any help she should take advice from competent financial advisors.

42 Susan expressed concern about the subdivision, and said that it might take years and would be expensive. She again complained about how William and Madelaine were proceeding with the subdivision.

> If it is no business of mine then it is no business of yours or Bub's either.
>
> If on the other hand I am expected to have some involvement then I am disadvantaged because decisions are being made without reference to me.

43 Relevantly, she also wrote:

> Dad has left more than ample assets to Mum which if handled professionally will provide Mum with a comfortable living for the rest of her life. That is why he left everything to Mum, not to you, not to me and not to Bub.
>
> I do not consider that I'm disadvantaged, at least not in the sense suggested in your letter. Dad constantly reassured me that we would be treated equally so why should I feel disadvantaged?
>
> …

> I do however feel disadvantaged when I receive bits of information from you and Bub rather than the whole picture, and when I am told about decisions that have been made that may concern me.

44 Susan sent copies of the letter to her mother and to Madelaine.

45 After that letter to William, Susan spoke to her mother by phone. She said to her mother words to this effect: 'I am shocked Dad made a new will because he told me very clearly on a number of occasions that everything was going to be divided between we three children'. Mrs Waterton replied with words to the effect, 'Bill left everything to me. It was Bill's last wish that the subdivision go ahead and the three of you will benefit eventually'.

46 Susan's case is based on what was said in a letter that her mother wrote to her after that conversation. The letter is not dated. In 2012, Susan apparently instructed her solicitors that the letter was received in January 2004. In her evidence at trial, Susan said that she received it in March 2004. Although she could not be certain of the date, she was confident it was after she moved to London in late February, early March, 2004. I accept that evidence.

47 Before she received the letter, Susan's husband told her she may be entitled to make a family provision claim and suggested that, if she was unhappy, she should obtain advice from a Melbourne solicitor. She had not made enquiries or sought advice before the letter arrived. After receiving her mother's letter, Susan said she thought it would be wrong to question the will, 'when I believed my mother had clearly promised to leave me an equal one third share of her Estate'. Susan did nothing more about a claim against her father's estate. She did not, until 2012, tell her mother or her siblings that she had contemplated challenging her father's will or seeking an order for provision out of his estate.

48 The letter from Mrs Waterton is short enough to be set out in full (I have not corrected it in any way).

> Sissy my dear,
>
> Your phone call the other nite made me very thoughtful - actually I was a bit upset that you would think - or seem to think - that you are or will be deprived in some way of whatever is your 1/3 of my remaining assets. I know you didn't mean it to come across that way but that's how I felt.
>
> I can assure you Bills wishes are being carried out to the enth degree, it is also my desire for this property to be developed to its full potential - if the

> Watertons don't do it the next owners will, so if Billy is willing to do the work - hence I and eventually you three will benefit.
>
> It would be easy to sell Mulguthrie as a whole and get out but I would consider myself selfish and irresponsible if I did that, I might live to be 106 by which time I may have gone through the lot and I would be perfectly within my rights according to Bills Will to do so but that's not my nature or my desire.
>
> No 9 is legally Bills, morally mine and I have no doubts that on my demise that is how it will be divided, the same goes for No 3 and any other assets I may leave equally between you 3.
>
> I do hope you will think carefully on all this darling cos we are all in this together. I don't want anyone to feel left out, you only have to ask anything you [want] to know and you will be informed pronto.
>
> However you must remember that Bills main concern was to leave me provided for as is every husbands duty and wish, so if there is anything left after I die please be assured you will get your fair 1/3.
>
> I forgot the upstairs downstairs bit of the address so hope this reaches you.
>
> Much love to you both.
>
> Mum

49 Susan alleges that William and Madelaine knew of the letter in 2004 or thereabouts. Each of them denies the plea that they knew of the terms of the representation 'at all material times'. There is no evidence that either of them had been told about the letter by their mother or by Susan.

50 Susan remained in England, save for visits to Australia, until January 2010.

Event up to 2011, including the first gifts

51 In November 2004, Mrs Waterton gave the two aeroplanes that her husband had owned to William.

52 The land in Victoria was sold in 2005. Mrs Waterton relocated to Perth.

53 In February 2006, Susan returned to Perth for a short time. On this visit, Susan became aware that Mrs Waterton had given antiques to Madelaine. She said nothing about it.

54 While she was in Perth, the family met at Mrs Waterton's home in Unit 9. Susan said that William gave a presentation about the

development of the land in Victoria, at the conclusion of which he asked Susan and Madelaine what they wanted. Susan said, 'I only want my promised equal one third share'.

55 Susan relies on that as evidence that William and Madelaine knew about the representation her mother had made in the letter. I am not satisfied that it demonstrates actual or constructive knowledge of what had been represented in a letter, two years earlier, that neither of them knew about.

56 In 2008, Mrs Waterton gave $200,000 to Madelaine. Mrs Waterton also paid for the education of Madelaine's son at a private school from 2009 to 2014.

57 In February and April 2010, in three payments, Mrs Waterton gave $200,000 cash to Susan. In May she gave the same amount to William.

58 The payment to Susan followed another family meeting in February 2010. Before that meeting, Susan had been given a letter from her mother, dated 31 January 2010. It is very formal. The evidence does not show why Mrs Waterton wrote such a letter:

> Dear Sue
>
> At this time, I want to be clear about how I am supporting my children while I am alive and my intent to support them equally.
>
> For this purpose I am proposing to make a gift of $200,000 to each child and I do this on the basis that you understand and accept that this is all I can afford while I am alive and is still leave sufficient funds to live on and not leave me dependent on my children for future financial support.
>
> My intention is that each of my children provides for their accommodation.
>
> My further intention is that each of my children also provides for their long-term healthcare needs.
>
> While trying to be clear about my support for all my children, I would like to clarify the situation about the Bill living in No. 3. He asked first, is paying rent and this is a substantial proportion of my income.
>
> This is what I am offering. To be completely clear, I would like everyone to acknowledge that they are receiving this money and not look to me for any further financial support.

> With this letter I am asking you to acknowledge the intent with which I am giving you this money, and understand that if any dispute or ill will is created by you the full gift will not be given.
>
> If you do not follow my wishes and intentions in this letter I will be reviewing your inclusion in my will.
>
> With love
>
> Mum

59 At the February meeting, Susan was told she would be given $200,000, and would be asked to give a receipt for it. When she and her husband questioned what was happening, her mother told them they could 'nick off'. She did not, however, withdraw the gift. Susan was given $10,000 at the time and the balance later. She signed a receipt.

60 Susan said she felt shocked and humiliated by her family's behaviour. Except at the court mediation, she has not spoken to her brother or her sister since then. She still saw and spoke to her mother until December the following year.

61 On 18 November 2010, Mrs Waterton made a statutory declaration 'to record the reasons why I have made my will and the provision that I have made for each of my children and grandchild'. Specifically she referred to Susan and her husband as '[leading] a very good life on a high combined income and they do not have children'. William was also described as well off with the ability to provide for himself. Madelaine was described as 'not in a strong financial position', owning a home but with a very large mortgage. Mrs Waterton stated that she felt a greater obligation to provide for Madelaine and her son. She referred to gifts to each of her children of $200,000.

62 The declaration is evidence of Mrs Waterton's perception of the relative financial positions of her children. Whether she was right or wrong, it explains her later conduct.

Events from 2011

63 On 11 August 2011, Mrs Waterton made two further statutory declarations about Unit 9 and Unit 3.

64 She said that Unit 9 belonged to William and that she had no interest in it, except for her understanding with William that she might occupy Unit 9 until her death, upon which he would be the absolute legal and

beneficial owner. She repeated what she said about Unit 9 in her witness statement in 2015.

65 The statutory declaration about Unit 3 was more detailed, setting out Mrs Waterton's account of the transfer of the shares in Edgewater Home Units Pty Ltd from her mother, in terms consistent with the statement of claim. Mrs Waterton attached documents showing the transfer of Unit 3 to her name in 1989.

66 Pursuant to a Deed of Trust, dated 11 August 2011, Unit 3 was to be transferred to William and Madelaine, as trustees, to hold on express trusts to let the property and pay the net income to Madelaine until her son Oscar attains the age of 30, and to Oscar from the date he turns 30. The property is to vest in Oscar on his attaining the age of 30, with the trustees to transfer the property to him on request. The trust continues, although William has now been replaced by Madelaine's husband as trustee.

67 Mrs Waterton also gave $1,000,000 to Madelaine in two payments in August 2011. On the same day, Mrs Waterton gave $298,000 to William.

68 On 18 August 2011, Mrs Waterton made a statutory declaration to record her full name and change the address on the certificate of title for Unit 3. The declaration was stated to be 'in support of my transfer of [Unit 3] to William Frank Waterton and Madelaine Peggy Jungstedt'. The transfer to William and Madelaine was registered on 13 October 2011.

69 Mrs Waterton gave William a further $85,000 in April 2012.

70 Susan alleges Mrs Waterton made a further gift of $13,476.07 to William in October 2012. That is the amount of the refund on overpaid stamp duty on the transfer of Unit 3: the amount is recorded on the duty stamp on the Deed of Trust. The evidence does not show who paid the duty and was entitled to the refund. Susan has not proved it was a gift.

71 While Susan's relationship with her siblings was strained, she maintained contact with her mother.

72 Susan said that in 2011, referring to a news article about a dispute between members of the Rinehart family, Mrs Waterton made an offhand comment that there would be nothing to fight about when she was gone because there would be nothing left. Susan said that only then did she consider that her mother might not treat her children equally.

73 Susan began investigating matters relating to her father's estate. On 1 December 2011, she discovered that her mother had disposed of Unit 3. At a Christmas and birthday lunch with her mother on 20 December 2011, she confronted her mother with titles office documents relating to Unit 3, and the letter written in 2004. Her mother left and they never spoke again.

74 Mrs Waterton made another statutory declaration recording her account of that lunch. She confirmed what she had earlier declared, that she believed she held a greater obligation to make provision for Madelaine and Oscar. She added, however, 'I have retained sufficient assets in my estate to make the provision that I consider to be appropriate for SUSAN'.

The letter of October 2012

75 On 22 October 2012, solicitors for Susan wrote to Mrs Waterton advising that they were instructed to challenge the validity of Mr Waterton's will, on grounds including undue influence and lack of testamentary capacity, and to commence proceedings against Mrs Waterton regarding her transfer of property to William and Madelaine. The letter referred to a 'proprietary estoppel as a consequence of the promise or representation that you made to our client by letter in January 2004'. The letter also challenged the ownership of Unit 9.

76 On 20 December 2012, Mrs Waterton made another comparatively long statutory declaration.

77 Mrs Waterton said that she and her husband had made mutual wills, leaving everything to each other. She referred also to having cancer for which treatment had failed.

78 Mrs Waterton continued to assert her right to deal with her property during her lifetime as she saw fit:

> I would like to emphasise that I have always regarded my money as my money and that I am entitled to do what I wanted with it.

She further said:

> I wanted to make sure that Oscar was properly looked after. Oscar is Madelaine's son and my only grandchild. I have paid for him to go to Scotch College so he could get a good education, and I want to see that he is looked after in the future.

> I wanted it settled so that he could get it and I would know that he would be OK. I was worried that Sue would not be happy with my decision and contest my Will. I therefore gave Madeleine some money, as she is Oscar's mother and will use it to look after him.
>
> In addition to my 3 children, I also have 1 grandchild who my husband and I love dearly. I inherited Unit 3 from my mother many years ago and it was always my desire for it to go to Oscar, who is our much loved only grandchild.

79 On 23 December 2013, Mrs Waterton made a will, expressly giving any interest she might have retained in real or personal property that she had given during her lifetime to the recipient of the gift. Specifically, she confirmed that she owned no real property and had no interest in Unit 3 or Unit 9. Clause 5(b)(ii)C states:

> In the event that I do have an interest in Unit 9, I GIVE free of all duties and expenses such interest to my son WILLIAM FRANK WATERTON.

80 She gave the residue of her estate to William and Madelaine.

81 Mrs Waterton had now clearly discarded any intention she might previously have held to balance things between the children by her will, or to confer any benefit on Susan.

82 On the same day, Mrs Waterton made a Deed of Gift and Indemnity assigning to William and Madelaine 'absolutely her right title and interest in all of her Personal Property' in consideration of the love and affection she had for them.

The effect of the gifts

83 I am satisfied that Mrs Waterton intended to divest herself of all of her interest in the property - cash and otherwise - that she gave to her children, whether to hold on trust (in the case of Unit 3) or absolutely.

84 In effect, at the time of her death Mrs Waterton had ensured that she had no substantial assets to dispose of by will. The inventory of her estate at her death showed assets of $261.

A summary of the plaintiff's case

85 Susan pleads that, as a natural child of Mr Waterton, she was entitled to apply for a family provision order under pt IV of the *Administration and Probate Act 1958* (Vic). She alleges that:

(1) her father had a moral duty to provide for her maintenance and support: par 7; and

(2) she is not and was not at the time of her father's death capable by reasonable means of providing for her maintenance and support: par 8.

86 In par 9, she pleads the property in her father's estate, and estimates its worth. She also pleads factors relevant to a family provision application, including the age and financial position of each of the children.

87 In pars 10 to 15, Susan sets out the events from 2004 relating to the subdivision and sale of land owned by his father in Victoria. In par 16, she pleads the circumstances in which her mother acquired Unit 3; and in par 17, the circumstances in which William acquired title to Unit 9.

88 The crux of Susan's claim is in pars 19 and 20. Susan pleads that in the letter of March 2004, Mrs Waterton represented to her:

> The estate which she had inherited from [Mr Waterton] and any assets of her own subject to what may be expended for her proper maintenance and support during her lifetime would upon her death be divided in equal third shares between her three children.

89 Susan pleads that the representation induced in her an assumption and expectation to that effect. Acting in reliance on the representation and induced by it, she refrained from applying for provision from her father's estate: par 20.

90 Susan pleads that Mrs Waterton subsequently evinced an intention not to be bound by the representation, and acted in such a manner so as to ensure she would be unable to fulfil it, by giving gifts of money and personal property to both William and Madelaine, and by the creation of the trust over Unit 3: pars 21 - 25.

91 Susan pleads that she has suffered loss and damage in that any entitlement she may have had in respect of the estate of her father is no longer available to her: par 27.

92 Susan further pleads that William and Madelaine knew of the terms of the representation and knew or ought to have known of Mrs Waterton's intention not to be bound by it when they received transfers of assets from their mother: pars 28 to 30.

93 Based on those allegations, Susan claims that Mrs Waterton and her executors are estopped from acting other than in accordance with the assumption and expectation that Mrs Waterton induced: par 31. She further alleges in par 32 that:

(a) Mrs Waterton held one third of the estate which she had inherited from her late husband and any assets of her own, subject to what may have been expended for her proper maintenance and support during her lifetime, subject to a constructive trust in favour of Susan.

(b) William held Unit 9 subject to a constructive trust in favour of Mrs Waterton, and upon her death as to one third of the value of that interest subject to a constructive trust for the benefit of Susan.

(c) William and Madelaine held Unit 3 subject to a constructive trust in favour of Mrs Waterton and upon her death as to one third of the value of the property subject to a constructive trust for the benefit of Susan.

(d) William and Madelaine held so much of the gifts of money and personal property as they have received from Mrs Waterton as amount to a one third interest of the value of the estate of Mrs Waterton existing at the date of the representation subject to a constructive trust to Susan.

94 Read literally, par 32(d) is not subject to Mrs Waterton expending any money during her lifetime.

95 In pars (d) - (f) of the prayer for relief, she also seeks:

> A declaration that [William and Madelaine] are liable to account for the one third share of the estate to which [Susan] was entitled and which they knowingly received in breach of the Representation.
>
> In the alternative equitable compensation in a sum equivalent to the value of a one third share of the estate which [Mrs Waterton] inherited from [Mr Waterton] and any assets of her own subject to what she may have expended for her proper maintenance and support during her lifetime.
>
> Further in the alternative equitable compensation in a sum equivalent to the sum [Susan] would have received from the estate of [Mr Waterton] had she made a claim for provision from the deceased's estate under the *Administration and Probate Act 1958* (Vic).

The defences

96 William and Madelaine filed broadly similar defences - in many respects identical. Each denies that, at the date of their father's death, Susan was not capable, by reasonable means, of providing adequately for her maintenance and support. The defendants deny that the property in their father's estate included Unit 3 and Unit 9, saying that Mrs Waterton was the legal and beneficial owner of Unit 3, and William the owner of Unit 9. They plead that the antiques and other household items passed to Mrs Waterton by survivorship.

97 Each of them responds to Susan's claim that she would have been entitled to an order out of Mr Waterton's estate.

98 William and Madelaine deny Susan's allegations in pars 19 and 20 regarding the letter of 2004, and her reliance on the representations in it. Further, each pleads that, even if Susan acted in reliance on representations in the letter as she alleges, she suffered no detriment because Mr Waterton had no responsibility to make provision for her, and the distribution of the estate made adequate provision for her proper maintenance and support.

99 Each denies knowledge of the letter and the representations in it.

100 Each admits the gifts made to them (as set out above).

Are the defendants estopped from denying Susan's entitlement to one third of her mother's assets?

101 It is difficult to ascertain the breadth of Susan's claim. The claim relies on either proprietary estoppel or promissory estoppel. Both forms of estoppel are based on the principle that the conduct of a promisor in engaging the promisee to change his or her position to their detriment on the basis of the promise, when acted upon by the promisee, creates an equity which binds the promisor to make good the expectation the promisor has created. Promissory estoppel and proprietary estoppel are intended to protect the promisee against the detriment which would flow from the promisee's change of position if the assumption (or expectation) that led to it were deserted: ***Sidhu v Van Dyke*** [2014] HCA 19; (2014) 251 CLR 505 [1] (French CJ, Kiefel, Bell & Keane JJ).

102 In ***Harrison v Harrison*** [2011] VSC 459 [371], Kaye J summarised the matters the plaintiff must establish to invite the intervention of equity based on proprietary estoppel. By reference to the issues in this case, they are:

> (1) Mrs Waterton made promises to Susan that she would confer on her an interest in property.
>
> (2) Susan acted in reliance on those promises in refraining from bringing proceedings for provision from her father's estate.
>
> (3) Susan acted reasonably in so relying on the promises made to her by her mother.
>
> (4) Mrs Waterton knew or intended that Susan would rely on her promises and would thereby refrain from instituting legal proceedings for provision out of her father's estate.
>
> (5) Susan has suffered detriment as a consequence of the failure by her mother to adhere to her promise.

103 At [370], his Honour identified two characteristics which may differentiate promissory and proprietary estoppel: first, the form of relief; and second, whether promissory estoppel may constitute a foundation of legal rights independently of any other cause of action.

104 Counsel for William referred to another possible distinction in the level of clarity or certainty of the representation. In ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [2016] HCA 26 [38], French CJ, Kiefel and Bell JJ referred to, but did not find it necessary to consider whether there is such a distinction. In my opinion, their Honour's statement at [35] applies, whether the estoppel is promissory or proprietary:

> It has long been recognised that for a representation to found an estoppel it must be clear. In ***Low v Bouverie***, it was said that the language used must be precise and unambiguous. This does not mean that the words used may not be open to different constructions, but rather that they must be able to be understood in a particular sense by the person to whom the words are addressed. The sense in which they may be understood provides the basis for the assumption or expectation upon which the person to whom they are addressed acts. The words must be capable of misleading a reasonable person in the way that the person relying on the estoppel claims he or she has been misled.

105 On my view of the fundamental defects in Susan's case, I do not need to consider any distinctions between the two forms of estoppel.

The promise and the assumption or expectation

106 It is important to identify the assumption or expectation which Mrs Waterton's estate is said to be estopped from denying. There are three alternatives. First, did Susan assume that she would receive one

third of the property held by her mother in 2004, subject only to expenditure for her mother's proper maintenance and support? Second, did she expect to receive a third of Mrs Waterton's remaining property at the time of her death? If so, did she expect her mother to act reasonably or even frugally in conserving her estate? Third, did she expect her mother to perform some equalisation exercise by her will by leaving Susan greater than a third of the property then remaining to compensate for gifts made during her life?

107 Looking at the pleading of the statement of claim and the evidence given by Susan, both orally and in her witness statement, all three alternatives find some expression.

108 In her statement of claim, Susan pleads the first alternative: Mrs Waterton promised that the estate which she had inherited and any assets of her own, subject to what may be expended for her proper maintenance and support during her lifetime, would upon her death be divided in equal third shares. As counsel for William correctly submitted, this representation has three components: Mrs Waterton would give Susan one third of her estate on her death; she would preserve her assets (subject to her proper maintenance and support); and she would not revoke or depart from that intention before death.

109 The claim as pleaded is unrealistic. The letter cannot be reasonably understood as promising one third of the assets Mrs Waterton then held, including the estate of Mr Waterton, subject only to expenditure for 'proper maintenance and support'. Mrs Waterton asserted her right to 'go through the lot', writing that there may not be anything left on her death. She did not promise to act frugally or even reasonably in using or expending her property in her lifetime only for 'proper maintenance and support'. If there is a promise, it is confined to one third of what may remain, with no representation about how Mrs Waterton would use her property during her life.

110 At best, for Susan's case, Mrs Waterton said that it was not her nature or her desire to 'go through the lot'. That statement is not promissory. Quite simply, there is no promise to preserve assets, and Susan did not understand that such a promise had been made. In cross-examination, Susan accepted that, on her understanding of the letter, her mother had not promised that she would not dispose of assets, or make gifts, or pay for her grandchild's education, or perhaps make substantial donations to charity. She accepted that she understood that her mother might use up her property during her lifetime, and not just on basic necessities. Her

evidence is not consistent with her having any assumption or expectation, as a result of the letter, that Mrs Waterton's expenditure during her life would be confined to proper maintenance and support.

111 In her witness statement and evidence, Susan expressed what she understood from the letter in a way that is more consistent with the second alternative, and at times the third.

> I believed my mother had clearly promised *to leave me an equal one third share of her Estate…* [229].

112 Susan was asked why she did not raise the 2004 letter, or say anything about claiming against her father's estate before December 2011. She said, and repeated, that she thought that her mother would treat the children equally and 'would be fair'.

113 For example, when asked whether she understood the letter as conveying that Mrs Waterton could not pay for her grandchild's education, Susan answered:

> Yes, but she assured me that she would share her estate equally between the three of us.
>
> But if she wanted to pay - - -?---That wouldn't be doing it equally (ts 193).

And later:

> … I didn't tell her that I could have made a claim, but I did rely upon her letter. I believed that she would be fair, even though she was giving everything away. I thought that she still would be fair.
>
> You never told her, ever, that you were going to make a claim, did you?---I didn't tell her I was going to make a claim. No.
>
> Or even suggest it, did you?---Not to my mother I didn't. No. I still thought that she would be fair.
>
> You didn't raise the letter of March '04 with her in February 2010 when all those things had happened, did you?---I - I did when I went to lunch with her.
>
> I'm talking about February 2010. All the things we've been through now, that you knew in February 2010, you never said to your mother 'What about the letter of March '04' - - -?---No. I didn't.
>
> You never said - - -?---Because I thought she would still be fair (ts 198-199).

114 While Mrs Waterton did give an assurance that she would distribute what was left on her death equally, that is not sufficient for Susan to establish any claim against William and Madelaine. To succeed against them, she must establish the representation she has pleaded so that she may 'undo' the gifts made by Mrs Waterton during her life. If she cannot undo the effect of those gifts, Susan is left with the claim which (somewhat surprisingly) her counsel maintained in his final address, for one third of the $261 that remained in Mrs Waterton's estate at the date of her death.

115 Counsel for William also submitted that the letter, reasonably understood, did not convey a representation by Mrs Waterton not to change her intention or her will. Because I am satisfied the claim must fail on other grounds, I do not need to resolve that contention.

Reliance and detriment

116 The next two factors are conveniently dealt with together. Did Susan rely on the assurances in the letter in acting, or refraining from acting, to her detriment? And did Mrs Waterton know or intend that Susan would rely on the letter in that way?

117 It is the conduct of the plaintiff in acting on the expectation to which the promise gives rise that invites the intervention of equity: ***Giumelli v Giumelli*** (1999) 196 CLR 101 [35] - [65]. The onus is on Susan to establish that she suffered detriment by changing her position in reliance on Mrs Waterton's promises: see ***Sidhu v Van Dyke*** [58], [61]. Susan's evidence, which I accept, is that her husband told her that she may be entitled to make a family provision claim, and if she was unhappy she should obtain advice from a Melbourne solicitor. She does not say that she was going to make a claim, or even that she was going to seek advice.

118 Her evidence, at best, is that she refrained from further inquiries about a family provision claim that, if successful, would have made some provision for her maintenance and support. I am not satisfied that she has shown that she would have proceeded with a claim had she not received the letter.

119 Susan's case is inconsistent with her roughly contemporaneous correspondence with William. Susan expressed no disquiet about the estate being left solely to her mother. I suspect it may have been very different if Mr Waterton had made unequal provision for his children. Her letter to William reveals no belief that she had not been properly

provided for. Her expressed concern was at being left out of the discussions and decisions about the estate and looking after Mrs Waterton.

120 In her oral evidence, Susan said nothing about any concern she felt that no adequate provision had been made for her. She said her father had promised things would be shared equally between the three children and 'everything was different from what I thought it would be … I was [unhappy] because it was different from what Dad had always said' (ts 180).

121 The unconscionability which would attract equitable relief in the present case has a further element: that Mrs Waterton induced or acquiesced in Susan's adoption of the assumption or expectation, intending or knowing that her assurances would be relied on: ***Waltons Stores (Interstate) Ltd v Maher*** (1988) 164 CLR 387, 423 (Brennan J). I am not satisfied that it would be unconscionable for Mrs Waterton to proceed to exercise testamentary freedom when she did not know, and could not have known, that Susan would treat her letter as an assurance inducing her to refrain from legal action. Susan does not plead that Mrs Waterton knew that she would rely on the letter, or knew that she might be contemplating a claim against the estate. And there is no evidence that Mrs Waterton knew, or could have known, that Susan was considering a claim against the estate, or that she would materially change her position on the basis of any promise or assurance in the letter. The terms of the letter are not directed to present or future legal relations between mother and daughter, but to family relationships, the death of the husband and father, and the circumstances that called for the family to develop and sell Mulguthrie while Susan was expressing disquiet about being 'left out'.

Family provision and the evidence of Susan's financial position

122 Finally, even if Susan altered her position by not applying for a family provision order out of her father's estate, I am not satisfied she suffered any detriment.

123 Part IV of the *Administration and Probate Act* (Vic) deals with orders for family provision. Had Susan applied for an order, it would have been determined under s 91 of the Act.

124 Under s 91(4), as it stood in 2004 (it has since been amended), the court must have had regard to 11 specified matters, and any other matter the Court considered relevant, in determining:

> (a) whether or not the deceased had responsibility to make provision for a person; and
>
> (b) whether or not the distribution of the estate of the deceased person …makes adequate provision for the proper maintenance and support of the person; and
>
> (c) the amount of provision (if any) which the Court may order for the person.

125 Whether Mr Waterton had adequately provided for Susan must depend on all the facts that existed at the date of his death, whether he knew of them or not, and all the eventualities that might at that date reasonably have been foreseen by a testator who knew the facts: ***Hughes v National Trustees Executors and Agency Co of Australasia Ltd*** (1979) 143 CLR 134, 147 - 148. As an adult child, Susan would not have needed to establish some special need before relief could be granted: see ***Jones (a pseudonym) v Smith (a pseudonym)*** [2016] VSCA 178 [38].

126 Susan pleads that her father had a moral duty to provide for her proper maintenance and support because she was not at the time of his death capable, by reasonable means, of providing adequately for her proper maintenance and support. She was then 51 years old and employed as a receptionist in London. She was married to Philip Lafferty, a legal practitioner who was working as a law clerk in London, and they had no dependants. Susan pleads no other matters affecting her capacity to support herself, or her financial resources.

127 In her witness statement, and in oral evidence, Susan gave a superficial account of her financial position. She said that in December 2003 her financial situation was poor. She had no savings, and little in the way of assets. She was earning about £15,600, and her husband earned £50,000 for the year ending April 2005. Mr Lafferty was not qualified to practice as a solicitor in England until September 2004. But there her evidence stops.

128 After he qualified, Mr Lafferty was an assistant solicitor at Lloyds & Associates from 15 September 2004 until July 2005. From July 2005, he was a member of the limited liability partnership Lloyds & Associates LLP until 30 September 2012: see exhibit 4. No evidence was led about what he might reasonably have been expected to earn once he qualified, or his actual earnings after he qualified and became a member of the partnership.

129 There is some evidence about Mr Lafferty's earnings before he and Susan moved to England in 2001. Documents in evidence include notices of assessment and amended assessment for income tax that were issued to Mr Lafferty for the years ended 30 June 1998 to 30 June 2000. While this precedes the death of Mr Waterton by three years, Mr Lafferty's earnings in the period of the assessments are, in my opinion, relevant to the financial resources of Susan and her husband in 2003 and 2004. Mr Lafferty's assessed taxable income was high in each of those years.

130 Susan had no knowledge of the family's financial resources. She could say little about her husband's business activities; she had been a director of a number of her husband's companies, but did not know what they were. She just signed what he produced for her to sign. In particular, for 14 years from 1991 Susan was a director of River Image Pty Ltd, a service company for solicitors. She knew nothing about its operations.

131 Mr Lafferty may have been able to explain or qualify some of this evidence, but was not called. There is no need however to consider ***Jones v Dunkel*** inferences. The evidence that the plaintiff chose to adduce was insufficient. Quite simply, Susan has not proved what her financial resources were at the time. For the court to make a finding, it must be actually satisfied of the facts to the civil standard of proof. On the exiguous evidence the plaintiff has adduced, I am not satisfied that on the facts that existed at the time of her father's death, her proper maintenance and support required any provision from Mr Waterton's estate.

132 It follows that Susan has not shown that she suffered any detriment by not pursuing a claim for family support.

Conclusion

133 The claim against all three defendants will be dismissed.