SUPREME COURT OF QUEENSLAND

CITATION:	*Frater & Ors v Murphy & Anor* [2026] QSC 184
PARTES:	**DONNA ANNE FRATER** (first applicant) **MARLA JEANNE HURLIMAN** (second applicant) **JOHN SCOTT PERMEWAN** (third applicant) **v** **MYLES GERARD MURPHY as Administrator of the Estate of PRUDENCE VERONICA PERMEWAN (deceased)** (first respondent) **ZERELDA PTY LTD ACN 623 050 760 as trustee of THE LOTUS TRUST** (second respondent)
FILE NO/S:	BS No 6343 of 2020
DIVISION:	Trial Division
PROCEEDING:	Interlocutory application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 July 2026
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2026
JUDGE:	Williams J
ORDER:	**THE COURT ORDERS THAT:** **1. The application dated 20 April 2026 is dismissed.** **THE COURT DIRECTS THAT:** **2. The parties liaise about the appropriate costs order and provide agreed orders to the Associate to Williams J by 4pm on 7 August 2026.** **3. If the parties are unable to agree on the appropriate costs order, then the parties are to provide brief submissions of no more than two pages to the Associate to Williams J by 4pm on 14 August 2026.**

4. The issue of costs be determined on the papers.

CATCHWORDS: SUCCESSION – ADMINISTRATION OF ESTATE – ASSETS – OTHER CASES – where the applicant is an applicant for provision from the estate – where the applicant sought orders to have the administrator sell commercial property held by trustee company where shares held by the estate – where the applicant sought orders for a declaration that the Purported Resolutions documents are invalid and are of no effect – where the respondent submits that the applicant does not have standing to interfere with the administration of the estate – whether the trust property should be sold – whether the declarations should be made that the Purported Resolutions documents are invalid and are of no effect

Evidence Act 1977 (Qld), s 60
Trusts Act 1973 (Qld) s 8, s 9, s 94, s 96, s 98
Trusts Act 2025 (Qld) s 6, s 7, s 8, s 9, s 137, s 163, s 165, s 179, s 181, s 183, s 184, s 185, s 186, s 187, s 188, s 189, s 284
Succession Act 1981 (Qld) s 6
Uniform Civil Procedure Rules 1999 (Qld), r 150, r 483

Burke v Dawes (1938) 59 CLR 1, cited
Commissioner of Taxation v Linter Textiles Australia Ltd (in Liquidation) (2005) 220 CLR 592, cited
Gerstenmeier v Gerstenmeier [2024] NSWSC 712
Harris v Sanmuganathan [2000] NSWSC 1214, cited
Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers appointed) (in liq) [2013] FCAFC 48, considered
Mataska v Browne [2013] VSC 62, cited
Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306, cited
Re Davis (Deceased) [1952] VLR 517, cited
Re Langford (deceased); Equity Trustees Ltd v Langford [2005] VSC 84, considered
Re Permewan [2021] QSC 151, cited
Re Permewan (No 2) (2022) 11 QR 25, cited
Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd (2021) 7 QR 1, cited

COUNSEL: A Morris KC, with I Erskine for the first applicant
P J Sams for the third applicant and second respondent
K J Kluss for the first respondent

SOLICITORS: Simmonds Crowley Galvin Lawyers for the first applicant
Wilson Lawyers for the second applicant
Merthyr Law for the third applicant and second respondent
MGM Lawyers for the first respondent

[1] This is an application by the first applicant for:

(a) orders for, and in relation to, the sale of a commercial property at Morayfield (**Morayfield Property**) pursuant to s 6 of the *Succession Act 1981* (Qld) (**Succession Act**) and ss 8 and/or 94 of the *Trusts Act 1973* (Qld) (**Trusts Act 1973**); and

(b) declarations of invalidity of two documents pursuant to ss 8, 9 and 96 of the Trusts Act 1973 and directions as to the administration of the estate and/or the Lotus Trust.

[2] The application is made in the substantive proceeding, being applications for provision against the estate of Prudence Veronica Permewan, deceased (**Deceased**) (the **Estate**) who died on 21 September 2019, leaving a will dated 29 November 2017 (**Will**).

[3] The first applicant and the second applicant are the daughters of the Deceased, and the third applicant is the son of the Deceased. The applicants are all applicants for provision from the Estate.

[4] The first respondent is the Court-appointed administrator of the Estate (**Administrator**). The second respondent is the residuary beneficiary of the Estate.

[5] The second applicant supports the first applicant's application. The third applicant and the second respondent oppose the application.

[6] The Administrator does not have an interest in the outcome of the application and has made submissions in relation to what the Administrator considers is in the proper administration of the Estate. In this regard, the Administrator submits that the proper administration of the Estate includes preserving and, where possible, improving the assets of the Estate for distribution in accordance with the terms of the Will.

[7] The issues to be determined by the Court are:

(a) Is it appropriate to order at this stage that the Morayfield Property be sold?

(b) If so, what is the appropriate method for the Morayfield Property to be sold?

(c) Does the evidence before the Court support the conclusion that the documents purporting to be resolutions of the second respondent are invalid and of no effect?

(d) If so, is it appropriate to make the declarations sought?

[8] There are also several sub-issues that will be considered in respect of these issues.

Is it appropriate to order at this stage that the Morayfield Property be sold?

[9] The Court has a wide power under s 6 of the Succession Act to make orders in respect of the administration of a deceased estate. It is uncontroversial between the parties that it is a wide power, and the only practical limitation is that the directions relate to the administration of the estate.

[10] Section 6(4) of the Succession Act provides that the Court has jurisdiction to make any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 2025* (Qld) (**Trusts Act 2025**).[1]

[11] The first applicant also seeks the orders under s 8 and/or s 94 of the Trusts Act 1973. The Trusts Act 1973 was recently replaced by the Trusts Act 2025.[2] Section 8 of the Trusts Act 1973 dealt with an application to the Court to review acts and decisions in the administration of a trust and s 94 of the Trusts Act 1973 dealt with the Court's jurisdiction to make orders, including the sale of trust property.

[12] The written submissions do not identify or engage with the relevant provisions of the Trusts Act 2025, however in oral submissions the new provisions were dealt with (albeit briefly). Section 163 (persons who may apply for particular orders relating to trusts and trust property) and s 179 (Court may confer additional management powers) are the relevant corresponding provisions in the Trusts Act 2025.

[13] A note of the relevant provisions of the Trusts Act 2025 and the transitional provisions was provided by the Administrator after the hearing.[3] This was agreed with by the first applicant and the third applicant and the second respondent. The second applicant did not express a position in respect of the note. The Administrator provided a further note in answer to a further request from the Court.[4] No other response was received to the request.

[14] Section 284 of the Trusts Act 2025 provides as follows:

> "Existing proceedings under particular provisions of repealed Act
>
> (1) This section applies if, immediately before the commencement, a proceeding started under any of the following provisions of the repealed Act had not been finally decided –
>
> (a) section 8;
>
> (b) part 7, division 2 or 3;
>
> (c) part 7, division 4, other than section 101.
>
> (2) The repealed Act continues to apply in relation to the proceeding, and the proceeding must be heard and decided under the repealed Act, as if this Act had not been enacted."

[15] Section 94[5] of the Trusts Act 1973 is in part 7, division 4. Accordingly, both s 8 and s 94[6] of the Trusts Act 1973 are within s 284 of the Trusts Act 2025.

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1 At the time the application was filed the reference in s 6(4) of the Succession Act was to the Trusts Act 1973, which has subsequently been repealed.
2 Commencement 28 April 2026.
3 MFI A.
4 MFI B.
5 Similarly, s 96 of the Trusts Act 1973, relevant to the second issue.
6 Similarly, s 96 of the Trusts Act 1973, relevant to the second issue.

[16] The Trusts Act 2025 does not define "proceeding". The *Acts Interpretation Act 1954* (Qld) (**Acts Interpretation Act**) defines "proceeding" as meaning "a legal or other action or proceeding". The *Civil Proceedings Act 2011* (Qld) (**Civil Proceedings Act**) defines "proceeding" as follows:

> "***proceeding*** means a proceeding in a court (whether or not between parties) and includes –
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> (a) an incidental proceeding in the course of, or in connection with, a proceeding; and
>
> (b) an appeal or stated case."

[17] Section 284 of the Trusts Act 2025 is to be construed in context. The transitional provisions in the Trusts Act 2025 are consistent with Parliament's intention that existing court matters under the Trusts Act 1973 were to proceed and be heard and determined under the repealed Act as if the Trusts Act 2025 had not been enacted. A narrow construction of "proceeding" in s 284 of the Trusts Act 2025 would be inconsistent with that intention, and likely to add to costs and delay in the hearing of applications dealing with the administration of trusts.

[18] "Proceeding" in s 284 of the Trusts Act is to be construed to include an "incidental" proceeding, consistent with the definitions in the Acts Interpretation Act and the Civil Proceedings Act and the context evident in the Trusts Act 2025.[7]

[19] Here, the first applicant's application was brought pursuant to the Trusts Act 1973, the then in force legislation in respect of trusts, and is an application in the originating application seeking further provision under the Succession Act. It is an "incidental proceeding". The application was filed on 20 April 2026 and was set down to be heard by me in the Applications List on 27 May 2026.[8] The application was started under the Trusts Act 1973 provision and is therefore within s 284(1) of the Trusts Act 2025 and therefore governed by s 284(2) of the Trusts Act 2025. Accordingly, the application in respect of the first issue is to proceed under the Trusts Act 1973.[9]

[20] Two sub-issues arise for consideration in determining the issue of whether it is appropriate to order that the Morayfield Property be sold now, namely:

(a) Does the first applicant have standing to seek the order for the sale of the Morayfield Property?

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7 See also discussion of "proceeding" by Holmes CJ in *Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd* (2021) 7 QR 1 at [27] in respect of a counterclaim being an incident of the principal proceeding, in that "it flows from it". Philippides JA agreed but Brown J expressly did not decide the construction point.

8 Following case management directions being made on the Wills and Estates List.

9 MFI A notes that "insofar as [the application] relies upon ss 8, 94 and 96" the application is to be determined according to the Trusts Act 1973 and "otherwise, according to the Trusts Act" 2025. What is not clearly identified is what part of the application falls to be determined under the Trusts Act 2025. MFI A notes that ss 6 to 9, 137, 163, 165, 183 to 185 and 186 to 189 of the Trusts Act 2025 are or may be relevant to the determination of the Application. This is noted in a footnote to be where expressly relied upon by the first applicant by reference to the provision of the Trusts Act 1973 or as provided for by s 6(4) of the Succession Act. Neither of these propositions are expanded on by the first applicant or otherwise.

(b) Is it in the interests of the Estate that the Morayfield Property be sold at this stage?

[21] Dealing with these sub-issues in turn.

Does the first applicant have standing to seek the order for the sale of the Morayfield Property?

[22] The Administrator contends that the first applicant does not have standing to interfere with the administration of the Estate in the way proposed in the application.

[23] The first applicant is an applicant for provision from the Estate and not a beneficiary. It is submitted that an applicant for provision may seek to restrain an executor "from parting with assets of the estate" pending the decision in respect of provision. However, what is proposed here is relief that would result in triggering the payment of significant liabilities which would reduce the value of the Estate, while increasing its cash position. This relief would have the opposite effect of what is permitted.

[24] In support of this contention the Administrator relies upon the authorities of *Harris v Sanmuganathan*[10] and *Zarella v Zerella*.[11]

[25] Young J in *Harris v Sanmuganathan* was considering an application for various orders including removal of the executor, revocation of a grant of probate or appointment of a receiver and manager. An issue of the applicants' standing to bring the application arose as the first question. Young J relevantly stated:

> "[16] There are some decisions of the Court, such as my decision in *Packo v Packo* (1989) 17 NSWLR 316, that the Court will interfere at the behest of an applicant under the Family Provision Act to restrain the executor from parting with the assets of the estate pending the decision in the Family Provision Act proceedings. However, as appears from the decision in *Packo* at page 318, that jurisdiction is based on the inherent power of the Court to preserve the subject matter of an application before the Court. One cannot, in my view, reason by analogy from that line of authority that such a claimant has any right to interfere with the estate or its administration generally."

[26] His Honour concluded that the applicants in that case did not have standing to obtain the orders sought.

[27] In *Zerella v Zarella* Bampton J was considering an appeal from a Master ordering joinder of a trustee company as a defendant to proceedings seeking provision. An issue as to the standing to bring the application arose. Ultimately his Honour dismissed the appeal. Relevantly the reasoning recognised that the applicant for provision had a prima facie interest in the value of the estate[12] and by the application did not seek to interfere with the administration of the estate.[13] Rather, the application

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10 [2000] NSWSC 1214 at [16] per Young J.
11 [2014] SASC 100 at [34] per Brampton J.
12 At [33].
13 At [34].

concerned the Court ascertaining the value of the estate, in order to determine the provision claim.

[28] In that case, the Court was referred to the New South Wales decision in *Harris v Sanmuganathan.* Further, the Court was taken to Victorian decisions that an applicant for provision does not have standing to make complaints about the administration of an estate. *Re Davis (Deceased)*[14] was relied upon for the proposition that further provision proceedings are not the appropriate vehicle to deal with issues in the administration of an estate. The appropriate way to proceed is for the further provision proceeding to be adjourned and the issue be addressed in appropriate proceedings dealing with the administration of the estate.[15]

[29] Further, *Mataska v Browne*[16] was relied upon for the proposition that an applicant for further provision does not have an actual interest in the estate, but has a contingent interest and that, without more, is insufficient to support standing.[17]

[30] The third applicant and the second respondent similarly contend that it is settled authority that an applicant for family provision has no direct vested or contingent rights in the subject trust estate. Rather, it is only through the order of the Court that the family provision applicant obtains any direct right or interest in the state. In these circumstances, it is submitted that a family provision applicant may assert to "potentially" having an indirect interest in the trust estate, but such an interest is only capable of crystallising upon resolution of the family provision application.

[31] The High Court in *Official Receiver in Bankruptcy v Schultz*[18] considered the effect of a family provision order under s 41(1) of the Succession Act. The majority of the Court observed as follows:

> "… the effect of an order under [section 41] is not to change the benefits to be expected from the right to due administration arising pursuant to the will, but to **superimpose upon the duty of due administration a judicial order** made pursuant to statute. In other words, **a new and independent obligation is created** which has an impact upon the way in which the executor administers the estate pursuant to his or her existing duty, by compelling him or her to comply with the terms of the court's order. Each beneficiary's right to due administration is made subject to the terms of the order in the sense that the order governs the executor's actions to the exclusion of any inconsistent direction contained in or derived from the will. But the respective rights to due administration are themselves unchanged, notwithstanding the impact upon their value … Viewed in this way, the making of an order under s 41 gives rise to a new right in a person in whose favour the order is made, corresponding to the new obligation imposed upon the executor. That right is derived from statute and is independent of the right conferred by the will."[19] (emphasis added in bold)

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14 [1952] VLR 517.

15 At p 518.

16 [2013] VSC 62.

17 At [48], [51] and [53].

18 (1990) 170 CLR 306.

19 Mason CJ, Brenna, Deane, Dawson and Gaudron JJ at pp 315 to 316.

[32] The third applicant and the second respondent also rely on the observations of Meek J in *Gerstenmeier v Gerstenmeier*[20] as being consistent with this contention. Meek J stated at [59] as follows:

> "**Upon making a family provision order**, the Court would, in the ordinary course, **leave the matter to the executor or administrator to administer the estate and pay the legacy, or transfer any property** which the Court has ordered be transferred under the family provision order." (emphasis added in bold)

[33] Applying these two authorities, the third applicant and the second respondent contend there is a proper basis to dismiss the application. The first applicant as an applicant for family provision has no direct interest in the Estate and the Court should leave it to the Administrator, in accordance with the ordinary approach, to administer the Estate, including how any order for family provision will be fulfilled.

[34] The first applicant's written submissions do not deal with the issue of standing. The submissions, however, state as follows:

> "3. The Applicants collectively are all of the potential beneficiaries of the [Estate] and the Lotus Trust, whether:
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> (a) pursuant to testamentary dispositions; or
>
> (b) upon intestacy;
>
> (c) as applicants for family provisions under s 41 of the [Succession Act]; or
>
> (d) as discretionary beneficiaries or potential discretionary beneficiaries of the Lotus Trust.
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> 4. Unlike most litigation, no inferences should be drawn in the present case regarding the parties' respective interests and alliances from their designation as "applicants" or as "respondents". In fact:
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> (a) although [the Administrator] is a respondent, he was appointed as Administrator of the [Estate] on the application of the [first and second applicants] and over the initial opposition of the [third applicant], but is now obliged to act – and is acting – in the collective best interests of all of them;
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> (b) although the [third applicant] is himself an applicant for family provision, his primary interest is to defeat or minimise the application for family provision by the [first and second applicants];
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> …".

[35] Further at [19] of the written submissions the first applicant states:

> "A beneficiary does not, during administration, ordinarily have title to any specific estate asset. The beneficiary's right is a right to due

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20 [2024] NSWSC 712.

> administration. *Wright v Lemon (No 2)*, [2021] WASC 159 at [60], restates the orthodox position that a residuary beneficiary has a chose in action to compel proper administration, rather than a proprietary interest in specific assets before administration is complete. That distinction does not weaken the [first applicant's] position. It identifies the very basis upon which the Court's intervention is sought: the [first applicant] does not claim an immediate proprietary right to the [Morayfield Property]; she seeks orders to secure the proper administration of the [Estate]."

[36] In oral submissions the first applicant addressed the issue of standing and made several points in response. Firstly, it was contended that the standing issue did not arise under s 6 of the Succession Act and the Court has power under s 6(4) of the Succession Act.

[37] In oral submissions the first applicant referred to the broader definition of who can apply in s 163 of the Trusts Act 2025.[21] However, that does not assist in respect of the current application to the extent that it is governed by the Trusts Act 1973.

[38] To the extent that s 6(4) of the Succession Act is relied upon, this would be in respect of the Trusts Act 2025 and would rely on the new provisions dealing with the defined terms (ss 6 to 9), s 137 (claims against trust property and trustee) and 163 and 165 (replacing s 98 of the Trusts Act 1973, as to who may apply for particular orders relating to trusts and trust property).[22] The first applicant's submissions do not address these provisions,[23] articulate how they are to be applied in the current circumstances or otherwise explain how the concerns in respect of standing are met (including the identified authorities). To the extent that any relief can be said to be impliedly sought under the Trusts Act 2025, the first applicant has not established an entitlement to that relief.

[39] The first applicant does more generally contend that it is not a matter of standing but is a consideration going to the exercise of the discretion. In this regard reliance is placed on the decision of Davis J to remove the executor and appoint an administrator on the application of the first applicant and the second applicant. In *Re Permewan*,[24] it does not appear that the issue of standing was considered, and the authorities identified above were not referred to. His Honour did consider whether removal of the executor was in the interests of all beneficiaries and the proper administration of the estate. Ultimately, Davis J found that the discretion in s 6 of the Succession Act should be exercised in all of the circumstances to remove the executor.

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[21] Section 163 of the Trusts Act 2025 provides that an application for orders may be made by persons including "(2)(d) a person in whose favour a power to distribute the trust property may be exercised". The first applicant does argue this broadens the definition to include potential beneficiaries of the Estate. In response, the Administrator submitted that if the Trusts Act 2025 applied the first applicant was "at best" within s 163(2)(d) and s 181 of the Trusts Act 2025.

[22] Sections 183 to 185 (replacing s 94 and 96 of the Trusts Act 1973) and 186 to 189 (replacing s 8 of the Trusts Act 1973) are relevant if, contrary to the above construction, the Trusts Act 2025 is to apply to the entire application.

[23] Other than the identification of the definition in s163(2)(d) of the Trusts Act 2025.

[24] [2021] QSC 151.

[40] Notwithstanding the broad jurisdiction given to the Court in s 6 of the Succession Act, consistent with the authorities the interest of the first applicant is relevant to the ability to make the application for the relief sought.

[41] The first applicant is not a beneficiary under the Will, but only has a contingent interest as a result of the application for further provision. That particular interest has been held to give standing to seek certain orders, including restraining an executor from parting with estate assets. It is directed at the preservation of estate assets until determination of the further provision application. That is not what arises here.

[42] Here, before any right arising from the statute has arisen, the first applicant seeks to have the Court make orders that have the effect of fettering the Administrator administering the Estate. The Administrator does not seek the orders – but will appropriately abide by the orders of the Court.

[43] The only parties seeking the order for the sale of the Morayfield Property are the first and second applicants, both of whom only have an interest as applicants for further provision. By the nature of the order sought they do seek to in effect interfere with the administration of the Estate in a substantive way.

[44] The written submissions of the first applicant "roll up" the interests of all parties and do not give proper regard to the differences between the various parties. The submission that no inferences should be drawn from the designation of applicant or respondent also is an attempt to gloss over the, at best, contingent interest of the first applicant.

[45] This approach can be tested by considering the scenario that the first applicant is unsuccessful in obtaining an order for further provision. If the order for the sale of the Morayfield Property was made and no right arises pursuant to the statute, a party with no interest would have been able to substantially impact the administration of the Estate. Until the application for further provision has been determined there is only the potential of having an indirect interest in the trust estate.

[46] In all of the circumstances, the first applicant does not currently have standing to bring the application seeking an order that the Administrator sell the Morayfield Property. Therefore, paragraphs [1] and [2] of the application should be dismissed.

[47] Given the contentious nature of the application, the substantive arguments will also be considered in case the standing point is not a complete answer to paragraphs [1] and [2] of the application.

Is it in the interests of the Estate that the Morayfield Property be sold at this stage?

[48] Turning to consider the substantive arguments in respect of whether it is in the interests of the Estate that the Morayfield Property be sold at this stage and whether it is appropriate to make the orders sought.

[49] The starting point of the first applicant's position is that the Estate lacks sufficient liquid funds to meet its liabilities, including litigation and administration costs. The first applicant also points to "practical considerations" in support of this position including:

(a) The Morayfield Property has been held for years and has produced rental income. However, the rental income has not "generated a sufficient available reserve" to resolve the liabilities of the Estate or the claims before the Court.[25]

(b) The accretions in the market value of the Morayfield Property are the basis that a reserve does exist.

(c) Unless the Morayfield Property is sold the Estate is not presently in a position where the Administrator can sensibly administer, compromise or litigate the competing further provision claim.

[50] Further, the first applicant contends:

> "7. The application is not an attempt by the beneficiaries, or any of them, to interfere with a discretionary management decision in an otherwise solvent and orderly estate. It seeks the Court's intervention in circumstances where:
>
> (a) the administration has stalled;
>
> (b) liquidity is inadequate;
>
> (c) the only substantial value is locked in [Orion Investments (Qld) Pty Ltd (**Orion**)];[26]
>
> …". (underlining in the original)

[51] In all of these circumstances, the first applicant contends that if the Estate is to be finally administered the Morayfield Property will need to be sold. The real question is whether that should occur now, in accordance with directions of the Court, or at a later stage. It is submitted that delaying the sale will result in further costs and continued uncertainty as to the Estate's true financial position.

[52] An administrator has power to sell estate property where the sale is required or appropriate for the purposes of administration.[27] The first applicant submits that while Orion is the legal owner of the Morayfield Property, the Administrator controls Orion and the shares in Orion are held for the benefit of the Estate.[28] The value of Orion is the Morayfield Property and it is therefore the Morayfield Property which is Estate's "practical value". Therefore, the sale of the Morayfield Property is an "orthodox and proportionate" way of realising the Estate asset for the purposes of administration.

[53] The Court may make an order for sale of property in a variety of circumstances. It is not limited to where an executor refuses to sell. It includes where due administration requires a sale and may arise where a delay has become unacceptable.

[54] The first applicant also relies upon the existence of the applications for further provision as supporting the relief sought. In this respect the first applicant submits:

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25 It can be inferred that this is a reference to the further provision applications.

26 The company that owns the Morayfield Property.

27 *Burke v Dawes* (1938) 59 CLR 1 at 11 to 12.

28 The current ASIC extract for Orion shows the Administrator as director and secretary and the two shares are held by the Administrator, not beneficially.

> "25. An important aspect of the present case, not always featured in cases involving deal [sic] in the realisation of estate assets, is the fact that the outcome of applications for family provision under s 41 of the Succession Act cannot be predicted with any measure of uncertainty. Absent a consensual outcome reach[ed] by negotiation and unanimous compromise, a judicial determination must be imposed. Negotiation and compromise is obviously preferable to a judicial determination, but is difficult if the value of the estate cannot be quantified to a dollar amount. If judicial determination is necessary, that will also be facilitated by quantification of a dollar amount.
>
> 26. These considerations are especially important in a case like the present one, where any outcome (whether negotiated or imposed by judicial determination) is unlikely to proceed on the assumption that a single income-earning property, which represents the bulk of the estate, will continue to be held by the respective beneficiaries and claimants as co-owners despite their past differences."

[55] Ultimately, the first applicant contends that the longer the administration of the Estate remains unresolved the stronger the justification required for continued retention of the property. Further, where the Estate's only substantial value is locked in a company controlled by the Administrator, directions requiring the Administrator to sell the asset are appropriate in order to be able to realise the Estate value.

[56] The first applicant also points to the time since the Deceased's death in 2019, the commencement of the proceeding in 2020 and the Administrator being appointed in 2021. It is submitted that the continued retention of the Morayfield Property does not advance the administration of the Estate but preserves the problem that has prevented resolution and finality. The proposed orders provide a measured response and are appropriate.

[57] In the written submissions, the first applicant does go on to consider whether there is a "viable alternative" to the sale. The solicitor for the first applicant gives sworn evidence that the Estate does not have sufficient liquid funds to meet its present and anticipated liabilities. Further, that Orion's income is derived from rent generated by the Morayfield Property and Orion does not have a surplus in cash or liquid assets to enable a distribution of the Estate. Critically, it is submitted that the rental income is insufficient to meet the Estate's immediate and anticipated funding requirements.

[58] Other assets and liabilities do not assist. For example:

(a) There is the benefit of a costs order from the Lotus Trust proceedings but that is not a liquid asset. It may be able to be accounted for later but does not assist at this time to fund the Administrator, a trial or pay further provision claims.

(b) There is also an Orion loan. Again, it does not assist general liquidity and does not fund the claims to meet the liabilities.

(c) The ability to borrow against the Morayfield Property would also not provide reliable or timely funds. It would merely defer the sale, increase cost, introduce new risk and reduce the net value available to the Estate.

[59] Further, the first applicant submits that sale consequences identified by the Administrator should be "treated with caution". The capital gains tax and sale costs will arise whenever the sale occurs and are estimates only.

[60] The second applicant supports the first applicant's position. In oral submissions the second applicant's solicitor raised points in support of that position. It was recognised that the Estate asset is the shares in Orion, but that the Morayfield Property owned by Orion is where the value is. The value of the shares in Orion is impacted by the taxation implications that have been identified.

[61] Overall, the second applicant contends that the Estate does not have enough cash, and the potential alternative funding identified by the Administrator is not viable.

[62] While both do not support an order being made at this stage for the sale of the Morayfield Property, the positions taken by the Administrator and the third applicant/ second respondent are different.

[63] It is appropriate to consider the position of the third applicant and second respondent first as they are a full contradictor to the first applicant and oppose the proposed sale of the Morayfield Property.

[64] The second respondent is the trustee of the Lotus Trust, being the sole residuary beneficiary under the Will. Zalerina Pty Ltd was previously the trustee of the Lotus Trust but was removed and the second respondent was appointed trustee. This appointment was confirmed by Court order on 9 December 2022.

[65] The assets of the Estate include the shares in Orion, which is the owner of the Morayfield Property, valued at $2,825,000 to $3,700,000. Rent of approximately $20,103 is paid monthly under commercial leases.

[66] The third applicant and the second respondent dispute the first applicant's assertion that the Estate does not have sufficient liquid funds available and point to the affidavit of the Administrator as showing that the Estate holds significant funds, which are sufficient to meet its present and anticipated liabilities. Further, Orion has funds which could be made available to the Administrator, should the need arise.

[67] Ultimately, the third applicant and the second respondent point to the non-commerciality of the proposed sale. In particular, the third applicant and the second respondent submit that the proposed sale of the Morayfield Property would trigger significant taxation liabilities and sale costs which would significantly impact the amount the Estate would receive.

[68] That is, the Estate (on the estimated values of the Administrator):

(a) would receive a net payment of approximately $1.37 to $1.8 million, being a reduction in value of approximately $1.45 to $1.9 million; and

(b) would be deprived of the rental income of approximately $241,236 per annum.

[69] It is submitted that the proposed sale of the Morayfield Property "makes little sense" where it would:

(a) Trigger taxation liabilities payable by Orion estimated at approximately $558,000 to $820,500.[29]

(b) Incur sales commission and conveyancing costs of approximately $46,000 to $136,000.[30]

(c) Trigger further taxation liabilities if the net sale proceeds are to be paid from Orion to the Estate, estimated at approximately $281,000 to $371,000.[31]

(d) Reduce the monthly income received.[32]

[70] Under the terms of the Will the whole of the residuary of the Estate is gifted to the Lotus Trust. The second respondent, being the trustee of the Lotus Trust, points out that the transfer of the shares in Orion to it under the Will would be free of any taxation liabilities and sale costs.[33] Accordingly, the second respondent also expressly opposes the proposed sale as it would be inconsistent with the interests as residuary beneficiary under the Will.

[71] In addition to the standing point discussed above, the third applicant and the second respondent raise another jurisdictional issue. Here the proposed order is that the Administrator who holds shares in Orion on behalf of the Estate sell an asset of the company. Orion does not hold the asset on trust. Rather, the trust property is the shares in Orion, and not the Morayfield Property itself. Orion is and remains the beneficial owner of the Morayfield Property.[34]

[72] It is submitted that no authority has been provided to the Court where the power has been extended to the scenario in the orders sought by the first applicant.

[73] The first applicant seeks to rely on s 8 and s 94 of the Trusts Act 1973 as a basis for the orders. In response the third applicant and the second respondent rely upon the decision of the Supreme Court of Victoria in *Re Langford (deceased); Equity Trustees Ltd v Langford*[35] which considered a sale of part of an estate's property pursuant to the Victorian Trusts legislation's equivalent of s 94 of the Trusts Act 1973.[36] In that case, the sale was proposed to realise funds to meet land tax liabilities. The Court stated as follows:

> "[42] It has been authoritatively decided that expediency is a wide and flexible concept. The Court may act where it has formed the opinion that the **proposed transaction is advantageous**

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29 Being a loss of 19.75% to 22.18% of the gross value.
30 Being a loss of a further 1.62% to 3.67% of the gross value.
31 Being a loss of a further 9.95% to 10.02% of the gross value.
32 The monthly rent is approximately $20,103 per month and if the net proceeds of sale were invested in a term deposit the return would be approximately $5,900 to $9,400. This is a reduction of approximately 29.34% to 46.75% of the current income stream.
33 Such as those estimated above.
34 *Commissioner of Taxation v Linter Textiles Australia Ltd (in Liquidation)* (2005) 220 CLR 592 at [54] – [55].
35 [2005] VSC 84.
36 Section 63 of the *Trusts Act 1958* (Vic) is in similar but not the same terms.

> **or desirable in the interests of the trust property as a whole**.
>
> ….
>
> [44] The power conferred by s 63 [of the Victorian legislation] is a discretionary one which would authorise a departure from the expressed wishes of the testator. It must therefore be exercised with a due sense of responsibility. This will include a respect for the intention of the testator as this is disclosed in the general scheme of the will and for the interests of all of the beneficiaries or classes of them, without preferring one beneficiary or class only.
>
> …
>
> [45] … I am concerned with the wishes of the testator as he has expressed them in the will, rather than the wishes of the beneficiaries." (emphasis added)

[74] Ultimately the Court authorised the trustee to sell parts of the estate property from time to time but only to the extent that other assets were insufficient to pay outgoings.

[75] Here, relevant circumstances include:

(a) The Deceased had the opportunity to deal with the shares in Orion in her Will, but did not specifically do so. The shares in Orion form part of the residue of the Estate and are gifted to the Lotus Trust.

(b) There is nothing in the Will suggesting that the Morayfield Property ought to be sold by Orion.

(c) The preference of the second respondent, being the sole residuary beneficiary, is that the assets forming the residuary of the Estate be, as far as possible, retained *in specie*.

(d) There is currently no crystallised right of the first applicant to any particular assets of the Estate.

[76] In all of these circumstances, the third applicant and the second respondent submit that it would be premature to order the sale of the Morayfield Property.

[77] It is also submitted that the significant prejudice falls on the beneficiaries of the Estate if the property is sold if ultimately the further provision applications are not successful. A sale of the Morayfield Property should be an absolute last resort. It is accepted that ultimately the Administrator may have no other choice, but that is not the case at the current stage.

[78] Consistent with the role and obligations of a Court-appointed administrator, the Administrator takes a reasoned and measured approach to the application for the sale of the Morayfield Property. The Administrator is concerned with whether there is a need in the proper administration of the Estate to sell the Morayfield Property irrespective of the consequences of the sale and whether it is in the interests of the Estate. Ultimately, the Administrator submits that on the current evidence before the

Court it is not in the interests of the Estate to compel the sale at this time of the Morayfield Property.

[79] The Administrator deposes in detail to the current value of the Estate being approximately $5.5 million, with approximately $400,000 in cash.[37] The primary asset of the Estate is the shares in Orion and the Morayfield Property is the primary asset of Orion, being valued at between $2.83 million and $3.7 million. There is also the income from the rent paid in respect of the Morayfield Property of approximately $20,000 per month.

[80] It is against this analysis of the value of the Estate that the Administrator then considers the propositions put forward by the first applicant, namely that:

(a) the Estate lacks sufficient liquid funds to meet present and anticipated liabilities;

(b) there is no practical alternative to the realisation of the Morayfield Property; and

(c) the sale of the Morayfield Property is necessary to enable the proper administration of the Estate.

[81] If the Morayfield Property was sold, the Administrator estimates the Estate would receive between $1.37 million and $1.8 million. Further a monthly return on those net funds deposited in a term deposit would be between $5,952.19 and $9,435.65. Both of these outcomes would be a decrease from the current position of a value of $2.83 million to $3.7 million and an average monthly income of $20,103.

[82] The reduction is significant being between $1.45 million and $1.9 million in respect of the value and between $10,667.35 and $14,150.81 in respect of the income per month.

[83] The reduction in value comes about due to the costs associated with the sale (estimated between $45,989.47 and $135,950.00) and also capital gains tax (estimated between $557,994.30 and $820,494.30). There is a further deduction if the proceeds are to be paid by Orion to the Estate (a corporate entity to an individual) as the result of further income taxation payable (estimated between $281,336.10 and $371,167.81).

[84] The reduction in the income stream is due to the difference between the commercial rent and the investment of the net proceeds of sale. This would also be dependent on the likely return rate.

[85] The Administrator is mindful of his obligation to ensure the proper administration of the Estate, including preserving and where possible improving the assets of the Estate for distribution in accordance with the terms of the Will. This requires consideration of the duties to both the Estate and the beneficiaries.

[86] In light of the above analysis, the Administrator has formed a view and appropriately indicated that view to the Court. This includes:

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37 See Affidavit of MG Murphy (CFI #107) at [4] and written submissions at [13].

(a) The sale of the Morayfield Property would increase the available cash but would trigger the payment of significant liabilities which would in turn reduce the value of the Estate.

(b) The evidence does not support the conclusion that the sale of the Morayfield Property is in the interest of the Estate. This includes the evidence of the reduction in the value of the Estate and the income each month as outlined above.

(c) The Administrator's sworn evidence is that he does not currently require the sale of the Morayfield Property to meet the liabilities of the administration of the Estate.

(d) While the sale will increase the cash available to meet any order for further provision, the sale will decrease the value of the Estate and will not increase the likelihood of the resolution or expeditious determination of the application for further provision.

(e) The progression of the application for further provision has been impacted by the applicants not providing up to date affidavits for two and a half years. It was the Administrator himself who had the proceeding listed on the Wills and Estates List to progress the matter.

(f) The applicants have also not filed affidavits identifying the provision sought. Accordingly, there is no ability to evaluate the merits or quantum of the claims. This is relevant to both a negotiated settlement or a Court ordered outcome.

[87] The Administrator is also of the view that there is "little utility" in the sale at this stage. A sale at this stage would decrease the value of the Estate, decrease the monthly income, deprive the Estate of the advantage of capital growth and deprive the residuary beneficiary of the potential to receive a valuable income producing asset upon distribution.

[88] Some thought has been given to alternative ways of raising funds to meet any order for further provision. This could include a mortgage against the Morayfield Property serviced by the rental income. Initial enquiries have been made in respect of this course and it is possible that between $1.68 million and $2.2 million could be raised. In this scenario, the Estate would have between $300,000 and $400,000 more cash than if the property was sold. This could be used to meet any order for further provision and fund the administration of the Estate.

[89] Consideration has also been given to a sale of the Morayfield Property, if required, at some later stage. The sale could occur when the proceeding has been determined by the Court (or resolved), or earlier if, and when, the Administrator forms the view that the liabilities of the Estate cannot be maintained or met by the cash assets of the Estate.

[90] Taking into account all of these factors, the Administrator contends that the "better course" is for directions to be made for the applicants to file updated evidence in respect of the applications for provision and to progress to trial. If further funds are required to meet any settlement, at that stage the Administrator can sell the property.

Alternatively, the Administrator can sell the property if required to pay any orders for provision following a trial (or if required to fund the trial).

[91] Further, delaying the sale of the property (if ultimately required) would mean that the Estate receives the benefit of increased monthly income as well as the likely increase in the value of the Morayfield Property.

[92] In all of the circumstances, it is submitted that the applicants[38] cannot contend that there is a "dire and urgent need to sell" the Estate's most valuable asset without further delay.

[93] During oral submissions, the first applicant appeared to recognise that there was no immediate urgency for the sale of the Morayfield Property. Rather, the realisation of the property could be dealt with in an "efficient manner". This could include that there is an order that the Morayfield Property be sold but if there was a reason to postpone the sale then the Administrator could seek agreement or get judicial advice. The first applicant also submitted that it was appropriate to order at this point in time that the property be sold, but that the sale would not occur until after the contingencies were determined. All of this tends to support there not being any urgency to the sale of the Morayfield Property.

[94] This is an unusual application. The orders are not sought by the beneficiaries under the Will or the Court-appointed Administrator. Rather, the application is brought by an applicant for further provision, who at best has a contingent interest. There is not sufficient evidence before the Court to be able to reach a preliminary view as to the prospects of success of the applications for further provision. The proceeding is case managed on the Wills and Estates List and directions have been made for updated affidavits to be filed by the applicants to progress the proceeding.

[95] In determining the issue of whether it is in the best interests of the Estate that the Morayfield Property is sold at this stage:

(a) Generally, I accept the evidence of the Administrator, over the evidence of the solicitor of the first applicant. The Administrator does not have an interest in the Estate and is not advocating for a partisan position. Rather, the Administrator is subject to his duties and obligations in respect of the Estate.

(b) In particular, I accept the Administrator's evidence that the sale of the Morayfield Property is not required at this stage to meet the liabilities of the administration of the Estate.

(c) I find that the evidence does not support the conclusion that the sale of the Morayfield Property at this stage is in the best interests of the Estate and/or the beneficiaries. Rather, the evidence supports the opposite conclusion. That is, the evidence establishes that it is not in the best interests of the Estate for the Morayfield Property to be sold at this stage.

(d) The submissions made on behalf of the Administrator are persuasive and I accept those submissions.

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[38] Being the first applicant, and also the second applicant given her support for the application.

(e) I also accept the submission of the third applicant and second respondent that if an order is to be made for the sale of Estate property, it should only be to the extent necessary to meet any insufficiency of funds.

[96] Accordingly, if it is necessary to consider whether it is appropriate to make the order that the Morayfield Property be sold at this stage, I find that on the evidence it is not appropriate to make the orders sought in paragraphs [1] and [2] of the application.

[97] The appropriate order is that paragraphs [1] and [2] of the application be dismissed.

[98] To the extent that the first applicant may be seeking relief pursuant to the Trusts Act 2025 (possibly implied from the reliance on s 6(4) of the Succession Act), the first applicant has not established any entitlement to that relief and the application, to that extent, must also be dismissed.

If so, what is the appropriate method for the Morayfield Property to be sold?

[99] Whilst not necessary given the position reached in respect of the issues above, it is appropriate to briefly address the method of sale that would be appropriate if it was appropriate to make orders for the sale of the Morayfield Property.

[100] The first applicant contends that given the level of "mistrust and animosity which exists" between the first and second applicant and the third applicant, and to some extent between the first and second applicants and the Administrator, the appropriate method of sale is that outlined in [2] of the application. That is, it is in the best interests of all of the parties to adopt the directions in [2] of the application as this approach:

(a) minimises scope for controversy regarding the sale process; and

(b) affords an appropriate measure of protection to the Administrator.

[101] Further, it is submitted that the proposed orders do not "strip the Administrator of control" or "expose the [Estate] to an improvident sale". Rather, the proposed orders provide "a conventional mechanism" providing for "independent valuation, proper marketing, public auction, reserve protection, and disclosure after the sale process."

[102] The first applicant submits that the proposed sale method and orders are "protective, not oppressive". The proposed orders provide for the appointment of a registered valuer, recommendation of a reserve price, selection of a selling agent, sale by public auction, confidentiality of the reserve price and pre-auction offers until after sale, and disclosure of offers and bids after the auction. The method is said to be intended to ensure the sale process is transparent and at arm's length and achieves the best available price.

[103] The Administrator also considered the proposed sale method if it was in the best interest of the Estate for the Morayfield Property to be sold at this stage. The Administrator submits that the proposed sale method is "unnecessarily onerous" in terms of cost and time.

[104] If a sale was to proceed, the Administrator's position is that it would be preferable to engage a suitably qualified agent to prepare, market and sell the Morayfield Property for the best available market price. Further, it is submitted there is no advantage in

obtaining an additional valuation where the agent would be seeking to achieve the highest market value irrespective of any valuation obtained.

[105] Further, as the Administrator has fiduciary obligations that would govern the sale, it would not be appropriate for the first and second applicants to interfere with the sale process.

[106] If it was appropriate and necessary to make orders for the sale of the Morayfield Property at this stage, I consider that the Administrator should be able to proceed with the sale taking appropriate professional advice as to the best way to market and sell the property to maximise the sale price. This would be consistent with the fiduciary obligations and duties owed by the Administrator, and also the ability to obtain up-to-date expert advice on what could be a quickly changing market.

[107] Accordingly, if orders were to be made for the sale of the Morayfield Property they would be consistent with the proposal by the Administrator, as opposed to those sought by the first applicant. However, it is not necessary to precisely articulate a form of orders.

[108] If it is necessary to sell the Morayfield Property in the future, the Administrator should consider what is in the best interests of the Estate and beneficiaries at that point in time and seek judicial advice if necessary and/or appropriate.

[109] Turning to consider the second component of the application.

Does the evidence before the Court support the conclusion that the documents purporting to be resolutions of the second respondent are invalid and of no effect?

[110] The second component of the application is quite distinct from the first. The first applicant seeks a declaration pursuant to the inherent jurisdiction of the Court and/or s 8, 9 and 96 of the Trusts Act 1973 that the following documents are invalid and of no effect, namely:

(a) Document headed "Resolution 1 of Trustees of the Lotus Trust" dated 21 February 2011 (**Resolution 1**); and

(b) Document headed "Resolution 2 of the Trustees of the Lotus Trust" dated 21 February 2011 (**Resolution 2**)

(together, the **Purported Resolutions**).

[111] Further, the first applicant seeks directions in relation to the administration of the Estate and/or the Lotus Trust arising from the determination of the application for declarations.

[112] The parties again take different position in respect of this issue. The first applicant seeks the declarations of invalidity and is supported by the second applicant. The third applicant and the second respondent oppose the declarations being made. The Administrator says that the Purported Resolutions are relevant to the administration of the Lotus Trust and not the Estate. Accordingly, this is a matter between the applicants and the second respondent, and the Administrator will abide by the orders of the Court on the issue.

[113] The first applicant brings the application for declarations on the basis that:

(a) The Purported Resolutions have never been carried into effect.

(b) There is a lack of a reliable evidentiary foundation for the Purported Resolutions.

(c) The Purported Resolutions could give rise to tax issues, for example capital gains tax and/or transaction duty if the trustee of the Lotus Trust was obliged to proceed on the basis that the trust had been resettled over 15 years ago.

(d) The Purported Resolutions represent a potential obstacle to a settlement or judicial determination of the outstanding issues in the administration of the Estate and the Lotus Trust.

(e) The Purported Resolutions cloud the standing and rights of the parties.

[114] A deed dated 14 February 2011 established the Lotus Trust, with John and Prudence Permewan the trustees. The initial primary beneficiaries were the children, grandchildren and great-grandchildren of John and Prudence Permewan. Therefore, the first, second and third applicants were primary beneficiaries.

[115] Resolution 1 purports to remove the first and second applicants and their descendants from the class of primary beneficiaries. The first applicant contends that Resolution 1 has significant and serious consequences. If valid and effective, purported Resolution 1 would "radically alter" the operation of the discretionary trust merely one week after the Lotus Trust was first established.

[116] The first applicant submits that the evidence in respect of the Purported Resolutions is "unsatisfactory".

[117] The evidence includes:

(a) The Purported Resolutions were not in the Estate records when the Administrator was appointed, and the Administrator had no knowledge of the Purported Resolutions prior to them being disclosed.

(b) Only copies of the Purported Resolutions are produced. No original versions have been located or produced.

(c) The evidence of the third applicant is that he does not believe he has ever seen an original version and he was not aware of the existence of Resolution 1 when it was purportedly made on 21 February 2011.

(d) There is no evidence, contemporaneous or otherwise, in respect of the preparation of Resolution 1, advice and consideration of it, and implementation of Resolution 1. Given the nature of the change and effect on the Lotus Trust, it would be expected that there would be contemporaneous file notes, correspondence, minutes or other records in respect of Resolution 1 around the date it was purported to be made, 21 February 2011.

(e) The timing of Resolution 1 is only one week after the Lotus Trust was established. There is no evidence as to why there was a substantial change to the primary beneficiary class shortly after the trust was established.

(f) The Purported Resolutions have not been implemented or acted upon.

[118] The first applicant also contends that the second respondent has not put on adequate evidence, being the trustee of the Lotus Trust. The third applicant and his son are the directors of the second respondent. It is submitted that the affidavit of the third applicant does not address meaningfully address Resolution 1 and there is no affidavit from the son. The first applicant submits, in these circumstances, there is no direct evidence from the trustee establishing the validity of the Purported Resolutions.

[119] Further, the first applicant points to related litigation involving documents executed by the Deceased in blank with fabricated dates inserted at a later time. Cooper J in *Re Permewan (No 2)*[39] made findings, including that documents had been defectively executed, that false dates had been subsequently inserted and the documents were void.[40]

[120] The first applicant goes as far as to submit that given the findings by Cooper J, the Court could have no confidence that the Purported Resolutions "have any greater validity than the documents dealt with by Cooper J".

[121] There is power to vary the Lotus Trust given the broad powers in clauses 23.1, 23.2(c), 23.3 and 24.1 of the deed. The first applicant submits that the "practical burden" falls on a party who wishes to assert the validity and efficacy of the Purported Resolutions. That is, the onus would be on the second applicant to prove the due execution and compliance with the Lotus Trust deed.

[122] Ultimately, the first applicant submits the evidence does not establish that the Purported Resolutions were validly prepared, executed and implemented and the Court should declare that Resolution 1 and Resolution 2 are invalid and of no effect.

[123] In the alternative, the first applicant submits that "the appropriate minimum relief" is a declaration or direction that:

> "(a) the [Purported Resolutions] are not to be acted upon by the Administrator or the trustee of the Lotus Trust unless and until their validity is established by further order;
>
> (b) pending further order, the Lotus Trust is to be administered on the footing that the Deceased's Daughters and their respective issue continue to be primary beneficiaries; and
>
> (c) any party asserting the validity of the [Purported Resolutions] (or either of them) must, within a limited period of time, bring a properly constituted application supported by admissible evidence from the trustee and any relevant directors or custodians of Lotus Trust records."

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39 (2022) 11 QR 25.

40 On the basis that they were contrary to public policy, and they reflected sham transaction.

[124] The first applicant's position is that the declarations sought are preferable to this alternative position in that the second respondent has had the opportunity to provide evidence and has not done so. The Purported Resolutions affect the class of beneficiaries of the Lotus Trust and this in turn affects the administration of the Lotus Trust, the financial resources relevant to the further provision claims and the proper treatment of the residue of the Estate. Whether the first and second applicants and their lines are excluded as beneficiaries of the Lotus Trust requires clarification.

[125] The second applicant supports the first applicant but did not add to the submissions in respect of the declarations sought.

[126] The position of the third applicant and the second respondent is that the Court should not make the declarations sought. Several relevant matters are relied upon in support of this contention, including:

(a) The concerns raised in the affidavit of the solicitor for the first applicant are "mere speculation and conjecture" as to the doubts concerning validity of the Purported Resolutions. That should not be sufficient to support final relief.

(b) If the Purported Resolutions are to be relied upon, they would need to be proved in accordance with s 60 of the *Evidence Act 1977* (Qld).

(c) The third applicant and the second respondent have not asserted validity of the Purported Resolutions. Nor have they sought to implement the Purported Resolutions.

(d) The third applicant and the second respondent were unaware of the Purported Resolutions until the disclosure of the documents by the first applicant. It is the first applicant that is now raising the issue of the validity of the Purported Resolutions.

(e) The Lotus Trust deed provides wide powers to amend and also confers on the trustee an absolute and unfettered discretion.

[127] Further, it is contended that in order to make the declarations sought the Court would be required to make factual findings. This would necessarily include findings to overturn the prima facie position that the Purported Resolutions were validly executed.

[128] Here, the application for the declarations is brought by the first applicant. Accordingly, it is submitted that the onus of proof is on the first applicant to establish the ambit of the rights to be declared and prove all of the facts necessary to enable the declaration to be made. This applies even where the first applicant seeks a negative declaration.

[129] In respect of the onus, the third applicant and the second respondent rely on the principle in *Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers appointed) (in liq)*.[41] In that case the Court was considering an appeal from declarations made as to the true ownership of certain convertible bonds. The grounds of appeal included that the trial judge had made an error in respect of the onus and

41 [2013] FCAFC 48 at [21] and [31] per Jacobson, Gordon and Robertson JJ.

that the onus had not been discharged. The appeal was ultimately dismissed, and the Full Court found there had been no errors by the trial judge.

[130] The trial judge had outlined the principles as to who bears the onus in an application for declarations as follows:

> "[47] Putting it another way, when a person commences a declaratory proceeding, that person bears the legal onus of proof. That is so even though the majority of the facts that are relevant may be in the opposing camp. It is for the claimant to establish the ambit of the rights to be declared, and to prove all the facts necessary to enable the declaration to be made (see *Blanch v British American Tobacco Australia Services Ltd* (2005) 62 NSWLR 653 at 655). When a party seeks a negative declaration, such as, for example, a declaration that an acquisition will not contravene s 50 of the *Competition and Consumer Act 2010* (Cth), that party bears the onus of proving that negative proposition (see *Australian Gas Light v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [355]-[356])."

[131] It is submitted that in accordance with this principle, the onus is on the first applicant to establish the necessary facts to enable the declaration to be made. The first applicant appears to reverse the onus.[42]

[132] The third applicant and the second respondent also submit that the first applicant raises factual questions as to whether the Purported Resolutions were validly prepared, executed and implemented. This includes factual assertions going to the conduct of the trustee and the trustee's knowledge at various particular points in time. These are matters that should be specifically pleaded pursuant to r 150(1)(k) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**). Further, to the extent that inferences are relied upon in respect of invalidity, that should also be specially pleaded pursuant to r 150(2) of the UCPR. Ultimately, it is contended that these are issues that should be dealt with at trial.[43]

[133] In oral submissions the third applicant and the second respondent also identified that:

(a) The application for the declarations did not necessarily have a bearing on the ultimate question in the proceeding, being an application for further provision. Pursuant to the discretionary trust, there was no entitlement or interest in trust property.

(b) The current application for declarations is not the proper process to determine the issue.

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42 Apparent from the submission that the Court should grant the declaration because of a "lack of satisfaction".

43 Alternatively, there is no application for the issue to be determined as a separate question under r 483 of the UCPR.

[134] In all of the circumstances, the third applicant and the second respondent submit that the onus is on the first applicant and the first applicant has not established on the evidence that the declarations should be made.

[135] To the extent that the first applicant relies on s 8 and s 96 of the Trusts Act 1973, consistent with the reasons outlined previously, s 284 of the Trusts Act 2025 provides that the proceeding must be heard and determined under the Trusts Act 1973 provisions.

[136] Further, to the extent that s 96 of the Trusts Act 1973 is relied upon, that provision would not apply here as the trustee is not the applicant. Section 96 provides for a trustee to make an application for directions.

[137] It is not clear how s 9 of the Trusts Act 1973[44] would apply and it has not been addressed in submissions by the parties. Arguably the Trusts Act 2025 would apply to the extent that s 9 of the Trusts Act 1973 is relied upon. However, the first applicant has not established any basis to the relief sought under s 9 of the Trusts Act 1973 or any equivalent provision in the Trusts Act 2025. It is not for the Court to speculate as to what the first applicant could possibly rely on in the circumstances.

[138] The inherent jurisdiction of the Court would enable declarations to be made, if it was otherwise appropriate that they be made.

[139] This is an unusual application as the first applicant seeks declarations in circumstances where no one appears to be seeking to rely on or implement the Purported Resolutions. The Purported Resolutions were disclosed by the first applicant and the first applicant seeks a declaration that they are not valid. There is no evidence from any party that is contending that the Purported Resolutions are valid.

[140] Further, the application is brought in the originating proceeding seeking further provision. There are no pleadings, as the proceeding was commenced by originating application. The relevance of the validity or otherwise of the Purported Resolutions is not directly relevant to the current proceeding as the Lotus Trust is a discretionary trust and is the residuary beneficiary under the Will.

[141] Given the wide powers in the Lotus Trust deed, the beneficiaries under the trust could be changed. There is no direct entitlement to any funds, nor is there any interest in the trust property. Accordingly, the relevance to the further provision application is that funds may, or may not, be distributed to the first and second applicant by the second respondent. That is foreseeably relevant to the consideration of their financial position in determining what further provision should be ordered or any settlement reached.

[142] In considering this issue, there are several sub-issues that are to be determined:

(a) Who has the onus to establish the necessary facts to make the declaration?

(b) Has the onus been discharged?

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[44] Effect of conversion of trust property.

[143] Dealing with each of these in turn.

Who has the onus to establish the necessary facts to make the declaration?

[144] Consistent with the principles discussed in *Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers appointed) (in liq),*[45] the first applicant brought the application for declarations and the onus is on the first applicant to satisfy the Court on the balance of probabilities of the necessary elements to found the declarations.

[145] It is not enough to say that on the evidence the Court cannot reach a level of satisfaction that the Purported Documents are valid. The first applicant needs to establish that the Purported Documents are not valid. This would extend to displacing any presumption of validity that may arise.

Has the onus been discharged?

[146] On 20 February 2026 orders were made that the parties file and serve affidavits concerning the preparation, execution and implementation of purported Resolution 1. All parties filed affidavits addressing this issue.

[147] The evidence establishes that the Lotus Trust was established by deed on 14 February 2011. The deed provided that the primary beneficiaries of the trust were John Permewan and the Deceased and any person who is or becomes or has been a child, grandchild or great grandchild of John Permewan and the Deceased. Further, the terms of the deed identified "nil" persons as excluded beneficiaries.

[148] There is also a further document being minutes of meeting of trustees dated on or about 14 February 2011, signed by John Permewan as one of the trustees of the Lotus Trust and as chairman of the meeting.

[149] The evidence in relation to the Purported Resolutions is contained in the copies of the two documents and various affidavits filed for the application.

[150] The copy of Resolution 1 provides that the primary beneficiaries immediately be removed except for John Permewan, the Deceased and the third applicant and the children and grandchildren of the third applicant. On its face it purports to be made on or about 21 February 2011.

[151] The copy of Resolution 2 provides that the particulars of excluded beneficiaries of the trust be immediately varied to provide that "Any person who is, or becomes, or has become a child, grandchild or great grandchild of John Permewan and [the Deceased], other than those named as Primary Beneficiaries." On its face it purports to be made on or about 21 February 2011.

[152] There is also a further document on or about 21 February 2011 described as a "Confidential Memorandum of Wishes" of John Permewan and the Deceased (**Confidential Memorandum**), which purports to be directed to the trustees of the Lotus Trust. On the face of this document, it was dated as executed on 21 February 2011 but said to be effective from 14 February 2011. It also seeks to convey that the intention was to make the third applicant and his line the "primary beneficiaries" and

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45 [2013] FCAFC 48 at [21] and [31] per Jacobson, Gordon and Robertson JJ.

seeks to have any distributions take into account the purposes expressed in the document.

[153] No relief is sought in respect of the Confidential Memorandum and its contents or provenance is not addressed by the first applicant, despite it being exhibited to the affidavit of the first applicant.

[154] The first applicant deposes to how she obtained a copy of Resolution 1, Resolution 2 and the Confidential Memorandum in her affidavit sworn 13 March 2026 (CFI #90). The first applicant took photographs of these documents on 17 September 2019 and subsequently disclosed them in the proceeding. The first applicant also deposes to having no knowledge regarding the preparation, execution or implementation of the documents.

[155] The second applicant's affidavit deposes to the second applicant only becoming aware of the documents from the first applicant. Further, she has no knowledge as to the preparation, execution, authenticity or implementation of the documents.

[156] The third applicant's affidavit deposes to:

(a) The signatures on Resolution 1 are, to the best of the third applicant's knowledge, those of John Permewan and the Deceased.

(b) He was not aware of the existence of Resolution 1 at or about 21 February 2011.

(c) He does not believe he saw a copy of the Resolution 1 prior to the Deceased's death in 2019.

(d) He does not believe he has ever seen the original of Resolution 1.

(e) In his previous affidavit dated 28 July 2023 he stated his belief at that time that the primary beneficiaries of the Lotus Trust were the first, second and third applicants, their children and great-grandchildren. Further, at that date he does not recall having been aware of Resolution 1.

(f) On or about 10 May 2022 his lawyers had received a copy of Resolution 1. This was shortly before a hearing commencing on 16 May 2022 for four days. Further, he does not recall seeing a copy of Resolution 1 at this time.

(g) The best of his recollection and knowledge is he first saw a copy of Resolution 1 in or around mid-September 2023.

(g) As deposed to in [4] of his fourth affidavit, he did not know how Resolution 1 was made or whether it was valid.

[157] The solicitor for the first applicant includes in his affidavit that:

(a) Based on his review of the affidavit he believes that the Purported Resolutions were not part of the Estate records when the Administrator assumed his role.

(b) He believes that the Administrator had no prior knowledge of the existence of the Purported Resolutions.

[158] The affidavit also seeks to give evidence of the absence of originals and contemporaneous material, lack of contemporaneous awareness and conduct inconsistent with the alleged amendment, additional "objective concerns" and also "conclusion as to provenance and validity".

[159] It is difficult to see how some of this evidence is properly admissible or, even if it is, that it should be given any real weight. In effect, the solicitor is swearing the issue that the Court is asked to determine.

[160] The Administrator also addresses the Purported Resolutions in his affidavit dated 12 March 2026 (CFI #88). Relevantly:

(a) The Administrator was provided with a copy of Resolution 1 by the solicitor for the first applicant on 14 April 2022.

(b) The Administrator has not seen and does not have the original version of Resolution 1.

(c) The Administrator has not found any evidence of any minutes or resolutions regarding the Lotus Trust.

(d) No information had been provided by the applicants to the Administrator in relation to the circumstances surrounding Resolution 1.

[161] The Administrator also addresses some of the concerns he has in respect of Resolution 1, including:

(a) The validity or otherwise of Resolution 1 is "uncertain".

(b) If it is valid, it may constitute a resettlement of the Lotus Trust and, as a consequence, incur a tax liability. This could include interest for the period since 2011.

(c) While the Lotus Trust would be liable for any tax payable and interest, if the trust has insufficient assets to meet the liability, then the Administrator is concerned that the tax payable and interest could become liabilities of the Estate where the Deceased was trustee of the Lotus Trust.

(d) This could alter the corpus of the Estate available for distribution.

(e) The Administrator does not want to distribute the Estate before the validity of Resolution 1 is determined, otherwise the Administrator is at risk of being personally liable.

(f) The trustee of the Lotus Trust would have standing to bring a proceeding to seek determination of the validity or otherwise of Resolution 1 and should bring such an application.

(g) The Administrator does not have standing in respect of the Lotus Trust.

(h) Upon determination of this issue, the Administrator can determine the size and value of the Estate available for distribution, which is relevant to the further provision application.

[162] The form of the current application and the evidence are both unsatisfactory and of little assistance in determining the validity of Resolution 1 and Resolution 2. It is impossible to reach any level of satisfaction on the evidence that is available. Many questions remain unanswered, including as to why such a major change was undertaken so soon after the original deed was executed.

[163] The first applicant has to establish the ambit of the rights to be declared and to prove all the facts necessary to enable the declaration to be made on the balance of probabilities. The first applicant has identified a number of concerns but there is no evidence upon which the Court can reach a level of satisfaction that the Purported Resolutions are invalid and of no effect. Accordingly, the first applicant has not discharged the onus.

If so, is it appropriate to make the declarations sought?

[164] Given the first applicant has not, on the evidence, established the ambit of the rights to be declared and proved all the facts necessary to enable the declaration to be made on the balance of probabilities, it is not appropriate to make the declarations sought. Accordingly, the appropriate order is that paragraph [3] of the application be dismissed.

[165] To the extent that the first applicant may be seeking relief pursuant to the Trusts Act 2025 (possibly implied from the reliance on s 6(4) of the Succession Act and s 9 of the Trusts Act 1973), the first applicant has not established any entitlement to that relief and the application, to that extent, must also be dismissed.

[166] However, something does remain to be said about the unsatisfactory position that the issue is left in. The second respondent as the trustee of the Lotus Trust should consider the issue further and obtain legal advice as to the further steps that should be taken in respect of the issue.

[167] While no party is seeking to rely on or implement Resolution 1 and Resolution 2, whether the Lotus Trust has a tax liability is an issue that a prudent trustee on notice of the issue should take steps to clarify. The second respondent could, and should, investigate the issue further and bring a proceeding or an application in relation to the issue.

[168] One of the purposes of any proceeding or application would be to crystallise the existence, or not, of the possible tax liability if Resolution 1 is valid. Further, it is likely to provide some certainty and protection to the second respondent in administering the Lotus Trust, and also the Administrator in administering the Estate.

[169] The concerns raised by the Administrator need to be addressed and the proper vehicle to do that is a proceeding or application brought by the second respondent. There is some cross-over between the concerns raised by the first applicant and the concerns of the Administrator. It is in the interests of all parties, including the beneficiaries of the Estate and the Lotus Trust, that the issue is clarified.

[170] The first applicant submitted that the Court is in the best position of anyone to consider and determine this issue. That proposition is incorrect, given that this application is not the proper process to do so.

[171] As discussed above in respect of standing,[46] where further provision proceedings are not the appropriate vehicle to deal with issues in the administration of an estate the appropriate way to proceed is for the further provision proceeding to be adjourned and the issue be addressed in appropriate proceedings dealing with the administration of the estate.

[172] This would similarly apply in respect of issues in respect of the administration of a related discretionary trust. That is, the issue would appropriately be dealt with in proceedings concerning the administration of the Lotus Trust. This could be by way of a proceeding seeking determination of the validity or otherwise of Resolution 1 and/or a properly formulated application for judicial advice and directions under the Trusts Act 2025.

[173] The parties should give further consideration as to how this issue can be progressed in the interests of all parties.

Orders

[174] At the conclusion of the hearing on 27 May 2025, orders were made as follows:

"THE COURT ORDERS THAT:

1. On or before 4.00pm on 3 June 2026, the Third Applicant and the Second Respondent are to write to the First Respondent providing their respective positions as to whether they wish to enter into a complying Division 7A loan agreement in respect of Orion Pty Ltd.
2. On or before 4.00pm on 24 June 2026:

   (a) The Applicants are to each file and serve any further affidavits upon which they wish to rely in the final disposition of this proceeding including evidence as to their (and where relevant, their respective spouses') circumstances, including:

      i. relationship status;
      ii. employment status;
      iii. income;
      iv. expenses;
      v. assets;
      vi. liabilities;
      vii. any interests they hold in any trusts, even if on a discretionary basis;
      viii. superannuation balances;
      ix. medical and health conditions;
      x. financial dependants;
      xi. identification of provision sought from the estate.

46 See in particular [21].

(b) The solicitors for the Applicants are to file and serve updated affidavits estimating each of the applicants' costs and disbursements, calculated on both the standard basis and indemnity basis, up to and including the completion of a five day trial;

(c) The First Respondent shall file and serve an updated affidavit deposing to:

i. an estimate of costs to obtain further valuations of estate assets for the purpose of a trial;

ii. work in progress yet to be billed by the administrator as at the date of the said affidavit;

iii. an estimate of future costs and outlays, on the indemnity basis, up to and including the completion of a five-day trial;

iv. an updated list of assets and liabilities; and

v. any statement as to the tax consequences;

(d) The Second Respondent is to file and serve any further affidavits upon which it wishes to rely in the final disposition of this proceeding as the residuary beneficiary of the estate.

3. The matter be listed for further review on the Wills and Estates List before Williams J at 9am on 26 June 2026.

4. By 4pm on 25 June 2026 the parties are to provide to the Associate to Williams J an agreed joint position paper outlining the orders or directions sought at the review and the basis for any differences in position.

5. The First Respondent's costs of this application are to be assessed and paid in accordance with paragraph 2 of the Order of Burns J made on 15 February 2024."

[175] On 25 June 2026, orders were made by consent varying the orders to extend the time for filing the affidavits and adjourning the review to 13 August 2026.

[176] The proceeding remains on the Wills and Estates List and further directions can be made at the regular case management hearings to progress the matter to trial or to deal with any further applications (including as discussed above).

[177] In respect of the application of the first applicant, for the reason outlined above the application should be dismissed. To the extent that the first applicant may be seeking relief pursuant to the Trusts Act 2025 (possibly implied from the reliance on s 6(4) of the Succession Act and/or s 9 of the Trusts Act 1973), the first applicant has not established any entitlement to that relief and the application, to that extent, must also be dismissed.

[178] In the circumstances, the orders and directions are as follows:

THE COURT ORDERS THAT:

1. The application dated 20 April 2026 is dismissed.

THE COURT DIRECTS THAT:

2. The parties liaise about the appropriate costs order and provide agreed orders to the Associate to Williams J by 4pm on 7 August 2026.
3. If the parties are unable to agree on the appropriate costs order, then the parties are to provide brief submissions of no more than two pages to the Associate to Williams J by 4pm on 14 August 2026.
4. The issue of costs be determined on the papers.