




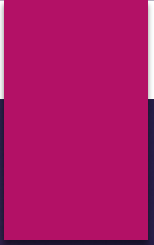
How much '*need*' do you
need?

Staking a claim in Family Provision



“You can’t always get what you want, but if
you try sometimes, you might find, you get
what you need.” – Mick Jagger

“O, reason not the need!”
William Shakespeare
King Lear

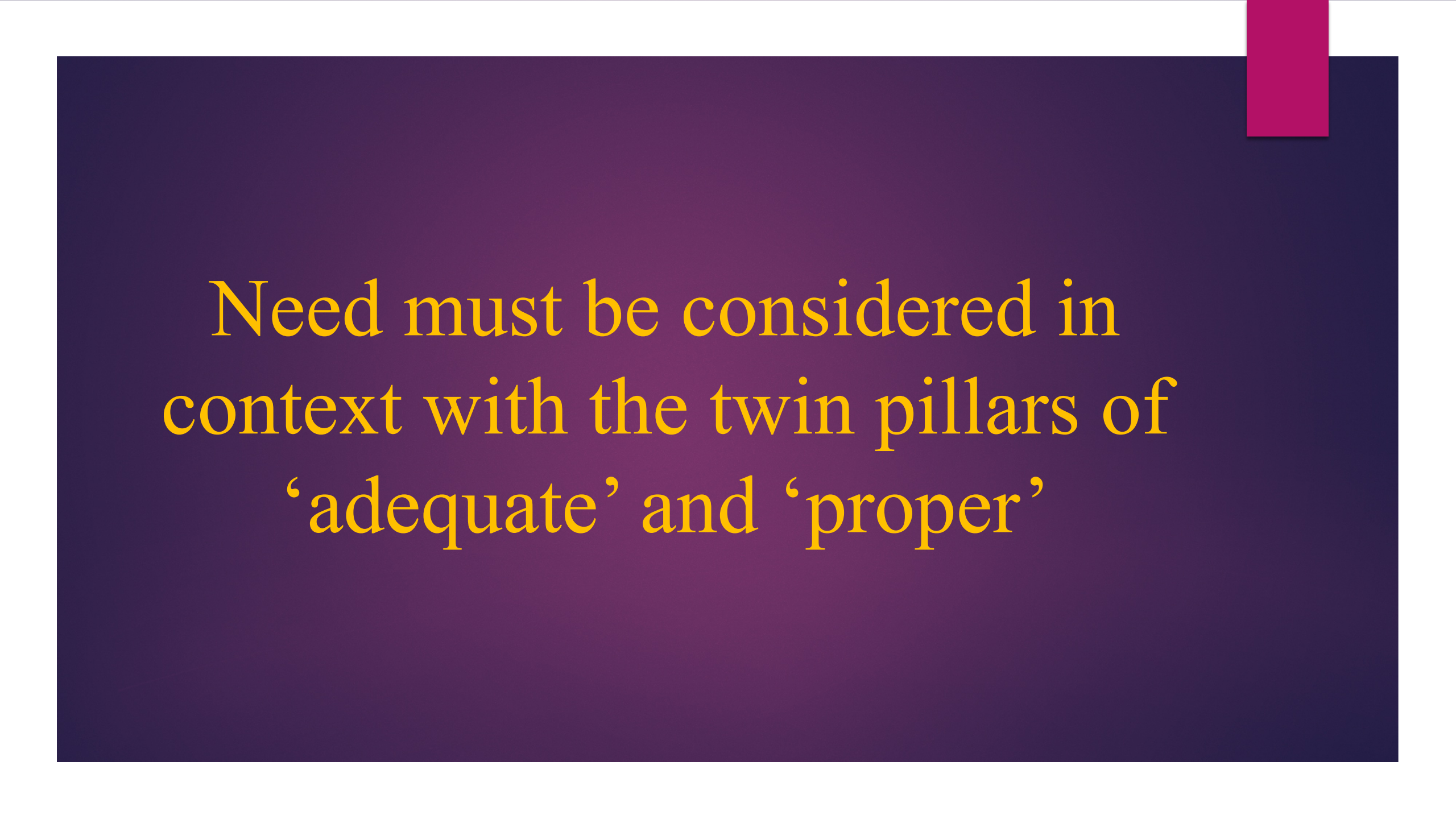


The concept of '*need*' has been described as one of the key loci in a family provision claim



It is sometimes the source of confusion
due to:

lack of awareness of its gravity;
the contextual and relative nature makes it
a moving target; and
it can suffer from both over and under
reliance.



Need must be considered in
context with the twin pillars of
'adequate' and 'proper'



In *Re Elwell* [1977] Qd R 141 at 145 it was stated that:

“often need and moral claim co-exist... But in determining whether there is jurisdiction to interfere with the terms of the testator’s will the two must be looked at in globo...”

Sadiq v NSW Trustee & Guardian [2015] NSWSC 716

“Whether an applicant has a “need” or “needs” is also a relevant factor at the first stage of the enquiry: see s 60(2)(d) of the Act. It is an elusive and an elastic concept to define, yet, it is an element in determining whether “adequate” provision has been made for the “proper” maintenance, education and advancement in life of the applicant in all of the circumstances. The concept involves economic considerations.”



And in the case of *Collins v McGain* [2003] NSWCA
190 at [42] it was stated:

“the proper level of maintenance etc appropriate for an eligible person in all the circumstances clearly calls for a consideration of his or her needs. However, the question of needs must not be too narrowly focussed. It must, in my view, take into account, depending upon the particular circumstances of the case, present and future needs including the need to guard against unforeseen contingencies.”

In *Singer v Berghouse (No 2)* (1994) 123 ALR 481 at 501 it was stated

“It is well settled that the preliminary question which arises under testators’ family maintenance legislation, namely, whether the provision (if any) is inadequate, is to be determined in the light of all the circumstances of the case. It follows, at least as a matter of law, that the issue goes beyond the question whether the applicant has needs and requirements that cannot be met from his or her own resources. Conversely, if an applicant does establish needs and requirements of that kind, he or she will have gone a very long way towards satisfying and, as a general rule, will satisfy the requirement...”




And further...

“There may be cases where, given the circumstances and the size of the estate, an applicant will, in practical terms, only succeed by proving needs and requirements that cannot be satisfied from his or her own resources. But that is a practical consideration only. And it will not even be a practical consideration in a case where the estate is sufficient to meet the moral claims of all members of the family.”

There may be no best definition of ‘*need*’

In *Gorton v Parks* (1989) 17 NSWLR 1 it was stated,

“it seems to me, be a departure from the method and from the meaning of the legislation if judicial authority established fixed concepts binding on courts of first instance of what in this context is a moral duty or is a need. This part of the judicial function must be exercised contemporaneously and is incapable of becoming entrenched in the system of rules of law established by past precedents.”



Ultimately, '*need*' is a concept that is:

Pivotal

Complex

Relative

But then...

Joss v Joss [2020] VSC 424



Questions?

Thank you

KM Francis
Barrister