

Promises of property and detrimental reliance

PRESENTED BY NICHOLAS OLSON

2026 WILLS AND ESTATES CONFERENCE - 13 OCTOBER

Promises of property and detrimental reliance

Identifying and running proprietary estoppel claims in estate disputes

Nicholas Olson

Ground Floor Wentworth Chambers

ACT Law Society | 2026 Wills and Estates Conference | 13 October 2026

Bushell v George [2025] NSWSC 1347 | *Wright v Kennedy* [2026] NSWSC 834

Bushell v George: the claim

*“The result of these transactions was that when Wayne died later that year, **Abe was already the owner of the whole of the farmland** and the company which conducted the farming business, subject to a requirement that he pay only \$1,200,000 of the purchase price to Wayne’s estate.”*

Bushell v George [2025] NSWSC 1347 at [6] (emphasis added)

*“**Their claim is one of proprietary estoppel by encouragement.** The primary relief sought by each plaintiff is a constructive trust over the whole of the land to secure the respective one-third interests which, they say, Wayne encouraged them to believe they would receive.”*

Bushell v George [2025] NSWSC 1347 at [7] (emphasis added)

Wright v Kennedy: the claim

*“It follows that the starting point in this litigation is that under Vera’s Will, Terry and Mark are to share virtually the whole of Vera’s estate in the ratio 70:30 and that **the five daughters are to receive nothing.**”*

Wright v Kennedy [2026] NSWSC 834 at [9] (emphasis added)

*“Terry claims that he was encouraged by both of his parents to believe that he would eventually inherit the whole of that property and that he relied to his detriment on those assurances. He says that the gift in the Will (70% of the residue which includes Dundooga) involves **an unconscionable departure from what he says he was promised.**”*

Wright v Kennedy [2026] NSWSC 834 at [12] (emphasis added)

The elements: promise and encouragement

*“[37] First, as with the requirement for representations in estoppels by representation generally, **there must be a ‘clear and unequivocal’ promise** made by the party estopped (the promisor) to the party who relies upon the promise (the promisee). Of its nature, the clear and unequivocal promise will generally concern some representation about future conduct.”*

*“[38] Secondly, **a reasonable person in the promisor’s position must have expected or intended** (or the promisor actually did expect or intend) that the promisee would rely upon the promise by some action, omission or course of conduct. This is what is meant by references, including throughout this appeal, to the promise being an ‘encouragement’ for the promisee to act.”*

Kramer v Stone (2024) 281 CLR 484; [2024] HCA 48 at [37]–[38], quoted in *Bushell* at [263] and *Wright* at [314] (emphasis added)

The elements: reliance

*“[39] Thirdly, the promisee must have relied upon the promise by acting or omitting to act in the general manner that would have been expected. In order to establish reliance, it is ordinarily necessary for the promisee to show not merely that the promise was one factor taken into account in motivating the promisee’s action or omission but that the promisee **would not have acted or omitted to act in the absence of the promise.** In other words, it must usually be shown that the promisee’s reliance ‘**made a difference to [the promisee] taking the course of action or inaction**’.”*

Kramer v Stone (2024) 281 CLR 484; [2024] HCA 48 at [39], quoted in *Bushell* at [263] and *Wright* at [314] (emphasis added)

The elements: detriment

*“[40] Fourthly, the consequence of the promisee’s reliance must be that the promisee **will suffer detriment if the promise is not fulfilled, in the sense that the promisee will be left in a worse position**, as a consequence of reliance upon the promise, than if the promise had not been made. ... it is the existence of detriment arising from reasonable reliance upon an unfulfilled promise that completes the recognition of the estoppel and moulds the remedial response.”*

Kramer v Stone (2024) 281 CLR 484; [2024] HCA 48 at [40], quoted in *Bushell* at [263] and *Wright* at [314] (emphasis added)

*‘[i]t is not the existence of an unperformed promise that invites the intervention of equity but **the conduct of the plaintiff in acting upon the expectation to which it gives rise**’*

Kramer v Stone (2024) 281 CLR 484; [2024] HCA 48 at [40] (emphasis added)

Relief follows the detriment

*“In cases where the detriment suffered by a plaintiff is ‘a relatively small, readily quantifiable monetary outlay on the faith of the [defendant’s] assurances’ then, apart from interest, the likely equitable relief ordered will be **compensation in the amount of the monetary outlay**. By contrast, where the detriment suffered ‘involves life-changing decisions with irreversible consequences of a profoundly personal nature’, the likely equitable relief will be to require **fulfilment of the assumption upon which the plaintiff acted**, such as by a conveyance of rights, or an assessment of the monetary value of the assumption.”*

Kramer v Stone (2024) 281 CLR 484; [2024] HCA 48 at [40], quoted in *Bushell* at [263] and *Wright* at [314] (emphasis added)

How clear must the promise be?

*“... the degree of clarity required by a representation giving rise to a promissory estoppel (namely, that it must be clear and unequivocal) is greater than that required for a proprietary estoppel (namely, that **it need only be sufficiently clear**) and that *Kramer v Stone* should not be understood to have altered this position ...”*

Wright v Kennedy [2026] NSWSC 834 at [315], referring to *Kronenberg v Macaulay* [2025] NSWCA 195 at [158] (emphasis added)

*“More recently, however, in *Penya v Penya* [2026] NSWCA 73, Bell CJ (Adamson JA agreeing) at [28] expressed the view that the majority’s statement in *Kramer v Stone* that a ‘clear and unequivocal’ promise is required **now represents binding authority**.”*

Wright v Kennedy [2026] NSWSC 834 at [315] (emphasis added)

The promise is judged objectively

*“Whether any, and if so what, representation has been made is to be judged ‘objectively according to the impact that whatever is said [or done] may be expected to have on **a reasonable representee** in the position and with the known characteristics of the actual representee’ ...”*

Q (a pseudonym) v E Co (a pseudonym) [2020] NSWCA 220; (2020) 383 ALR 469 at [15] (Meagher JA), quoted in *Bushell* at [265] (emphasis added)

*“It follows that the question of whether a representor made a ‘clear and unequivocal promise’ (Kramer v Stone at [37]) sufficient to found a proprietary estoppel by encouragement cannot necessarily be answered merely by reference to the words used by a promisor. It will very often be necessary to determine **whether it was reasonable for the plaintiff to interpret the words used in the way they claim** to have understood and relied on them.”*

Bushell v George [2025] NSWSC 1347 at [266] (emphasis added)

Promises to leave property by will

*“... the promise of a gift by will is ordinarily to be understood as meaning just that – **an effective gift by will, taking effect on death**, not an ineffective, because revoked, disposition. Of course it all depends on the circumstances.”*

Flinn v Flinn [1999] 3 VR 712; [1999] VSCA 109 at [75] (Brooking JA), quoted in *Bushell* at [269] (emphasis added)

*‘not whether the person incurring the detriment understood that testators may change their wills, it is whether it was reasonable for the person incurring detriment to understand the particular encouragements or inducements in the circumstances to be **an irrevocable promise**’*

Bassett v Cameron [2021] NSWSC 207 at [415] (Ward CJ in Eq), quoted in *Bushell* at [270] (emphasis added)

Promise or statement of testamentary intention?

*“Wayne’s statements were general statements of his testamentary intention. They were made when Hannah was a child or very young adult. To the extent they expressed an expectation about how Hannah should behave (moving off the farm, getting a degree and so on) they were just that: expressions of a parent’s expectations. **They were not promises about an interest in land.**”*

Bushell v George [2025] NSWSC 1347 at [294] (emphasis added)

*“A parent might say that they ‘expect’ their child to work hard on the farm for low wages in return for inheriting it one day. But the expectations on which Hannah and James purport to have relied were never expressed in that way. ... The expectations expressed by Wayne were **not tied to ownership of the land or to inheritance.**”*

Bushell v George [2025] NSWSC 1347 at [295] (emphasis added)

The scope of the promise

*“It would be quite unusual for someone to build a house on their parents’ land without having a conversation about who would own the land on which it was to be built. It was therefore reasonable for Terry to have understood that his parents were making **some kind of promise about ‘the land’** at this point in time.”*

Wright v Kennedy [2026] NSWSC 834 at [323] (emphasis added)

*“In my view, the promise his parents made to him in 1978 was as to the land on which he would build a house. **It was not a promise that he could have the entire farm and farming business, to the exclusion of all of his siblings, provided only that he build on Dundooga rather than buy in Albury.**”*

Wright v Kennedy [2026] NSWSC 834 at [327] (emphasis added)

Silence before the litigation

*“There were numerous occasions prior to this litigation on which **it would have been obvious for James to remind his father of a binding promise** he had made but where he did not do so. One explanation for this is that it is only more recently that he has come to see such statements as binding promises.”*

Bushell v George [2025] NSWSC 1347 at [334] (emphasis added)

*“The conclusions I have reached on this part of the case are further supported by the fact that Terry **did not assert the existence of the alleged promises prior to this litigation**. In fact, he only raised them for the first time quite late in the piece.”*

Wright v Kennedy [2026] NSWSC 834 at [334] (emphasis added)

Reliance: the counterfactual

“So far as the question of detrimental reliance is concerned, a plaintiff must usually establish that he or she would have acted differently in the absence of the relevant encouragement or if he or she had been told that the promise would not be kept: Q v E Co at [88]-[89] (Meagher JA). The conduct of the representor need not necessarily be the sole inducement operating on the mind of the promisee: Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19 at [71]; Kramer v Stone at [39]. However, it is not sufficient to show that the promisee believed the promise and that he or she took it into account as one factor to motivate a certain course of action or inaction.”

Bushell v George [2025] NSWSC 1347 at [267], adopted in *Wright* at [317] (emphasis added)

Reliance: once the promisee knows the promise is not safe

*“At most, it was one matter amongst others that she took into account in deciding when to return to Australia and, in the absence of it, was **unlikely to make a difference to her decision**: Kramer v Stone at [39].”*

Bushell v George [2025] NSWSC 1347 at [320] (emphasis added)

*“By this point, Hannah had received **clear indications that it was not guaranteed** that Wayne would honour any previous representations concerning ownership of the farm: Q v E Co at [89].”*

Bushell v George [2025] NSWSC 1347 at [322] (emphasis added)

*“From that time, **he knew that his mother was not proposing to leave him the entirety of Dundooga, her DPC shares, or her units in the Dundooga Unit Trust.**”*

Wright v Kennedy [2026] NSWSC 834 at [350] (emphasis added)

Detriment: the comparison

*“The detriment that makes an estoppel enforceable is that which the party asserting the estoppel would suffer, **as a result of his or her original change of position**, if the assumption which induced it was repudiated by the party estopped. ...”*

Delaforce v Simpson-Cook (2010) 78 NSWLR 483; [2010] NSWCA 84 at [42] (Handley AJA), quoted in *Wright* at [354] (emphasis added)

*“There can be no real detriment if the party asserting the estoppel **would have been in the same position in any event.**”*

Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19 at [92] (Gageler J), quoted in *Wright* at [355] (emphasis added)

*“... the question becomes whether this was a case in which there were opportunities forgone ... through reliance which cannot readily be valued but which nevertheless cannot be rejected as carrying only **a fanciful or unrealistic prospect** that the party encouraged would have been better off.”*

Q v E Co at [158] (Handley AJA), quoted in *Wright* at [359] (emphasis added)

Detriment: it must be proved

*“The ‘what if’ scenario is **too uncertain** for me to be able to conclude with confidence that she is actually worse off than if she had known that Wayne would not keep his promises.”*

Bushell v George [2025] NSWSC 1347 at [329] (emphasis added)

*“But as to what his life would now look like if he had made that decision, there is **little to no evidence**.”*

Bushell v George [2025] NSWSC 1347 at [346] (emphasis added)

*“Terry has not demonstrated that there is **a realistic prospect that he would have been better off** if he had taken some different course in life. Far from it.”*

Wright v Kennedy [2026] NSWSC 834 at [360] (emphasis added)

Estoppel and family provision: what is the ‘estate’?

*“Authority supports the view that a promise to leave property by will which is capable of establishing a proprietary estoppel **does not take that property out of the estate** which is available to make a family provision order.”*

Wright v Kennedy [2026] NSWSC 834 at [584] (emphasis added)

*“[35] A proprietary estoppel by encouragement based on similar promises must be **subject to the same contingencies.**”*

Delaforce v Simpson-Cook at [35] (Handley AJA), quoted in *Wright* at [585] (emphasis added)

*“In my view, Terry’s proprietary estoppel claim, **even if it were successful**, would not have the result that Dundooga and Vera’s units in the Dundooga Unit Trust and shares in DPC ceased to be assets from which the Court could make a family provision order under s 63.”*

Wright v Kennedy [2026] NSWSC 834 at [588] (emphasis added)

The ACT: Kulczycki v Public Trustee

*“Therefore I am satisfied that there was no representation that Peter was the owner of the property. Rather, the representations made were that Peter would inherit the property. ... Kataryna acted consistently with the representations that she made, leaving the house in her will to Peter. She has therefore **fulfilled the assumption** rendering it impossible for Peter to establish an estoppel.”*

Kulczycki v Public Trustee for the Australian Capital Territory [2013] ACTSC 230 at [60] (Master Mossop) (emphasis added)

*“The difficulty so far as Peter is concerned is that this exposes his entitlement to the property to a claim under the Family Provision Act. ... The decision in Barns is equally applicable to the ACT legislation and **applies by analogy to a claim of estoppel as opposed to contract ...**”*

Kulczycki v Public Trustee for the Australian Capital Territory [2013] ACTSC 230 at [61], cited in Wright at [587] (emphasis added)

Estoppel and family provision: the failed promise still counts

*“Although it is appropriate to have regard to the statements made by Wayne during Hannah and James’s childhoods and early adulthoods about a potential three-way split of the lands, I do not consider it appropriate to give that matter significant weight in determining whether they received adequate provision. ... Nevertheless, I do take them into account and **I do give them some weight** in deciding whether the legacies for the plaintiffs were adequate.”*

Bushell v George [2025] NSWSC 1347 at [463] (emphasis added)

*“Although I have rejected Terry’s claims based on proprietary estoppel as well as his quantum meruit claim, it remains the case that he has made **a lifetime of contribution** to Dundooga and the Dundooga Unit Trust.”*

Wright v Kennedy [2026] NSWSC 834 at [672] (emphasis added)

Unit trusts and companies: what was promised?

*“In principle, there is no reason why a promise about ownership of a parcel of property could not give rise to an estoppel in relation to the promisor’s units in the trust that holds that property. **It all depends on the facts.**”*

Wright v Kennedy [2026] NSWSC 834 at [364] (emphasis added)

*“The references to ‘the farm’ could only reasonably be understood as connoting **the beneficial interest that Vera had in the land itself, not her units** which confer a proportionate interest in all of the property of the Dundooga Unit Trust apart from the Church Paddock, property which included the trust’s livestock, plant and equipment.”*

Wright v Kennedy [2026] NSWSC 834 at [365] (emphasis added)

If the land is transferred before the hearing

*“He now says that by virtue of s 43 of the Real Property Act 1900 (NSW) he took title free of James and Hannah’s equitable claims **despite being on notice of them.**”*

Bushell v George [2025] NSWSC 1347 at [10] (emphasis added)

*“Rather, there must be an ‘**additional ingredient**’ to the notice, being some form of ‘acknowledgment of the unregistered interest, or an agreement or undertaking to act in accordance with it, from which the registered proprietor later resiles’ ...”*

Bushell v George [2025] NSWSC 1347 at [357], quoting *Heggies Bulkhaul v Global Minerals Australia* (2003) 59 NSWLR 312; [2003] NSWSC 851 at [103] (emphasis added)

*“Although the point is not an easy one, I would have held that clauses 7.1 and 7.2 of the Loan Variation amounted to **an undertaking by Abe to respect or act in accordance with any right, estate or interest that James and Hannah might establish in the properties through these proceedings.**”*

Bushell v George [2025] NSWSC 1347 at [358] (emphasis added)

Limitation and laches

*“But the question arising under the Limitation Act is not when the constructive trust arose. It is, rather, when the cause of action accrued (s 27) or when the plaintiffs discovered facts necessary to demonstrate that it had accrued (s 47). That will not ordinarily occur in a case such as this, ie in a claim for proprietary estoppel, **until the promisor resiles from the promise** or, at the very least, the plaintiff has some cogent basis to contend that the promisor will do so.”*

Bushell v George [2025] NSWSC 1347 at [366] (emphasis added)

The ACT: Limitation Act 1985

*“... an action on **any cause of action is not maintainable** if brought after the end of a limitation period of 6 years running from the date when the cause of action first accrues to the plaintiff ...”*

Limitation Act 1985 (ACT), s 11(1) (emphasis added)

*“Nothing in this Act applies— (a) to a cause of action to recover land or an estate or interest in land or **to enforce an equitable estate or interest in land** ...”*

Limitation Act 1985 (ACT), s 5(a) (emphasis added)

*“Nothing in this Act affects any equitable jurisdiction to refuse relief on the ground of **acquiescence** or otherwise.”*

Limitation Act 1985 (ACT), s 6 (emphasis added)