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Family Provision Claims in New South Wales

Presented by Christopher Lawrence*

Introduction

1. The focus of this paper is Family Provision Claims under the ***Succession Act 2006*** (NSW).

2. This paper has two objectives. The first is to provide an outline and overview of the current family provision legislation in New South Wales. How the courts are approaching claims, including some recent trends, developments and cases, will be looked at.

3. The second objective is to explain the practice and procedural aspects of bringing or defending an application for family provision.

Part 1 – Chapter 3 of the Succession Act

4. A family provision claim refers to an application for an order for provision to be made out of an estate for a person's maintenance, education and advancement in life.

5. Chapter 3 of the ***Succession Act 2006*** (NSW) contains the legislated scheme for family provision. It applies in cases where the deceased died on or after 1 March 2009. This paper does not cover the legislation applying in cases where the death occurred before that date (which, it should be noted, although similar in some ways, contains important differences).

* Barrister, Edmund Barton Chambers. Email: lawrence@ebc44.com

Time limits on making a claim

6. A claim must be brought within 12 months of the death of the deceased person: s 58. The court may permit a claim to be brought after that time in cases where "sufficient cause" is shown.

7. It is a matter for the court alone to decide whether to permit a claim out of time. Unlike what was the position under former legislation[1], an extension of time cannot be achieved merely by agreement or consent between the parties.

Who can make a claim

8. Persons who qualify as "eligible persons" under the Act may apply for a family provision order: s 57. There are six (6) categories, each limited to a family member or to a person with a particular status or relationship to the deceased:

- The wife or husband of the deceased when the deceased died;
- A person in a de facto relationship[2] with the deceased when he/she died;
- A child of the deceased;
- Former wives and husbands of the deceased;
- A person:

  (i) who was, at any particular time, wholly or partly dependent on the deceased, and

  (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member;

[1] ***Family Provision Act 1982*** (NSW) (repealed), s 16.
[2] De fact relationship is defined in the ***Interpretation Act 1987***, s 21C.

- A person who was living with the deceased in a close personal relationship at the time of death.

9. A child of the deceased includes (apart from the obvious): adopted children; a child of the woman in a male-female de facto relationship whom the man is presumed, by virtue of the ***Status of Children Act 1996***, to be the father (except where the presumption is rebutted); in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the ***Status of Children Act 1996***; and a child for whose long-term welfare both parties have parental responsibility (within the meaning of the ***Children and Young Persons (Care and Protection) Act 1998***).

10. A "close personal relationship" is defined as a relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

11. Section 95 of the ***Adoption Act 2000*** (NSW) sets out the position of adopted children. An adopted child is regarded as a child of the adoptive parent or parents. However, the position may be different where the adoptive parent is a step-parent: see sub-section 95(3) of the Adoption Act.

12. An adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child upon an adoption order being made. The effect is that such an adopted child ceases to be a child of a deceased birth parent for the purposes of section 57 of the Succession Act: see also the discussion in ***Thomas v Pickering; Byrne v Pickering*** [2011] NSWSC 572 at [5] and [9] and ***Jordan-Watt v Riordan*** [2013] NSWSC 1132 at [6]. This would not preclude a biological child claiming under another category of eligibility, eg a person who was at any particular time dependent on the deceased and a member of the deceased's household.

13. The position of foster children was recently considered by Hallen J in ***Hamilton v Moir*** [2013] NSWSC 1200 as follows:

> 138 In relation to a claim by a foster child, the following principles may also be relevant:
>
> (a) Making a conscious decision to bring a child into the world brings with it responsibilities. Taking a child into care, without adoption, does not involve the same commitment. If foster carers are asked if they are able to have a child placed with them, there is not an obligation to accept the child. They may, for any reason, decline to accept a child into their care. If they take a child into their care, and if it does not work out, the foster parents can have the child retaken from their care, and the State will resume care of the child as a ward of the State. However, experience teaches that the relationship of foster parent and child can change over the years as, hopefully, they grow together in their relationship: *Carney v Jones* [2012] NSWSC 352 per Macready AsJ, at [50].
>
> (b) Whether there is a major difference in the obligation owed to a natural child compared to that owed to a foster child depends upon the facts of each individual case: *Carney v Jones*, at [51] - [52].
>
> (c) A foster child brought up as a member of a family, in a secure and loving environment, may have a greater claim on his, or her, foster parent's testamentary bounty than a foster child who was not integrated into the family: *Slack v Rogan; Palffy v Rogan*, at [69].
>
> (d) Some of the matters that may be considered relevant include the duration of the foster care relationship; the age of the child when she, or he, became a foster child to the deceased; whether the child was brought up as a permanent member of the family; the closeness of their relationship during foster care and subsequently; whether the foster child and foster parent maintained the relationship thereafter, and if so, for how long; and the extent to which the applicant was supported by the deceased, whether it be financially, educationally or emotionally.
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> 139 I make clear that I do not intend what I have described as "principles" to be elevated into rules of law. Nor do I wish to suggest that the jurisdiction should be unduly confined, or the discretion at the second stage to be constrained, by statements of principle found in dicta in other decisions. I identify them merely as providing useful assistance in considering the statutory provisions, the terms of which must remain firmly in mind.
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> 140 In addition, in each case, a close consideration of the facts is necessary in order to determine whether the bases for a family provision order have been established. As Lindsay J said in *Verzar v Verzar*, at [131]:
>
> > "Whatever guidance one might draw from analogous cases all analogies, and any guidelines drawn from a pattern of similar cases, must yield to the text of the legislation, the duty of the Court to apply that text to the particular circumstances, and the totality of material circumstances, of each case.

> Preconceptions and predispositions, comforting though they may be, can be the source of inadequate consideration of the jurisdiction to be exercised: *Bladwell v Davis* [2004] NSWCA 170 at [12] and [18]-[19]."

141 I respectfully agree, also, with the statement of White J in *Slack v Rogan*, at [126]:

> "The question of whether the provision, if any, made for an eligible applicant is adequate for his or her proper maintenance, education or advancement in life is to be assessed having regard to the facts and circumstances of each individual case. The assessment involves a broad evaluative judgment which is not to be constrained by preconceptions and predispositions (*Bladwell v Davis*). This really means that there are no definite criteria for the exercise of the "evaluative judgment"."

14. The categories of eligible persons are closed categories in the sense that only people who fit into one of the categories may apply for a family provision order. In other words, the court has no discretion to permit a claim from a person who is not an eligible person even in exceptional circumstances – there is no allowance for a claim by "*any other person the court thinks fit in the circumstances*".

Determining the application – the two-stage process

15. In ***Singer v Berghouse***, the High Court laid out a two-stage process for deciding an application for family provision: ***Singer v Berghouse*** [1994] HCA 40; (1994) 181 CLR 201; (1994) 123 ALR 481; (1994) 68 ALJR 653.

16. The seminal passage of the majority judgment (Mason CJ, Deane and McHugh JJ at 208-210) is as follows:

> 15. It is clear that, under these provisions, the court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the "jurisdictional question" ((4) See, e.g. ***White v. Barron*** [1980] HCA 14; (1980) 144 CLR 431 at 456; ***Bondelmonte v. Blanckensee*** (1989) WAR 305 at 307; ***Golosky v. Golosky***, unreported, New South Wales Court of Appeal, 5 October 1993.). That description means no more than that the court's power to make an order in favour of an applicant under s.7 is conditioned

upon the court being satisfied of the state of affairs predicated in s.9(2)(a).

16. The Act draws a distinction between two classes of eligible person. Thus, where the applicant is an eligible person by virtue of s.6(1)(c) and (d), that is, a former spouse, a dependent grandchild or a dependent member of the deceased's household, the court must determine first whether there are factors which warrant the making of an application. This initial inquiry is irrelevant when the applicant is an eligible person under s.6(1)(a) or (b), that is, where the applicant is a widow as here, a widower, a bona fide domestic partner of the deceased, or a child of the deceased.

17. In Australia, it has been accepted that the correct approach to be taken by a court invested with jurisdiction under legislation of which the Act is an example was that stated by Salmond J in ***In re Allen (Deceased), Allen v. Manchester*** ((5) (1921) 41 NZLR 218.). In that case his Honour said ((6) ibid. at 220-221; appvd in ***Bosch v. Perpetual Trustee Co.*** (1938) AC 463 at 479; appld in ***Worladge v Doddridge*** [1957] HCA 45; (1957) 97 CLR 1 at 11; ***Goodman v. Windeyer*** [1980] HCA 31; (1980) 144 CLR 490 at 497.):

> "The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to "moral duty" or "moral obligation" may well be understood as amounting to a gloss on the statutory language ((7) ***Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd.*** (1979) 143 CLR at 158; ***Goodman v. Windeyer*** (1980) 144 CLR at 504-505.).

18. The first question is, was the provision (if any) made for the applicant "inadequate for (his or her) proper maintenance, education and advancement in life"? The difference between "adequate" and "proper" and the interrelationship which exists between "adequate provision" and "proper maintenance" etc. were explained in ***Bosch v. Perpetual Trustee Co.*** ((8) (1938) AC at 476.). The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.

19. The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful

that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like ***Ellis v. Leeder*** ((9) [1951] HCA 44; (1951) 82 CLR 645.),where there were no assets from which an order could reasonably be madeand making an order could disturb the testator's arrangements to paycreditors.

The nature of the two-stage inquiry

20. Although the precise nature of the jurisdictional question has been the subject of some debate, the correct view is that the question is strictly one of fact, notwithstanding that it involves the exercise of value judgments ((10) ***White v. Barron*** (1980) 144 CLR at 441-443 per Mason J, 448-449 per Aickin J, 456-457 per Wilson J; ***Goodman v. Windeyer*** (1980) 144 CLR at 509 per Aickin J; ***Hunter v. Hunter*** (1987) 8NSWLR 573 at 576 per Kirby P). The evaluative character of the decision stems from the fact that the court must determine whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life.

21. In ***White v. Barron*** ((11) (1980) 144 CLR at 443.), although Mason J held that the question does not involve the exercise of a discretion, his Honour observed:

> "There is an element of the artificial in saying that it is only after jurisdiction is established that the exercise of discretion begins, for the twin tasks which face the primary judge are similar."

22. In ***Goodman v. Windeyer***, Gibbs J (with whom Stephen J and Mason J agreed) expressly agreed with this comment and held that the nature of the inquiry is such that the court is called upon to exercise a discretion. Gibbs J said ((12) (1980) 144 CLR at 502.):

> "(T)he words 'adequate' and 'proper' are always relative. There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards".

23. It is clear from this passage that his Honour was conveying that the primary judge was in essence making a value judgment in much the same way as a primary judge makes a sound discretionary judgment in personal injury cases when he or she assesses the quantum of damages say for pain and suffering, and for loss of amenities of life.

24. Strictly speaking, however, the jurisdictional question, though it involves the making of value judgments, is a question of objective fact to be determined by the judge at the date of hearing. This conclusion may have consequences in terms of what an appellant needs to demonstrate on appeal, an issue that will be considered shortly.

25. The decision made at the second stage, by contrast, does involve an exercise of discretion in the accepted sense ((13) ***White v. Barron*** (1980) 144 CLR at 442 per Mason J, 449 per Aickin J, 455 per Wilson J; ***Goodman v. Windeyer*** (1980) 144 CLR at 501-502 per Gibbs J, 509 per Aickin J). This is evident from the term "may" in s.7, and this conclusion is not affected by the fact that this section, unlike s.3 of

> the ***Testator's Family Maintenance and Guardianship of Infants Act 1916*** (N.S.W.), the predecessor to the present Act, does not contain an express reference to the court's discretion to make an order for family provision. The fact that the court has a discretion under s.7 means that, as stated above, it may refuse to make an order even though the jurisdictional question has been answered in the applicant's favour ((14) ***Pontifical Society for the Propagation of the Faith v. Scales*** [1962] HCA 19; (1962) 107 CLR 9 at 19 per Dixon CJ; ***Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd.*** (1979) 143 CLR at 149 per Gibbs J; ***White v. Barron*** (1980) 144 CLR at 442 per Mason J; ***Re Fulop Deceased*** (1987) 8 NSWLR 679 at 680 per McLelland J).

17. In summary, the two-stages are:

(1) Under the will or intestacy rules, is there inadequate provision for the applicant's proper maintenance, education and advancement in life. This is a question of fact (although it necessarily involves some value judgment);

(2) If so, what if any provision ought to be made out of the estate in favour of the applicant. This is a discretionary exercise.

18. Some doubt has been expressed in the Court of Appeal about whether the two-stage process continues to apply in cases under the ***Succession Act***: ***Andrew v Andrew*** [2012] NSWCA 308. The two-stage process in ***Singer v Berghouse*** concerned the ***Family Provision Act 1982*** (NSW). In ***Andrew v Andrew***, Basten JA stated (at [41]) the language of the ***Succession Act*** is not consistent with the two-stage process and (at [29] that the approach to determining claims should be reconsidered. Allsop P (at [6]) agreed that the expression of the court's task differs from the previous legislation, but thought it "*may be an analytical question of little consequence*". On the other hand, in the judgment of Barrett JA (at [62]ff), the court's task under the ***Succession Act*** is substantively the same and that the two-stage process continues to apply.

19. Basten JA revisited what he said about the two-stage test in ***Andrew v Andrew*** recently in ***Poletti v Jones*** [2015] NSWCA 107, and said at [19]:

> In *Andrew v Andrew*, I suggested that the changes in the structure of the legislative provisions resulting from the enactment of ss 59 and 60 of the *Succession Act* meant that a two stage process was no longer

> required. That was not to say that there might not be circumstances in which such an approach was the preferable way to proceed. My only point was that the legislation no longer dictated such an approach in circumstances where a rigid demarcation of issues along those lines would be artificial, a point made by Callinan and Heydon JJ in *Vigolo v Bostin*…

20. The point has been referred to (and received some analysis) in other judgments of the Court of Appeal but left unresolved on the basis the same result was achieved in those cases regardless of whether the two-stage process was applied. See for example at ***Phillips v James*** [2014] NSWCA 4 [52]-[57].

21. The procedure and considerations are set out in ss 59 and 60. In the case of a claim by a spouse (de facto or married) or child of the deceased, the court's jurisdiction to make an order for family provision is triggered where it is satisfied that:

- The person is an eligible person; and

- At the time the application is being considered by the court, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules.

22. Where the claimant is an eligible person by reason other than being the spouse or child of the deceased, the claimant must also satisfy the court that having regard to all the circumstances of the case (whether past or present) there are *factors which warrant the making of the application.* Factors which warrant the making of the application are factors which, when added to the facts which render the applicant an eligible person, give the applicant the status of a person who would generally be regarded as a natural object of testamentary recognition by the deceased: ***Re Fulop*** (1987) 8 NSWLR 679 at 681.

23. When the court is satisfied of these matters it may make such order for provision out of the estate of the deceased person as it thinks ought to be

made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known at the time the order is made.

24. The matters the court may have regard to when considering whether the applicant is an eligible person and whether to make a family provision order and, if so, the nature of the order, include:

- any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,
- the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
- the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
- the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
- if the applicant is cohabiting with another person-the financial circumstances of the other person,
- any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
- the age of the applicant when the application is being considered,

- any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,
- any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,
- any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,
- whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,
- whether any other person is liable to support the applicant,
- the character and conduct of the applicant before and after the date of the death of the deceased person,
- the conduct of any other person before and after the date of the death of the deceased person,
- any relevant Aboriginal or Torres Strait Islander customary law,
- any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

Claims by grandchildren

25. The principles applying to claims by grandchildren were recently considered by the Court of Appeal (Basten, Barrett and Gleeson JJA) in ***Chapple v Wilcox*** [2014] NSWCA 392.

26. The deceased left a will which provided for his whole estate to pass to his only child, Patricia Wilcox. She was also appointed sole executrix. The estate mainly comprised extensive pastoral holdings in the Walgett district.

27. The deceased's two grandsons, Robert and Benjamin Wilcox, brought claims for family provision under the Succession Act.

28. They also brought claims alleging a promissory estoppel arising from representations made by the deceased that they would inherit the properties, which claims were unsuccessful.

29. The family provision claims of both grandsons were successful at first instance, but went over for a further hearing on the question of what provision should be ordered. Benjamin's claim settled in the meantime and was not the subject of the later appeal.

30. The hearing was conducted in tranches over several days. The primary judge delivered two substantive judgments: ***Wilcox v Wilcox*** [2012] NSWSC 1138 and ***Wilcox v Wilcox (No 2)*** [2014] NSWSC 88.

31. The plaintiff, Robert Wilcox, was aged 46 at the time of the second hearing. He had virtually no assets and a liability to the ATO of $107,000. Although on his own evidence he had expertise which equipped him to earn a much greater income, he lived off unemployment benefits and a small amount of income received from a tree lopping and tree surgery business.

32. The plaintiff was held to be an eligible person as a grandchild who had been partly dependent on the deceased earlier in his life.

33. The primary judge said the plaintiff had "*a highly developed and unhealthy sense of entitlement*" and that he and his brother had "*deluded themselves into thinking*" they had a right to their deceased grandfather's property.

34. Nevertheless, the plaintiff was successful. The primary judge concluded that "a wise a just testator" would make some limited provision plaintiff, including to assist discharge the $107,000 tax debt.

35. The plaintiff received an order for provision of $107,000 and an annual payment of $40,000 for seven years.

36. The estate appealed – successfully.

37. The Court of Appeal held that when considering whether to make a family provision order, it is appropriate to have regard to "*perceived prevailing community standards of what is right and appropriate*". This may be achieved in the case of a claim by a grandchild by reference to the principles which were set out by Hallen AsJ (as he the was) in ***Bowditch v NSW Trustee and Guardian*** [2012] NSWSC 275 at [113], namely:

    (a) As a general rule, a grandparent does not have a responsibility to make provision for a grandchild; that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition;

    (b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes in *loco parentis*, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally;

    (c) The mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created in a particular case by reason, for example, of the care and affection provided by a grandchild to his, or her, grandparent;

(d) Generosity by the grandparent to the grandchild, including contribution to the education of the child, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent. It has been said that a pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence;

(e) The fact that the deceased occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the deceased for the purposes of the Act;

(f) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents."

Disentitling conduct

38. The character and conduct of the applicant before and after deceased died may warrant a refusal to make any order provision or to reduce the amount of provision. Such conduct is generally referred to as “disqualifying conduct” or “disentitling conduct”.

39. Examples include:

- Adultery
- Desertion
- Violence or threats
- Ill treatment
- Estrangement.

40. Although cases where an applicant is completely shut out on these grounds are rare, estrangement between child and parent is often an issue in family provision proceedings. The cause of the estrangement will be important, and it should be observed that there is no presumption that the estranged applicant was at fault or that the testator acted with reasonableness. It may

be appropriate to look at the causes of the estrangement and whether the actions of the parties can be justified (such as a testator's reasons for treating a beneficiary in a certain way under a will or excluding them entirely. See for example ***Andrew v Andrew*** [2012] NSWCA 308 at [57]; ***Wheatley v Wheatley*** [2006] NSWCA 262 (testator's letter setting out reasons for disinheriting son not sufficient to disentitle the applicant, although poor state of relationship "operates to restrain amplitude in the provision to be ordered" (at [37])). The court may even apportion blame or at least responsibility for certain situations: ***Andrew v Andrew*** [2012] NSWCA 308 at [48].

41. In ***Poletti v James*** [2015] NSWCA 107, the (successful) plaintiffs were the daughters of the deceased. The deceased deliberately excluded them from his last will because they had intervened in family law proceedings in support of their mother and were, in the deceased's view, able to support themselves. There had been no contact between the plaintiffs and the deceased for 19 years at the date of the last will, and 21 years at the time of death.

42. The court found that the plaintiffs had not expected that the estrangement would be permanent, and that it had continued partly because of the deceased himself, *inter alia* launching legal proceedings against the plaintiffs for small sums which caused further alienation. The court further found that the continued estrangement was also partly due to another child of the deceased assisting the deceased in that course of conduct, and failing to pass on the deceased's expressions of regret over the deterioration of the relationship in later years to the plaintiffs to give them an opportunity to re-establish the relationship.

43. The court noted that the estrangement did not prevent the making of a family provision order. But that it is a factor to be taken into account, and the amount of provision was reduced accordingly. The court further noted that although the deceased had said he believed the plaintiffs were able to support themselves, there was no indication that he had any actual knowledge of their circumstances.

44. No contact for a period of 25 years between the deceased and his son, the plaintiff, was an important factor – but one of several factors – in the

decision to dismiss the plaintiff's claim in ***Stollery v Stollery*** [2016] NSWSC 54.

45. The Court of Appeal found no error in ***Burke v Burke*** [2015] NSWCA 195 in the trial judge's decision to uphold the will against a claim by an estranged son. The trial judge had concluded that the plaintiff had decided that he wanted nothing to do with the deceased, or the rest of the family, and that that decision was not caused by the fault of the deceased or her other children. The trial judge found, therefore, (correctly – according to the Court of Appeal) that the deceased was entitled to regard the plaintiff as a person undeserving of any benefit from her estate, whatever his financial circumstances were at the time of his application. Significantly, the plaintiff had been able to demonstrate financial need, and the estate had a net value of approximately $1.25 million.

The Estate and Notional Estate

46. The property that may be subject to a family provision order is property that on a grant of probate or letters of administration vests in the executor or administrator: s 63.

47. The notional estate provisions are set out in Part 3.3 of the Act (ss 74-90).

48. The provisions empower the court in limited circumstances to designate property "notional estate" from which a family provision order or costs order may be made: s78. It is a form of claw-back.

49. The court must first be satisfied that the estate, if any, is insufficient for the making of the family provision order, or any order as to costs, that the court is of the opinion should be made, or provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances: s 88.

50. An order may designate as notional estate property only to the extent that is necessary for provision to be made or costs paid or both: s 89(2).

51. Property that may be designated notional estate includes, for example, property disposed of for less than full valuable consideration by the deceased in the 3 years prior to his/her death with the intent of denying or limiting provision being made out of the estate, and property of the estate that has been distributed.

52. There is a helpful and detailed analysis of the notional estate provisions by Hallen AsJ (as he then was) in ***Kastrounis v Foundouradakis*** [2012] NSWSC 264 at [76]-[130].

53. Two particular examples of property that may in limited circumstances be designated as part of the notional estate are:

- Property of which the deceased was a joint tenant at the time of his/her death. Property held in joint tenancy (as opposed to tenancy in common) passes automatically to the surviving tenant when a tenant dies. Thus joint tenancy property does not form part of the estate. There is authority that joint tenancy property may be designated as notional estate where full valuable consideration was not given for not severing the joint tenancy: ***Cetojevic v Cetojevic*** [2007] NSWCA 33. See also s 76(2)(b) and (4).

- Superannuation, although there is some tension where a binding death benefit has been made under Commonwealth legislation. See ***Cabban v Cabban*** [2010] NSWSC 1433 at [41]; ***Kelly v Deluchi*** [2012] NSWSC 841; ***Westwood v Quilty & Ors*** [2013] NSWSC 109 at [82].

Nature of orders

54. A family provision order may be made in any of the following ways:

(a) by payment of a lump sum of money,
(b) by periodic payments of money,
(c) by application of specified existing or future property,
(d) by way of an absolute interest, or a limited interest only, in property,

(e) by way of property set aside as a class fund for the benefit of 2 or more persons,

(f) in any other manner the Court thinks fit.

55. So-called "*Crisp* orders" give a plaintiff an interest for life in real property or an interest in the property with the right (should the need arise) to have the property sold for the purposes of securing, for the plaintiff's benefit, more appropriate accommodation. Such orders are intended to provide flexibility, by way of a life estate, the terms of which can be changed to cover the future needs and situations including allowing a plaintiff to move from her own home to retirement village: ***Milillo v Konnecke*** [2009] NSWCA 109.

56. The court may make an interim family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order.

Releasing the Estate from a claim or future claim

57. Parties cannot "contract out" of the Act.

58. A release of a person's rights to apply for a family provision order has effect only if it has been approved by the Court: s 95. A covenant to obtain a release or an agreement (for example, in a deed of settlement and release) is no release until approved by the court.

59. The approval can be given before or after the death of the person whose estate may be the subject of an order.

60. An order for release will not be made as a matter of course (ie no rubber stamping). The court is required to consider all the circumstances of the case, including whether:

(a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and

(b) it is or was, at that time, prudent for the releasing party to make the

release, and

(c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and

(d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.

Part 2 – Practice and procedure of Family Provision Claims

Time limits on bringing a claim

61. It is always prudent to ensure, as soon as you become involved, the client is made aware of the 12 month limitation period in s 58. Generally, this advice should be confirmed in writing.

How proceedings are commenced

62. Which court? In practice, most claims are brought in the Supreme Court. The District Court has limited jurisdiction over family provision claims up to $250,000: ***District Court Act 1973***, s 134(1)(c) and (2); ***District Court Rules 1973***, Pt 51D r 2.

63. Family provision claims must be commenced by filing a Summons. (Although a Statement of Claim will be appropriate if it is combined with certain other types of claim, such as a probate suit or promissory estoppel claim.)

64. The Summons must state name of the plaintiff. The executor/administrator must be joined as defendant: see Schedule J of the ***Supreme Court Rules***.

65. The date the deceased died should be identified on the Summons.

66. A plaintiff must also file with the Summons:

(a) An affidavit from the plaintiff supporting the claim;

(b) A notice setting out the names and addresses of any person who is or might be an eligible person;

(c) A further affidavit setting out an estimate of the plaintiff's legal costs and disbursements, on a party/party basis, up to and including mediation.

67. If the time limit for bringing a claim is about to expire, these affidavits and the notice may be filed up to 5 days before the first directions hearing.

68. The defendant (executor/administrator) must serve a notice of claim on various persons, including all eligible persons. (Note this is not the same notice that the plaintiff gives at the time the Summons is filed.) The form of notice of claim and a list of who it must be served upon in set out in Schedule J of the ***Supreme Court Rules***.

Caveats and Injunctions

69. Caveats are sometimes lodged against the estate against probate. An applicant for family provision (if that is all s/he is claiming and not also, for example, contesting the will) is not trying to stop probate being granted, but rather a distribution of the estate, and a caveat is not appropriate: ***Kyros v Stavrakis*** [2009] NSWSC 163 at [25]-[27].

70. If there is a threat, it may be appropriate to seek an injunction restraining the executors from distributing the estate: s 62(3).

Family Provision List

71. Family provision claims are entered into and case managed in the Family Provision List within the Equity Division of the Supreme Court.

72. The practice and procedure of the Family Provision List is detailed in Practice Note SC Eq 7. The current version of this practice note commenced on 1 March 2013.

73. A Family Provision List Judge – presently Justice Hallen – manages the List and all directions hearings are before him. This function was formerly carried out by a Registrar.

Plaintiff affidavit

74. The plaintiff's affidavit-in-chief is filed and served with the Summons commencing the proceedings.

75. The Practice Note provides a precedent form of plaintiff affidavit. The form is to be adapted as the case required. The form does not need to be strictly followed in every case, and does not list exhaustively all the matters that will be relevant in every case.

76. Other witnesses may be available to give evidence on affidavit in support of the plaintiff. If the plaintiff has a spouse, there must be evidence of his/her situation including financial circumstances and any health issues. To save costs, generally only an affidavit of the plaintiff will be served prior to mediation. That affidavit will deal with his/her spouse's circumstances. Affidavits of other witnesses will be assembled if mediation is unsuccessful.

77. It is noteworthy to remember and impress upon a client that an applicant for a family provision order is under a duty to provide full and frank disclosure of his/her financial and material circumstances: see ***Mann v Starkey*** [2008] NSWSC 263 at [25] ff. Somewhat spectacularly, the plaintiff failed in this duty in ***Stollery v Stollery*** [2016] NSWSC 54. The judge held that the failure to place before the court evidence of his true financial position made the judge unable to make any assessment of what his true financial needs are (if any): at [120]. Stevenson J said at [50]:

> Based on Mr Stollery's evidence, I have no idea what his true financial position is, save that it is nothing like what he swore to be true in the affidavits filed in support of his application.

Defendant's evidence

78. At the first directions hearing, the defendant (administrator or executor) will be ordered to serve affidavits in accordance with paragraph 9 of the Practice Note.

79. The affidavit of the administrator/executor must include the following matters:

(a) A copy of the deceased's Will and the probate or letters of administration, if granted (if a copy is not already annexed to the plaintiff's affidavit);

(b) A description of the nature and value of the assets and liabilities of the deceased at the date of death. (A copy of the inventory of property attached to the probate or letters of administration will suffice so far as the property of the deceased at the date of death unless other assets have been discovered);

(c) What is, or is likely to be, the nature, and an estimate of the value, of:

(i) The assets and liabilities of the deceased at the date of swearing the affidavit;

(ii) Any property of the deceased that has been distributed at any time after the death of the deceased and the date of the distribution of that property;

(iii) The gross distributable estate (omitting the costs of the proceedings).

(d) A description of the nature, and an estimate of the value of any property which, in the administrator's opinion, is, or may be, the subject of any prescribed transaction or relevant property transaction;

(e) The name and address of every person who, in the administrator's opinion, is holding property as trustee, or otherwise which is, or may be, the subject of any prescribed transaction or relevant property transaction;

(f) Any testamentary and other expenses, or other liabilities of the estate that have been paid out of the estate of the deceased, including the amount, if any, paid for, or on account of, the administrator's costs of the proceedings;

(g) Whether any commission is to be sought by the administrator, and if so, an estimate of the amount proposed to be sought;

(h) The names and address of every person who, in the administrator's opinion, is, or who may be:

(i) An eligible person;

(ii) An eligible person under a legal incapacity;

(iii) A person beneficially entitled to the distributable estate;

(iv) A person holding property as trustee or otherwise.

80. In addition, the administrator/executor must also provide:

- An affidavit of service of a notice of claim on various persons in accordance with Schedule J of the Supreme Court Rules and paragraph 9.2 of the Practice Note.

- An affidavit in reply to the plaintiff's affidavit in chief, which may contain facts contradicting facts contained in the plaintiff's affidavit or other matters the administrator/executor will rely upon;

- An affidavit, if necessary on information and belief, which identifies each beneficiary who is raising, or is likely to raise, his, her, or its, financial, material, or other, circumstances as a competing claimant, and each beneficiary who is not raising, or is not likely to raise, those circumstances;

- An affidavit setting out an estimate of the administrator's costs and disbursements, calculated on the indemnity basis, up to, and including, the completion of a mediation.

81. Executors are obliged to place before the court all evidence which bears on the issues raised in a plaintiff's claim, including evidence of the financial positions of themselves and any beneficiaries. In the absence of such evidence the court may infer that those persons are able to meet their own

needs without provision from the estate: see ***Tobin v Ezekiel*** (2010) 83 NSWLR 757; [2012] NSWCA 285 at [94]. However in general such evidence, along with evidence in reply to the plaintiff's evidence, will not be ordered to be put on until after mediation. This practice attempts to save costs prior to mediation.

Evidence and proof of certain matters

82. The Practice Note enables informal proof of certain matters, unless the court orders otherwise, or reasonable notice is given that strict proof is necessary:

(a) A kerbside appraisal by a real estate agent of any real property.
(b) An estimate of the value, or a monetary amount, for the non-monetary assets of the estate other than real estate;
(c) Internet, or other media, advertisements of the asking price of real estate;
(d) The plaintiff's, or beneficiary's best estimate of costs or expenses of items the plaintiff or the beneficiary wishes to acquire;
(e) The plaintiff's, or the beneficiary's, best estimate of costs or expenses of any renovation or refurbishment of property the plaintiff or the beneficiary wishes to incur;
(f) A description by the plaintiff, or by the beneficiary, of any physical, intellectual, or mental, disability, from which it is alleged the plaintiff, or the beneficiary, or any dependant of the plaintiff or beneficiary, is suffering, together with a copy of any medical, or other, report, in support of the condition alleged.

83. The intention of allowing informal proof is to avoid unnecessary cost. Strict proof of these matters can add significantly to the costs of proceedings. Care should be taken before giving notice requiring the other party to prove strictly any matter – the court may order indemnity costs against a party that does so unnecessarily and cannot later demonstrate that there were good grounds for doing so.

84. Expert evidence may sometimes be necessary, in which case Practice Note Eq 5 will apply.

Mediation

85. Once the parties' affidavits are on, the matter will be referred to mediation. Although the court may order otherwise, there is a requirement (and a fairly strong expectation) that all claims will be referred to mediation: s 98.

86. The Supreme Court provides a "free" court-annexed mediation facility. One of the Registrars is allocated as mediator, and the use of mediation rooms, at no charge to the parties. Court-annexed mediation is not an unlimited resource and its availability fluctuates from time to time. The present practice (not inflexible) seems to be that parties will be ordered to have a settlement conference in matters involving an estate of less than $500,000, or a private mediation where the estate is more than $1 million.

87. In matters where the estate is less than about $500,000 (or so) the List Judge (Hallen J) will generally convene a settlement conference before himself. This is a directions hearing where the parties are required to attend Court with their legal representatives. The Judge is robed and hears a little information about the size of the estate, the costs to date, and the likely future costs if the matter runs to trial. He then addresses the parties and encourages them to have settlement discussions, and stands the matter in the list for that to occur.

88. Court-annexed mediations are usually listed to commence at 9:30am or 2pm. They are generally limited to a half-day, and in practice rarely run much over 2 hours.

89. A date and time for a court-annexed mediation is given at the directions hearing – so it's important to have your available dates with you.

90. Information about the next available dates for court-annexed mediations can be found on the daily court list. There is usually some dates available to the court 3-4 weeks into the future, but may be further off given all parties will need a mutually convenient date.

91. If a settlement is reached at a court-annexed mediation, the Registrar can facilitate the filing of orders and the proceedings can be finalised then and there. However, the Registrar does not have power to approve a release of the estate.

92. Of course where the matter warrants and the parties are prepared to pay, a private mediation can occur. It is best practice to agree on a mediator and have a date booked when going into a directions hearing and informing the Court that the parties are privately mediating and standing the matter over.

93. The administrator's legal representative is required to advise the plaintiff's legal representative, in writing, of any beneficiary who is known to wish to attend the mediation, no later than 7 working days prior to the mediation.

Consent orders

94. Consent orders finalising proceedings must address the following matters:

(a) The application was made within time;
(b) The plaintiff is an eligible person;
(c) The plaintiff has served a notice identifying all other eligible persons on the administrator at the time of serving the Summons;
(d) The administrator has filed the administrator's affidavit and the affidavit of service of the notice of the plaintiff's claim on any person who is, or who may be an eligible person, as well as upon any person beneficially entitled to the distributable estate, and any person holding property of the estate, as trustee or otherwise;
(e) The administrator has filed an Appearance.

Costs

95. The court has a very wide discretion in relation to awarding costs in family provision proceedings: s 99.

96. As a general proposition, an executor's or administrator's costs will be paid out of the estate or notional estate if they have been reasonably incurred.

97. ***Chapple v Wilcox*** [2014] NSWCA 392 held that in family provision cases, the general rule is that costs follow the event, so that an unsuccessful plaintiff will be ordered to the defendant's costs unless a good reason to depart from that rule is demonstrated.

98. However the discretion in these types of cases is wide enough to enable a departure from that result in the circumstances of a particular case. For example, some cases may warrant an order that an unsuccessful applicant's costs be paid from the estate. The plaintiff's order for further provision was set aside on appeal in ***Smith v Johnson*** [2015] NSWCA 297, but the costs order in his favour at trial was not disturbed (although he had to pay the successful appellants' costs).

99. Costs always seem to be something of an issue in family provision cases, and best endeavours should be made to keep them contained.

100. Parties are required to provide affidavits setting out costs incurred and estimated future costs at the commencement of proceedings and before final hearing.

101. The proportionality between how the case is run and the costs involved to the size of the estate and the complexity of the issues should be continuously weighed during proceedings.

102. In addition to the proportionality of costs requirements under s 60 of the ***Civil Procedure Act***, the Practice Note states (at par 25.3) that the court expects that the resources of the estate and of the Court will not be used in a manner that is out of proportion to the size of the estate and the provision that may be made. Costs consequences may result from a failure to fulfil this expectation.

103. The court may order a cap on the amount of costs that may be recovered. The circumstances that may warrant a cap on costs include but are not limited to cases where the net distributed value of the estate in question (excluding costs of the proceedings) is less than $500,000.

Christopher Lawrence

Edmund Barton Chambers

lawrence@ebc44.com

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