WHAT TO DO WITH THE FAMILY FARM?
FAMILY PROVISION CLAIMS BY GRANDCHILDREN

By Christopher Lawrence

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In its recent decision in *Chapple v Wilcox* [2014] NSWCA 392, the NSW Court of Appeal set down a number of important principles for family provision claims by grandchildren under the *Succession Act 2006* (NSW). The decision is also of significance to cases involving other categories of eligible persons, and the question of costs in family provision cases where the plaintiff's claim is unsuccessful.

Factual background

The deceased left a will that 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.

The deceased's two grandsons, Robert and Benjamin Wilcox, brought claims for family provision under the *Succession Act* (the Act). They also brought claims alleging a promissory estoppel arising from representations made by the deceased that they would inherit the properties – claims which were unsuccessful.

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.

Different eligible persons

Section 57 of the Act sets out the "eligible persons" who may apply for a family provision order. The Act divides the eligible persons into two groups. The first group includes those who are often described as being natural objects of testamentary recognition, namely a spouse or child of the deceased.

The second group of eligible persons includes those who are not generally regarded as natural testamentary objects.

This group includes:

- a former wife or husband of the deceased person;
- a grandchild of the deceased who was, at any particular time, wholly or partly dependent on the deceased;
- a person who was, at any particular time, wholly or partly dependent on the deceased and, at that or any other time, a member of the household of which the deceased was a member;
- a person with whom the deceased person was living in a close personal relationship at the time the deceased died.

The court's discretion to make a family provision order in respect of eligible persons in the first group is engaged if it is satisfied of two matters:

- the applicant is an eligible person; and
- at the time when the court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made by the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both.

In addition, however, eligible persons who fall into the second group (such as grandchildren) must also satisfy the court that, having regard to all the circumstances of the case (whether past or present), there are factors that warrant the making of the application (s 59(1)(b)).

Snapshot

- The Court of Appeal has stated the principles applying to family provision claims by grandchildren.
- Plaintiffs who are not the spouse or child of the deceased must demonstrate there are factors that warrant the making of their application.
- Although costs is discretionary, the general rule is that costs will follow the event.

The decision at first instance

The primary judge delivered two substantive judgments: *Wilcox v Wilcox* [2012] NSWSC 1138 and *Wilcox v Wilcox (No 2)* [2014] NSWSC 88.

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 that 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.

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

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.

Nevertheless, the plaintiff was successful. The primary judge concluded that 'a wise and just testator' would make some limited provision to the plaintiff, including to assist discharge of the $107,000 tax debt. The plaintiff received an order for provision of $107,000 and an annual payment of $40,000 for seven years.

The estate appealed.

The Court of Appeal's decision

The Court of Appeal (Basten, Barrett and Gleeson JJA) 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' (*Chapple v Wilcox* [2014] NSWCA 392, per Basten JA at [11]-[12]; Barrett JA at [62]-[64]; Gleeson JA agreeing).

According to the Court of Appeal, this may be achieved in the case of a claim by a grandchild by reference to the principles set out by Hallen AsJ (as he then 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.'

The Court of Appeal was at pains to point out that these principles are useful guidelines, but should not be treated as rules of law (*Chapple v Wilcox* [2014] NSWCA 392 per Basten JA at [18]-[19]; Barrett JA at [67]; Gleeson JA agreeing).

The Court of Appeal held that these principles apply equally to the questions under s 59(1), of whether there are factors that warrant the making of the application and what is adequate and proper provision.

Basten JA said (at [14]): 'There may be circumstances in which widely held community standards might expect a grandfather to make some provision for his grandchildren, for example where they had maintained a strong relationship and where there was reason to doubt the willingness or the ability of the parents to make adequate provision for their children.'

In upholding the appeal and setting aside the provision ordered by the primary judge, the Court of Appeal had particular regard to the relationship between the deceased and his plaintiff grandson. The plaintiff had lived and worked on his grandfather's properties from 1986 until 1993. He had little contact with the deceased after 1993. His visits were infrequent and ceased in 2004.

On the other hand, the deceased's daughter (to whom the estate passed under the will) had been closely associated with the deceased's rural properties virtually all her life. In later years, she had helped operate and manage the properties and derived her livelihood from them, as well as attending to the deceased's needs. She had been a 'dutiful and caring daughter' (at [95]).

The nature of the estate – a pastoral business – was also relevant to the Court of Appeal's assessment. Its viability was borderline and its limited borrowing capacity needed to meet the financial requirements of the enterprise itself. Breaking up the properties to meet an order for provision was not feasible.

Both Basten and Barrett JJA (Gleeson JA agreeing) held that none of the factors in the plaintiff's claim supported the conclusion that the deceased, according to community standards and expectations, should have given anything to the plaintiff in the will so as to warrant an interference with his testamentary intentions.

Costs in family provision cases

The Court of Appeal also held that, although the discretion as to costs in family provision matters may be wider than in other types of cases, the general rule that costs follow the event still applies.

The decision distinguished cases dealing with costs under the provisions of the former *Family Provision Act 1982*.

In holding that, where an application for a family provision order is dismissed, the general *prima facie* principle is that there should be an order that the unsuccessful plaintiff pay the defendant's costs, Barrett JA (Gleeson JA agreeing) cited *Daniels v Hall (No 2)* [2014] WASC 272 where it was said at [32] in relation to a costs order having a detrimental effect on an unsuccessful applicant's financial position: 'In more modern times, particularly with principles of modern case management, the tendency has been to move away from that position in favour of the more general principle of costs following the event but with attendant liberality and discrimination before adopting such a position in any particular case'.

Barrett JA held that there is, of course, discretion to depart from the rule for good reason (*Chapple v Wilcox* [2014] NSWCA 392 at [139]).

Implications

The decision highlights the additional requirement on eligible persons who are not, unlike spouses and children, the natural objects of testamentary intention to demonstrate there are factors warranting the making of their application. That will likely require circumstances justifying a reason to find that some provision should have been made for the plaintiff in the deceased's will.

In determining whether to make a family provision order, courts have regard to perceived prevailing community standards of what is right and appropriate. The community standards that apply to a claim by a grandchild may be assessed by reference to the principles set out by Hallen J in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [133], although every case will depend upon its own facts. In family provision cases under the Succession Act, the general rule is that costs follow the event, so that an unsuccessful plaintiff will be ordered to pay the defendant's costs unless a good reason to depart from that rule is demonstrated. **LSJ**