BRATS AND BITCHES

RECENT DEVELOPMENTS IN FAMILY PROVISION LAW AND PRACTICE

WIVES, EX-WIVES, STEP-CHILDREN AND ESTRANGED CHILDREN

Therese Catanzariti, 13 Wentworth Chambers

Freedom of testamentary disposition is a fundamental right. Chapter 3 Succession Act 2006 (NSW) gives the court a limited right to interfere with a testator's will in certain circumstances. However, the court will not lightly interfere with the testator's wishes, and will not re-write the will to make it fair and will only interfere to the limited extent required[1] to make adequate provision for the proper maintenance, education or advancement in life of the person where such provision ought to be made.[2]

Chapter 3 Succession Act limits the class of applicants, the "eligible persons" who may apply for provision.[3] These include

- Spouse;
- Child;
- Member of the household and wholly or partly dependant on deceased (which may include step-children, foster children, not-quite de factos, ex-de factos, carers and boarders);
- Grandchild and wholly or partly dependant
- Former spouses

At first blush, it may appear that there are a limited number of reported cases similar to the facts of your case. However, the reported cases are only the cases that are fully litigated to final judgment. Anecdotally, 80% of all filed cases are ultimately settled before final judgment, by analogy or by extension of the principles in the fully litigated cases.

1 Spouse

The broad general rule is that to the extent to which the testator's assets permit them to do so, the testator has a duty to ensure that the spouse is secure in the matrimonial home, to ensure that they have an income sufficient to permit them to live in the style to which they are accustomed, and to provide them with a fund to enable them to meet any unforeseen contingencies - *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24)., approved in *O'Loughlin v O'Loughlin* [2003] NSWCA 99.. This has been described as allowing the widow to be "the mistress of her destiny." - *Langtry v Campbell* (NSWSC, 7 March 1991, Powell J, unreported). In *Khreich v Khreich*,[4] Hallen set out general principles applying to applications by spouses.

This does not mean that "widow takes all".[5] The general rule may not apply to short marriages, or later in life marriages, or where the widow has their own resources.

In particular, there may be issues if there may be a windall gain, if the widow passes away within a relatively short time so that the real beneficiaries of the claim are not the widow but the widow's own beneficiaries.[6] This is the Russian roulette of blended families, the surviving spouse's children ultimately benefit to the detriment of the deceased's spouse's children.

The court has made clear that a mere right of residence or even a life estate is not appropriate, because the matrimonial home may become increasingly unsuitable as the spouse becomes less independent and physically fragile, and then mentally fragile, and ultimately needs assisted accommodation and care.

---

[1] *Pontifical Society for the Propogation of the Faith v Scales* (1962) 107 CLR 9; *Gorton v Parks* (1989) 17 NSWLR 1

[2] Section 59 Succession Act 2006

[3] Section 57 Succession Act 2006

[4] *Khreich v Khreich* [2012] NSWSC 1299

[5] *Bladwell v Davis*, Bryson JA at [19]

[6] *Milillo v Konnecke* [2009] NSWCA 109,

However, this does not necessarily mean that the spouse should be entitled to the fee simple in the matrimonial home. This is particularly true when substantially all of the testator's assets are tied up in the matrimonial home.

Initially, the courts made orders for a portable life estate, described as a Crisp order arising from the case of *Crisp v Burns Philp Trustee Company Limited*.[7] This gives the widow the right to use the matrimonial home, and when the matrimonial home becomes unsuitable to sell the property and move to a more suitable property chosen by the applicant, and so on until the proceeds may ultimately be used to finance an accommodation bond.

However, there are issues with a Crisp order. First, if the widow moves a number of times, the capital sum may be reduced by the transaction costs of stamp duty and conveyancing, not to mention capital loss. Second, if the widow moves into a nursing home, there may be further reductions in the capital sum – the refundable accommodation bond may not earn interest because the nursing home may be entitled to the interest or may only pay a portion of the interest, and the nursing home may have the right to deduct retention amounts or other amounts from the bond. Third, the widow is effectively required to have a relationship with the testator's executor and beneficiaries, involving them in every sale and purchase – so much for being mistress of her own destiny.

Increasingly, the courts have encouraged parties to settle cases on the basis of the estate providing the widow with an interest free loan. The estate loses interest, the time value of money. However, the capital sum is guaranteed, the estate is not involved in the widow's transactions or exposed to the widow's transactions. The estate's position can be strengthened by requiring the widow to sign an irrevocable power of attorney in the executor's favour directing that any proceeds of sale or any refundable accommodation bond is paid direct to the testator's estate.

2 Ex-spouses

Eligible persons expressly includes former spouses.[8] Notably, a former de facto is not a former spouse, and falls into the category of member of the household at any time and wholly or partly dependant.

There are a number of reasons why a former spouse may make a claim. First, the parties may not have had a property settlement. Notably, if a person commences property settlement proceedings in the Family Court, then the application may continue after death, but if a person dies before commence proceedings then they cannot commence property settlement proceedings. Second, the parties may have reconciled, to some extent, although they may not qualify as spouse or de facto. Third, the testator may have continued to provide support for the former spouse.

However, generally speaking, the courts are not favourable to ex-spouses. In *Glynne v Public Trustee*,[9] Hallen J set out the general principles applying to claims by ex-spouses. He referred to in *Dijkhuijs (formerly Coney) v Barclay*[10] where Kirby P referred to "the policy of the law to promote finality of settlements of property disputes by orders made in the Family Court". Inevitably, the applicant will claim a disadvantageous property settlement (although it must be said that most family law litigants are disappointed by their property settlement). However, the court is reluctant to look behind the property settlement and it is only relevant to the extent that it can be said that the testator made provision for the applicant during the testator's lifetime, and to the extent that the applicant continues to have needs.

Unusually, in *Lodin v Lodin*, Brereton J at first instance[11] ordered provision of $750,000. It was large $5 million estate, there was effectively no competing claim, and the applicant had solely supported their

---

[7] *Crisp v Burns Philp Trustee Company Ltd* (NSWSC, 18 December 1979).
[8] Section 57(1)(d) Succession Act
[9] *Glynne v Public Trustee* [2011] NSWSC 535
[10] *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639
[11] *Lodin v Lodin* [2017] NSWSC 10 (trial)

child. Brereton J noted that there was "something unbecoming" about the fact that the applicant was in significant need and reliant on a social security pension when the daughter she had raised would inherit $5 million. The court also appeared to take into account that the relationship had started as an inappropriate doctor / patient relationship and the acrimonious break-up had had a very damaging long-term effect on the applicant. The decision led to a number of ex-spouse cases being filed. However, the case was ultimately overturned on appeal and the application was dismissed.[12] Both Sackville and White JJA said that the fact that it was a large estate and provision could be made without disturbing the provision to the daughter could not be characterised as 'factors warranting".

3 Step-children

The increasing number of step-children applications reflects the increasing number of blended families in the community.

Adult step-children are in a difficult bind. Their strongest claim is against their own parent's estate, but this is fraught with difficulty. First, it will antagonise the surviving spouse, who may be grieving, elderly and fragile. Second, the surviving spouse will have a stronger claim as the deceased's spouse relative to the child's claim as an adult child. Third, even if the adult child merely wants to secure their inheritance by ensuring that the surviving spouse ultimately leaves them something in the surviving spouse's will or the remainder of a life estate, the courts may not consider that this is appropriate provision. The court determines whether proper and adequate provision has been made and whether provision ought to be made based on a number of factors including need *at the time of the applicant's application.* The court cannot order provision that kicks in when the surviving spouse passes away, because no-one knows what the child's needs will be *when the surviving spouse passes away*. The child may have won lotto, received a promotion or inherited other money. Therefore, the court cannot order provision in the form of a remainder of a life estate or provision from the surviving spouse's estate. However, as a practical matter, the parties often negotiate such solutions even if as a technical matter the court would not order such provision.

Therefore, the step-child may hold their fire, wait for the surviving spouse to pass away and then make a claim against the surviving spouse's estate. However, this has its own risks. First, the surviving spouse may have dissipated their inheritance, through a profligate lifestyle (or merely by living for many many years), or more deliberately by making large gifts to the spouse's own family. Second, the step-child may not be an eligible person, or may be eligible but may have had a very weak relationship with the surviving spouse, and there may not be factors warranting their application.

A step-child is only eligible if they are a member of the household and wholly or partly dependant on the deceased.[13]

The fact that a person is a member of a household is relatively objective. Generally speaking, the applicant needs to have lived in the same house as the testator, although it is possible to have one household and two properties. "Member of the household" connotes some element of permanence, frequency of contact, some degree of voluntary restraint upon personal freedom which each party undertakes, some element of mutual support and some element of community of resources.[14] It may not be enough to spend school holidays with the parent and surviving spouse.[15]

The concept of dependency may be more flexible, is a question of degree, an "evaluative judgment"[16], may involve subjective concepts such as "emotional support" and may be difficult to demonstrate.

---

[12] *Lodin v Lodin* **[**2017] NSWCA 327 (appeal)
[13] Section 57(1)(e)(i) Succession Act
[14] *Oakes v Oakes* [2014] NSWSC 1312 per Pembroke J at [3] to [6].
[15] *Porthouse v Bridge* [2007] NSWSC 686
[16] *Page v Page* [2017] NSWCA 141 per Sackville AJA at [92]

In Re Estate of Hakim; Simons v Permanent Trustee Co Ltd , Palmer J said:[17]

> "Dependence …., is seen as the giving of financial or other material assistance by the deceased over a significant period of time in order to meet a need of the eligible person, with the result that the recipient has come ordinarily to rely upon that assistance."

The period of dependence may be relatively short – in *Page v Page*, Sackville AJA acknowledged that a person may be partially dependant, even if it is only for a period of 14 months.

Importantly, dependant includes both financial and emotional dependence. In *Petrolihos v Hunter*,[18] Hope JA said that the provision by a mother to her children, living with her, of the services essential for their well-being makes them partly dependent upon her, and the same considerations apply to a step-child or his or her step-mother when the child lives with the step-mother and is looked after by her.

In *Spata v Tumino*,[19] the testator's *husband* owned the two houses that the applicant lived in. However, Payne JA said that the court needs to determine the factual question of who, *in a practical sense,* determined who lived in the matrimonial home. The evidence demonstrated that the testator had a right to determine who lived in her and her husband's home, even if her husband was the person was the person who actually owned the home.

When a person moves in with the testator bringing their own children, the children may remain dependant *on their own parent*, and may not be directly dependent on the testator. For example, in *Siddle v Ellis*,[20] Macready J acknowledged that the testator had "affection and warmth" for her partner's son, they cared about each other's well-being, but he was dependent on the testator's partner, the father, not the testator. Macready J said that the testator's partner was the primary carer, the testator did not attempt to alter that situation, and she regarded her partner as having that role.

However, there is a suggestion in the recent case of *Spata v Tumino*, that indirect dependence may be enough provided that there was the actual fact of dependence. In particular, Payne JA referred to *Shaw v Lambert* and said

> "the fact that the grandchild was dependent upon her mother does not, of itself, preclude a finding that the grandchild was also dependent upon her grandfather for accommodation," [21]

4 Estranged

Applications by estranged children can be the most difficult and expensive applications.

First, they are necessarily fact-intensive and fact-dependant, which means that the parties spend significant time and money preparing affidavits and reply affidavits, and it is difficult to predict what a judge may ultimately decide on the facts.

Second, there is likely to be bitterness, anger and resentment between the parties, which means that the matter may not be able to be resolved on a dispassionate commercial basis at mediation and may need to go to trial.

Third, the changing trend of decisions, which may change further by the time the matter is ultimately heard and decided.

---

[17] *Re Estate of Hakim; Simons v Permanent Trustee Co Ltd* [2005] NSWSC 223 at [42]
[18] *Petrohilos v Hunter* (1991) NSWLR 343 at 346 per Hope JA
[19] *Spata v Tumino* [2018] NSWCA 17
[20] *Siddle v Ellis* per Macready at [73]
[21] *Spata v Tumino* per Payne JA at [76]

The courts have always acknowledged that a testator may exclude a child if there is disentitling conduct,[22] or "callousness compounded by hostility"[23]

However, in *Palmer v Dolman*,[24] *Keep v Bourke*[25] and *Andrew v Andrew*, the NSW Court of Appeal said that it was necessary to consider the *reasons* for the estrangement, and *the testator's own conduct*, so the court may order significant provision for an estranged child. In *Polistena v Mitton*[26] the deceased had been an "extremely difficult person", a "hard, frugal, uncompromising woman".

In *Andrew v Andrew*,[27] the NSW Court of Appeal acknowledged that the court should "restrain the amplitude of provision" for an estranged child because of the very fact of estrangement. However, the court said that estrangement was less reprehensible that outright hostility, so the court would still make provision even if the child had been estranged for over 30 years.

This led to the filing of many cases by estranged children. It appeared that a testator could only exclude an estranged child if there was outright hostility or other disentitling conduct.

The NSW Court of Appeal is now less sympathetic. In *Burke v Burke*,[28] the court said that there was no prima facie right to entitlement in the absence of hostility or callousness. The NSW Court of Appeal dismissed the appeal and said that the testator was entitled to exclude an estranged child even though there was no hostility, and the estranged child had simply decided to lead his life without being involved with his family.

---

[22] *Hastings v Hastings* [2008] NSWSC 1310

[23] *Ford v Simes* [2009] NSWCA 351 at [71] per Bergin CJ; see also *Madden Smith v Madden* [2012] NSWSC 146

[24] *Palmer v Dolman* [2005] NSWCA 361

[25] *Keep v Bourke* [2012] NSWCA 64

[26] *Polistena v Mitton* [2011] NSWSC 931

[27] *Andrew v Andrew* [2012] NSWCA 308

[28] *Burke v Burke* [2015] NSWCA 195