



Précis Paper

An Overview of Succession and Family Provision Law

Abstract – 1 paragraph

Discussion Includes

- Two stage test in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201
- Matters considered by the Court in family provisions claims
- Challenging the exercise of the judge's discretion
- Costs in family provisions claims
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- Notional estates provisions in NSW legislation

Précis Paper

An Overview of Succession and Family Provision Law

1. In this edition of BenchTV, Lindsay Ellison SC (16 Wardell Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly and Company) discuss the regime for family provisions claims in Australia, with a particular emphasis on the law of NSW and how other jurisdictions may differ.

Background to the Succession and Family Provision Regime in Australia

2. Succession and family provision law must be understood against the backdrop of the overriding principle of freedom of testamentary disposition. Fundamentally, someone who owns property in Australia is free to leave their assets as they wish under a will, without government interference.
3. However, in limited circumstances, the law provides for a Court to override the testamentary intention, and to impose a different regime under the will in favour of a particular class of persons generally described as family. This was originally regulated in NSW by the *Testators Family Maintenance and Guardianship of Infants Act 1916* (NSW). Following law reform in NSW, the *Family Provision Act 1982* (NSW) was passed, which expanded the criteria for eligibility, brought in concepts of notional property, and laid out a more detailed framework for judges and the courts to follow. In 2006, the current regime under the *Succession Act 2006* (NSW) was passed.
4. Legislation in other states is similar in effect, and the underlying principle in all jurisdictions is the same, namely that the right of a testator to leave his or her assets as they wish can be interfered with in certain circumstances by a court.

NSW Family Provision Regime

5. As the first hurdle, the *Succession Act 2006* (NSW) requires a claimant to be an "eligible person" (ss 57 and 59). In NSW, an eligible person includes a married spouse, a child, a de facto partner (including same sex partners), ex-spouses, ex-de facto partners, grandchildren (in certain circumstances), carers and members of the household. Where the relationship between the deceased and the claimant is not self-evident (such as in the case of a spouse or child), the onus is on the claimant to satisfy the Court of eligibility. An application for a family provision order must be filed no later than 12 months after the date of death, unless the Court orders otherwise (s 58).

6. Once eligibility is established, the claimant must establish that the provision made under the will or intestacy was not proper and adequate. Mr Ellison SC reminded viewers that this is *not* a test of fairness, but rather a consideration of whether what a person has received under a will is proper and adequate. This is a question of degree and requires consideration of the subjective facts of the case.
7. A two-stage test was laid down by the High Court in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201. The test is a practical means of determining whether someone should get provision, asking:
 - Is the provision made for the claimant proper and adequate? (The jurisdictional test.) If it is adequate, the claim cannot proceed.
 - If the first question is answered in the negative, the Court then considers what the claimant should receive.
8. Courts have said that, in reality, the same considerations are in play in answering both the first and second limb of the test.
9. In exercising its discretion, the Court has regard to the list of factors set out in s 60 of the *Succession Act*. These include:
 - The size of the estate;
 - How the estate is made up – some items, such as cash, are easily redistributed, whereas others, such as a house, are not;
 - Direct and indirect financial contributions made by the claimant;
 - The existence of an ongoing financial relationship (e.g. a child paying for their deceased parent's renovations);
 - Non-financial factors, such as a poor relationship between the claimant and the testator or estrangement;
 - The financial circumstances of the claimant(s) and the beneficiaries, including the person's needs such as housing and medical needs;
 - Any provision or benefits that the claimant(s) or beneficiaries received during the lifetime of the deceased (e.g. advances to a child to purchase property made during a parent's lifetime); and
 - Conduct disentitling (e.g. fraud, blackmail, physical assault).
10. There is no hierarchy in NSW family provisions claims, meaning that no one class of claimants receives priority over others. The mere description of a claimant as a particular class of claimant, e.g. child, spouse, etc, does not give that individual any greater status over another category. However, the claim of a widow or widower may be a greater claim

than that of others, but this is due to the nature of the relationship and the obligation to one's spouse, rather than the category in itself.

11. A judge will take into account community standards in determining a claim for provision, however this does not assist greatly as it is difficult to determine the content of community standards. Ultimately, it is still for the judge to determine what is proper and adequate, as well as a consideration of the claimant's needs and the circumstances of other beneficiaries. There is no scope for leading evidence on the content of community standards.
12. The Court will also take into account representations made by the testator during their lifetime. However, family provision claims are not estoppel-type claims where representations have some legal force and a deceased is bound by statements he or she may have made. Again, the ultimate test is still what is proper and adequate.
13. The Court will look at the relationship between a claimant and the deceased and consider any estrangement. The Court will often come to the conclusion that there is no right or wrong party in the breakdown of the relationship. Indeed, Mr Ellison SC notes that estrangement when there is no contact of any sort or one side is clearly to blame is quite rare. Although a child of a deceased will not be rewarded or punished in a claim for provision for being a "good" or "bad" child, a good relationship is a reason why the community might expect a testator to make provision for a child and is therefore a relevant consideration.
14. Finally, the Court will consider disentitling conduct on the part of the claimant. Disentitling conduct is relatively rare, and therefore Mr Ellison SC considers that a precise statutory formulation of the concept is unnecessary. Instead, the courts have recourse to the list of factors set out in s 60. Disentitling conduct was considered in *Burke v Burke* [2015] NSWCA 195, where the evidence showed that the deceased's adult son had only very infrequent contact with the deceased and her nursing home. The trial judge found that the son was only interested in finding out when his mother had passed away, with a view to some prospective inheritance, a finding that was upheld by the Court of Appeal. Therefore, although the claimant was eligible and needy, and the estate was large enough to make provision, the Court declined to make an order for provision on the basis that there was no relationship between the claimant and the deceased.
15. In contrast, in *Andrew v Andrew* [2012] NSWCA 308, the Court of Appeal overturned a finding by the trial judge rejecting a claim on the basis that there was no relationship between the plaintiff daughter and her deceased mother. The Court of Appeal held that bond of maternity was such that the testator should have nevertheless recognised the claim.

Appeals

16. The law surrounding claims for family provision is well established. In order to challenge a decision of a judge in a claim for provision, it is therefore often a question of challenging the exercise of the judge's discretion, a notoriously difficult exercise as the discretion of the trial judge must be shown to have miscarried. The principles espoused in *House v The King* [1936] HCA 40; 55 CLR 499 make clear that the following must be established to overturn a judge's discretion:
- The trial judge took into account material that he or she should not have considered; or
 - The trial judge failed to take into account material that he or she should have considered; or
 - The decision was so obviously wrong that an error in the exercise of discretion must clearly be there.
17. As a result of the significant hurdles involved in overturning a trial judge's discretion, appeals are relatively rare and the High Court has only considered family provision claims in three cases since the 1980s. The fact that a claimant has been awarded too much or too little under a will or intestacy is not in itself a ground of appeal.

Costs

18. In NSW, judges have always made clear that the normal rules as to costs apply, and if a claim is dismissed, the prima facie rule is that costs will follow the event. Exceptions may arise where offers of compromise or Calderbank letters are invoked. In other states, the courts have been relatively more generous towards unsuccessful plaintiffs.
19. An executor's role is to defend the will or compromise for the benefit of all of the beneficiaries. Ordinarily, an executor would therefore be expected to receive his or her costs on an indemnity basis. In a few rare cases, where an executor is also a beneficiary and has also been defending his or her personal entitlement, there have been different costs orders where the executor is seen as being too vigorous in his or her defence of the will.

Differences in Law between Different Australian Jurisdictions

20. Key differences in the family provision statutes of different states and territories include:
- Differences in time limits by which the claim must be commenced;

- Different categories of eligible persons;
 - Only NSW includes the concept of a "notional estate", which allows the Court to claw back, for the purpose of funding a provision, assets that the deceased had and disposed of, or assets that the deceased had control of and had been dealt with outside of the will, such as a joint tenancy, superannuation, or property under a trust.
21. Legislation regarding the formal validity of wills, informal wills and revocation is fairly uniform. However markedly different laws still exist with regard to intestacy between the different states and territories. Proposals have been made to create uniform laws regarding executors, however this is still pending.

BIOGRAPHY

Lindsay Ellison SC

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Lindsay was called to the Bar in 1985. He became a Senior Counsel in 2005. He practices principally in equity and probate and has appeared in many leading NSW wills and estates cases. He frequently lectures barristers, solicitors, and occasionally judges on aspects of law and practice. He is an accredited mediator under the Australian Mediation Accreditation System.

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Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Cases

Singer v Berghouse [1994] HCA 40; 181 CLR 201

Burke v Burke [2015] NSWCA 195

Andrew v Andrew [2012] NSWCA 308

House v The King [1936] HCA 40; 55 CLR 499

Legislation

Testators Family Maintenance and Guardianship of Infants Act 1916 (NSW)

Family Provision Act 1982 (NSW)

Succession Act 2006 (NSW)