



## Précis Paper

### Balancing the Needs of Adult Children in Family Provisions Cases

This is an interesting discussion about family provisions claims by adult children, and considers applications for extension of time, Crisp orders, and the factors that a court will consider in making an order for provision.

#### **Discussion Includes**

- Family provision claims under Part 3, Succession Act 2006 (NSW)
- Time limits for bringing claims for provision
- Applications for extension of time
- Accounting for increasing values for real estate
- Crisp orders
- Community standards
- Factors considered in redistributing an estate

## Précis Paper

### Balancing the Needs of Adult Children in Family Provisions Cases

1. In this edition of BenchTV, Victoria Hartstein (Barrister, Chalfont Chambers – Sydney) and Ian Benson (Solicitor, AR Conolly and Company – Sydney) discuss the recent NSW Supreme Court case *Life v Hall* [2016] NSWSC 316 and issues that arise in relation to family provisions claims by adult children.

#### Background and Material Facts

2. The deceased, Mrs Life, was the mother of both the plaintiff and the defendant. A claim for a family provision order under Part 3.2 of the *Succession Act 2006* (NSW) was made by the deceased's adult son.
3. The deceased died at the age of 88. The plaintiff had looked after his mother for many years prior to her moving to a nursing home. The defendant had also contributed to looking after the mother's affairs in other ways, including by holding her Power of Attorney.
4. The plaintiff suffered from depression and was a disability pension recipient. He was 68, nine years older than his sister, the defendant. He owned a property in Queensland of insignificant value. The defendant owned her own home and an investment property, worked in a steady job, and had considerable superannuation savings. Neither the plaintiff nor the defendant had children.
5. In her will, the mother divided her estate evenly between her two children. The estate included the home in which the plaintiff lived, which was valued at approximately \$400,000 at the time of death and rose in value before the hearing to over \$500,000. The plaintiff had refused to leave the home, as the value of half of the estate was insufficient to allow him to purchase a house in the area where he could remain close to his existing support network and that would be sufficiently large to allow him to keep his two dogs.
6. After the defendant had commenced proceedings against the plaintiff to obtain possession of the property, the plaintiff brought this claim for family provision. The claim was filed some 13 months after the time allowed in the relevant provisions.

#### Family Provisions Claims in NSW

7. Part 3 of the *Succession Act 2006* (NSW) establishes a system whereby an eligible person (defined in s 57), including a child of the deceased, can bring a claim for provision or further provision from the estate of the deceased if the will or intestacy did not make proper and

adequate provision for the plaintiff. Section 59 sets out when an order can be made, and s 60 lists non-exhaustive factors which can be considered by the Court.

8. Section 58(2) provides that an application for provision must be made within 12 months of the date of death of the deceased. This provision should be read in conjunction with s 36(1) of the *Acts Interpretation Act 1987* (NSW), which provides that the date from which time shall be reckoned is exclusive of the date specified in the particular legislation. This in essence allows an extra day to commence proceedings. In this case, for example, the deceased died on 16 May 2013. The last day for filing was therefore 16 May 2014.
9. In certain cases, the Court will grant extensions of time. Under s 58(2) of the *Succession Act*, a party must show "sufficient cause" why the application should be granted. In order to seek an extension of time, a practitioner should seek an extension until the date on which the summons was filed. The Court will consider the application to extend time at the same time as the substantive application. Factors that the Court can take into account include:
  - The likely success of the claim;
  - Prejudice to the defendant or the other beneficiaries (noting that there will often be significant prejudice where the estate has already been distributed);
  - Unconscionable conduct by any person;
  - The history of the proceedings;
  - The nature of the litigation;
  - The consequences for the parties of the granting or refusal of the application;
  - The size and nature of the estate;
  - The position of the individual applicant(s); and
  - The rightful expectations of the parties.
10. In most cases where there is a good claim and a sufficient explanation for the delay, it is likely that the Court will allow an extension of time. If the plaintiff has not known that he or she had an ability to bring the claim until shortly prior to the filing of the claim, that is often regarded as sufficient cause.
11. In this case, the claim was filed 13 months out of time. The plaintiff had sought legal advice in relation to the defendant's claim for possession of the property, however the solicitor had failed to provide sufficient advice regarding the plaintiff's claims under the *Succession Act*.
12. In determining applications for extension of time, some judges have taken a more restrictive view than others. Justice Hallen set out a detailed summary of the relevant law at paragraphs 52 to 59 of the judgment, and ultimately allowed the application given that he considered that the underlying application should succeed; there was no prejudice to the defendant; and there was a good explanation for the delay.

13. In determining the outcome of a claim for provision, some judges have adopted a two-stage approach. Under that approach, the question of whether the plaintiff needs provision is first determined, and only then does the Court consider all other relevant factors. Other judges have eschewed this approach, deeming that everything should be considered together. Ms Hartstein believes that some cases lend themselves to a two-step process whereas others do not, and so there should not be any set rule.
14. The Court will also take into account community standards in determining the family provision claim. However, the Court will not ask for expert evidence or often even submissions on the content of those community standards. The most commonly applied community standard is that the community expects a parent to look after a child who does not have the wherewithal to look after him or herself.
15. Other relevant factors considered by the Court, as set out in s 60 of the *Succession Act*, include the size of the estate and the need of the plaintiff or beneficiaries to support others. Where the other beneficiaries are charities or persons who are not eligible persons, the Court may look more favourably on the plaintiff's case. Where the other person is also an eligible person, the Court will carefully weigh the needs of both sides.
16. There is no presumption of equality of children under Pt 3 of the *Succession Act*. The Act does not allow the Court to simply remake wills; the Act enables the Court to make provision for the needs of any eligible person who has not been left with adequate and proper maintenance and support.
17. Finally, in this case, Hallen J made clear that there is no obligation on a parent to provide accommodation or a fully paid off house to an adult child. However, this must be balanced with the duty of the parent, if the estate is sufficiently large, to make sure that an adult child has adequate accommodation and money set aside to pay medical bills.

#### Outcome of Substantive Application

18. In finding in favour of the plaintiff, Hallen J awarded the plaintiff an additional 7.5 percent of the estate absolutely. In addition, he allowed the plaintiff a further 7.5 percent if he bought real estate in which he would live. The additional 7.5 percent would be provided by way of a loan secured by a mortgage which was interest free and portable. This would allow the plaintiff to buy a house, and then transfer the loan to assisted accommodation as required. It was only upon his death that repayment of the sum was required. Given that the defendant was significantly younger than the plaintiff, this mechanism meant that she would not lose the benefit of this 7.5 percent of the estate.

19. Ms Hartstein noted that it was relatively uncommon for the court to make orders in terms of a percentage of the estate, rather than for actual monetary figures. However in this case, the value of the house had increased by over \$100,000 in just two years and it was thought that it may increase again in the time that it would take to prepare the house for sale. It therefore seemed appropriate to make an order in terms of a percentage of the estate, in order to protect both parties should the value of the property change.

#### Crisp orders

20. It is relatively common for the Court to make "Crisp" orders, which take their name from *Crisp v Burns Philp Trustee Company Ltd* (Supreme Court (NSW), 18 December 1979, unrep). Crisp orders involve an outcome whereby the whole of the estate or the defendant's share of the estate is invested in real estate where the plaintiff can live, which is transferrable from house to house. Crisp orders are normally made in circumstances where there is a generation dividing the parties, so that the beneficiaries of the will are not completely denied the benefit of the provision that was made for them in the will.
21. Ms Hartstein noted, however, that she had not experienced a case in which the Court made orders of this nature, specifically where only a small portion of the estate is used for the plaintiff's benefit pursuant to Crisp orders.

## **BIOGRAPHY**

### Victoria Hartstein

Barrister, Chalfont Chambers, Sydney

Victoria Hartstein was called to the NSW Bar in 1978. Between 1985 and 1995, she practised in Hong Kong as Crown Counsel. Her practice in Australia is a general civil practice, specialising in family provisions law, professional discipline, child protection, international child abduction, and children's guardian matters.

### Ian Benson

Solicitor, AR Conolly and Company, Sydney

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

## **BIBLIOGRAPHY**

### Focus Case

*Life v Hall* [2016] NSWSC 316

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/composite/benchmark\\_04-04-2016\\_insurance\\_banking\\_construction\\_government.pdf](https://benchmarkinc.com.au/benchmark/composite/benchmark_04-04-2016_insurance_banking_construction_government.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/56f0cca1e4b0e71e17f50876>

### Cases

*Crisp v Burns Philp Trustee Company Ltd* (Supreme Court (NSW), 18 December 1979, unrep)

### Legislation

*Succession Act 2006* (NSW)

*Acts Interpretation Act 1987* (NSW)