



Précis Paper

What is “proper and adequate” in family provision claims?

This is an interesting discussion about whether a provision valued at \$2 million under a will can be considered improper and inadequate in the circumstances of the case.

Discussion Includes

- Can a provision worth \$2 million be improper and inadequate?
- A claimant's accommodation requirements
- Dependency of a plaintiff upon the deceased
- What are the implications of a defendant beneficiary not raising his or her financial circumstances?
- The continued relevance of the two-stage test from *Singer v Berghouse* [1994] HCA 40; 181 CLR 201
- Considerations for practitioners in taking instructions in family provision claims
- Costs

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What is “proper and adequate” in family provision claims?

1. In this edition of BenchTV, Justin Brown (Barrister, 13 Wentworth Selborne Chambers, Sydney) and Craig Birtles (Senior Associate, Teece Hodgson & Ward, Sydney) discuss the recent decision of the NSW Court of Appeal, *Chan v Chan* [2016] NSWCA 222.

Background and Material Facts

2. The appellant, Clement Wai Shing Chan, sought a family provision order with respect to the estate of his late father, August Ying Kiang Chan. August Chan died on 29 January 2011 and left an estate valued at his death at \$9.36 million to be shared by his two sons, Clement Chan and the respondent Benedict Aloysius Wai Nam Chan. Under the will made on 18 November 2006, the appellant received a house in which he was then living and a legacy of \$50,000. The respondent received the balance of the estate.
3. The value of the bequest to the appellant was in the order of \$2 million. As time progressed, it became apparent that work was needed to maintain the property. Moreover, medical evidence adduced by the appellant at trial indicated the importance for him of remaining in his current home, due to his low intellectual functioning and the stress that a change in living conditions would cause him.
4. The deceased was also survived by his four daughters and had set up a trust for their benefit. The assets of the trust, in the form of several residential units, were distributed to the sisters after their father's death. Two of the sisters also made family provision claims. However, as they received property via the trust, their Family Provision claims were dismissed.
5. At first instance, the trial judge also dismissed the application of Clement Chan, but only he appealed the dismissal of his claim.
6. The task for Clement Chan on the appeal was this: demonstrate that the trial judge had erred in determining that a gift of a property valued at \$2million was adequate provision. The presenters stressed that this case illustrates the importance of considering what is proper and adequate in *all* of the circumstances of the particular case.

The Arguments on Appeal

7. The appellant submitted that the provision made to him under the will was not adequate for a number of reasons. First, the appellant had lived in the property for some years and

the deceased had been paying the outgoings of the property during his lifetime. His dependency upon his father had always therefore been substantial. Second, the value of the estate was large. Third, as described above, the appellant had medical needs which would be better met if he remained living in the current property, and the medical evidence was unchallenged at trial. As the appellant had been dependent upon the deceased for accommodation for his entire life, he ultimately argued that adequate provision should be made to allow this arrangement to continue after his father's death. The appellant sought a fund of \$500,000 to repair and maintain the house.

8. The respondent's main argument was that the provision under the will, with a house valued between \$1.7-1.9 million, was adequate, and the appellant could sell the house and buy alternative accommodation if he was unable to maintain the property.

The two-stage test in *Singer v Berghouse*

9. An applicant for a Family Provision order must be an *eligible person* – defined in s 57 of the *Succession Act* 2006 (NSW) as including a husband or wife of the deceased, a person with whom the deceased person was living in a de facto relationship at the date of death, a child, a former wife or husband, a dependent grandchild or dependent member of the household, or a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death. Applicants who are claiming eligibility as a former spouse, a dependent grandchild or member of the household, or a close personal relationship applicant, must each demonstrate that there are factors which warrant the nature of the application.
10. Subject to establishing eligibility to make a claim, in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201, the High Court laid out a two-stage process to family provision claims under the now-repealed *Family Provision Act 1982* (NSW). The first stage is the jurisdictional test, considering the question: was inadequate provision made by the testator in the will? Once that hurdle is overcome, the Court turns to the second stage, namely what provision *should* be made.
11. The difficulty with this analysis, which was brought out by some comments of the High Court in *Vigolo v Bostin* [2005] HCA 11; 221 CLR 191, is that it is difficult to neatly divide those two stages in two. Under the *Succession Act*, the emphasis is slightly different to that contained in the *Family Provision Act*, and there is an open question about the continued relevance of the *Singer v Berghouse* test under the *Succession Act*. In *Andrew v Andrew* [2012] NSWCA 308, Basten JA suggested that the two stage analysis may not neatly be applied in relation to the *Succession Act*, a comment that was later qualified in *Poletti v*

Jones [2015] NSWCA 107. Mr Birtles' view is that the two-stage test will continue to apply until there is a clear indication otherwise from the High Court.

Considerations under the *Succession Act 2006* (NSW)

12. Whether or not the two-stage test continues to apply, s 60(2) of the *Succession Act 2006* (NSW) sets out a number of considerations for the court in determining whether to make a family provision order. The quantitative considerations for the court in determining whether to make a family provision order include the nature and value of the deceased's estate, the plaintiff's material and financial circumstances (including age, employment, family relationships and characteristics), and the material and financial circumstances of competing beneficiaries.
13. When taking initial instructions, Mr Birtles advises practitioners to focus primarily on these considerations, and to separate notes into the known information (i.e. what the client is able to tell the practitioner), and the unknown (such as the circumstances of competing beneficiaries) and to work out how to obtain the information which is not known.
14. Once this base information is compiled, the practitioner should move on to the qualitative factors under s 60, namely the nature of the relationship between the plaintiff and the deceased, and any narrative reason why provision should be awarded.
15. It is of course also necessary to consider whether an applicant is an eligible person.
16. Under s 60(2), the dependency of a plaintiff upon the deceased during the deceased's lifetime is a relevant consideration. Mr Brown pointed out that this consideration is a double-edged sword: on one hand, the fact that a plaintiff lived in a property during the deceased's lifetime means that he or she had the benefit of money that he or she would have otherwise had to pay in rent. However on the other hand, dependency can work in the plaintiff's favour in an argument as to why further provision should be made, and Mr Brown considered that this factor will ultimately always enhance a plaintiff's case.
17. Another relevant consideration in *Chan v Chan* was the nature of the other beneficiary, Benedict Chan (the respondent). Under s 60(2) of the *Succession Act*, the material and financial circumstances of the competing beneficiary are a relevant consideration. However, here, Benedict Chan elected not to raise his financial circumstances. Where there are no competing circumstances that suggest that the other beneficiaries have a greater entitlement to the estate, the Court will have to look at the plaintiff's evidence in isolation.

Therefore in this case, where the Court knew nothing about the respondent's financial position, in the absence of countervailing considerations there was a clear argument in favour of the appellant. There was also a strong narrative reason for additional provision to be made to the appellant to allow him to remain in the house, and the appellant was ultimately successful on appeal.

18. If, however, the appellant had received a legacy in cash instead of the provision of the house that he received under the will, Mr Birtles considered that his claim would have been far less persuasive. The evidence in the case would have been different in nature, as the appellant would not have been able to point to a medical reason why the provision was inadequate and he would not have been able to raise the strong arguments as to why it was important for him to stay in that particular property.
19. Mr Birtles also noted that although there was a basis for the decision of the Court of Appeal, from an estate planning perspective the making of a specific gift of property in a Will does not necessarily mean that the testator intended for the beneficiary to stay in the property forever.

Considerations for the Practitioners in Taking Instructions in Family Provision Claims

20. Mr Birtles advises practitioners to be wary of interpreting the result from *Chan v Chan* to mean that where there is a large estate or where the claimant has received a large provision under the will, they will nonetheless be entitled to further provision from the court. Instead, it is important to consider the qualitative factors of the plaintiff and the particular circumstances which may entitle them to succeed in a claim.
21. In *Smith v Johnson* [2015] NSWCA 297, for example, the Court of Appeal set aside an order for provision that was made on the basis that the plaintiff should not have been required to live in a two bedroom apartment. The estate in this case was much smaller than in *Chan v Chan*, but more importantly, Mr Birtles considered that the plaintiff was unable to own the narrative in the same way that Clement Chan had been able to in *Chan v Chan*. Specifically, during the testator's lifetime, the plaintiff in *Smith v Johnson* had unsuccessfully pursued guardianship and financial management orders against the testator (his mother), as well as an application for a statutory will and a family provision claim following the death of the plaintiff's father. The plaintiff had also borrowed money from the testator during her lifetime.
22. The plaintiff was successful at first instance and was awarded \$500,000 in provision, free of any obligation to repay the debts in relation to the money borrowed during the testator's lifetime. On appeal, however, the Court of Appeal overturned the order for provision. One of

the key rationales for this was that it had been submitted that the plaintiff was the architect of his own misfortune. That is, had he not run up so many debts in pursuing various legal applications, he would not have had such financial need by the time that proceedings were commenced.

23. In contrast, in *Chan v Chan*, the successful appellant did not have those negative characteristics in his claim which detracted from what may have otherwise been viewed as strong arguments in favour of a provision order in *Smith v Johnson*. Therefore it is important to consider the plaintiff's narrative and try to predict the positives and negatives upon which the Court may focus.

Costs

24. In family provision claims, it is not always the case that costs will follow the event. In *Singer v Berghouse (No 1)* [1993] HCA 35; 114 ALR 521, the Court held that in certain circumstances, an unsuccessful plaintiff may receive his costs or there may be no order as to costs.
25. In *Chan v Chan*, there were three distinct applications – one by the appellant, Clement Chan, and two by his sisters. Agnes Chan, one of the appellant's sisters, was ordered to pay her costs due to reasons relating to her financial disclosure and the fact that she had received three units under the trust and the provision under the will was found to be proper and adequate. Beatrice Chan, a second sister, was ordered to pay the costs only after the date on which she had received her three units under the trust, as prior to that date, she may have had an arguable claim for provision.
26. Following the trial, the Court ordered that Clement Chan pay the costs of the estate, however there was significant consideration given as to whether there should be no order as to costs. As he was successful on appeal, this order was overturned on appeal and he received his costs of both the trial and the appeal on an ordinary basis.
27. To try to minimise the risk that an unsuccessful plaintiff may receive his or her costs out of the estate, Mr Brown recommended that letters of compromise be sent, or at the least, an offer be made to the plaintiff on terms that the summons be dismissed but that the plaintiff's costs be paid out of the estate.

BIOGRAPHY

Justin Brown

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Justin Brown was admitted as a solicitor in 2006 and called to the Bar in 2013. Justin is also a lecturer in succession law at the University of Sydney and has been a guest lecturer in the courses offered by the College of Law in the Masters of Applied Law (Wills and Estates).

Craig Birtles

Senior Associate, Teece Hodgson & Ward, Sydney

Craig was admitted to practice in 2008 and is a Senior Associate at Teece Hodgson & Ward, Sydney working predominantly in Estate Litigation and Protective matters. He is a member of the Society of Trust & Estate Practitioners (STEP) and an Accredited Specialist in Wills & Estates Law. Craig is a co-author of C Birtles and R Neal, *Hutley's Australian Wills Precedents* 8th Edition (LexisNexis Butterworths) 2013 and 9th Edition 2016. He also lectures in family provisions and succession courses at the College of Law and the Law Extension Committee Diploma of Law. Craig was named as a Doyle's Guide Rising Star – Wills & Estates Litigation 2016.

BIBLIOGRAPHY

Focus Case

Chan v Chan [2016] NSWCA 222

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/57bb7d77e4b058596cb9eb13>

Cases

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

Vigolo v Bostin [2005] HCA 11; 221 CLR 191

Andrew v Andrew [2012] NSWCA 308

Smith v Johnson [2015] NSWCA 297

Singer v Berghouse (No 1) [1993] HCA 35; 114 ALR 521

Legislation

Succession Act 2006 (NSW)

Family Provision Act 1982 (NSW)