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Précis Paper

Subjectivity in Family Provision Law

A discussion about the recent decision of *Megerditchian v Khatchadourian* [2019] NSWSC 1870
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Discussion Includes

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Subjectivity in Family Provision Law

1. In this edition of BenchTV, Ventry Gray (Barrister, 13th Floor St James Hall, Sydney) and Margaret Pringle (Barrister, Chalfont Chambers, Sydney) discuss the recent decision of *Megerditchian v Khatchadourian* [2019] NSWSC 1870.

Key issues

1. The case was a family provision claim involving a claim by the daughter of the deceased aged 70 at the date of the trial. The deceased had died aged 91 and the claim was brought against his Executor, his son.
2. The estate, in its literal sense was insolvent. The only asset that was available so far as the plaintiff was concerned was notional estate which was a 50% share in a residential property at Willoughby. In 2007, the deceased had, by way of gift transferred a joint interest in the property to his son, the present defendant and it was that interest in the property that comprised the notional estate consequent on the date of the deceased in 2018.
3. In the will, the deceased had left a legacy of $10,000.00 to the plaintiff and the judge accepted that the provision of a legacy of $10,000.00 to the plaintiff did not in any sense meet an adequate provision for her maintenance and advancement
4. The judge accepted that the deceased's intention was that the son would inherit the entirety of the residential property and that any benefit that the daughter received from the estate would be anything that was left. Seeking provision from the estate which would have to come out of the property meant that the plaintiff had to persuade the court that the deceased's intention that the son inherit the entirety of the property had to be overridden.

Cultural Expectations

5. There was no evidence at all led by either party about what Armenian cultural practices were in situations of this kind. Section 60 of the *Succession Act* 2006 (NSW) only allows a court hearing family provision cases to consider cultural matters in cases of Aboriginal and Torres Strait Islanders only. Therefore, the judge dealt with the case without taking any cultural practices

Support from children

6. The defendant raised the fact that the plaintiff, a 70-year-old woman was solely dependent on the age benefit as her income, had no material assets and was financially supported by her children. The defendant raised the argument that the plaintiff's need for maintenance and advancement was being met by her children and therefore there was no occasion to make any significant provision for the plaintiff out of the estate.
7. The judge took this into account in a substantial way that the plaintiff need for provision and future welfare was being met by her children and ultimately made an order in favour of the plaintiff for $100,000.00. The fact that the plaintiff's children were looking after her or willing to do so was clearly one of them
8. Under section 59 of the *Succession Act* 2006 (NSW), the obligation and duty of the court is to make whatever order is appropriate for the proper provision of maintenance, education and advancement of a claimant. One question which immediately arises is whether proper provision is made if part of the obligation at least is being provided entirely gratuitously as this can stop. If this happens, the plaintiff of necessity be left with inadequate provision for the future.

Past Property Transactions

9. The position here was that the plaintiff had, as part of the institution of her proceedings, filed an affidavit in the form required by the practice note, which requires details of property dealings within the last three years or so, In this case the defendants wanted to investigate property dealings that went back to at least 2002, 16 years prior.
10. Most of these property dealings were dealings in which the plaintiff personally was not even a party. There had been a property owned by the plaintiff's husband which had been sold at market value to the plaintiff's children and was still owned by them. Out of the proceeds of sale, the plaintiff and her husband had purchased a residential property for themselves. The judge accepted that the plaintiff had had no interest in the original property that had been sold to their children and still had no interest in it and that she had no interest of the proceeds of sale that she and her husband had subsequently purchased and that she was in effect impecunious or destitute
11. The judge accepted that the plaintiff had had no interest in it or that there was nothing left in which the plaintiff had any interest, however the judge did say that this did not mean that these transactions were irrelevant. He did not say in express terms why they were relevant but he seems to have related it to the statements by the plaintiff's children that they expected some responsibility to care for. The judge accepted that whatever the plaintiff's children felt was not legally enforceable against them as an obligation to look after their mother but on the other hand he seems to have first found there existed what he described as a joint venture that included the plaintiff's children.

12. He said that he wasn't finding that the plaintiff was a party to the joint venture but he was not satisfied that she had no decision making role in the joint venture and as a result, he at least joined the notion of this alleged joint venture into the sense of obligation of the plaintiff's children.

The Plaintiff's assets at the time of hearing

13. However, any decision by a judge in family provision at first instance is made on the basis of the circumstances at the time of the hearing. The position of the plaintiff at the hearing was that she was impecunious and had no legal rights to anything to material assets or income. The judge did not seem particularly influenced by that in reaching the conclusion that the plaintiff's need for further provision was relatively modest in the sense that he awarded her $100,000.00 with a life expectancy of 20 or 25 years. The judge did it so as not to disturb the integrity of the deceased's testamentary disposition of wanting the property to pass to the defendant the son and the award to the plaintiff he felt could meet without jeopordising the defendant's ability to retain the property himself

Subjectivity in Family Provision cases

14. In *Cowap v Cowap* [2020] NSWCA 19 The widow was 91 years old and the trial judge had effectively said that she can have $700,000 to purchase a house in Canberra. The trial judge said that although she had lived in the farm property for some years and wanted to continue to do so, it was inevitable that she would have to leave it by death or because physically she could not continue to stay there.
15. Such cases illustrate the high degree of subjectivity in decisions in this area. The subjectivity makes it difficult to give advice to a plaintiff on the likely outcome of proceedings because whilst there is consistency in process and in the consistency of the legislation, the final outcome can be drastically different depending on which case is pressed on to a hearing. Further, Courts of Appeal in these cases are hesitant to set aside first instance decisions as there is really know way of knowing or justifying saying that somebody else's decision is better than one before.

Costs Decision

16. *Megerditchian v Khatchadourian (No 2)* [2020] NSWSC 112 concerned the costs decision.
17. In this matter, the defendant had put forward an offer of compromise that was twice the amount that the judge awarded. The judge held that the offer, which technically did not comply with the offer of compromise rules, was nevertheless sufficiently clear and capable of being understood by the plaintiff and the plaintiff was not under any prejudice or disadvantage because of the technical non compliance with the rules
18. The judge decided in the circumstances of this case that he would order the defendant to pay the plaintiff's costs up to the date of the offer.
19. In the early days and prior to the operation of the current *Civil Procedure Act 2005* (NSW) and *Uniform Civil Procedure Rules 2005* (NSW), the view was taken that failure by a testator to make adequate provision for an eligible person was regarded in the same way as a defective will and that litigation about a defective will was very often met, in terms of costs, from the estate.

Takeaways

20. It is impossible to predict or draw conclusions the proceedings raised several different issues, all of which could have been decided either way.
21. The reality is that there are so many uncertainties in family provision cases that the necessity to take a cautious approach is no less in family provision cases than it is in others. Reasonable settlements are an attractive option rather than have litigants spend either their own money or the estate money fighting legal proceedings when the amount in dispute between the parties can be comparatively modest and a settlement early on can have tractions for parties rather than going to trial on a matter of principle at considerable cost to somebody.

BIOGRAPHY

Ventry Gray

Barrister, 13th Floor St James Hall, Sydney

Ventry Gray graduated with a LLM (VUW), was admitted to the NSW Bar in 1985 and appears regularly in the Supreme Court and the Federal Court and appeals therefrom, including some leading cases in revenue, equity and trusts law. He has addressed specialist seminars in his areas of expertise.

Margaret Pringle

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Margaret specialises in equity litigation, appearing regularly in the General Equity, Probate, Family Provision and Protective Lists of the Supreme Court and NCAT (Guardianship Division). Margaret is a regular speaks at the College of Law, UNSW and LegalWise seminars. Prior to coming to the bar, Margaret qualified and worked as a registered nurse in a variety of roles before commencing the Diploma of Law administered by the Legal Practitioners Admission Board Diploma in Law. Margaret was then employed at the NSW Trustee & Guardian (formerly Public Trustee) where she specialised in equity litigation involving deceased estates with a focus on matters involving testamentary capacity and claims for family provision as well as probate and trust.

REFERENCES

Legislation

Succession Act 2006 (NSW),
Civil Procedure Act 2005 (NSW)
Uniform Civil Procedure Rules 2005 (NSW),

Cases

Cowap v Cowap [2020] NSWCA 19

Megerditchian v Khatchadourian [2019] NSWSC 1870

Megerditchian v Khatchadourian (No 2) [2020] NSWSC 112