



Précis Paper

Release of rights to family provision claims

A discussion about the recent decision of *Robinson v Robinson* (2020) NSWCA 4.

Discussion Includes

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Précis Paper

Release of rights to family provision claims

1. In this edition of BenchTV, Andrew Stevens (Barrister, 2 Wentworth Chambers, Sydney) and John Armfield (Barrister, 2 Wentworth Chambers, Sydney) discuss the recent decision of *Robinson v Robinson* (2020) NSWCA 4.

Facts

2. The major asset of the deceased's estate was a notional half interest in a property, which upon his death passed by right of survivorship to his wife, Portia. After the Notice of Death had been filed and the property transferred to the widow, she undertook a transaction whereby the property was transferred from her name into her name and the name of her son.
3. The daughter of the deceased, Sarah then brought a family provision claim against Ronald's estate. A judicial settlement conference was held in an attempt to keep costs down. It was mildly successful in the sense that a settlement in principle was reached and an amount was agreed to. However, the agreement was not binding and later the plaintiff wished to no longer be bound by the informal arrangement.

Position of Estate

4. There was a desire on the part of the estate to get releases in respect to Ron's estate, as well as Portia's Estate to ensure that there wasn't any further litigation in the future.
5. The transaction to Portia's son was not for valuable consideration, and therefore the transfer itself would arguably be notional estate. If she had died within three years, it could have been proven that the transaction was entered into with the intention of defeating the family provision claim by Sarah. If this was the case then, arguably the totality of the property would be notional estate. However, Portia did not die within the three year period and her estate as presently constituted would simply be the half interest in the property and any other assets in her name.

Steps taken to resolve matter

6. A hearing was set before Pembroke J. After the matter had been set down for hearing, there was correspondence between counsels and eventually a settlement was reached between the parties which ended with consent orders and a deed of release being entered into.

7. As part of those orders, there was an order for provision in the amount of \$200,000.00 in a staged payment. The orders also contained releases as per section 95 of the *Succession Act 2006* (NSW).
8. The section 95 releases entered into by Sarah were twofold. The first was to the effect that Sarah could not bring any further family provision claim in relation to the deceased's estate and the second was in relation to Portia's estate to the effect that in the event that Portia becomes a deceased person, Sarah would be unable to bring any claim in relation to her estate.

Problems with Release Approval

9. Once the consent orders and release deed was signed, the plaintiff's daughter alleged undue influence or duress in relation to the plaintiff signing the orders or if not, that the plaintiff lacked capacity to sign the orders.
10. Following the correspondence, His Honour decided to deal with the matter in open court and the plaintiff was given the opportunity to express her views to Pembroke J. The plaintiff claimed that she did not think that the deal was fair and she took issue with the transaction that was done transferring half of the property to her brother. She no longer considered herself bound by the orders and no longer wanted to proceed.
11. His Honour gave her an opportunity to take further advice from her counsel. She went back to the Barrister's chambers and went through the risks of proceeding, benefits of settling and at the conclusion of that, an Affidavit was drafted that went through the factors contained in section 95(4) of the *Succession Act 2006* (NSW), which were that the releases were to her advantage, financial and otherwise, that they were prudent, fair and reasonable and that she did take legal advice.
12. There was also an email from counsel for the plaintiff stating that she had had the opportunity to speak with her client after the directions hearing which was adjourned, in which she encouraged her to let go of her emotional approach and think about her future and the future of her daughter.
13. The Estate then made payment of the first installment under the consent orders.

Appeal

14. The plaintiff then filed a Summons seeking leave to appeal with a draft notice of appeal seeking to have the orders set aside as she did not think they were fair.
15. The Court gave the appellant leave, only on the question of whether or not the primary Judge erred in his consideration of the section 95(4) factors, that is whether or not the release was to her advantage, financially or otherwise, whether or not it

was prudent, fair and reasonable and whether she had taken legal advice and given consideration.

Cross Appeal

16. The defendants then filed a cross appeal that in the event that the court set aside the releases, that formed two of the orders, then all of the orders must be set aside. Part of the orders was an order for the \$20,000.00 that had already been paid.

Kelly v Kelly [2019] NSWSC 994

17. The matter of *Kelly v Kelly* [2019] NSWSC 99 involved a question about the approval of an inter vivos release. A son brought a claim against his father's estate, which passed to his mother upon his death. A settlement was reached where he was to receive \$215,000.00 but had to provide releases in respect of both his father and his mother's estates.
18. The Judge was reluctant to approve the release as he was not satisfied that the plaintiff understood what he was giving up and there was no evidence as to the value and nature of the defendant's estate (that is, the mother that was still alive).
19. The parties agreed on a partial release which is permitted under section 95 of the *Succession Act 2006* (NSW) in which the plaintiff released his rights to make any family provision claim with respect of the four fifths estate that went to his other siblings.
20. This case shows that when a court is called upon to approve a release, it must look at what the person is giving up and whether they understand it and whether it is fair and reasonable.

Austin v Austin [2019] NSWSC 1397

21. *Austin v Austin* [2019] NSWSC 1397 was another case which involved an inter vivos release.
22. A wife inherited a substantial fortune from her grandfather in circumstances where the wife was concerned that the money that she inherited from her family, in the event that she died would pass to her husband and that he may remarry and the wealth would then pass to persons not related to her.
23. An application was made for approval of releases that the husband would make in relation to the wife's estate so that he would release any right to make any family provision claim in respect of the whole of his wife's estate.

24. Eventually it came out in a will that he was receiving right of residence in a property and was the object of a discretionary testamentary trust. It became apparent that being an object of a discretionary trust does not give certainty of income and the question of whether or not she could change her will had not been fully explored or fully appreciated by the husband. In those circumstances, a partial release was adopted.

Court of Appeal

25. Any person whose estate or property is going to be the subject of a designating order, has to be joined as a party to the proceedings. A notice of motion was filed and Portia Robinson was joined in the proceedings both retrospectively at trial and also in the Court of Appeal in line with the case of *Mulcahy v. Curramore Pty. Ltd.* [1974] 2 NSWLR 464.
26. In determining whether a release should be approved, the court must make enquiry as to whether or not the section 95 factors are, from the plaintiff's point of view, satisfied.
27. On appeal, the appellant's position was that on the material before the trial judge, there was not sufficient material that the judge could properly exercise his discretion to approve the release. Ultimately, Justice Ward, the appeal judge held that this was incorrect and that on the basis of the material before Justice Pembroke, that he could properly exercise discretion.
28. Justice Ward made the point that Justice Pembroke had sufficient material so as to establish the pool of assets. There was also clear evidence that the judge was aware that there had been wavering consent on behalf of the appellant, in the sense that she had from time to time altered her position. However, as the judge had given the appellant the opportunity to have the matter explained to her by her own counsel and had evidence that she did, there was enough material, in the appeal judge's opinion to make an assessment that in view of all the circumstances, that it was prudent, reasonable and fair to approve the release.

Takeaways

29. It is important for a solicitor to make sure that the person who is providing the release really understands just what it is that they are giving away. They need to put that in affidavit evidence so that it is clear to the judge that person understands what they are doing.

30. A solicitor should concentrate their mind on what releases are needed, ie whether it is a release which is simply against the deceased person's estate or whether a release is also needed in respect of a living person. It is also important to focus on what precise release is needed, whether it be a general release of any claims against the estate or whether it is a more restricted form of release.

BIOGRAPHY

Andrew Stevens

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Andrew practices in Equity and Succession Law, including probate, family provision, contested estates and equity claims. Andrew presents at Continuing Professional Development seminars in the topic of succession law. Andrew has achieved a Masters in Laws majoring in Wills & Estates. Andrew worked as a paralegal and solicitor prior to coming to the NSW Bar.

John Armfield

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John specialises in estate litigation. He has been listed in Doyle's Guide as a pre-eminent junior counsel in Wills and Estates Litigation in 2019, 2018, 2017 and 2015. He regularly acts as a mediator with respect to family provision claims, regularly advising and appearing for plaintiffs and estates in relation to matters in the Equity Division of the Supreme Court of New South Wales. John has extensive experience also representing clients at mediations and informal settlement conferences. His practice has a strong emphasis on probate, family provision applications and will construction. He has also appeared in applications seeking a review of orders allowing commission to executors. John regularly presents papers at legal conferences in relation to wills and succession law and was recently a keynote speaker for the Society of Trust and Estate Practitioners (STEP) of which he is a member in Hobart.

REFERENCES

Legislation

Succession Act 2006 (NSW).

Cases

Robinson v Robinson (2020) NSWCA 4.

Kelly v Kelly [2019] NSWSC 99

Austin v Austin [2019] NSWSC 1397

Mulcahy v. Curramore Pty. Ltd. [1974] 2 NSWLR 464