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Précis Paper

Family Provision Applications

This is a further edition in our series of cases about family provision applications. Jennifer Beck brings a unique perspective to this important and interesting area of law.

Discussion Includes

- What are the requirements for a family provision order under Chapter 3 of the *Succession Act 2006* (NSW)?
- What is the nature of the requirement in s 59(1)(c) that the Court be satisfied that the applicant has been left without adequate provision for his or her proper maintenance, education or advancement in life?
- Is this a jurisdictional question?
- Are community standards taken into account in answering the s 59(1)(c) question? If so, how is the court informed as to those community standards?
- Is it still correct to say family provision applications involve a two-stage test, the first dealing with a factual jurisdictional issue, and the second dealing with the (judicial) exercise of a discretion?
- What are Hallen J's principles relating to family provision claims by adult children?
- What principles does the court follow regarding costs in such cases?

Précis Paper

Family Provision Applications

1. In this edition of BenchTV, Jennifer Beck (Barrister and Mediator) and Ian Benson (Solicitor) discuss two Supreme Court of New South Wales decisions dealing with family provision applications: *Estate Raineri* [2016] NSWSC 489 and *Sung v Malaxos* [2015] NSWSC 186. Ms Beck acted for the successful defendants in both proceedings.

Material Facts of *Estate Raineri* [2016] NSWSC 489

2. In the case of *Estate Raineri* [2016] NSWSC 489, there were three adult children and the oldest and the youngest of the three children sued the mother's estate. Essentially, the applicants were provided with 20% of their mother's estate each, whereas the brother who was the executor of the estate was provided with 60% of the estate. The estate was essentially made up of a property which was sold the day before the hearing for $1.84 million.

Requirements for a Family Provision Application

3. There is a time limit of 12 months for a family provision application to be made, according to s 58(2) of the *Succession Act 2006* (NSW). An extension of the time period by consent is not permitted under the new Act, however the court can make an order to extend the limitation period. In any event, the *Raineri* case was brought well within the 12 month period.

4. The requirements for a family provision order are set out under s 59 of the *Succession Act*:

SECTION 59:

When family provision order may be made

(1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:

(a) the person in whose favour the order is to be made is an eligible person, and

(b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of "eligible person" in section 57-having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and

(c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.

(2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.

...

5. The first requirement is that the plaintiff must be an "eligible person". An eligible person is defined under s 57(1) of the *Succession Act* and clearly includes children of the deceased (s 57(1)(c)). There are six possible categories of eligible persons:

SECTION 57:

Eligible persons

(1) The following are "eligible persons" who may apply to the Court for a family provision order in respect of the estate of a deceased person:

(a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,

(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,

(c) a child of the deceased person,

(d) a former wife or husband of the deceased person,

(e) a person:

(i) who was, at any particular time, wholly or partly dependent on the deceased person, and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,

(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

6. The second requirement, according to s 59(1)(c) of the *Succession Act,* is that inadequate provision was made for the proper maintenance, education and/or advancement of the plaintiff in their lives. Traditionally, this is known as the jurisdictional threshold or the first stage of a two-stage test. The approach required is evaluative, taking all the circumstances into account including competing beneficiaries of the estate, the size of the estate and particular applicants.

7. If both requirements are satisfied, the court can make an order on what provision is to be made out of the estate of the deceased, This is the second stage of the two-stage test and is a discretionary exercise,

8. At both stages of the process, the matters referred to in s 62 of the *Succession Act* need to be taken into account:

SECTION 62:

Interim family provision orders and orders restraining distribution of the estate

(1) The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order.

(2) After making an interim family provision order, the Court must proceed to finally determine the application for a family provision order by confirming, revoking or varying the interim order.

(3) The Court may make an order restraining the final or partial distribution of an estate (other than a distribution under section 94 (1) of this Act or section 92A of the Probate and Administration Act 1898) pending its determination of an application for a family provision order.

9. While the courts still use the two-stage test from *Singer v Berghouse* [1994] HCA 40; 181 CLR 201, there is, however, debate over whether the test is still relevant today.

Arguments and Findings in *Estate Raineri* [2016] NSWSC 489

10. In *Raineri*, Ms Beck argued that the plaintiffs never identified sufficient 'need' under s 59(1)(c) since they were both materially well-off people. The plaintiffs owned multi-million dollar properties without any mortgages, one of them had a second holiday home, both had various cars, cash in their bank accounts (around $100,000) and both were in permanent relationships. Moreover, both were left with $330,000 from the mother's estate. Thus, the plaintiffs were not able to overcome the jurisdictional threshold. In Ms Beck's view it was a simple case that probably should have never gone to a hearing,

11. The court discussed the mode of life in their judgment, implying that a poor beneficiary may be treated differently from a rich one. Ms Beck notes that while the words "maintenance" and "advancement in life" are not defined in the Act, maintenance can imply a continuation of lifestyle, which can be anywhere from 'bare bones' to just short of complete and sheer luxury.

12. The counsel for the plaintiffs argued that they should be entitled to more from the estate for "cheese and jam", which is an expression that comes from the High Court case *Blore v Lang* [1960] HCA 73; 104 CLR 124. That case involved a married woman with a healthy husband in satisfactory employment who supported her in reasonable comfort and her need was said not to be one of "bread and butter" but to be for "a little of the cheese and jam that a wise

and just parent would make in the circumstances". However, Ms Beck notes that it is not a submission that should be lightly made and the courts do not look happily upon a claim for "cheese and jam".

13. The judge in *Raineri* noted that the case was run on the basis of "unfairness", that is the applicants both felt that they should be treated equally with their brother as they were all dutiful loving children. The applicants thus felt very deeply aggrieved and hurt. Unfortunately, there is not a test of unfairness.

14. Ms Beck notes that it is important to identify some other reason that demonstrates need (over and above the amount granted by the estate) such as very serious health problems, a mortgage, or no savings in the bank.

15. A possible reason for why the middle child was favoured in the will was that he had a long history of depression and mental instability as well as problems with some of his own dependent children. This was a case where each of the adult children were dutiful and loving to their mother and each were in close daily contact with the mother right up to her death. This mother was very well aware of each of the three circumstances of each child and in that case, the problems experienced by the middle child were enough to make the disposition of the will understandable.

16. The final result in the case was that both the applicants' summons were dismissed. His Honour found that they were materially well-off and did not change the will.

<u>General Principles Applicable to a Family Provision Claim by Adult Children</u>

17. The general principles applicable to a family provision claim by adult children were stated by Hallen J in *Camernik v Reholc* [2012] NSWSC 1537:

> In relation to a claim by an adult child, the following principles are useful to remember:
>
> (a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.
>
> (b) It is impossible to describe in terms of universal application, the obligation, responsibility, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life, such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set

his, or her, children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation: *McGrath v Eves* [2005] NSWSC 1006; *Taylor v Farrugia* [2009] NSWSC 801.

(c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death if he or she is able to do so. But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute: *Taylor v Farrugia*.

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant: *Re Buckland Deceased* [1966] VicRp 58; [1966] VR 404 at 411; *Hughes v National Trustees Executors and Agency Co. of Australasia Ltd* [1979] HCA 2; (1979) 143 CLR 134 at 148; *Goodman v Windeyer* at 498, 505. But the Act does not permit orders to be made to provide for the support of third persons to whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons: *Re Buckland Deceased* at 411; *Kleinig v Neal* (No 2) [1981] 2 NSWLR 532 at 537; *Mayfield v Lloyd-Williams*, at [86].

(e) There is no need for an applicant adult child to show some special need or some special claim: *McCosker v McCosker; Kleinig v Neal (No 2),* at 545; *Bondelmonte v Blanckensee* [1989] WAR 305; and *Hawkins v Prestage* (1989) 1 WAR 37 per Nicholson J at 45.

(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: *MacGregor v MacGregor* [2003] WASC 169 (28 August 2003) at [181], [182]; *Crossman v Riedel* [2004] ACTSC 127 at [49]. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant: *Marks v Marks* [2003] WASCA 297 at [43]. In addition, if the applicant is unable to

earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: *Christie v Manera* [2006] WASC 287; *Butcher v Craig* [2009] WASC 164 at [17].

(g) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim: *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* at 149.

18. None of these factors were applicable in the case of *Raineri*.

Costs in *Estate Raineri* [2016] NSWSC 489

19. Costs generally follow the event. In the case of *Estate Raineri* [2016] NSWSC 489, his Honour ordered indemnity costs against the applicants. As a Calderbank offer was made early in the proceedings, the indemnity costs came for a significant amount of time. Ms Beck notes that Calderbank offers should be used more often, especially by executors, since if a party is successful they have a good chance of getting indemnity costs.

20. It is not the case that whether or not a plaintiff loses or wins, the costs will come out of the estate. In this case, the executor's costs did not come out of the estate, but rather the failed applicants had to pay the executor's costs on an indemnity basis. Ms Beck notes that this is a very unpleasant situation to occur in a family context.

Duty of the Executor

21. As a general rule, the executor will secure their costs out of the estate on an indemnity basis. But it should be noted that an executor does not have to defend every case that comes their way. The executor does have a duty to uphold the will, but in some cases it is better to take a case to mediation and agree to a sensible settlement rather than wasting the funds in the estate. An example of this occurred where a testatrix had two dependent adult children living in her house (one unemployed and had been her carer and the other had significant difficulties and was under a Guardianship Order) and the testatrix gave her children a life estate in the house but the body of the estate went to all the grandchildren. In that case, the dispute was settled in mediation rather than taking the matter to a hearing. The executor should make a sensible assessment in each and every case.

Mediation

22. Ms Beck believes the mediation process is an outstanding way of resolving family provision disputes. In *Raineri*, which went to a hearing, a brother and a sister had to pay about $75,000

in costs to their brother, which is likely to cause ongoing bitterness within the family. Thus, Ms Beck recommends settling at a mediation to prevent such bitterness.

Sung v Malaxos [2015] NSWSC 186

23. The case of *Sung v Malaxos* [2015] NSWSC 186 involved a de facto applicant who had lived with the testator for 26 years up until his death. The testator left a third of the estate to the de facto and two thirds of the estate to his only daughter. The testator had maintained a very close relationship with his daughter even though he had divorced the daughter's mother many years ago. The applicant felt aggrieved that she had not been left the entirety of the estate and wanted to invert it so that she received two thirds and the daughter one third. There was no dispute that the applicant was a de facto, but they had met when the deceased was in his early 60s where he had already built up his wealth and estate on his own and the de facto had played no part in building up the wealth of his estate. The de facto also had independent means as she was a full time social worker on just under $100,000 per year, had several hundred thousand dollars' worth of superannuation and a home in Queensland. The testator made a very sensible split in his eyes as his daughter was struggling since her husband had become unemployed with very little hope of gaining employment in the near future.

24. There is a misconception that a de facto should be the primary object of benefaction. This is not the case. It is necessary to look at each case on its merits. It would be ridiculous in a traditional husband and wife scenario, where the husband had worked while the wife stayed home raising several children, for the testator to leave two thirds to the children and one third to the wife as the wife had helped build up the wealth of the family and the children should wait their turn. That scenario can be contrasted to the de facto relationship in this case, where the couple had no children together and had kept their finances separate throughout their relationship. Moreover, it was an unusual relationship since she had kept a room in Paddington through the entirety of their relationship and she would take holidays separately from him.

25. Calderbank offers were sent out very early in this case and indemnity costs were again awarded against the unsuccessful applicant.

26. Testamentary freedom is paramount in this area. The father was uniquely positioned to know the particular trials and tribulations with which his own daughter, whom he had a very close relationship, was undergoing. Thus, it was not appropriate for the judge to change the father's will.

De Facto Relationships

27. A de facto does not have to live with the testator. It can be the case that each member of the relationship have their own separate residences and they can still be considered as in a de facto relationship. In a recent case that Ms Beck was involved in, which settled at mediation, the applicant who was the de facto wife partner, had her own separate residence at all times and the testator also had his own residence. They had at some point lived together but that was many years ago. They had been a couple for 12 years and had shared every aspect of each other's lives. They spent all of their time either at one or the other partner's house. Their lives were inextricably joined together. The applicant had been left nothing under the will, all being left to the testator's sister. The case was happily settled in mediation.

28. In another case, a young girl of Greek origin was living with her parents but frequenting at her de facto partner's home three nights a week. She was considered a de facto due to the way they had held themselves out to the public at large.

Advice to Practitioners

29. When making a will for someone, a lawyer needs to ascertain from them the familial context in which they operate, including how many children they have. If the testator is leaving one of the children out of the will, a lawyer needs to explain to them the *Succession Act* and the consequences therein. Sometimes it is sensible to leave them an adequate amount to prevent a family provision application being brought. Each case depends on the circumstances of the family including whether or not there has been estrangement, whether a child is a drug addict or whether a child has a criminal background. Ms Beck notes that it is very important to take good file notes.

30. The testator will know the circumstances of his or her own family intimately and should know who should be getting what and in what amount.

31. When taking instructions from someone who is dying, it is very important that a solicitor takes the instructions directly from the testator, not the carer or beloved. Additionally, the testator should be on their own when giving instructions and the solicitor should not permit other people to come into the room. This is because sometimes when people are dying of a terminal illness, they become very weak, often cannot stick up for themselves and can be easily overridden.

Undue Influence

32. Undue influence has traditionally not been easy to prove and it is a different concept from undue influence in equity. However, there have been some recent successful cases in the Victorian Court of Appeal and the NSW Supreme Court, but Ms Beck notes that they are few

and far between. The problem with bringing undue influence claims is that the plaintiff bears the onus of proof, and if the plaintiff cannot prove undue influence they will get a costs order against them, In Ms Beck's experience, she believes plaintiffs are better off to run a lack of testamentary capacity claim and/or a claim for lack of knowledge and approval. An undue influence claim differs from a claim of lack of testamentary capacity, because in an undue influence case the testator is considered to have capacity but their will has been overborne. A lack of testamentary capacity claim has the advantage that the plaintiff only needs to prove a reasonable doubt as to the testator's capacity and then the burden of proof falls on their opponent to prove that they had capacity when providing instructions and/or executing the will. The same applies with a lack of knowledge and approval claim.

BIOGRAPHY

Jennifer Beck

Barrister, Clarence Chambers – Sydney

Jennifer Beck was admitted in 1996 before being called to the Bar in 2008. She is a mediator, having completed her training with the Institute of Mediators and Arbitrators in 2008. She has been appointed to the Westpac Industrial Relations Arbitration Panel (2012), and the Local Court of New South Wales as an Arbitrator. Ms Beck was appointed to the Farm Debt Mediation panel (2013, reappointed in 2016), the Supreme Court of New South Wales mediation panel (2013, reappointed in 2016) and the District Court Mediation Panel. She has served as a Judge in the Chinese International Court Competition for the past 5 years held each year in China, in 2012 (Beijing), 2013 (Beijing), 2014 (Shanghai). 2015 (Beijing), and 2016 (Suzhou).

Ian Benson

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

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