



Précis Paper

Family Provision Claims by Stepchildren

Bill Washington discusses a family provision application by a stepchild who had fallen out of contact with the deceased.

Discussion Includes

- Claims against an intestate estate that would otherwise be bona vacantia
- The importance of identifying other potential family provision claimants
- Section 57 of the *Succession Act 2006* (NSW) - eligible persons to make family provision claims
- Section 60 of the *Succession Act 2006* (NSW) - the relevant factors in determining whether a claimant is deserving of a family provision order
- Time limits on family provision claims
- What duties does a legal representative owe a potential family provision claimant?

Précis Paper

Family Provision Claims by Stepchildren

1. In this edition of BenchTV, Mr Bill Washington (Barrister) and Mr Ian Benson (Solicitor) present on succession law, with particular reference to the Supreme Court of Australia's (Lindsay J) decision in *Re Estate of Ian McDermott; Application of Aiveh Ahmad* [2015] NSWSC 595 in which Mr Washington successfully acted as Counsel for the plaintiff.

Background to *Re Estate of Ian McDermott; Application of Aiveh Ahmad* [2015] NSWSC 595

2. The plaintiff was the daughter of the deceased's former wife. Despite a loving relationship at first, the plaintiff and the deceased eventually became estranged during her teen years. The deceased had died intestate and his Estate was bona vacantia (the government has a right to the property of the deceased where the deceased died leaving no spouse, parents, siblings etc.).
3. The applicant was an eligible person as "a member of the household" under s 57 of the *Succession Act 2006* (NSW) to make an application for a family provision order in respect of the estate of a deceased person. The only other person who was possibly an eligible person was the applicant's mother, but she declined any interest in the proceedings.

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.*

4. Mr Washington notes that in these cases, the plaintiff would have to demonstrate, in great detail, the extent of the closeness of the relationship. The mere fact that the plaintiff was an "eligible person" would not have been sufficient. Mr Washington discusses the various entitling factors taken into account by the court under s 60(2) of the *Succession Act*:

SECTION 60:

Matters to be considered by Court

- (1) *The Court may have regard to the matters set out in subsection (2) for the purpose of determining:*
- (a) *whether the person in whose favour the order is sought to be made (the "applicant") is an eligible person, and*
 - (b) *whether to make a family provision order and the nature of any such order.*
- (2) *The following matters may be considered by the Court:*
- (a) *any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,*
 - (b) *the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,*
 - (c) *the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,*
 - (d) *the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,*
 - (e) *if the applicant is cohabiting with another person-the financial circumstances of the other person,*
 - (f) *any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,*
 - (g) *the age of the applicant when the application is being considered,*
 - (h) *any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,*

- (i) *any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,*
- (j) *any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,*
- (k) *whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,*
- (l) *whether any other person is liable to support the applicant,*
- (m) *the character and conduct of the applicant before and after the date of the death of the deceased person,*
- (n) *the conduct of any other person before and after the date of the death of the deceased person,*
- (o) *any relevant Aboriginal or Torres Strait Islander customary law,*
- (p) *any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.*

5. In addition to the matters listed under s 60 to determine whether the person in whose favour the order is sought to be made is an eligible person, and whether to make a family provision order and the nature of any such order, the Court can take into account any other matters it considers relevant: *Lumsdon v Gargano* [2012] NSWSC 116g.
6. Mr Washington notes that none of the matters listed under s 60 is necessarily of decisive significance and the weight of such matters will depend on the facts of the particular case.

How did these Considerations Affect the Proceedings in *Re Estate of Ian McDermott*?

7. In this case, the plaintiff was able to 'tick all the boxes'. It was necessary to provide full evidence by way of affidavit to satisfy the Court that the applicant was not only entitled as an "eligible person" but also deserving of the award. Mr Washington notes that the fact that the plaintiff was previously close to the deceased, organised the funeral and was of modest means were determinative factors. Additionally, Mr Washington notes that Lindsay J focused on the quality of the individual relationship and the reasons for estrangement, rather than looking at broader community standards. Relevantly, he quotes Lindsay J's judgment at [17] as below:

The evidence adduced by the plaintiff in support of her summons for the family provision relief establishes, to use a colloquial expression, that she not only has a familial claim on the estate of the deceased, but she has been left with a substantial need for assistance. That need is of an order that totally subsumes the available estate.

8. Mr Washington propounds the "*Ahmad test*" in which a close familial relationship over a period of time combined with need, will displace bona vacantia.

Time Limit of Applications

9. Under s 58 of the *Succession Act*, applications are to be made no later than 12 months from the date of death. Mr Washington notes that this is of particular importance as the previous legislation provided a time limit of 18 months from the date of death. The provisions of s 58 are set out below:

SECTION 58:

When an application may be made

- (1) An application for a family provision order may be made whether or not administration of the estate of the deceased person has been granted.*
 - (2) An application for a family provision order must be made not later than 12 months after the date of the death of the deceased person, unless the Court otherwise orders on sufficient cause being shown.*
 - (3) An application is taken to be made on the day it is filed in the Court's registry.*
10. Mr Washington further explains that an out-of-time application will be entertained, but the question of whether an extension of time will be granted is to be decided at the same time as the hearing of the substantive application. This is because the courts have said that it is not possible to determine all the factors of entitlement to an extension of time, without hearing the whole case. Mr Washington warns that parties may run into the problem of paying a substantial sum to run the whole case, only to find that the extension of time is not granted.

The Duties of Solicitors and Executors to Potential Third Party Claimants

11. Finally, Mr Washington considers the duties of solicitors and executors in relation to administering Estates.
12. The executor's duty is to the beneficiaries to administer the Estate in accordance with the will and inform them of any potential claims from third parties. The executor should disregard the interests of a third party who is external to the processes of administering the Estate.
13. The solicitor for the executor only has a duty to the executor in relation to the administration of the Estate. This does not include a duty in relation to extraneous claims, but will include a duty for claims made by creditors under s 92.

BIOGRAPHY

Bill Washington

Bill Washington was awarded a Bachelor of Law and Diploma in Juris Prudence from Sydney University. He practised as a Solicitor in New South Wales for 25 years, principally in litigation and commercial law, and gained wide experience in rural issues. He was accredited by the Law Society as a specialist in both criminal law and business law. He was called to the Bar in 1999 and was a member of 11 Garfield Barwick Chambers.

Mr Washington sadly passed away after the recording of this presentation.

Ian Benson

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

BIBLIOGRAPHY

Focus Case

Re Estate of Ian McDermott; Application of Aiveh Ahmad [2015] NSWSC 595

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_21-05-2015_banking.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/553d7913e4b0a12bb972fe73>

Cases

Lumsdon v Gargano [2012] NSWSC 1169

Legislation

Succession Act 2006 (NSW)