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Précis Paper

Family Provision in Deceased's Estate

Leary v NSW Trustee and Guardian [2017] NSWSC 111

The plaintiff in this matter brought an application for provision, on the basis that he had been left without adequate provision. Whether or not a plaintiff has been left without adequate provision is a threshold question which necessarily requires the Court to be satisfied that it has been presented with as full and frank account of the plaintiff's financial and material circumstances as possible.

Discussion Includes

- Factual Background
- The Hotchpot Clause
- Inadequate Provision
- Full and frank disclosure of a plaintiff's financial and material circumstances
- Recommended standard procedures for practitioners
- Costs
- A plaintiff's criminal conviction

Family Provision in a Deceased's Estate

In this edition of BenchTV, Greg J Smith (barrister) and John Armfield (barrister) discuss the recent case of *Leary v NSW Trustee and Guardian* [2017] NSWSC 111 and the need for full and candid disclosure of a plaintiff's financial circumstances.

Factual Background of *Leary v NSW Trustee and Guardian* [2017] NSWSC 111

The deceased was survived by her husband, four adult children, and 12 grandchildren. By her Will, the deceased gave gifts to her surviving 12 grandchildren (of approximately $13,000 each), with a further legacy of $2,000 to such of her 12 grandchildren as shall attain the age of 21 years. The deceased then gave the rest and residue of her estate on trust for her four children in equal shares as tenants in common. The size of the estate was approximately $3.5 million. The deceased executed 2 Statutory Declarations on the same day she made her Will, one of which explained why she had not made provision for her husband who was living in a nursing home, suffering from advanced dementia and comfortably provided for by a discretionary family trust. Her husband died about 6 months after the deceased.

The Hotchpot Clause

The Will contained a 'hotchpot clause'. These are commonly used by a testator when they have made advances to one or more of their children during their lifetime, to take into account and balance such 'inter vivos' provision as between the children. It is a kind of "equalising" clause where moneys which have been given to someone during the deceased's lifetime are offset against the provision made for them in the Will.

The hotchpot provision was referred to at [5] in the judgment to the effect 'that particular amounts of money, described as "money paid or advanced" to her children or paid for their benefit "or paid as a result of their actions during [her] lifetime", be taken into consideration in determining the extent of their shares in her residuary estate, and further directed that they be brought into account on the distribution thereof.'

But for the hotchpot clause, each child would have received something in the vicinity of $850,000. The four children were affected by the clause as follows:

- Suzanne had received no advances or adjustments
- Andrew had borrowed approximately $372,000 which he acknowledged
- James had borrowed approximately $102,000 which he acknowledged
- John (the plaintiff) – approximately $551,000 had been paid by the deceased in relation to legal costs for John and other legal costs incurred as a result of his actions. He would therefore receive something like $280,000 after the adjustment of $551,000.

The clause was drawn in a way which was wide enough to bring these moneys into account. Additionally, the other of the 2 Statutory Declarations, made by the deceased on the same day as her Will, set out her explanation of and matters relating to the Hotchpot Clause.

Inadequate Provision

John, the plaintiff, brought an application for provision, on the basis that he had been left without adequate provision, arguing that:
(1) He was impecunious (and a homeless, disability pensioner); and that,
(2) The adjustment of $551,000 to his share of residue under the hotchpot clause was not spent on his behalf or at his behest.

Whether a plaintiff has been left without adequate provision is a threshold question. The application was ultimately dismissed on the basis that Ward CJ in Eq could not be satisfied that the plaintiff had presented a full and frank account of his financial and material circumstances.

Full and frank disclosure of a plaintiff's financial and material circumstances

When you are acting for an estate, you need to ascertain whether a plaintiff is being candid in terms of his or her financial and material circumstances and as to what those circumstances really are. Legal practitioners, on both sides of the record, require documentary evidence of what the plaintiff and the beneficiaries' circumstances are.

As a defendant, the following steps can be taken to test a plaintiff's true financial circumstances:

- Parties provide lists of categories of document (to be inspected) to each other by certain dates, often in accordance with Court directions but which are normally only made in relatively large estates
- Issuing of a Notice to Produce for Inspection
- Issuing of a Notice to Produce to the Court
- Issue of subpoenas

Key classes of documents that need to be requested, or the subject of a formal Notice, in order to properly evaluate a person's circumstances, normally include:

- Tax Returns (from 2-3 last years)
- Bank & Building Society statements (from last 3 years)
- Credit Card Statements (from last 2 or 3 years)
- Life Insurance Statements (last year)
- Superannuation Fund Statements (at least last year)

These assist in both the general preparation for mediation and hearing, and in making an assessment of what the plaintiff's circumstances (and competing beneficiaries' circumstances) and real need are. There is also a forensic use if nothing is produced. One would expect these documents exist and, in the absence of them being produced - or an explanation as to why they were not produced - a finding of inadequate provision cannot be easily or readily made.
This is what occurred in *Leary*. At [104] of the judgment:

> ...I am not satisfied that John has presented a full and frank picture of his personal and financial circumstances so as to permit a conclusion on the threshold question.

Similarly, at [105]-[106] Ward CJ in Eq stated at [105]-[106]:

> In *Collings v Vakas*, the application for family provision was dismissed in circumstances where a crucial element of the applicant's financial situation (her income and expenditure) had not been satisfactorily proved. In that context, his Honour said (at [67]):
>
> > ...**before a court can be satisfied that a plaintiff was left without adequate provision, the court needs to be persuaded that it has been presented, at least in broad outline, with the whole picture concerning the plaintiff's financial situation** (emphasis added).
>
> Having regard to the evidence before me, including the evidence of John in the witness box, I am not satisfied that the whole picture concerning John's financial position, even in broad outline, has been truthfully put before me and on that basis, as adverted to earlier, the application for provision should be dismissed.

In relation to the plaintiff John's evidence that he had gambled away at least $200,000 (which he withdrew from one bank account, as evidenced by subpoenaed documents, 3 weeks prior to the hearing), her Honour noted that if that evidence was accepted, 'at least insofar as that was intended or calculated by him to improve his position' it would be a clear abuse of the process of the Court. Her Honour went on to say at [60]:

> ....It surely cannot be the case that the legislature contemplated (when appointing the time of the making of an order for family provision as the time at which adequacy of provision is to be assessed) that someone who had held substantial assets (which, if retained, might lead to the conclusion that there had been adequate provision made for him or her) could by his or her own deliberate conduct divest those assets in the weeks leading up to a hearing so as to improve (or establish) an argument as to inadequacy of provision.

Recommended procedures for practitioners

Family provision orders are about the dollars and cents, and what is proper and adequate provision. Affidavits should include evidence such as to determine the cost of the provision sought. A Family Provision Checklist can be provided to clients to assist them in correctly disclosing his or her (and, if applicable, their partner's):

- Average Monthly Income
    - salary
    - wage
    - pensions
    - child support
    - interest
    - superannuation
    - dividends
    - other

-Details of their assets and liabilities

-Average Monthly Expenditure

- rent/mortgage payments
- council and water rates
- electricity, gas, telephone and other utilities
- other regular outgoings including, groceries, medical expenses, motor vehicle expenses, and so on

This information needs to be included in a plaintiff's affidavit (the form of which is annexed to Practice Note SC Eq 7). It is useful both from the point of view of intelligibility of the affidavit, and for establishing the jurisdictional foundation of any inadequacy of provision. It is important to tell the client to bring in supporting documents to confirm that the information, he or she has provided, is correct. Clients should be told upfront that their evidence about their financial circumstances will be tested by notices to produce and subpoenas. Judges will dismiss plaintiffs' claims if they cannot work out what their true financial circumstances are.

Evidence quantifying the provision a Court might make for a plaintiff involves a consideration of:
(1) The plaintiff's circumstances; and,
(2) The circumstances of the estate; and,
(3) The circumstances of the other beneficiary/beneficiaries.

Importantly, a plaintiff should give evidence as to the nature and cost of the provision sought by him or her. That evidence is always and inevitably more important to the Court than what was said at the kitchen table in 1989 and or who mowed the lawn for the deceased.

Some examples of material that is useful and important to include, if relevant, in a plaintiff's evidence to set out and quantify the type of provision the Court might make, include:

A lump sum case:

- Motor vehicle quotes
- Renovation quotes
- Medical circumstances (initially, evidenced by a letter from their GP)
- Whether their medicines are covered by social welfare payments or they have a deficiency, and or the cost of private health insurance
- Life expectancy and the cost of likely future contingencies, including care
- Other general and specific needs

Evidence of the cost of specific needs that a plaintiff may have beyond a lump sum payment for contingencies of life or exigency, include the:

- Value of what appropriate accommodation would be, including conveyancing costs and any stamp duty if applicable

In relation to the way in which parties may give evidence as to the cost of real estate and so on, see Paragraph 21 of PN SC Eq 7.

The Hon. Justice J C Campbell, writing extra-judicially, stated that costs in *Family Provision Act* applications are "getting out of hand" and are (often) "disproportionate to the amount at issue". His Honour identified that practitioners regularly draft affidavits which go into the most minute detail of family circumstances, largely irrelevant to the Court's determination. His Honour advanced an opinion that the facts which are by far the most important ones can be set out succinctly.

<u>Costs</u>

Calderbank offers are an offer of settlement expressed to be 'without prejudice save as to costs'. A Calderbank letter (*Calderbank v Calderbank* [1975] 3 All ER 333) leaves the party seeking to rely on the offer, as to cost consequences, in a position where it must satisfy the Court that the offer was reasonable in all the circumstances. This is distinct to offers of compromise made under UCPR Pt 20, where resulting costs orders are almost automatic (pursuant to UCPR Pt 42), although they are still in the discretion of the Court.

In the costs judgment, Ward CJ at Eq (*Leary v NSW Trustee and Guardian (No 2)* [2017] NSWSC 1226) identified at [4] that the defendant had made a Calderbank offer, on the eve of the hearing, to the effect that the proceedings be dismissed with no order as to the plaintiffs costs with the defendant's costs to be borne out of the estate – that is on the day that the plaintiff John had filed his affidavit which had disclosed his (allegedly) true circumstances – and had previously made formal offers of compromise pursuant to Pt 20 of the UCPR. The plaintiff was ultimately and effectively ordered to bear his own costs of the whole of the proceedings and pay the defendant's costs on an indemnity basis up to and including the day he filed his affidavit on the eve of the hearing.

An executor defendant is virtually indemnified for their reasonable costs, unless they do something incredibly ridiculous.

A plaintiff's criminal conviction

The plaintiff John, amongst other less serious convictions, had been convicted of abducting and holding one of his children for ransom and was sentenced to 15 months' imprisonment with a non-parole period of 3 months and 12 days. This followed him taking the infant child through various Asian countries over a period of 5 months and demanding more than $1 million dollars in ransom from the child's mother, prior to his arrest in Thailand. In one of her Statutory Declarations, the deceased stated "His criminal activities have cost me more than half a million dollars, not to mention the worry and sadness."

Whether a plaintiff has been convicted of a criminal offence is a relevant factor but not prohibitive. The fact that someone has been convicted of a crime is not of itself a complete bar to an order for provision. It depends on the circumstances and how it impacts overall on the case for provision.

In *Curran v Harvey* [2012] NSWSC 276, where the plaintiff stepdaughter was found to have been sexually abused by the deceased over a period of decades and had admittedly been a drug addict and incarcerated on many occasions, Hallan AsJ (as his Honour then was) amongst other provision, made a type of probationary provision for the plaintiff to the effect that:

"A further $50,000 (of the $250,000), together with any interest accrued thereon, should be paid to her at the end of each 12 month period that she remains out of prison. It follows that if she is able to stay out of prison for four consecutive 12 month periods, she will have received the balance of the capital sum.
If she is incarcerated at any time, the 12 month period before she will be entitled to the amount of $50,000, together with the interest accrued thereon, will commence on the day of her release from prison."

His Honour at [245] further stated:

"I appreciate that the order I am proposing is an unusual one and the precise form will require some further consideration by the parties' legal representatives. However, it is not without

precedent. As will be appreciated, what I have proposed is based on the type of order made by Young J (as his Honour then was) in *Hoadley v Hoadley* (Supreme Court of New South Wales, 17 February 1987, unreported)."

BIOGRAPHY

Greg J Smith

Barrister – Second Floor Wentworth Chambers, Sydney

Greg was admitted as a solicitor in 1995 and was accredited by the Law Society of New South Wales as a Specialist in Wills & Estates in 2002. Prior to going to the Bar in 2011, he worked for 14 years as an advocate solicitor specialising in family provision, equity, probate, protected estates and property litigation for various firms simultaneously. Before that, Greg was a solicitor at the Permanent Trustee Company and a Legal Officer at the Public Trustee where he wrote the probate practice and procedure manuals. From 2012 to 2014, Greg was the Lecturer in 'Family Provision' in the Masters of Applied Laws program at the College of Law.

John Armfield

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John was admitted to the NSW Bar in 1983. In addition to his work as a court-appointed mediator, John regularly appears in the Equity Division of the NSW Supreme Court and is a member of the Society of Trust and Estate Practitioners. He has been involved in a large number of speaking engagements regarding Wills & Probate matters and Estate Mediation.

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Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_25-08-2017_banking.pdf

Judgment Link

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Hastings v Hastings [2010] NSWCA 197 (at first instance *Hastings v Hastings* [2008] NSWSC 1310)

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Hoadley v Hoadley (Supreme Court of New South Wales, 17 February 1987, unreported)

Legislation

Succession Act 2006 (NSW), ss 57, 59 and 60

Uniform Civil Procedure Rules 2005 (NSW), Parts 20 and 42

Other

Supreme Court of New South Wales Equity Division, Practice Note SC Eq 7 – Family Provision

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