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Précis Paper

Competing Claims and Contributions in Family Provisions Matters

This fascinating discussion between experienced counsel David Liebhold and John Armfield considers a very common scenario in Wills & Estates law, namely, a dispute between siblings over the ownership of a family home. This case is an exception to the usual rule that a plaintiff who has seemingly received inadequate provision will be granted at least a modest increase to what was provided under the will.

Discussion Includes

- Weighing competing claims in family provisions cases
- Contributions by beneficiary
- Intersection between notional estate provisions and the concept of a competing claim
- Intersection between notional estate provisions of Succession Act and equity at general law
- Practical considerations for solicitors drafting wills where a provisions claim is anticipated
- Expenses involved in family provisions cases and consequences for estates

Précis Paper

Competing Claims and Contributions in Family Provisions Matters

1. In this edition of BenchTV, David Liebhold (Barrister) and John Armfield (Barrister) discuss the recent NSW Supreme Court (Kunc J) decision in *Woodleigh v Williams* [2016] NSWSC 979 which considered a very common fact scenario in Wills & Estates law, namely, a dispute between siblings over the ownership of a family home. Mr Liebhold successfully represented the defendants, the Estate and a son, in resisting a daughter's family provisions application.

Material Facts

2. The deceased mother owned a property with her son as joint tenants. When she died, the property passed by survivorship to the son. The mother owned various other assets but these were insignificant (with a value of approximately $20-30K) in the trial and were in fact divided equally amongst the deceased's children. The critical issue at trial was whether or not a daughter (the plaintiff) could persuade the court to designate the half share of the house belonging to the mother as a notional estate from which an order for provision could be made.

3. The plaintiff daughter had almost no assets and subsisted on a pension. The property in question had a value of $1.1M such that the total possible notional estate available was $550K.

4. Ultimately, it was held that the property that had passed by survivorship to the son had effectively been purchased by him over a number of years under arrangements that he had with his late parents. The son had actually selected the site of the property and made various financial contributions to the property and for the care of the parents. Importantly, the testator had given a statutory declaration acknowledging that the defendant had made these contributions. In the circumstances, the son's competing moral claim was so strong that the plaintiff's claim had to fail.

Legal Issues

5. The traditional approach to family provisions claims involves two stages as per *Singer v Berghouse* (1994) 181 CLR 201. The first question is: is the provision inadequate? In other words, was the plaintiff left without adequate provision for her maintenance?

6. The next question is: if the provision is inadequate, what provision does the court think ought to be made for the proper maintenance, education or advancement of the plaintiff. Section

60 of the *Succession Act 2006* (NSW) provides a series of factors for the court to take into account when determining whether to make a family provision order:

> **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:*
>
> *...*
>
> *(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,*
>
> *...*
>
> *(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,*
>
> *...*
>
> *(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,*
>
> *...*
>
> *(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.*

7. In answering the first question, the Court is required to consider the financial claims of the competing interests but also the moral claims of parties. In particular, the contributions and conduct of the parties will be taken into account in this initial assessment. Here, the estate was very small and the brother had made significant contributions to assist the mother and

father. Accordingly, the Court determined that the provision was not inadequate. In relation to the second question, although a consideration of this stage was strictly unnecessary given the finding on the first stage, the statutory declaration acknowledging the significant financial contributions of the son would similarly militate against such an order.

8. His Honour also rejected the plaintiff's claim on a number of other levels. For example, s 87 of the *Succession Act 2006* (NSW) provides:

> **SECTION 87**
> ***General matters that must be considered by Court***
>
> *The Court must not make a notional estate order unless it has considered the following:*
>
> *(a) the importance of not interfering with reasonable expectations in relation to property,*
> *(b) the substantial justice and merits involved in making or refusing to make the order,*
> *(c) any other matter it considers relevant in the circumstances.*

9. His Honour held that the injustice that would flow from an order in favour of the plaintiff effectively outweighed any claim that the plaintiff may have had in other circumstances, i.e. where the estate passed by will or windfall rather than receipt by survivorship. This was because the defendant had been involved in the acquisition and improvement of the property over many years.

10. The presenters note that this case illustrated the intersection between notional estate provisions and the concept of a competing claim. The son's efforts and financial contributions were such that his moral claim defeated the daughter's competing claim and also ensured that a notional estate order would result in substantial injustice. Effectively, the defendant was asserting that in equity the property belonged to him on a common intention constructive trust or on a promissory estoppel basis. However, it was unnecessary to make formal pleadings on these grounds because the son was already in possession of the property and was the legal owner at the time of the proceedings.

Implications

11. The presenters note that this decision should prompt solicitors who know in advance that there will be a family provisions claim, to ask the will-maker to provide a statutory declaration supporting family history and any agreements. This can be particularly important where a child made contributions which are no longer recorded in documentary evidence and can

thus be readily disputed. Such a statement by the deceased can be admissible under s 100 of the *Succession Act* in the subsequent proceedings. The presenters recommend that a statement of this kind should set out (1) the contributions that the child made, (2) the significance of those contributions and (3) the reasons why the parent has decided to make the will they have.

12. It is possible that the additional legal costs of asking a solicitor to prepare a statutory declaration may discourage will-makers from adopting this recommendation. However, the presenters note that simply recording a video of the will-maker in which the will-maker explains their reasons for distributions and their family history may provide a cheaper alternative. Evidence of this kind has taken on greater significance in light of the decision in *Salmon v Osmond* [2015] NSWCA 42 where the NSW Court of Appeal emphasised the importance of considering what the testator was trying to achieve.

13. Finally, the presenters note that it is very difficult for counsel to give advice in the family provisions jurisdiction because weak plaintiff claims will rarely be dismissed out of hand. However, *Woodleigh* was one such case and exceptional to this general rule.

14. This unpredictability will often make settlement a financially prudent option for estates faced with defending such a claim. This will particularly be the case where a plaintiff has no available assets and thus a defendant estate cannot pursue the plaintiff for the costs of an unsuccessful claim.

BIOGRAPHY

David Liebhold

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David was admitted as a Solicitor in 1992 and called to the NSW Bar in 2003. His practice is focused on succession and equity and he frequently presents papers, most recently 'Life-Changing Decisions: The Equitable Consequences of Promises and Encouragement' (University of New South Wales). David is a member of the Society of Trust & Estate Practitioners.

John Armfield

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John was admitted as a Barrister and Solicitor in NSW in 1983 and specialises in estate litigation. In addition to his work as a court-appointed mediator, John regularly appears in the Equity Division of the Supreme Court. He has been involved in a large number of speaking engagements in relation to Wills & Probate matters, Estate administration, Testamentary capacity, and Estate mediation.

BIBLIOGRAPHY

Focus Case

Woodleigh v Williams [2016] NSWSC 979

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_18-07-2016_insurance_banking_construction_government.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/57871bafe4b058596cb9d6f9

Cases

Salmon v Osmond [2015] NSWCA 42
Singer v Berghouse (1994) 181 CLR 201

Legislation

Succession Act 2006 (NSW)