



Précis Paper

Estrangement of Adult Children in Family Provision Claims

A discussion about the relevance of estrangement in considering a claim for provision under the *Succession Act 2006* (NSW).

Discussion Includes

- The plaintiff's financial circumstances
- The lack of competing claim by the defendant
- The nature of the estrangement
- The deceased's moral obligation
- The testamentary wishes of the deceased
- Advising clients in family provision claims

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Estrangement of Adult Children in Family Provision Claims

1. In this edition of BenchTV, Mark Gunning (Barrister, 9th Floor Wentworth Chambers, Sydney) and Stephen Hearne (Partner, Djekovic Hearne & Walker, Sydney) discuss the recent case of *Jodell v Woods* [2017] NSWSC 143.

Background and Material Facts

2. The plaintiff, Winifred Jodell, sought provision out of her mother's estate under the *Succession Act 2006* (NSW) ("the Act"). The defendant, Helen Woods, was the plaintiff's sister, as well as the executor of the estate and the sole beneficiary under the will. The deceased made no mention of the plaintiff in her will.
3. The deceased's husband (the plaintiff's father) passed away in 1996. The plaintiff received approximately \$80,000 from her father's estate, which represented most of the estate.
4. The deceased's estate comprised of a property worth approximately \$1.6 million, as well as an accommodation bond, cash and shares. The entire estate was valued at approximately \$2 million.

The Plaintiff's Relationship with the Deceased

5. One of the principle issues in the case was the deceased's estrangement from the plaintiff. The plaintiff accepted that she had never really had a close relationship with the deceased. Even as a child, the deceased did not treat her as a loving mother would, and their relationship always was a difficult one.
6. After the plaintiff's father's death, the relationship between the plaintiff and the deceased deteriorated. The terms of the father's will caused further difficulties between the plaintiff and her mother, and some disputes arose regarding a motor vehicle that formed part of the estate. At the time of the father's death, the deceased's will left a legacy of \$100,000 to the plaintiff. However, this will was subsequently revoked, with no provision being made for the plaintiff in the deceased's final will. The presenters noted that in considering the family provision claim, the Court considered it relevant that the deceased had felt that she had some obligation to her daughter up until the time of her father's death.
7. Despite the estrangement, the plaintiff made efforts to communicate with the deceased over the years, and wrote her many letters while she was living overseas in an attempt to continue the relationship. The deceased did not respond to any of the plaintiff's letters.

The Relevance of Estrangement

8. The trial judge, Hallen J, set out the following general principles relating to estrangement at [109], reiterating what had been said in *Underwood v Gaudron* [2014] NSWSC 1055:

- The word "estrangement" does not, in fact, describe the conduct of either party. It is merely the condition that results from the attitudes, or conduct, of one, or both, of the parties to the relationship. Whether the claim of the applicant on the deceased is totally extinguished, or merely reduced, and the extent of any reduction, depends on all the circumstances of the case: *Gwenythe Muriel Lathwell, as Executrix of the Estate of Gilbert Thorley Lathwell (Deceased) v Lathwell* [2008] WASCA 256, at [33].
- The nature of the estrangement and the underlying reason for it is relevant to an application under the Act: *Palmer v Dolman; Dolman v Palmer* [2005] NSWCA 361, at [88] - [94]; *Foley v Ellis* [2008] NSWCA 288. The mere fact of estrangement between parent and child should not ordinarily result, on its own, in the child not being able to satisfy the jurisdictional requirement under the Act: see *Palmer v Dolman* at [110], that.
- There is no rule that, irrespective of a plaintiff's need, the size of the estate, and the existence or absence of other claims on the estate, the plaintiff is not entitled to "ample" provision if he, or she, has been estranged from the deceased. The very general directions in the Act require close attention to the facts of individual cases.
- The Court should accept that the deceased, in certain circumstances, is entitled to make no provision for a child, particularly in the case of one "who treats their parents callously, by withholding, without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility": *Ford v Simes* [2009] NSWCA 351, at [71], per Bergin CJ in Eq, with whom Tobias JA and Handley AJA agreed.
- As was recognized by the New South Wales Court of Appeal in *Hunter v Hunter* (1987) 8 NSWLR 573, at 574 - 575, per Kirby P (with whom Hope and Priestley JJA agreed):

"If cases of this kind were determined by the yardstick of prudent and intelligent conduct on the part of family members, the appeal would have to be dismissed. If they were determined by the criterion of the admiration, affection and love of the testator for members of his family, it would also have to be dismissed. Such are not the criteria of the Act. The statute represents a limited disturbance of the right of testamentary disposition. It establishes a privilege for a small class of the immediate family of a testator (the spouse or children) to seek the exercise of a discretionary

judgment by the Court for provision to be made out of the estate different from that provided by the testator's will."

- Even if an applicant bears no responsibility for the estrangement, its occurrence is nevertheless relevant to the exercise of the Court's discretion under s 59(2) of the Act to make a family provision order where the jurisdictional requirements of s 59(1) are met. That the applicant had no relationship with the deceased for some years, and that there did not, therefore, exist between them the love, companionship and support present in normal parent/child relationships, during those years, is a relevant consideration: *Keep v Bourke* [2012] NSWCA 64, per Macfarlan JA, at [3].
- The poor state of the relationship between the applicant and the deceased, illustrated by the absence of contact for many years, if it does not terminate the obligation of the deceased to provide for the applicant, may operate to restrain amplitude in the provision to be made: *Keep v Bourke*, per Barrett JA, at [50].
- Where the applicant has been estranged from the deceased, the application of the Act requires that the estrangement be appraised and its causes considered. In addition, s 60(2)(m) permits the Court to consider the character and conduct of the applicant at the second stage of the process. Care should be taken not to oversimplify the complex and nuanced relationships within a family by yielding to the temptation to condemn categorically the behaviour of one party or the other. Events viewed years later through the cold prism of a courtroom may give a different impression than when the events are set in the context of raw emotions experienced at the time: *Foley v Ellis*, at [102].

The Plaintiff's Financial Circumstances

9. The plaintiff's claim for provision was in part based upon her financial need. The plaintiff owned a home in rural Victoria, worth approximately \$600,000, which was secured by a reverse mortgage of approximately \$150,000. She had no superannuation and relied primarily upon the aged pension for income.
10. The plaintiff was around 72 years old at the time that she made the claim. Her evidence was that she wished to relocate to Melbourne and would need approximately \$300,000 to do so. The judge recognised that the plaintiff had no-one who could provide her with immediate, or continuing, financial support. The defendant did not put forward any competing financial circumstances.

Determination of the Claim for Provision

11. The Court ultimately found in favour of the plaintiff. The Court held that judged by quantum and looked at through the prism of her financial and material circumstances, adequate provision for her proper maintenance or advancement in life was not made for the plaintiff by the will of the deceased.
12. In determining what is adequate for the proper maintenance or advancement in life of an applicant, the Court considers the nature, extent and character of the estate and the other demands upon it, and also what the deceased regarded as superior claims or preferable dispositions. In this case, the plaintiff was unable to meet her present and future obligations from her own resources. She had a reverse mortgage debt which she was unable to reduce and a modest income provided by a pension and some interest/dividends. She has no fund available for exigencies of life and no earning capacity. Given that there was no competing financial claim by the defendant, a proportion of the deceased's estate could be used without necessarily impacting in any significant way on the defendant's financial needs.
13. The Court did not, however, consider that the plaintiff had a "need" to move to Melbourne, and was not satisfied that it was necessary to make an order that would finance such a move.
14. In considering the issue of estrangement, the Court did not consider that the plaintiff's conduct had been callous or unfeeling, nor did it demonstrate hostility. The judge found that the plaintiff's attempts to retain or rekindle her relationship with the deceased, via the letters that she had written to her, were important. The Court ultimately determined that the plaintiff should receive \$425,000, stating (at [143]):

I do not regard the circumstances of the Plaintiff's relationship with the deceased to be such as to relieve the deceased of her obligation to make adequate provision for the proper maintenance and advancement in life of the Plaintiff. However, the nature of the relationship between the Plaintiff and the deceased, and the fact that the Plaintiff received, effectively, the whole of her father's estate, does warrant a slight moderation of the amplitude of the provision that, otherwise, would be no more than adequate for her proper maintenance and advancement in life.

15. Both presenters noted that there is always a tension between making an award and upholding a deceased's testamentary freedom. The Court's role is not to impose a result that it thinks fair, but to consider the factors set out in the Act to determine whether the criteria for a claim have been met. It can also be difficult to advise clients as to the likely outcome in a family provision claim because, although there are clearly identifiable factors that a Court will take into account, the question of what is proper and adequate in the

circumstances is a matter for the subjective determination of the judge, and can be difficult to predict.

BIOGRAPHY

Mark Gunning

Barrister, 9th Floor Wentworth Chambers, Sydney

Mark practices in a wide range of commercial and civil disputes. He was admitted to the New South Wales Bar in February 2002 and has over fifteen years of experience. He has experience in a diverse range of areas, including appearing in criminal trials, commercial and equity matters and family provision claims.

Stephen Hearne

Partner, Djekovic Hearne & Walker, Sydney

Stephen was admitted as a solicitor in 1977 and has remained in private practice. His principal areas of practice are probate and estates, estate disputes and commercial litigation.

BIBLIOGRAPHY

Focus Case

Jodell v Woods [2017] NSWSC 143

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_03-03-2017_banking.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/58b34b2ee4b058596cba468e>

Cases

Underwood v Gaudron [2014] NSWSC 1055

Gwenythe Muriel Lathwell, as Executrix of the Estate of Gilbert Thorley Lathwell (Deceased) v Lathwell [2008] WASC 256

Palmer v Dolman; Dolman v Palmer [2005] NSWCA 361

Foley v Ellis [2008] NSWCA 288

Ford v Simes [2009] NSWCA 351

Hunter v Hunter (1987) 8 NSWLR 573

Keep v Bourke [2012] NSWCA 64

Legislation

Succession Act 2006 (NSW)