



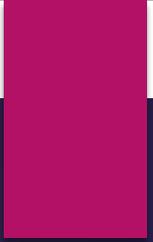
# Family Provision Applications

BEN SYMONS

BARRISTER – STATE CHAMBERS

# Roadmap to FPA presentation

1. Main provisions – Chapter 3 *Succession Act 2006* (NSW):
  - a. S57 - Who is an 'eligible beneficiary'?
  - b. S 59(c) - When a family provision order made be made?
  - c. S 60(2) - Factors to be taken in to account in considering whether to make an order?
2. General principles – case law;
3. Principles: different categories of claimant;
4. Notional Estate Orders;
5. Costs Orders; and
6. Making a claim out of time.



**Main provisions – Chapter 3**  
***Succession Act 2006 (NSW)***

# S 57 - An FPA order can be made in respect of an eligible person

- ▶ S 59 - a court may make an FPA order in respect of an 'eligible person'
- ▶ S 57 Succession Act 2006 sets out 6 categories of 'eligible person':
  - (a) Wife or husband of deceased;
  - (b) Live in de-facto spouse of deceased at time of death;
  - (c) Child / adopted child of the deceased (but not step-child);
  - (d) Former wife or former husband of deceased;
  - (e) Person who was wholly or partly dependent on deceased and either:
    - (i) a grandchild; or
    - (ii) was previously a member of the household of the deceased.
  - (f) A person with whom the deceased had a **close personal relationship** at the time of the deceased persons death:
    - (i) Further defined in s 3(3) SA as a relationship between 2 adult persons who are living together and one or each provides the other with domestic support or personal care;
    - (ii) S 3(4) – but not a relationship where there is a fee/reward; or where someone lives with person on behalf of an organisation

# § 57 – an eligible person

- ▶ A distinguishing feature of an 'eligible person' is that they will almost always have lived with the deceased;
- ▶ Consider whether the following parties may be able to make a claim:
  - (i) Former spouse;
  - (ii) A de-facto partner (possibly even if they resided separately from the deceased for at least part of the week);
  - (iii) A domestic carer;
  - (iv) Some other party who lives with the deceased and is dependant on the deceased e.g. a sick or handicapped child.

# § 59(c) FPA – When a family provision order may be made?

- ▶ The Court may make an FPA order in respect of an ‘eligible person’ if it is satisfied that:
  - adequate provision was not made in the deceased’s will for the proper maintenance, education and advancement in life of the person in whose favour the order is to be made (or by operation of intestacy); and
  - at the time the Court is considering the application (therefore, can take account of all evidence after deceased’s death up until trial).
- ▶ The weight of authority suggests that this is a 2 stage process:
  - (1) Stage 1 - jurisdictional question – determination of whether the applicant has been left without adequate provision for their proper maintenance, education or advancement in life;
  - (2) Stage 2 – the discretionary question – if a determination should be made, the court must decide what adequate provision should be made

Originally espoused by in High Court judgment of *Singer v Berghouse* [1994] HCA 40 under predecessor provisions in the Family Provision Act 1982, reiterated in NSW Court of Appeal judgments *Keep v Bourke* [2012] NSWCA 64 and *Franks v Franks* [2013] NSWCA 60

# S 60(2) SA 2006 – Factors court must take in to account in making a claim

- ▶ S 60(2) lists 15 factors the court may have regard to in making a determination:
  - (a) Nature and duration of relationship between applicant and deceased;
  - (b) Nature and extent of any obligations or responsibilities owed by deceased to applicant, and other applicants;
  - (c) Nature and extent of the deceased persons estate (including notional estate);
  - (d) The financial resources and financial needs, both present and future, of the applicant and any other applicants;
  - (e) The financial circumstances of any person that the applicant co-habits with;
  - (f) Any physical, intellectual or mental disability of the applicant and other applicants;
  - (g) The age of the applicant;
  - (h) The contribution of the applicant to the maintenance of the deceased estate or the welfare of the deceased for which they had not received consideration;
  - (i) Any provision made by the deceased for the applicant during their lifetime or out of their estate;
  - (j) Any evidence of testamentary intentions of deceased;

# S 60(2) SA 2006 – Factors court must take in to account in making a claim (cont'd)

- ▶ S 60(2) lists 15 factors the court may have regard to in making a determination (cont'd):
  - k. Whether the applicant was maintained by deceased before their death and the basis on which deceased did this;
  - l. Whether any other person is liable for the support of the applicant;
  - m. The character and conduct of the applicant before and after the date of death of the deceased;
  - n. The conduct of any other person before and after the death of the deceased;
  - o. Any relevant Aboriginal or Torres Strait Islander customary law;
  - p. Any other matter that the court considers relevant.

# General principles – case law

# General principles – provision in general

- ▶ The question of what level of maintenance or advancement in life is "proper" depends on all of the circumstances of the case "*including the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty*" (*Singer v Berghouse* (1994) 181 CLR 201 at 210), White J in *Slack v Rogan & Anor* ; *Palffy v Rogan & Anor* [2013] NSWSC 522;
- ▶ Essentially, the making of provision is a multi-faceted evaluative judgment in all the circumstances of an eligible beneficiaries needs and their relationship to the deceased;
- ▶ A larger estate means that a more generous allowance can be made for various contingencies when provision is made (White J in *Barbara Mayfield v Suzy Carolyn Lloyd-Williams* [2004] NSWSC 419)

# § 59(c) – making a determination as to whether there is inadequate provision

- ▶ A determination of whether adequate provisions has been made at the 1<sup>st</sup> stage is made "according to the feeling and judgment of the fair and reasonable person in the community, the spokesman of which is and must be the court itself" (*Andrew v Andrew* [2012] NSWCA 308 Barrett JA at [97]);
- ▶ Focus remains on statutory language - Hallen J in *Weekes v Barlow* [2014] NSWSC 1776 at [81] has said that principles espoused in FPA cases are just principles and not rules of law that should be applied with circumspection in considering statutory provisions. They should provide guidance but not fetter or constrain the exercise of the court's discretion at stage 2;
- ▶ Emmett JA in *Burke v Burke* [2015] NSWCA 195 at [124] highlighted the difficulty with identifying what "community expectations" are and different people in the community may have different views;
- ▶ The notion that the exercise of the court's discretion should be informed by a "moral duty" to make provision for the deceased is seen more as a distraction from the statutory language (*Andrew v Andrew* [2012] NSWCA 308 Allsop P at [11]) or otherwise a notion that should be approached with considerable care –(*Andrew v Andrew* [2012] NSWCA 308 Barrett JA at [97]);
- ▶ The consideration of some of the factors in section 60(2) requires a comparison to be made with respect to other eligible beneficiaries or persons named in the deceased will, while others do not (*Popovski v Kenjar; Hafizovic & Anor v Kenjar* [2011] NSWSC 731);
- ▶ Discretionary exercise at first instance is crucial – it may only be reviewed on the principles in *The House v King* (1936) 44 CLR 499

# General principles – respect for testamentary freedom

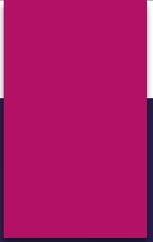
- ▶ Court's determination is made at the time of the hearing rather than when the testator died (Brereton J in *Stone v Stone* [2016] NSWSC 605);
- ▶ The court's have moved toward respect of testamentary freedom particularly where the testator was capable and gave careful consideration to their will (White J in *Haskakis v Hatzopoulos* [2015] NSWSC 1408);
- ▶ An explanation in a testator's will as to their motives for making a particular disposition are relevant to a consideration of whether adequate provision has been made, although they are not determinative of whether adequate provision has been made (*Salmon v Osmond* [2015] NSWCA 42)

# § 100 SA – statement by deceased as to their testamentary intentions

- ▶ § 100 SA allows the deceased to make a written statement while they are alive detailing why they chose to make testamentary gifts the way they did;
- ▶ This is a good way of trying to evidence the testamentary intentions of the deceased (such statements could also be incorporated into a will);
- ▶ Such a statement should be calm, reasoned and rational;
- ▶ The statements should ideally specify the basis on which provision is made;
- ▶ Ideally it should be prepared and reviewed by someone with extensive wills and probate experience.

# Was adequate provision made during the deceased lifetime

- ▶ S 60(2)(i): the Court cannot make an order unless satisfied the provision made by the deceased during their lifetime or out of the will is inadequate;
- ▶ The court must consider any contribution or improvement that the claimant made to the property of the deceased, including provision of domestic services;
- ▶ Henry v Hancock [2016] NSWSC 71 – claimed denied partially because of benefits claimant had received during her lifetime;
  - (a) 1995: \$28,000 Toyota Celica;
  - (b) 1999: \$20,000 cost of wedding
  - (c) 1999: \$200,000 interest free loan to buy house – only \$40,000 ultimately repaid;
  - (d) 2008: \$40,000 deposit on a childcare centre
  - (e) 2008: guarantee by defendant given of up to \$860,000, of which \$100,000 may be called
- ▶ Essentially, the plaintiff had received substantial provision during her lifetime



# Different categories of claimant

# Principles - provision for a spouse

- ▶ There is some recognition of the matrimonial / partner bond (Robb J in *Vanderloo v Milne* [2014] NSWSC 1932), however remaining spouse claim does not take all primacy;
- ▶ Very broadly, it would be expected that a deceased would make the following provision for their spouse:
  - (i) Ensure they are secure in their home;
  - (ii) They have enough money to live in the style to which they are accustomed; and
  - (iii) They have a fund to meet unforeseen contingencies (Robb J in *Lada Causillas v NSW Trustee and Guardian; Bentancor Lado v NSW Trustee and Guardian* [2015] NSWSC 1204).
- ▶ Where the claims of the eligible beneficiaries is roughly equal, the claims of the spouse will usually take precedence, particularly if the spouse is elderly and not able to work and the children are younger and able to work (majority in *Bladwell v Davis & Anor* [2004] NSWCA 170).

# Principles – provision for an adult child

Hallen J in *Kelly v Deluchi* [2012] NSWSC 841 best sums up the principles of making provision for adult children:

- ▶ Impossible to fully describe terms of universal application of obligation, responsibility and community expectation for an adult child;
- ▶ The Applicant will bear the onus of showing that inadequate provision was made for them on the balance of probabilities;
- ▶ The relationship between a parent and a child changes when the child leaves home, although the child could still expect some support;
- ▶ ***A child could generally expect that a parent would provide for their education and a deposit for a house, but not an unencumbered house;***
- ▶ In an exceptional situation, an adult child may remain dependent on their parents (e.g. through sickness or disability);
- ▶ A lack of reserves, ill health, the need for financial security and a fund to provide against the vicissitudes of life, or an inability to earn income could give rise to a claim for greater provision from the estate; and
- ▶ ***There is no obligation on the parent to equalise distributions to each child*** (although this may well follow if each child is needy and the estate is small)

# Principles: 2<sup>nd</sup> wife and children of 1<sup>st</sup> marriage

- ▶ The courts are generally conscious that the children of a 2<sup>nd</sup> wife may potentially receive a gain at the expense of the children of her partner's 1<sup>st</sup> marriage, when her partner probably intended that it was the children of his first marriage that should benefit from his estate;
- ▶ The courts often prefer a "Crisp order" in which the second wife of the deceased receives a "portable life interest" (*Court v Hunt* (Supreme Court (NSW), Young J, 14 September 1987, unreported) in the matrimonial home;
- ▶ This may involve giving the second wife of the deceased an interest in the property so she can sell the property to generate income or find more appropriate accommodation (see *Milillo v Konnecke* [2009] NSWCA 109 1pp J at [48]);
- ▶ The benefit that the second wife is given depends on her needs versus other claimants and the contribution that she made to the property during their marriage / cohabitation;
- ▶ Value returns to the estate when the second wife passes away and ideally passes to the children of the 1<sup>st</sup> marriage.

# Principles: grandchildren and dependence

- ▶ The principles applied to grandchildren are most comprehensively set out in the judgment of Justice Hallen in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at paragraph 113 approved by the NSW Court of Appeal in *Chapple and Wilcox* [2014] NSWCA 392;
- ▶ As a general rule, a grandparent does not have responsibility to provide for a grandchild, that obligation rests on the parent;
- ▶ Where a child has lost their parents at an early age and the grandparents stand in *loco parentis*, then prima facie this gives rise to a claim on the estate of a grandparent;
- ▶ Mere generosity by a grandparent is not enough to establish dependence; and
- ▶ If there is dependence by a grandchild, it must be direct and immediate. Dependence cannot be claimed as the indirect result of the deceased grandparent providing support to their child who provided support to the deceased's grandchild.
- ▶ **Chapple v Wilcox [2014] NSWCA 392:** two adult sons brought FPA claims against grandfather's estate:
  - (a) Acted as a father figure to them when parents divorced;
  - (b) Paid private school fees to Kings for each son;
  - (c) Provided them with paid work and accommodation on his rural properties earlier in their lives;
  - (d) His intention was that his daughter would inherit his rural properties and these would pass to her sons;
  - (e) Court held that sons had not demonstrated dependence

# Principles: Estrangement and hostility

- ▶ Estrangement of itself does not disentitle a plaintiff to further provision, but it is a matter to be taken in to account (*Keep v Bourke* [2012] NSWCA 64);
- ▶ All the circumstances of the estrangement must be considered;
- ▶ Within reasonable bounds, the negative consequences can be ignored or not given disproportionate weight in considering a claim (*Andrew v Andrew* [2012] NSWCA 308 Basten JA);
- ▶ It will assist the applicant if they can show there was an explanation for the estrangement, e.g the parent and child never had a close relationship, or the child feared / was abused by the parent (*Dolman v Palmer* [2005] NSWCA 361);
- ▶ However, no provision may be made where estrangement is coupled with callousness and a deliberate withholding of natural affection for a parent in their declining years, or even further compounded by hostility (see particularly Bergin CJ in Eq in *Ford v Simes* [2009] NSWCA 351)

# Notional Estate Orders

# Notional estate orders

- ▶ NSW is the only State with provisions that can claw back certain transactions the deceased entered in to and deem them to be part of the deceased's estate;
- ▶ The classic example is where the deceased moves property in their name to either a structure/trust or another person before they die;
- ▶ S75 SA: A "relevant property transaction" occurs (and a notional estate order may be made) where the deceased does or does not do an act / omission that results in property in their name being transferred to someone else or a trust and valuable consideration is not given by the acquirer ;
- ▶ S80 SA In relation to such a transaction, the court can make a notional estate order where the transaction took effect:
  - (i) On death or after the death of the deceased (e.g. a joint tenancy ceasing on the date of death of the deceased);
  - (ii) Within 3 years of the deceased's death if the deceased entered in to the transaction with the intention of denying the applicant provision; and
  - (iii) Within 12 months in all other cases, but the notional estate order is only to be made where the moral obligation of the deceased to make provision is greater than their moral obligation in entering in to the transaction.
- ▶ In making a notion estate order, the court must give consideration to the importance of not interfering with reasonable expectation in relation to the property and the substantial justice and merits involved in making an order.

# Notional Estate Orders

- ▶ Section 76(2) SA gives examples of relevant property transactions:
  - (i) Failure to exercise a power to appoint / dispose of property that was not in the deceased's estate;
  - (ii) Joint tenancy in property not severed before death (*Cetojevic v Cetojevic* [2007] NSWCA 33);
  - (iii) Deceased had jointly held property and could have extinguished the interest of the other holders;
  - (iv) A life insurance policy on the deceased's life where the deceased could have appointed someone else to receive benefits under policy or could have surrendered the policy before death;
  - (v) Deceased had an interest in a company, association or fund and on their death someone else became entitled to this interest; and
  - (vi) Persons enters in to a contract disposing of property out of the estate.

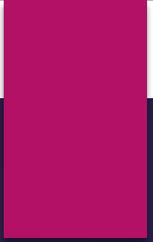
# Notional estate orders

- ▶ Examples of when a notional estate order would be made:
  - (i) A joint tenancy in a main residence owned at the date of death;
  - (ii) A binding death benefit nomination in relation to a superannuation fund;
  - (iii) Gifting of property or shares just before death;
  - (iv) Transferring property (shares or real property) to a trust just before death.
  - (v) Generally superannuation can be the subject of a notional estate order (*Pope & Ors v Christie Young J*)
- ▶ *Charnock v Handley* [2011] NSWSC 1408 – a friend of the deceased who had received around \$60K from the deceased's super fund was the subject of a notional estate order to make provision for the deceased's children;
- ▶ Brereton J has considered the reach of the NSW notional estate provisions:
  - (i) Deceased domiciled in NSW: all property inside and outside NSW (*Chen v Lu* [2014] NSWSC 1053 at [75] per section 64 SA)
  - (ii) Deceased domiciled outside NSW: only moveable property in NSW (*Hitchcock v Pratt* [2010] NSWSC 1508)

# Costs Orders

# Costs orders – costs follow the event

- ▶ Section 99 of the SA gives the court a discretion to orders costs out of the estate of the deceased;
- ▶ In *Chapple v Wilcox* [2014] NSWCA 392 a majority of the Court of Appeal held that the general rule in a FPA case is that costs should follow the event in light of the CPA and CPR introduced in 2005;
- ▶ The issue of costs is ultimately about considering the “overall justice of the case” (*Sung v Malaxos (No 2)* [2015] NSWSC 290 and *Salmon v Osmond* [2015] NSWCA 42);
- ▶ However, the court will consider the following factors in considering whether to exercise their discretion under section 99 of the SA that the applicants costs are to be paid out of the estate of the deceased:
  - (i) The strength of the plaintiff's case;
  - (ii) Whether the deceased made their testamentary intentions clear;
  - (iii) Whether an applicant conducted their proceedings expeditiously and cost efficiently; and
  - (iv) May consider whether an applicant might be left impecunious from the making of a cost order.



**Making a claim out of time**

# Making a claim out of time

- ▶ Section 58(2) of the *Succession Act 2006* (NSW) states that a claim must be made within 12 months of the deceased death **unless the court orders otherwise**;
- ▶ The court may consider the following in relation to making a claim out of time:
  - (i) The strength of the claimant's case;
  - (ii) The reason for the delay in making a claim;
    - a. Lack of understanding generally in making a claim;
    - b. Lack of funds;
    - c. Lack of knowledge whether all material facts established to bring a claim; and
    - d. Lack of knowledge of reasonable prospects of success (Brereton J in *Taylor v Farrugia* [2009] NSWSC 801).
  - (iii) The prejudice to any other eligible beneficiaries or parties named in the will (see *Stone v Stone* [2016] NSWSC 605 and *Carr v Douglass* [2016] NSWSC 854).
  - (iv) *Stone v Stone* [2016] NSWSC 605: the claimant made a claim 5 weeks out of time. However, the defendant had been on notice, the plaintiff was negotiating with the defendant without filing a formal claim and when resolution could not be agreed, the claimant filed a formal claim

# Making a claim out of time

- ▶ Section 90 of the SA – a court must generally not make a notional estate order in relation to a claim made more than 12 months after the deceased passed away unless **there are special circumstances**;
- ▶ Special circumstances in s 90 of the SA require something more than is required under Section 58(2) of the SA (Brereton J in *Stone v Stone* [2016] NSWSC 605);
- ▶ Factors contributing to a finding of special circumstances include:
  - (i) Incapacity as a result of infancy;
  - (ii) no fault on the part of the applicant for not making the claim in time;
  - (iii) The strength of the applicant's claim; and
  - (iv) That there is no prejudice to any other party who has dealings with the notional estate (Brereton J in *Stone v Stone* [2016] NSWSC 605).
- ▶ *Henry v Hancock* [2016] NSWSC 71: Plaintiff delayed bringing claim in full knowledge she could have made a claim because she wanted a guarantee for a business venture from the main beneficiary of the will – when the business venture failed she made a claim on the estate of out time. Deliberate delay counted against her.

# Contact details

**Ben Symons – Barrister-at-law**

**State Chambers**

52 Martin Place

Sydney NSW 2000

Ph: 9223 1522

Email: [bsymons@statechambers.net](mailto:bsymons@statechambers.net)

LinkedIn: [www.linkedin.com/in/ben-symons-barrister](http://www.linkedin.com/in/ben-symons-barrister)