Review of Family Provision Cases at First Instance and on Appeal Decided by the Supreme Court of NSW in 2017

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Introduction

On 18 September 1916, the New South Wales Parliament passed its first family provisions legislation, the *Testator's Family Maintenance and Guardianship of Infants Act 1916.* In 2018 therefore, family provision legislation in the state has been in place for 102 years.

Data the Supreme Court of New South Wales published on 24 January 2018 about the court's filings,[1] indicate that in the 2017 calendar year 973 applications for family provisions were filed, down from 1,018 in the 2016 year, and family provision cases accounted for 23.4% of the Equity Division's total filings (4,146) and 13.3% of the total filings in the Common Law and Equity Divisions (7,309).

Family provision matters are therefore a consistent and reliable source of work for the Supreme Court and practitioners.

This paper provides summaries of decisions the Court published in 2017 related to family provisions matters. There are 50 decisions in total and of these 5 were published by the Court of Appeal, there were 32 first instance decisions, 7 decisions on costs and 6 decisions about practice and procedure.

The summaries are intended to provide practitioners with a practical means of considering the court's decisions and to be a "ready reference" tool. To this end, the index will hopefully be an invaluable aid.

Significant decisions were the Court of Appeal's judgments in *Sgro v Thompson* [2017] NSWCA 326 and *Lodin v Lodin* [2017] NSWCA 327 both published on 15 December 2017. In *Sgro*, White JA again raised the issue whether a two-stage test was to be applied when considering whether an applicant was left without adequate and proper provision and he concluded that the structural changes between the *Family Provisions Act 1982* and the *Succession Act 2006* meant that a two-stage approach was no longer appropriate. Basten JA came to the same conclusion in *Andrew v Andrew* [2012] NSWCA 308 (at [41]). His Honour then said that the question ought to be of no real significance provided that the first stage of the inquiry involved a consideration of whether adequate provision for a claimant had been made. His Honour also noted that a court is not in as good a position as a capable testator to assess what maintenance or advancement in life is proper for an applicant having regard to all of a family's circumstances. In *Garcia Arenas v Fica; Crosby v Fica* [2017] NSWCA 1769 and *Ikonomou v Panagopoulos* [2017] NSWSC 1805, decisions published on 19 December 2017 and 22 December 2017 respectively and which are the last first instance decisions published in 2017, Parker J had the issue of testamentary intention at the forefront of his decision making process. In *Lodin*, the court stressed that when an applicant was in the second tier of eligible persons, there had to be factors warranting a claim and these must demonstrate a social, domestic or moral obligation on a testator to make provision for a claimant.

Decisions are presented in chronological order, unless they are related in some way when they appear consecutively.

1. See *http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/sco2_statistics.aspx*.

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Re Wilson (2017) 93 NSWLR 119; 2017 NSWSC 1

Supreme Court of New South Wales

Coram: Lindsay J

Date: 18 January 2017

Estate ($): Not known - Claimant's relationship: Biological sisters and step-sisters - Order for provision: The biological sisters equally shared the estate subject to provision for the step-sisters of $4,000 each - Costs: Not known

Issues: Indigenous intestate, intestacy

Facts:

The deceased was an Aboriginal man who was adopted at birth into a non-Aboriginal family. He died without preparing a will, he never married, he had no children, his adoptive parents and his biological mother predeceased him and it was not known who his biological father was.

When the deceased died he was in a close relationship with his three biological sisters who had searched for him over 30 years after he was adopted. He also had two adoptive sisters but he had no contact with them for over 30 years.

Section 101 of the Succession Act provides that a person is the brother or sister of another if they have one or both parents in common.

On an intestacy, the defendants and the deceased's step-sisters were each entitled to a 20% share of the deceased's estate. The plaintiffs sought an administration order under ss 134 and 135 of the Succession Act. These sections provide:

> "Part 4.4 Indigenous persons' estates
>
> 133 Application for distribution order
>
> (1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.
>
> (2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.
>
> (3) An application under this section must be made within 12 months of the grant of administration or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.
>
> (4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate until:
> (a) the application has been determined, or
> (b) the Court authorises the distribution.

134 Distribution orders

(1) The Court may, on an application under this Part, order that the intestate estate, or part of the intestate estate, be distributed in accordance with the terms of the order.

(2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate's death can be disturbed).

Note. For example, a distribution may have been made under section 92A of the Probate and Administration Act 1898 or section 94 of this Act.

(3) In formulating an order under this Part, the Court must have regard to:
(a) the scheme for distribution submitted by the applicant, and
(b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.

(4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just and equitable.

135 Effect of distribution order under this Part

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate."

The plaintiffs led evidence that distribution of the estate equally amongst the deceased's three biological sisters would be in accordance with the Indigenous communities' laws, customs, traditions and practices to which they belonged.

Decision:

The court held that Part 4.4 of the Succession Act was a means for effecting a just and equitable distribution of the intestate estate of an Indigenous person who died leaving dependents, persons who have a just or moral claim on an estate or other for whom the intestate might have been reasonably expected to have made provision.

The court held that a distribution order pursuant to s 134 of the Succession Act should be made as the deceased was an Indigenous person, he was of Aboriginal descent, he identified as an Aboriginal person, he was accepted as an Aboriginal person by an Aboriginal community, he died wholly intestate and the plaintiffs had a bona fide claim to the whole of his estate. It was just and equitable however that provision of $4,000 be made for each of the defendants ($8,000 in total).

Lodin v Lodin [2017] NSWSC 10

Supreme Court of New South Wales

Coram: Brereton J

Date: 25 January 2017

Estate ($): $5,000,000 - Claimant's relationship: Ex-spouse - Order for provision: $750,000 - Costs - By the estate on the ordinary basis

Issues: Ex-spouse, factors warranting a claim

Facts:

The plaintiff and the deceased commenced a relationship in 1986, they married in September 1988 and in April 1990 they separated though they continued living under the same roof until January 1991.

The deceased was a medical practitioner and he and the plaintiff met when she consulted him.

In December 1992 in contested property proceedings, the deceased was ordered to pay the plaintiff $55,000 and to transfer a motor vehicle to her. In terms the plaintiff received 52% of a property pool of $436,000. The plaintiff appealed the judgment and after the appeal was dismissed in June 1993, the plaintiff telephoned the deceased and said to him: “If you don’t give me an additional $60.000 I will destroy your life and make a complaint to the NSW Health Department Complaint’s Unit about you”. The plaintiff did make a complaint and the deceased was found guilty of unsatisfactory professional conduct, he was reprimanded and ordered to undertake a course in ethics.

In September 1993, the plaintiff informed police that the deceased possessed firearms and had been threatening to kidnap their daughter and the police issued a summons for an ADVO against the deceased. The deceased was served with the summons at his work something he described as “the most embarrassing moment in his life” and “deeply humiliating”. He resigned from his employment as a result. The ADVO was dismissed after a hearing.

In August 1993, the plaintiff commenced proceedings against the deceased for professional negligence. The proceedings were eventually discontinued.

Between 2008 and 2009, the plaintiff wrote to the deceased and told him that if he did not pay their daughter’s university fees she “would make what was left” of his “wretched life not worth living” and that “if you make me feel guilty in any way because I [have] written to you-you will certainly feel the wraith of Allah! directed towards your self”.

The deceased was “punctilious” in meeting his child support obligations for the couple’s daughter.

The plaintiff was involved in two motor vehicle accidents. As a consequence of the second accident in July 2000, the plaintiff received compensation of $72,500 (plus costs of $35,000) and she began receiving a disability support pension.

At the hearing the plaintiff had cash of $253,000, a car valued at $30,000, shares valued at $40,000, $300 in superannuation and a HECS debt of $11,855. She lived in a rented one-

bedroom unit and received a disability support pension of $20,000 per annum.

Former spouses of a deceased are “eligible persons” (s 57(1)(e) of the *Succession Act*) although s 59(1)(b) of the act requires there be “factors warranting” an application.

Decision:

The trial judge noted that with a former spouse the existence of a final matrimonial settlement under the *Family Law Act 1975* will usually pose a significant hurdle to bringing a family provision claim as the purpose of a settlement is to effect a “clean break”. Ominously, his Honour noted this was not invariably so unless there had been a release of rights under s 95 of the *Succession Act*. A release of rights had not been ordered here. The trial judge referred to *O’Shaughnessy v Mantle* (1986) 7 NSWLR 142 (at 147-8) where Young J identified four (really five) classes of case which might give rise to a moral duty on a testator to provide for a former spouse. The classes were: (1) where there has been a divorce but a spouse has died before financial matters have been resolved; (2) where the parties have not finally settled all their property dealings at the time of the divorce; (3) where maintenance was being paid at the date of a deceased’s death and the order for maintenance was inadequate to provide for the ex-spouse after the death of the paying spouse; (4) where despite the divorce there was some dependency on the deceased at the date of death; and (5) there was some special factor such as a very small estate and when the parties were alive it was only possible to give a pittance to the other spouse but now one spouse was dead, the barrier to giving the other spouse the whole of the family property had vanished.

The trial judge concluded that this was a case where the fact that there had been a final matrimonial settlement was important but not decisive and that the unusual and enduring impact of the relationship and marriage, the plaintiff’s care for the parties’ daughter, the respective post-divorce deterioration on the plaintiff’s circumstances and improvement in the deceased’s circumstances, the relative paucity of the matrimonial estate at the time of the property settlement and the plaintiff’s circumstances at the hearing were factors which warranted the making of a claim.

Provision was ordered to enable the plaintiff to purchase a house for $550,000 ($300,000 as the plaintiff had $250,000), to have a fund for maintenance of $400,000 and a sum for contingencies of $50,000 ($750,000 in total).

The plaintiff’s costs were ordered to be paid from the estate on the ordinary basis.

Lodin v Lodin [2017] NSWCA 327

Supreme Court of New South Wales, Court of Appeal

Coram: Basten JA; White JA and Sackville AJA

Date: 15 December 2017

Estate ($): $5,000,000 - Claimant's relationship: Ex-spouse - Order for provision: Order for provision made in the court below set aside - Costs: Appellant to pay the costs of the appeal and in the court below

Issues: Ex-spouse, factors warranting a claim

Facts:

The facts and the first instance decision are set out above in *Lodin v Lodin* [2017] NSWSC 10 and are not repeated.

The appellant's (the defendant in the court below) notice of appeal contained seven grounds. Six of the grounds in essence claimed that there were no "factors warranting" an order for provision and that as a matter of discretion, the trial judge ought to have ordered that the respondent receive no provision. The seventh ground was:

> "His Honour's decision is so divorced from reality, so unrepresentative of community standards or expectation, and so totally inconsistent with the objects and principles of family provision legislation as to be wrong and thus deserving of appellate correction."

The respondent filed a notice of contention that claimed that the deceased had misled the Family Court in 1992 about his earnings and the trial judge ought to have considered this a "factor warranting" a claim and that the deceased had a duty to "atone" which amounted to a "factor warranting" a claim.

Decision:

Sackville AJA wrote the leading judgment, White JA made some additional observations while agreeing with Sackville AJA and Basten JA agreed with Sackville AJA.

The court accepted, as the parties had in the court below, that McLelland J's decision in *Re Fulop Deceased; Fulop v Public Trustee* (1987) 8 NSWLR 679 was the starting point of any analysis albeit that the case referred to s 9(1) of the *Family Provisions Act 1982* and not s 59(1) of the *Succession Act*. In *Re Fulop*, McLelland J stated these propositions:

> "(I) The question posed by s 9(1) of the FP Act cannot be resolved until all admissible evidence relevant to the issue of whether there are factors warranting the application has been tendered. Despite s 9(1) using language that apparently contemplates the question as a preliminary issue, ordinarily it is impracticable to isolate the evidence bearing on that issue from other evidence in the case.
>
> (ii) Section 9(1) is premised on a distinction between 'factors which warrant the making of the family provision application' and the circumstances which justify the making of the family provision order. Otherwise the subsection would be pointless. This means that in a particular case an applicant might establish that there are factors warranting the application, yet the court might decline to make a family provision in the applicant's favour.

> (iii) The legislation also requires a distinction to be drawn between 'eligible applicants' who do not have to satisfy s 9(1) (a spouse, de facto partner or child of the deceased) and those who do (such as a former spouse or grandchild). The difference is that the former are generally regarded as natural objects of testamentary recognition by a deceased, while the latter are not generally so regarded. Accordingly, the 'factors' referred to in s 9(1) of the FP Act are those that give an eligible person in the second category 'the status of a person who would generally be regarded as a natural object of testamentary recognition of a deceased."

The court observed that persons in the second category of "eligible persons" are not normally regarded as a natural object of testamentary recognition by a deceased and an applicant therefore had to establish that there were circumstances that justified regarding the person as a natural object of testamentary recognition by a deceased. Those circumstances must go beyond the bare fact of a familial or previous familial relationship. The factors relied on must demonstrate a social, domestic, or moral obligation on the testator to make some provision for a claimant. In deciding this question a court could consider any matters listed in s 60(2) of the *Succession Act* provided they were relevant. That did not mean that in deciding if there were "factors warranting" a claim and provision for a claimant should be ordered, the issues for determination were the same.

The court next held that whilst it would be difficult to impose rigid constraints on the circumstances that might constitute factors warranting a former spouse of a deceased making an application for provision, it would be difficult for a former spouse to satisfy s 59(1)(b) of the *Succession Act* simply by relying on the existence of the marriage and the fact that she now has unmet financial needs. The reason for this was that these factors did not demonstrate that the deceased had a social, domestic or moral obligation to make testamentary provision for the former spouse. Moreover, the position was unlikely to be different if the estate was relatively large. Something more was needed for a claimant to show that he or she was a natural object of testamentary recognition. The court gave an example of a divorced claimant and deceased who had not reached a financial settlement prior to a deceased's death as being a matter that would amount to a "factor warranting".

The court also noted that: (1) in most cases, a financial settlement, if otherwise unimpeachable, is likely to terminate any obligation on a deceased to make testamentary provision for a former spouse; and (2) it was important to prevent a family provision claim from becoming a forum of matrimonial fault long since removed from family law, but the conduct of a deceased may be relevant if for example, physical or sexual abuse during the marriage or later caused a claimant to suffer a physical or psychological disability impairing his or her capacity to earn an adequate income. In this analysis, the court's decision in *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639 was referred to.

The court held that the trial judge was in error and there were no factors warranting the respondent's claim.

The court also accepted that the trial judge had decided to order provision for the respondent because the estate was a large one and it was wrong for the deceased to leave the whole of his estate to his daughter and to ignore his former wife. This was an erroneous consideration. In his separate judgment, White JA also made this observation.

The court also found that the trial judge accepted that the deceased had been responsible for the "respondent's persecutory conduct" of the deceased when the evidence did not establish whether the conduct could be explained by a psychiatric condition caused by the deceased's conduct or the nature of the relationship between the parties.

The trial judge's order for provision was set aside and the respondent was ordered to pay the appellant's costs at first instance and of the appeal.

The respondent's notice of contention was dealt with shortly; it was found that there had been no significant error about the deceased's income in the Family Court proceedings and there was no established "duty to atone".

Postscript: An application for special leave to appeal has been filed in the High Court of Australia..

Singh v Singh [2017] NSWCA 15

Supreme Court of New South Wales, Court of Appeal

Coram: Beazley P, Macfarlan JA and Emmett AJA

Date: 13 February 2017

Estate ($): Not known - Claimant's relationship: Son - Order for provision: Not applicable - Costs: Not known

Issues: Practice and procedure

Facts:

On 2 October 2015, Black J dealt with a variety of claims arising out of the death of Mr Singh's father. His Honour concluded that probate in solemn form should be granted of a will dated 17 August 2006. His Honour also concluded that a claim by the appellant for a family provision order should be dismissed, although no formal order to give effect to that conclusion was made.

The appellant appealed Black J's judgment.

In the Court of Appeal the appellant failed to comply with orders that required him to prepare appeal books and file written submissions. Simpson JA dismissed the appeal by an order pursuant to 61(3) of the Civil Procedure Act 2005 (NSW). Section 61 empowers the Court "by order" to give directions relating to practice and procedure, for the purpose of "the speedy determination of the real issues between the parties to the proceedings".

The appellant field an application for the Court to review Simpson JA's decision pursuant to s 46(4) of the *Supreme Court Act 1970 (NSW)*.

Decision:

The court held that the primary judge erred in two significant respects when exercising her discretion. Firstly, in her judgment Simpson JA did not consider explanations proffered by Mr Singh. Secondly, the appellant sought to explain his non-compliance with the directions by saying that he did not understand the appeal proper to have been fixed for hearing. In these circumstances, the court held that the primary judge's exercise of discretion miscarried and the court should re-exercise the discretion and it would be a disproportionate response to the appellant's defaults to dismiss his appeal and thereby effectively prevent him appealing.

Antova v Bokan [2017] NSWSC 115

Supreme Court of New South Wales

Coram: Kunc J

Date: 17 February 2017

Estate ($): Not known - Claimant's relationship: Daughter and grandson - Order for provision: Not applicable - Costs: Not known

Issues: Practice and procedure

Facts:

The parties attended a judicial settlement conference before Hallen J. The matter settled and the terms of settlement were reduced to writing in proposed short minutes of orders. Order 8 of the proposed orders was in these terms:

> "Order that agreement by the First Plaintiff to release her rights to make any further application in relation to the estate or notional estate of the Deceased be approved."

When the matter came before Hallen J his Honour indicated that he would need an affidavit from the first plaintiff before he could order a release. His Honour further indicated though that he would make orders and note the notations in the short minutes other than a release and these would not be entered until an affidavit was received from the first plaintiff and that when this occurred, a draft form of orders and notations would be sent to the parties and then entered. His Honour then formally made orders and notations in accordance with the short minutes but he did not grant a release. He referred the proceedings to himself in chambers.

The plaintiff did not forward an affidavit to Hallen J's Associate and the parties fell into dispute about the terms of their agreement.

In June 2016, the defendant filed a notice of motion seeking a declaration that the parties had compromised the proceedings at the settlement conference and that orders be made in accordance with the short minutes. In January 2017, the plaintiffs filed a notice of motion seeking a declaration that no concluded agreement had been made and ancillary relief.

In September 2016, after the defendant's notice of motion was filed, the second plaintiff commenced separate proceedings in which he sought orders that the deceased had gifted him the estate's major asset a property before her death.

Decision:

The plaintiffs contended that there was no concluded agreement because the parties did not intend to be bound by the agreement until an affidavit that satisfied s 95 of the *Succession Act* was provided and a release was granted. Alternatively it was contended that the parties had agreed the agreement was to be held in escrow until an affidavit was provided and a release granted.

The court did not accept either of the contentions and concluded that the parties had intended to be immediately bound when they signed the short minutes and that the defendant was entitled to waive compliance with order 8

The court was prepared to make orders and notations in accordance with the short minutes but declined to do as if the second plaintiff's proceedings were successful it would render any agreement nugatory and it therefore determined that a stay should be granted. In addition, the court made costs orders.

Antova v Bokan (No 2) [2017] NSWSC 556

Supreme Court of New South Wales

Coram: Kunc J

Date: 8 May 2017

Estate ($): Not applicable - Claimant's relationship: - Daughter and grandson - Order for provision: Not applicable - Costs: See below

Issues: Costs

Facts:

The defendant sought a gross sum costs and led expert evidence that with a 20% reduction, the defendant's costs of the proceedings were $91,180.02.

Decision:

The court accepted the expert evidence and held that it was not appropriate that the defendant be put to the expense of engaging in a costs assessment, particularly as the hearing on costs had taken three days and became a "case within a case".

The court also made an "otherwise" order and held that costs should be paid forthwith.

Steiner v Strang [2017] NSWSC 132

Supreme Court of New South Wales

Coram: Kunc J

Date: 24 February 2017

Estate ($): $5,500,000 - Claimant's relationship: Son - Order for provision: Not applicable - Costs: Not applicable

Issues: Interim preservation, practice and procedure

Facts:

A deceased's will provided that her son and daughter were each to receive legacies of $2,000,000 and to share the residue of her estate.

The will also requested that a loan to the plaintiff ($881,000) should be repaid.

The plaintiff and his sister had each made applications for family provision. In addition they had received interim distributions of $788,973 and $1,335,000 respectively.

The plaintiff had made a previous application for an interim distribution and the court ordered that he receive $300,000.

The court described the plaintiff's financial and personal circumstances as "parlous"; his assets exceeded his liabilities, the plaintiff and his wife lived on benefits, their monthly outgoings exceeded their pensions and the shortfall was funded by credit card debt.

The plaintiff made applications for interim provision pursuant to s 62 of the *Succession Act* and *UCPR* rules 54.3(3)(d) or 54.3(4)(b).

Decision:

Section 62(1) of the *Succession Act* provides:

> "The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order."

Kunc J referred to an earlier decision in which he considered this power (*Roberts v Moses* [2015] NSWSC 1504) and in which he referred to *Young v Salkeld* (1985) 4 NSWLR 375. His Honour concluded there were four considerations in this type of application:

> "(1) Is the applicant an "eligible person"?
>
> (2) If 'yes' to the preceding question, will a family provision order be made in favour of the applicant at the final hearing of the application for such an order? This requires the Court, by reference to the evidentiary material then before it, to consider what the Court thinks will be the position as at the date of a notional, future final hearing. The use of the modal or auxiliary "would be" does not mean the applicant must demonstrate an arguable case or a serious question to be tried that the applicant will be entitled to a final order. The Court must be satisfied on the balance of probabilities that the applicant will obtain an order at the final hearing.

(3) By reference to the evidentiary material before it as at the date of the hearing for an interim family provision order, what interim order does the Court propose to make, applying the principles that would apply to the making of a final family provision order but recognising its character as interim (the "proposed provision")?

(4) Is the Court of the opinion that no less provision than the proposed provision will be made in favour of the eligible person at the final hearing?"

The court concluded that it was not satisfied that the interim distribution from the estate the plaintiff had received was inadequate for the plaintiff's proper maintenance, education and advancement.

It also concluded that an interim distribution (a further interim distribution) pursuant to the rules should not be ordered as there was no certainty the executors could part with $500,000 and that sum was likely to be more that the plaintiff would receive when the estate was distributed. It was also a consideration that the plaintiff was unable to provide adequate security for a further advance.

Steiner v Strang (No 2) [2017] NSWSC 891

Supreme Court of New South Wales

Coram: Kunc J

Date: 3 July 2017

Estate ($): $5,500,000 - Claimant's relationship: Son - Order for provision: Not applicable - Costs: Not applicable

Issues: Practice and procedure, stay

Facts:

In June 2012, the plaintiff commenced family provision proceedings against his mother's estate. In 2014, the plaintiff commenced other proceedings against the estate which were unsuccessful and he was ordered to pay the estate's costs. On 25 April 2017, a certificate of assessment of the costs was issued in the amount of $460,003.72 and another certificate of the same date certified that the costs of the assessment were $21,498.65. On 18 May 2017, judgment was entered in the District Court for $460,003.72, based upon the certificate of costs. On 7 June 2017, the estate issued a bankruptcy notice against the plaintiff, grounded upon the District Court judgment. If the notice was not satisfied, an act of bankruptcy would occur on 7 July 2017.

The plaintiff's family provision application was heard over six days from 22 May 2017 and judgment was reserved.

The plaintiff filed a notice of motion seeking that the estate be restrained from taking any step to enforce the bankruptcy notice, the District Court judgment and the certificates of costs and an order that the estate withdraw the bankruptcy notice.

The issue the plaintiff faced was that he could commit an act of bankruptcy and perhaps become a bankrupt before the court delivered judgment. The costs a trustee in bankruptcy might impose would further erode whatever estate he had when there was some prospects he would receive a family provision order that may meet his liabilities, or a significant portion of them.

Decision:

The court held that it did not have jurisdiction to make orders in respect to the bankruptcy notice as s 27 of the *Bankruptcy Act 1966 (Cth)* granted exclusive power in "bankruptcy" to the Federal Court and the Federal Circuit Court. It also held it had no inherent jurisdiction because there was no relevant. Thirdly, it held that s 66 of the *Succession Act* which entitled a court to make consequential and ancillary orders had not been enlivened as a family provision order was yet to be made.

If it had arisen, the court also determined that it would not exercise its discretion to provide relief as the estate had the benefit of a judgment which it was entitled to exercise and that any order would offend judicial comity.

Spata v Tumino [2017] NSWSC 111

Supreme Court of New South Wales

Coram: Brereton J

Date: 24 February 2017

Estate ($): $685,416 - Claimant's relationship: Step-son - Order for provision: Summons dismissed - Costs: $198,261

Issues: Eligible person, household

Facts:

The deceased married the plaintiff's father in March 1980.

The deceased's husband (the plaintiff's father) died in February 2010. In his last will, the husband left his household chattels to the deceased and gave her a right of residence in a house at Belmore he owned. The deceased made a family provision claim and in lieu of the provision made for her in her husband's last will she received a legacy of $143,000, the Belmore house absolutely and an interest in another property. The executors were also ordered to carry out repairs to the Belmore property and the deceased's costs on the ordinary basis were to be paid from the estate.

The deceased had no children and in her last will she gifted her estate to two nephews.

The plaintiff was married and he and his wife had gross assets of $398,000 and liabilities of $300,000. They both worked and earned modest incomes ($26,584 and $28,000).

The plaintiff claimed that his "needs" were to pay off a mortgage that secured debt which had financed the purchase of a home ($255,000) and to repay a loan from his wife's family ($45,000).

Decision:

The plaintiff claimed that he was an "eligible person" as he had been a member of the deceased's household and had been partly dependent on her (s 57(1)(e) of the *Succession Act*).

The court held that membership of a household involves aspects of continuity and permanency of mutual living and the minimum requirements include some element of residence by a deceased and a claimant in the same house and mutual living so that there is a quasi-family unit. The court was satisfied that the plaintiff was a member of the deceased's household for at least six months in 1980 and for at least a couple of years from 1995 when he separated from his first wife.

The court also held that dependency is the giving of financial or other material assistance by a deceased over a significant period of time in order to meet a need of the eligible person, with the result that the recipient has come ordinarily to rely on the assistance. The mere fact of lodging without paying rent does not necessarily amount to dependence and here the house had belonged to the plaintiff's father not the deceased and living in the house was a matter of convenience for the plaintiff, not of dependence. The plaintiff's claim therefore failed at the first hurdle because he was not an "eligible person".

Phillips v Phillips (No 2) [2017] NSWSC 281

Supreme Court of New South Wales

Coram: Kunc J

Date: 22 March 2017

Estate ($): Not known - Claimant's relationship: Son - Order for provision: Not applicable - Costs: Not applicable

Issues: Practice and procedure

Facts:

The deceased made wills in 2006 and 2008. Probate of the 2008 will was granted to the defendant. The plaintiffs commenced proceedings in which they claimed the deceased lacked testamentary capacity when he made the 2008 will. The defendant filed a cross-claim which asserted the deceased did have testamentary capacity. In related proceedings a son sought a family provision order.

On the first day of a hearing, the defendant sought to amend his cross-claim to include a claim for family provision if the court decided the deceased did not have testamentary capacity when he made the wills. The plaintiff in the family provision proceedings consented to the amendment whilst the plaintiffs in the revocation suit did not.

The defendant led evidence that the need for the amendment arose because of a significant change in his financial circumstances.

Decision:

The plaintiffs had four substantive grounds for objecting to the amendment. Firstly, that there was no proper explanation for the delay in bringing the claim. Secondly, that by failing to make a family provision claim earlier, the estate had been deprived of disinterested third-party representation and the defendant had been benefitted because he has been empowered as he had been able to pay legal costs from the estate and to mortgage property to pay legacies. Thirdly, that the claim could reduce the plaintiffs' potential entitlements out of the estate. Fourthly, that a forensic decision had been made based on the facts in issue and the plaintiffs would be prejudiced if an amendment was allowed.

The court indicated that if delay had been the only consideration it would have refused the application and there was no proper explanation why the defendant had waited until the first day of the hearing to amend. The court though also accepted that the amendment was necessary to determine the real issues in the proceedings and the amendment was allowed subject to arrangements being made to ameliorate any prejudice suffered by the plaintiffs.

As the application for a family provision order was made more than twelve months after the deceased's death it was brought out of time and whether the defendant had an arguable case arose as an anterior question because if the leave application was hopeless there would be no point in granting the amendment application. The court was satisfied the evidence disclosed there was an arguable case and leave should be granted.

Postscript: In *Phillips v Phillips* [2017] NSWSC 280, the court determined that the deceased lacked testamentary capacity when he made the 2006 and 2008 wills.

Jodell v Woods [2017] NSWSC 143

Supreme Court of New South Wales

Coram: Hallen J

Date: 1 March 2017

Estate ($): $2,020,000 - Claimant's relationship: Daughter - Order for provision: $425,000 - Costs: $160,380

Issues: Estrangement, need

Facts:

The deceased's last will appointed one of her two daughter the executor of her estate and it gifted the whole of her estate to the defendant. The plaintiff was the deceased's other daughter.

At the hearing the plaintiff was 74 years old and the defendant was 66 years old.

The deceased's estate comprised a real property and liquid assets with a value slightly in excess of $2 million.

The deceased and the plaintiff had a difficult relationship and the plaintiff accepted in evidence that she and the deceased had "never been close". They did not see each from November 1996 until shortly before the deceased died in July 2015.

The plaintiff owned a real property in rural Victoria with a value of $600,000 and other assets worth $33,478. She had a reverse mortgage of $154,780 and a credit card debt of $1,283. She had net assets therefore of approximately $477,000. Her weekly income from the age pension and dividends was slightly exceeded by her outgoings.

The plaintiff's "needs" were to have funds ($300,000) so she might move to Melbourne and buy a residence, funds for a new car ($43,590) and funds for her maintenance and advancement ($17,278).

The defendant neither made an application for provision nor raised her financial and personal circumstances in the proceedings.

Decision:

An estrangement between the plaintiff and the deceased was at the forefront of the defendant's case in opposition to the plaintiff's claim. The court examined the issue and discounted its significance as the plaintiff had lived overseas for a considerable time and had made attempts to retain, or rekindle, the relationship with the deceased.

The court in undertaking the first stage of the two-stage test concluded that given the plaintiff's financial and material resources that adequate provision was not made for the plaintiff. The court then concluded that provision ought to be made for the plaintiff from the estate and that a contribution to contribution to the costs of alternative accommodation in Melbourne ($300,000) and a fund for exigencies of $125,000 should be ordered.

Estate of George Roby [2017] NSWSC 265

Supreme Court of New South Wales

Coram: Lindsay J

Date: 17 March 2017

Estate ($): $500,000 - $550,000 - Claimant's relationship: Granddaughter - Order for provision: $40,000 - Costs: Not known

Issues: Extension of time

Facts:

The deceased died in November 1999. He was survived by two sons, a daughter and two grandchildren. The plaintiff was the one of the grandchildren.

In his will, the deceased left so much of his estate as necessary to the executor to purchase one or two, one or two-bedroom home units and granted rights of residence of both units to his two sons with a gift-over to the plaintiff. The deceased made this provision understanding that his sons were entrenched in a debilitating drug culture which could limit their abilities to responsibly manage and maintain any property given to them.

The will's executor purchased two units with estate monies and the second defendant lived in one of the units until 2006 when he quit upon promise from the executor he could return when he wished.

The applicant for a family provision order was one of the deceased son's. He did not file an application until December 2016, about 17 years after the deceased's death and more than 15 years after the expiry of the 18 month limitation period prescribed in the Family Provision Act 1982 NSW.

In 2016, after the claimant suffered a decline in health, he proposed to re-enter into possession of one of the units but he was restrained from doing so by an interlocutory injunction obtained by the plaintiff.

The plaintiff commenced proceedings for the will, essentially seeking an order that the unit be transferred to her. The son then filed a family provision application and the two proceedings were heard together.

The unit had a value of between $500,000 and $550,000 and it had potential to earn rent of $20,000 a year.

Decision:

The court did not read the will as conferring a life estate or right of residence. The plaintiff became beneficially entitled to the Jannali unit when she turned 21 and the defendant having ceased to use the unit as his primary place of residence.

On the family provision claim, the court had to determine if "sufficient cause was shown", having regard to the circumstances of the case, to extend time. The court did extend time as it concluded the claimant's mental health when the deceased died was poor and he understood he was entitled to return to the unit at any time.

The court ordered that the fee simple in the unit was to be vested in the plaintiff and the claimant was granted a legacy of $40,000 to permit him to find suitable accommodation and the unit was to be charged in the amount of the legacy.

Meres v Meres [2017] NSWSC 285

Supreme Court of New South Wales

Coram: Hallen J

Date: 28 March 2017

Estate ($): $1,201,917 - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: $118,500

Issues: Need

Facts:

The deceased and her husband had two sons, the plaintiff and the defendant. At the hearing, both parties were 66 years old.

By his will, the parties' father left the whole of his estate to the plaintiff. The estate had been fully administered and distributed to the plaintiff.

In her last will the deceased appointed the plaintiff as the sole executor and trustee of her will. When the plaintiff filed a claim for provision, the defendant was appointed to represent the estate.

In her will, the deceased gave the plaintiff a legacy of $20,000, devised her Rockdale property to the plaintiff and defendant as tenants in common in equal shares and gifted the balance of the estate to the plaintiff absolutely. At the hearing, the gross value of the estate was $1,201,917 most of which comprised the value of the Rockdale property ($1.2 million). Had the will been administered, the plaintiff would have received $601,917 and the defendant $600,000.

The plaintiff had been close to the deceased and after she suffered a stroke he cared for her and his father.

The deceased and her husband had separated in 2004.

The plaintiff went to jail in 1980 for attempting to import 10 kilograms of cannabis but this did not prevent the deceased making provision for him in her last will and earlier wills.

The defendant had what was described as a "strained" relationship with the deceased and his father and he did not attend either the deceased's funeral or his father's funeral.

The plaintiff was a single man with no dependents. He was unemployed and he had not been in full time employment for over 20 years. He received the age pension of $877 per fortnight and his outgoings were $816 a fortnight. The evidence also disclosed that the plaintiff could purchase alterative accommodation for $749,000.

The defendant chose not to disclose his financial and material circumstances and he put on no evidence that he was in financial need or that he would be significantly prejudiced if provision were made for the plaintiff.

Decision:

The evidence established that this was not a case where an adult child had lived independently of his parent and who was in straitened circumstances. Rather, the deceased had supported the plaintiff by providing him rent free accommodation for many years before her death. It was also not a case where there was a dispute that the plaintiff and deceased had been “close”.

By providing in her will that the Rockdale property was to be sold and the proceeds of sale shared by the plaintiff and defendant, it had to be inferred that the deceased did not consider it was her moral obligation to provide accommodation for the plaintiff by devising the Rockdale property absolutely to him in her will.

The court also noted that although his income was modest he had been living within his means for some time that if he was to purchase alternative accommodation from the capital he had, he would still have capital to invest and receive a pension. In these circumstances, the court was not satisfied that adequate provision for the plaintiff’s proper maintenance or advancement in life had not been made for him in the deceased’s will. The court also noted there was no evidence to indicate one half of the Rockdale property would not have provided sufficient funds to enable the plaintiff to purchase alternative accommodation and as a matter of discretion, it would not have substituted its judgment for that of the deceased.

The summons was dismissed.

Meres v Meres (No 2) [2017] NSWSC 523

Supreme Court of New South Wales

Coram: Hallen J

Date: 9 May 2017

Estate ($): $2,020,000 - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: $118,500

Issues: Costs

Facts:

The defendant served two Calderbank offers and an offer of compromise that offered to resolve the parties' dispute on the basis that after the defendant's costs were paid out of the estate on the indemnity basis, the plaintiff's costs were paid on the ordinary basis, the plaintiff would receive the greater of $720,000 or 61% of the net proceeds of sale of the Rockdale property. The offer was not accepted and the defendant relied on the offer and claimed that his costs should be paid on the ordinary basis up to 11 November 2016 and thereafter on the indemnity basis.

The plaintiff did not seek an order that his costs be paid out of the estate and he acknowledged that he should bear half the burden of the defendant's costs.

Decision:

The purpose of a costs order is to compensate, or indemnify the person in whose favour it is made not to punish the person against whom it is made. Section 99 of the *Succession Act* gives the court a wide discretion in relation to costs as it permits costs to be paid "in such manner as the court thinks fit". In *Singer v Berghouse* [1993] HCA 35 Gaudron J noted that it should not be assumed that litigation may be pursued, safe in the belief that costs will be paid out of the estate".

The court concluded that the overall justice of the case indicated that the plaintiff should not be required to pay the defendant's costs on the indemnity basis but the defendant's costs should be paid by the estate on the indemnity basis and that the plaintiff should have no order for his costs.

Each party was also ordered to bear their own costs of the application.

Barbanera v Barbanera [2017] NSWSC 357

Supreme Court of New South Wales

Coram: Slattery J

Date: 5 April 2017

Estate ($): $2,750,000 - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: Not known

Issues: Estrangement, need

Facts:

The deceased was survived by four children, the eldest of whom was the plaintiff.

The deceased's wife died in 2009 and the deceased received the whole of her estate.

The deceased's last will made in 2008 gave his estate to his wife with a gift-over to three of his children and the plaintiff was excluded. One child had since died and the deceased's will provided that her share of the estate went to her children.

The deceased's estate comprised a house at Haberfield with an estimated value of $2.25 million and $50,000 in cash.

The plaintiff and his wife had total assets of approximately $7.514 million and liabilities of $5.076 million. He received a gross income of $93,510 and had expenses of over $50,000 a year. The plaintiff was 53 years old.

One of the defendants did not put his financial position in issue and the court assumed he had no financial needs. Another defendant was 47, she had modest assets and had moved into the Haberfield property to care for the deceased when his wife died. She and her husband's combined income equaled their outgoings. The remaining beneficiary was a child and her father's financial circumstances were relevant to ascertain what sources of funds may be available to her. The father owned his own home but had no other assets and he worked part-time, received a part pension and he lived day to day.

The real issue in the case was the nature of the relationship between the plaintiff and his parents. They excluded him from wills made in 2000 and 2008 and the evidence indicated they had a volatile relationship.

The defendants submitted that the plaintiff had deliberately estranged himself from his father and mother for the majority of his life causing them distress and that his circumstances did not warrant provision being made for him from the estate.

Decision:

The court considered the relationship between the plaintiff and the deceased was turbulent and volatile and it was characterized by abuse, threats and intimidation toward them. In making their wills, the deceased and his wife both signed statements explicitly making no provision for the plaintiff due to their troubled relationship and his comfortable financial position.

The court concluded the plaintiff had much success in his life; he had built up his smash repair and motor business in which he kept some share, he was semi-retired and lived with his family in a six-bedroom, four-bathroom and four-garage house and that given the nature of the relationship between the parties, this was not a case where inadequate provision had been made for the plaintiff.

The summons was dismissed.

Misek v McBride [2017] NSWSC 406

Supreme Court of New South Wales

Coram: Slattery J

Date: 18 April 2017

Estate ($): $783,231 - Claimant's relationship: Granddaughter - Order for provision: $460,000 - Costs: $245,000 (plaintiff - $120,000; defendant - $125,000)

Issues: Need

Facts:

The deceased died in June 2014, aged 83 years and was survived by her remaining daughter and four grandchildren, the children of her late son. The plaintiff was the eldest of the grandchildren.

The deceased's last will appointed her daughter as executor and sole beneficiary of her estate. The will stated that no provision was made for the grandchildren as substantial time, effort and money was expended by the deceased and her husband for the benefit of the children during their lifetime.

The estate had net assets of approximately $783,381. During the deceased's lifetime the defendant used a power of attorney granted to her by the deceased who was suffering from dementia, to advance $642,000 to herself so that she could acquire a property. The power of attorney contained a clause empowering her to use the power to benefit herself.

The plaintiff and her husband had three children, they owned their own home which required renovations estimated to cost $790,000 which the court accepted were necessary; they had gross assets of approximately $1,336,388 and liabilities of $651,075, which included a mortgage liability of $576,731. The household income was approximately $13,469 and outgoings were $15,437.

The defendant was married and she had significant net assets, income and superannuation.

Decision:

The defendant conceded that the plaintiff was an eligible person and there were "factors warranting" her claim.

The defendant contended that the power of attorney expressly authorized her to make loans to herself with what is commonly known as a benefit clause. This was accepted by the court.

The plaintiff received approximately $400,000 from her grandparents during their lifetimes but the court concluded this was a misleading figure as it was never given as a lump sum and most of the gifts were made ad hoc in amounts of $2,000 and $3,000.

The court held that the plaintiff should not be treated as a daughter among the objects of the deceased's testamentary intentions, however, adequate provision had not been made for her and a sum of $460,000 would enable the plaintiff and her husband to repay a significant portion of their mortgage which in turn would reduce their outgoings.

Postscript: The plaintiff also alleged that 20% of the deceased's estate was held on a secret trust for her which was communicated to her by both her grandparents in a conversation that took place between late 1999 and May 2000 where her grandfather, the deceased's husband, stated the defendant will give you 20% of the estate. The plaintiff alleged the defendant was present when the conversation occurred and that she nodded her agreement. The court found that there was no evidence to support the claim.

Misek v McBride (No 2) [2017] NSWSC 796

Supreme Court of New South Wales

Coram: Slattery J

Date: 20 June 2017

Estate ($): $788,231 - Claimant's relationship: Order for provision: $460,000 - Costs: See below

Issues: Costs

Facts:

The court ordered that provision be made for the plaintiff of $460,000.

On 3 March 2016, the plaintiff served a Calderbank Offer and an Offer of Compromise which relevantly
provided:

> "1. The plaintiff receive provision out of the estate of the deceased by way of lump sum of $349,000.
>
> 2. The statement of claim be otherwise dismissed.
>
> 3. The plaintiff's costs on a party-party basis be paid out of the estate of the deceased.
>
> 4. The defendant's costs on an indemnity basis be paid out of the estate of the deceased."

The plaintiff therefore offered to compromise the proceedings for a legacy of $349,000 plus the payment of costs out of the estate. The offer was rejected by the defendant.

The plaintiff claimed that the result she achieved in the proceedings was "no less favourable to the plaintiff than the terms of the offer" and pursuant to *UCPR* r 42.14 she should have her costs paid on the indemnity basis from the day following the date of the offer of compromise. The defendant disputed that the offer complied with *UCPR* r 20.26 and contended that as the plaintiff was unsuccessful with two causes of action, the plaintiff should receive significantly less than 100% of her costs of the proceedings.

Decision:

There was no validity to the defendant's claims that the Offer of Compromise was invalid and the plaintiff should not have her costs on the indemnity basis. There was merit though that two claims upon which the plaintiff was unsuccessful were severable from the family provision claim and that the proceedings would have taken significantly less time if they had not been advanced.

The court adopted a "broad brush" approach and determined that there should be a discount of 20% of the plaintiff's costs and an order should be made that the plaintiff receive 80% of her costs up to 3 March 2016 and on the indemnity basis thereafter.

Toscano v Toscano [2017] NSWSC 419

Supreme Court of New South Wales

Coram: Robb J

Date: 20 April 2017

Estate ($): $600,395 ($1,950,000 notional estate) - Claimant's relationship: Son - Order for provision: $180,000 - Costs: Not known

Issues: Need, notional estate

Facts:

The deceased died in March 2015.

The plaintiff was the deceased's son.

In his will, the deceased appointed another son his executor and gifted $500 to the plaintiff.

The second defendant was the deceased's youngest daughter and she was joined as a party, as before his death, the deceased transferred a property to her and the executor and the plaintiff sought a notional estate order in respect to the property.

The estate had a half-interest in property with a value of approximately $600,000 and few other assets. The will left a property to the deceased's wife. The wife also made a family provision claim which settled on terms which provided that the half-share of the property the deceased did not own was notional estate and transferred to the wife and that she was to sell the property and give 30% of the net proceeds of sale to the first defendant.

A family provision order of $70,000 had also been made to another child and her legal costs in those proceedings of $30,000 remained unpaid. In total, the estate had liabilities of $271,119.

The evidence established that the plaintiff and the deceased were estranged and the plaintiff
blamed this on his father's brutality that forced him to run away from home to join the navy when he was 19 years old. The plaintiff described the deceased as a "terrible father".

The plaintiff had modest net assets which included a house. He had separated from his wife and a property settlement was yet to occur, but it was likely that any settlement would require the house to be sold and the plaintiff would have, superannuation aside, cash of about $65,000. He was employed and he had net annual income of $83,232 and expenses of $81,220. He wished to purchase a house closer to his work so he would not be required to undertake a 150km daily round trip to work.

The will's other beneficiaries had significant assets.

During the deceased's lifetime, he gave the plaintiff little to no provision.

Decision:

The court held that the plaintiff, having fallen on hardship as a result of insecure employment and the fall out of two broken marriages required proper provision by way of a legacy in an appropriate amount to provide a buffer against contingencies and to assist the plaintiff in his retirement.

The court was also satisfied that the plaintiff was entitled to a family provision order subject to the question of whether any of the deceased's former property should be designated as notional estate. The court also weighed up the estrangement between the plaintiff and the deceased and held that because the plaintiff was an adult child reasonable recognition had to be given to the deceased's testamentary freedom.

The court held that properties transferred to the defendants for $1 may have the effect of allowing the court to make an order under s 80(2)(a) of the Succession Act designating each property as notional estate if the transactions were entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate for the maintenance, education or advancement of life for any person so entitled. The court was satisfied it could draw such an inference, albeit that the deceased also had a subsidiary intention of transferring the properties to the children who had remained closest to him in a manner that would allow him to determine the disposal of his estate and reduce the chance that his intentions would be thwarted by any family provision proceedings. The court looked at factors such as the timing of the transfers, the benefits conferred upon the beneficiaries and how the benefits differed from transfers under the will.

The plaintiff was granted a legacy of $180,000 and the defendants were ordered to bear the burden of the order and the plaintiff's costs equally.

Estate of MPS, Deceased [2017] NSWSC 482

Supreme Court of New South Wales

Coram: Lindsay J

Date: 4 May 2017

Estate ($): $2,500,000 approximately - Claimant's relationship: Living in a "close personal relationship" - Order for provision: $550,000 - Costs: Plaintiff - $135,000 on the indemnity basis and $85,800 on the ordinary basis; defendant - $292,800

Issues: Close and personal relationship, need

Facts:

The deceased died in October 2014 aged 71 years.

The deceased died intestate and administration of her estate was granted to her brother the defendant.

The deceased's estate comprised 3 home units in Balgowlah with an estimated value of $1,825,000, cash of $764,000 and a small number of shares in a public company with an estimated value of $2,345. The estate also had liabilities of $147,638 in strata levies to fund remedial works on the Balgowlah units and an unknown sum for income tax.

The plaintiff had known the deceased as a friend since 1979 and claimed he had a sexual relationship with her and her partner, as a threesome over a period of about six months. The deceased and he then parted ways until a chance meeting in August 2012. At this time, the deceased was terminally ill and the plaintiff claimed that her and the deceased resumed a sexual relationship until the deceased's death. The plaintiff also claimed that he cared for the deceased whilst living with her, despite maintaining separate residences and to have been substantially maintained by her during this time. From 2102 until her death, the deceased had approximately 12 admissions to hospitals and institutions and she listed the plaintiff in 10 of those admissions as her next of kin.

The plaintiff was 65, had never married or had children, he was unemployed, he had not worked regularly since 1993, he lived alone, he was in receipt of a disability pension and he suffered from various psychiatric conditions. His needs included security of accommodation.

The defendant had the only competing interest and he was 67 years old and he put forward no evidence about his personal or financial circumstances.

The plaintiff sought a lump sum legacy sufficient to enable him to discharge debts, to purchase a car, to provide him accommodation and treatment and support for his psychiatric condition and contingencies.

Decision:

The plaintiff had to establish his eligibility and that he had been in a "close and personal relationship" within the definition of that term in s 57(1)(f) of the *Succession Act*.

The defendant contended that there are three main issues; firstly, the plaintiff and the deceased were never "living together"; secondly, payments made by the deceased to or for

the benefit of the plaintiff activated the exclusionary provision in s 3(4)(a) and thirdly, the plaintiff had substantially abandoned the deceased towards the end of her life, so that he cannot be said to have been living in a close and personal relationship with her at the time of her death.

It was held that living together is essentially a relational concept and is not constrained by formalities nor geography and that it was significant that the plaintiff was nominated the deceased's "next of kin" in hospital admission forms. The court accepted there were "factors warranting" the claim and the plaintiff's claim that the deceased and the plaintiff were living together within the meaning of s 3(3) of the *Succession Act* (living together and providing domestic care). Further, any payment the plaintiff received or expected to receive was not in return for the care provided but rather incidental to the parties' relationship.

The appropriate order for provision was a legacy which would provide the plaintiff with ongoing rental assistance and a fund for contingencies which the court determined to be $550,000.

Carusi-Lees v Carusi [2017] NSWSC 590

Supreme Court of New South Wales

Coram: Hallen J

Date: 18 May 2017

Estate ($): $4,400,000 approximately - Claimant's relationship: Daughter - Order for provision: $550,000 - Costs: Plaintiff – $163,250 on the indemnity basis and $123,000 on the ordinary basis; defendant - $113,325 on the indemnity basis

Issues: Need

Facts:

The plaintiff was the deceased's daughter from his first marriage.

The deceased died aged 82 in December 2014 survived by his wife the defendant and two children by her. The second marriage had spanned 55 years.

The deceased's last will left the entirety of his estate to the defendant but the estate had no real property and little personal property as all the deceased's property was jointly owned with the defendant and it passed to her by survivorship. No application for probate of the deceased's will was made.

The defendant agreed to satisfy any order for family provision and therefore an order was not made that she be joined as a party pursuant to s 91 of the *Succession Act*, but an order was made that she be joined as a holder of property to be designated as notional estate pursuant to s 72 of the Act.

The notional estate had assets with a value of approximately $4,400,000.

The plaintiff was 58 years old and did not meet the deceased until she was 10 years old.

Previous wills the deceased made gave decreased provision for the plaintiff over time. During his lifetime though the deceased gave the plaintiff approximately $500,000 to purchase a house and various other items and he made a statutory declaration saying he believed this was sufficient provision for her.

The plaintiff earned $5,845 per month but spent $14,687 per month of which $5,750 was a mortgage commitment. She had assets of approximately $2 million and liabilities of approximately $1.3 million. Her marriage had broken down, her husband was a bankrupt and it was inferred that there would be a property settlement at some time. Also, an adult child was partially dependent upon the plaintiff and another child was wholly dependent on her. The plaintiff also had a history of anxiety and depression.

The plaintiff sought a fund to secure accommodation and to provide a fund "against contingencies".

The defendant had assets of approximately $5.9 million and liabilities of approximately $243,000.

Decision:

The court accepted that the deceased was “extremely generous” to the plaintiff during his lifetime however, it balanced the size of the notional estate with the plaintiff’s needs particularly that it was likely she would have to sell her home and it would cost around $900,000 to purchase a new one.

A legacy of $400,000 out of the notional estate was ordered which the evidence established would enable the plaintiff to pay off her liabilities in full and to provide a lump sum to enable her to purchase another house.

Mitar v Mitar [2017] NSWSC 647

Supreme Court of New South Wales

Coram: Robb J

Date: 26 May 2017

Estate ($): $3,191,000 - Claimant's relationship: Son - Order for provision: 30% of the estate ($964,000) - Costs: See below

Issues: Need

Facts:

The deceased died in May 2014, aged 74 years. He was survived by three daughters and a son.

In the deceased's last will dated 29 March 2011 he appointed one of his daughters the executor of his estate, he provided a right of residence in the family home for his son on condition he occupied the house and he paid electricity and water rates, he gifted the son his car and furniture, he gave the rest and residue of the estate to the executor and he directed her to pay any other expenses from the estate and to apply such part of the estate as she determined for the son's benefit. The will therefore made no provision for two other daughters.

The effect of the will was that the executor was entitled to apply the estate for her benefit if the son ceased occupying the family home.

The evidence indicated that the deceased probably wanted the executor to divide any cash funds between his three daughters. The evidence also indicated that the son had suffered from paranoid schizophrenic for many years up to 2006 and the deceased believed he was dependent on him for a place to live.

The son and the two daughters each brought family provision claims.

The son contended that he had suffered no symptoms of paranoid schizophrenia for more than 10 years and that he was now employed and fiscally more responsible. The son also argued a right of residence was an unsuitable gift as it was inflexible and that he wanted to "walk away from his sister's control.

All parties accepted the son's contentions.

On the first day of the hearing the sisters settled their claims broadly on the basis that they were to each receive an equal share of the estate.

At the hearing, $658,000 had been distributed to the parties in various way and the remaining estate had a value of approximately $3 million.

The son sought an order that the family home (with a value of $1,850,000) be transferred to him. His monthly income was $4,800 and his expenses were $1,930. He had modest assets of $46,570 and a debt of $3,000.

Decision:

The primary issue was what provision should be made for the son. Whilst the court accepted that the plaintiff should have a family provision order made in his favour, it considered the burden the other sisters would have with regard to their circumstances in making the order. It determined that the plaintiff should have a legacy that would enable him to buy a two-bedroom unit and provide him a buffer against contingencies.

The plaintiff was awarded 30% of the estate or $964,286 and the sisters were to determine the basis upon which the burden of the order would fall.

Mitar v Mitar (No 2) [2017] NSWSC 1308

Supreme Court of New South Wales

Coram: Robb J

Date: 26 May 2017

Estate ($): $3,191,000 - Claimant's relationship: Son - Order for provision: 30% of the estate ($964,000) - Costs: See below

Issues: Costs

Facts:

At the principal hearing (see above), the court ordered that the plaintiff was to receive a legacy of 30% of the deceased's estate, which after costs were allowed had a value of approximately $3.191 million. The imputed value of the provision made for the plaintiff was therefore $957,300.

The defendant made an offer to the plaintiff to settle his claim on the basis that he receive a lump sum of $950,000 from the assets of the estate.

The plaintiff's case was that he should receive title to a property which had an assumed value of $1,850,000. In final submissions it was also contended for the plaintiff that he should receive $50,000 in cash.

The defendant sought orders that: (1) the plaintiff's costs on the ordinary basis be paid by the estate up to the date of the offer and that the plaintiff pay his own costs after the date of the offer; (2) the plaintiff pay the defendant's costs on the indemnity basis for the date of the offer; and (3) that the defendant's costs, not otherwise paid by the plaintiff be paid by the estate on the indemnity basis. The offer was also conditional on the plaintiffs in the related proceedings accepting offers made to them that those plaintiffs and the defendant share the rest and residue of the residue after allowing for the provision payable to the plaintiff in these proceedings.

During the hearing, the defendant also made an unconditional offer that she would compromise the plaintiff's claim on the basis that he would receive a lump sum of $950,000.

Decision:

The estate's principal asset, a real property, had not yet been sold and as the order for provision was in a fixed amount of the net estate, there was a chance the provision the plaintiff would receive would exceed $950,000 and the result of the proceedings would therefore "not be more favourable to the defendant" than the offer. The court said that in the general case, a Calderbank offer will not be effective if the offeree achieves a better result than the terms of the offer, irrespective of how small the improvement of the result is over the terms of the offer. The court also said that it should strongly hesitate to find itself in the position of trying to judge when an "improvement" is so immaterial that it should be ignored and responding to Calderbank offers is a naturally risky business for the offerees which forces them to take serious risks and if any improvement over the terms of an offer is achieved, that should dispel the effectiveness of a Calderbank offer.

The court also considered it significant that the offer was conditional on a settlement in related proceedings being negotiated which made any acceptance of an offer contingent of a

settlement in the related proceedings and that the offer was made only five days before the hearing.

In respect to the offer made during the hearing, the court held that the plaintiff achieved a better outcome and he did not act unreasonably in not accepting the offer.

The court ordered that the plaintiff's costs be paid on the ordinary basis and that the defendant's costs be paid on the indemnity basis by the estate.

Calokerinios v Yesilhat [2017] NSWSC 666

Supreme Court of New South Wales

Coram: Slattery J

Date: 9 June 2017

Estate ($): $6,000,000 - Claimant's relationship: De-facto partner and member of the same household - Order for provision: Summons dismissed - Costs: Not known

Issues: Eligible person

Facts:

The deceased died aged 65 having never been married and leaving behind no children, surviving siblings or parents.

An informal will gave the deceased's entire estate to his closest surviving relatives, his two nieces, appointing one as executor.

The plaintiff claimed he was in an intimate same-sex relationship with the deceased for a period of approximately 14 years before his death that provided the whole of the estate was to be distributed to him and that the document was destroyed by the defendants. He sought letters of administration upon revocation of the informal will and if the grant of probate was not revoked that an order for family provision be made in his favour out of the estate as he was the deceased's de facto spouse, or as a dependent who lived with the deceased for a period, or as someone in a close personal relationship living with the deceased. The plaintiff also alleged the informal was constructed by the defendants.

The defendants claimed that $380,000 was taken out of the deceased's bank accounts by the plaintiff shortly before, and after his death, and they were fraudulent misappropriations by the plaintiff or a debt owed to the estate.

The plaintiff claimed the monies were gifted to him by the deceased.

Decision:

The plaintiff was seen as entirely unreliable witness. Conversely, the defendants were found to be reliable and trustworthy witnesses. The evidence including phone calls, photos and witness testimony led the court to conclude that the relationship between the plaintiff and the deceased was that of a friend and business associate and the plaintiff took advantage of the deceased's generosity. It was therefore concluded that there was no same-sex relationship with the deceased, that the plaintiff's same-sex attraction to the deceased was most likely an invention, that no will in favour of the plaintiff was destroyed nor ever made and that based on expert evidence and the circumstances in which it was made that the informal will was the deceased's last will.

The plaintiff also failed to establish that he was an "eligible person" as he was in a relationship with the deceased or that he was part of the deceased's household.

Further issues such as what provision should be made for the plaintiff and whether there were "factors warranting" a claim did not need to be decided as the plaintiff was not an "eligible person".

Hancock v Parker [2017] NSWSC 759

Supreme Court of New South Wales

Coram: Hallen J

Date: 20 June 2017

Estate ($): $865,000 - Claimants' relationship: Daughter and grandson - Order for provision: Daughter - summons dismissed; Grandson ($60,000) - Costs: Daughter - $90,750 on the ordinary basis; grandson - $108,860 on the ordinary basis; defendant - $133,000 on the indemnity basis

Issues: Grandchild, need

Facts:

The deceased died in January 2015 leaving three children.

The deceased's husband, and the children's father, predeceased her.

One of the deceased's daughters and the daughter's son (the deceased's grandson) made separate applications for provision and the two proceedings were heard together.

In her will, the deceased left the whole of her estate to her three children in equal shares. In addition the will permitted the daughter to reside in the deceased's Lugarno home for 12 months so long as she was responsible for outgoings.

The estate's principal asset was the Lugarno house, which had a value of $950,000, subject to a mortgage of $80,000. But for the commencement of proceedings therefore, each of the estate's beneficiaries would have expected to receive about $288,000.

The plaintiffs had resided in the Lugarno property since the Deceased's death.

The daughter was 53 years of age, she had few assets and her only income was from the Carer's Pension which was enough to meet her monthly expenses.

The grandson was 34 years old at the hearing, his relationship with the deceased had been more akin to that of a surrogate son than grandchild, he was at least partly emotionally dependant on the deceased for most of his life and he had lived in the deceased's household at various times. He also had a drug addiction and mental health problems although at the hearing he had abstained from drugs for two years and alcohol for twelve months. The grandson was on a disability support pension and he had negligible assets.

Decision:

The court made no change to the one-third legacy the daughter was to receive under the will as it did not consider that inadequate provision had been made for her in the will. In coming to the decision the court considered that significant provision had been made for the daughter during the deceased's lifetime and that she had occupied the Lugarno property since the deceased's death.

The court also held that in general, a grandparent does not have a responsibility to make provision for a grandchild as this obligation rests on the parents of the grandchild, nor does a

pattern of generosity toward the grandchild convert this relationship into one of obligation.

When the court considered the grandson's financial and material circumstances and his mental and psychological conditions, that no provision was made for him in the will indicated he was left without adequate provision. Using the estate's gross value as a guide, it was appropriate that he receive a legacy of 7% or $60,000. In coming to the figure, the court considered the significant provision made for the grandson during the deceased's lifetime and that he had remaining living at the Lugarno property since the deceased's death.

An order was also made that the burden of the provision fall unequally on the will's beneficiaries so that the daughter's share should suffer no burden and the other children would bear the burden.

Viljoen v Hayes [2017] NSWSC 801

Supreme Court of New South Wales

Coram: Parker J

Date: 21 June 2017

Estate ($): Not known - Claimants' relationship: Daughter - Order for provision: Not applicable - Costs: Not known

Issues: Practice and procedure

Facts:

The deceased died in July 2016.

In his last will, the deceased appointed the defendant his executor and trustee and he gifted one of three properties he owned to the plaintiff and the defendant in equal shares and the residue of his estate to the defendant.

The plaintiff and the defendant were brother and sister.

In February 2010, the deceased executed a power of attorney appointing his children jointly and severally, as his attorneys. The deceased's properties were heavily mortgaged and his financial difficulties meant that there was a real risk of impending foreclosure. The deceased and the defendant agreed that the primary family residence property should be sold at under market value to the defendant to repay the debt. The primary residence was sold and a consequence of this was that the plaintiff's gift of the house made in the will abated.

Since the deceased's death, the plaintiff's solicitors had made various requests for information about the estate and transactions entered into before the deceased's death. The plaintiff was not satisfied with the response she received that the property she received in the will as a co-tenant had been sold and the assets of the estate at death were approximately $44,000.

The plaintiff commenced proceedings seeking relief in three ways. Firstly an order under *UCPR* 54.3(3) that the defendant produce relevant documents. Secondly, an order in the same terms under the court's inherent jurisdiction. Thirdly, an order for preliminary discovery pursuant to UCPR r 5.3(1).

Decision:

UCPR r 54.3(3) states:

> "Proceedings may be brought for an order directing any executor, administrator or trustee:
> (a) to furnish accounts, or
> (b) to verify accounts, or
> (c) to pay funds of the estate or trust into court, or
> (d) to do or abstain from doing any act."

The term "administration proceedings" was defined in *UCPR* 54.1 as meaning "proceedings for the administration of an estate, or for the exercise of a trust, under the direction of the Supreme Court".

The court accepted that though probate had not been granted *UCPR* 54(3) applied as the defendant was in effect acting as an executor de son tort and therefore he was bound in law by the obligations of an executor. The court also accepted that the power was a wide one and the plaintiff had to show that the production of the documents sought is was an appropriate step to take in the interests of proper administration of the estate. The plaintiff though had no interest in the estate and if wrongdoing was established, any recovery would flow back to the defendant as sole beneficiary.

The court decided that any residual inherent power was confined to the proper administration of a trust or estate and it was also inappropriate to make such an order when the plaintiff had no interest.

The court next decided the plaintiff was entitled to seek preliminary discovery if two issues were satisfied; that the plaintiff may be entitled to make a claim for provision and that there was a sufficient case that provision would be made for the plaintiff at a hearing. The plaintiff did not meet the first requirement and even if she did, as a matter of discretion the court would not have made an order as a matter of discretion as the plaintiff had not put on evidence about her financial means and circumstances so the court could determine if she had “need”.

Page v Page [2017] NSWCA 141

Supreme Court of New South Wales, Court of Appeal

Coram: Basten JA, Leeming JA and Sackville AJA

Date: 22 June 2017

Estate ($): Not known - Claimants' relationship: Brother - Order for provision: Appeal dismissed - Costs: Appellant to pay the respondent's costs.

Issues: Dependent, eligible person

Facts:

In the court below, Hallen J dismissed the appellant's claim as he determined he was not an "eligible person" and had it been necessary to decide the issue, that there were not "factors warranting" the making of the application.

The deceased and the appellant were brothers and as children they were members of the same household.

There were two grounds of appeal. The first was that as a member of the same household, the appellant was partly dependent on his elder brother. The second was that there were factors warranting the making of the application. The appellant therefore had to succeed on both grounds.

Decision:

The evidence was that when their mother was not at home and the deceased was there, that in general terms, the deceased looked after the house. The court though said that any relationship which involves cooperative activity can be said to give rise to mutual dependence, but the statutory context required a more limited form of dependency. The trial judge found that at no time was the deceased acting in "loco parentis". The Court of Appeal held this was important as unless another person takes over the social, moral and legal obligation, there could be no relationship of dependency which would require provision from the estate of the carer. The appeal therefore failed.

The court (Sackville AJA) also considered whether there were "factors" warranting" a claim. The issue that led the trial judge to conclude there were not was a text message the appellant sent to the deceased in which he said he was going to report multiple incidents of sexual assault that he alleged the deceased perpetrated on him when they were children to the authorities unless the deceased contacted him by a certain date. The trial judge found that the allegations spoke more to damages and compensation that "factors warranting". The court took a different view of the text and opined that whether the text bore the character attributed to it by the trial judge might depend on the truth of the appellant's allegations. On balance though, the court id not conclude that there insufficient prospects the appellant would establish that the allegations were true to warrant a further trial.

The judgment is also useful as Leeming JA considers in detail the applicability of *House v King* principles in family provision matters and he concluded that issues of "partial dependency" do not invoke the principles (see [28] - [40]).

Wilson v Porada [2017] NSWSC 818

Supreme Court of New South Wales

Coram: Slattery J

Date 30 June 2017

Estate ($): $348,000 plus notional estate of $411,000 - Claimants' relationship: Dependent - Order for provision: $75,000 - Costs: See below

Issues: Close and personal relationship, de-facto relationship, factors warranting

Facts:

The deceased died in April 2015, aged 55 years without leaving a will.

The plaintiff claimed that at the time of the deceased's death she had been in a continuous 12 year de-facto relationship with him.

The deceased was survived by three siblings and unless the plaintiff could establish she was the deceased's de-facto spouse, they would be entitled to the whole of his estate.

The plaintiff sought a grant of administration of the deceased's estate and a family provision order. She relied on three grounds for the family provision claim; she was living in a de facto relationship with the deceased at his death, she was partly dependent on the deceased and a member of his household, and that she was living in a "close personal relationship" with the deceased at his death.

The plaintiff's evidence was that from 2004 to 2009, the deceased stayed at her place three or four times a week and that they did everything together such as sharing family holidays, going to family weddings and chopping wood. She also said that her children saw the deceased as a father figure and they had been inconsolable when he died.

The deceased's estate had net assets of between $800,000 and $850,000 and superannuation entitlements of $411,000.

The plaintiff received a disability pension of $1,875 a month and she owned a property worth approximately $85,000 with a mortgage of $32,600, she had no superannuation and few other assets.

Decision:

The court found that any de facto relationship between the plaintiff and the defendant had ended by 2010 so the plaintiff was not in a relationship with the deceased when he died.

The court did find that the plaintiff had been dependent upon the deceased between 2004 and 2009 as she had relied on financial contributions from him when she had no employment and had care of children. She also lived in a household with him. Further, whilst there were elements of a "close" and "personal" relationship, between the plaintiff and the deceased, they were not living in such a relationship at the time of death as they had reverted to being "friends".

There were "factors warranting" a claim, as the deceased chose to maintain a civil

relationship with the plaintiff for the sake of the plaintiff's children whose company he enjoyed, he still allowed the plaintiff a place in his life, she organised social functions with him and for they had some degree of life together.

The plaintiff was awarded $75,000, a sum the court assessed would enable her to repay a mortgage ($36,000) and to have a fund for exigencies ($39,000). The award also accounted for the substantial benefits the plaintiff received during the deceased's lifetime.

Wilson v Porada (No 2) [2017] NSWSC 1362

Supreme Court of New South Wales

Coram: Slattery J

Date: 9 October 2017

Estate ($): $348,000 plus notional estate of $411,000 - Claimant's relationship: Dependent - Order for provision: $75,000 - Costs: See below

Issues: Costs

Facts:

In the principal proceedings the plaintiff failed to establish that she was the deceased's de-facto partner when he died and that administration of his estate should be granted to her. The plaintiff though had some success as she was found to be dependent on the deceased and a member of his household and the court ordered that a legacy of $75,000 be provided to her.

The plaintiff contended that the defendant should have his costs only on the ordinary basis and contrary to the general principle that trustees and executors are entitled to an indemnity against all proper costs and expenses, as the defendant came within an exception in *UCPR* r 42.25 as the defendant had in substance acted for his own benefit rather than for the estate's benefit. It was alleged that the defendant failed to apply for probate and acted only to protect his own position as a potential beneficiary under the provisions of the *Succession Act*.

The defendant contended that each party should pay its own costs of the proceedings and that as the plaintiff had failed to establish that she had been in a de facto relationship with the deceased when he died, the plaintiff's costs should be capped.

Decision:

The court noted that costs on both sides were much higher that should be expected "from an ordinary family provision case" conducted over two days and that each side should incur costs of no more than $70,000 to $80,000 and a more complex case going four days may incur costs of between $120,000 and $140,000. The court also observed that from reading correspondence between the parties' solicitors, each party had been "unnecessarily aggressive" and that there had been a lack of objectivity which had contributed to the overall burden of costs.

After taking account of the fact that the plaintiff was awarded a legacy of $75,000, the court ordered that the plaintiff's costs be capped at $100,000. The "usual order" was made that the defendant's costs be paid by the estate on the indemnity basis.

Penninger v Penninger [2017] NSWSC 892

Supreme Court of New South Wales

Coram: Hallen J

Date: 6 July 2017

Estate ($): $179,000 (assumed) - Claimant's relationship: Daughter - Order for provision: $17,500 - Costs: Plaintiff - $30,000; defendant - $40,000

Issues: Extension of time, need

Facts:

The deceased died in July 2010, aged 86 years.

The plaintiff was one of the deceased's three children. Two of the children (but not the plaintiff) were named as executors of the deceased's estate in her last will but probate of the will had not been sought. One brother was not joined as a defendant and there was evidence that he lived on a yacht in Fiji. The brother joined as a party continued to reside in a property at Merriwa which was the estate's principal asset.

The court dispensed with the requirements of *UCPR* r 7.11 in the circumstances.

In the deceased's last will, she gifted her shares in a company she believed she owned to her sons, she gifted an interest in a property at Gymea to one of the sons and his wife and the rest and residue of her estate was gifted to the plaintiff. The evidence established the plaintiff did not own shares in a company and neither did she own a Gymea property.

The proceedings were not commenced within time and the plaintiff sought an order that an extension of time be granted. Her evidence was that she was not aware there was a time limit to bring an application and that she understood she would be advised of her entitlements from the estate by her brother at some time, that it might take time to sort out her mother's entitlements to the Merriwa property and that she trusted her brother.

The deceased owned two-thirds of the Merriwa property and the brother joined as a party owned the other one-third. The property had an estimated value of $537,500 and therefore the deceased's interest had a value of $358,333. A mortgage was also registered against the property's title of a sum which when principal and interest where calculated, consumed the deceased's interest in the property with the result that there was no estate from which an order for provision might be satisfied. Pre-hearing, an issue had arisen about the validity of the mortgage, however the mortgagee was not joined as a party to the proceedings and the court proceeded on the basis that the construction of the mortgage was not a matter that would be considered at the hearing. At the hearing though, the defendant conceded that the court should proceed on the basis that one-third of the property's gross value ($179,000), less the defendant's costs ($40,000) should be assumed to be the available estate.

The plaintiff was 61 years old and she received welfare of $290 per week. She worked to supplement this income and her total income matched her expenditure of $1,385 per month. She had cash assets of $25,297 and personal effects and she was currently residing in public housing with her son. The plaintiff had been unable to work full-time employment since a fall in 2006.

The defendant owned a one-third interest in the Merriwa property and sundry other assets.

He had a joint liability to repay the mortgage secured against the property. His income ($16,764 per annum) just met his weekly expenses of $315 per week. He also submitted that the Merriwa property would have to be sold to meet any order for provision made for the plaintiff.

Decision:

The court was satisfied that adequate provision had not been made for the plaintiff in the deceased's will. The court also considered that the defendant had been living in the Merriwa property since the deceased's death and had treated it as his own. The estate though was small and "adequate and proper" provision was a lump sum of $17,500 which would enable the plaintiff to pay off debts and leave an extremely capital sum to meet the exigencies of life.

The court also found that as the plaintiff had a reasonable claim, that as a matter of justice sufficient cause had been shown for the making of the claim and time should be extended to make a claim, to the date of the summons.

Hughes v Sharp [2017] NSWSC 962

Supreme Court of New South Wales

Coram: Hallen J

Date: 20 July 2017

Estate ($): $617,019 - Claimants' relationship: Son - Order for provision: 15% of the net estate - Costs: Plaintiff - $67,000 (ordinary basis); defendant - $76,700 (indemnity basis)

Issues: Extension of time, need

Facts:

The deceased died in August 2015, aged 87.

The plaintiff was the deceased's only surviving child and he sought additional provision from the deceased's estate.

The plaintiff's application was made 39 days out of time and consequently, leave was required.

The defendant was the plaintiff's daughter from his first marriage and the deceased's grandchild.

The plaintiff had never been a significant figure in the defendant's life.

The deceased's will named the defendant the deceased's executor and devised a property at Merewether to the defendant. The will also gave a legacy of $25 to the plaintiff, it made various other small gifts and provided that the residue of the estate should go to the defendant. The will also noted that in making the will the deceased had considered that the defendant and her then husband were the only family members who took care of the deceased during her old age.

A summons was not filed in time due to the lack of experience of the plaintiff's solicitor as the solicitor did not take into account the importance of filing the summons within 12 months of the deceased's death and the potential problems in leaving the filing of a summons until a few days before the limitation period expired. Any delay was exacerbated because the plaintiff also made an application to waive the filing fee and this too caused delay.

The defendant did not identify any prejudice arising out of the delay in commencing proceedings.

In 1985, the deceased and her husband took a mortgage over their property in 1985 to assist the plaintiff's legal case when he was held in a Thai prison for heroin trafficking. They also provided him emotional support. The deceased also took custody of the plaintiff who was then a baby. From that time and until she was 28, the defendant lived in the Merewether property. The deceased and her late husband acted in "loco parentis" and they paid all the costs of raising the defendant that would usually be borne by her parents.

The plaintiff was 58 years old, he lived with his partner and worked part-time as a traffic controller. He and his partner had few assets and the family's weekly income matched their outgoings. The plaintiff was undertaking a TAFE course so he might find alternative work in the future.

The defendant was 33 years old, she graduated with a double degree in 2012 and she was undertaking a masters' degree. She earned approximately $4,156 a month ad she had expenses of about $1,719 a month. She had assets of $75,000 and debts of $25,400.

The defendant contended that if provision was made for the plaintiff, the Merewether property would have to be sold.

Decision:

The court concluded that the plaintiff was in straitened circumstances, he had "negligible prospects", he had present financial needs and he was likely to have financial needs in the future. In comparison the defendant was in a better financial position and she had a "bright future". In the circumstances therefore, inadequate provision was made for the plaintiff in the deceased's will.

The court also concluded that the estate was of sufficient size to cater for the plaintiff's and the defendant's provision.

In making an assessment of what provision should be made for the plaintiff, the court took account of the significant provision made for the plaintiff during his lifetime. An order was made that the plaintiff receive 15% of the net estate which on the estimates available equated to a lump sum of about $70,500. The defendant therefore would receive 85% of the net estate or almost $400,000 which the court concluded was a reasonable sum to provide her with a sound financial start in life.

The court also allowed an extension of time to bring the application, having regard to the length of the delay, the plaintiff's promptitude in giving warning to the defendant a claim would be made and that the defendant would suffer no prejudice as the estate had not been distributed and the defendant had not changed her position in reliance on a distribution from the estate.

Towson v Francis [2017] NSWSC 1034

Supreme Court of New South Wales

Coram: Hallen J

Date: 10 August 2017

Estate ($): $504,739 - Claimants' relationship: Daughter - Order for provision: $60,000 - Costs: - Plaintiff - $47,000 on the ordinary basis; defendant - $58,000 on the indemnity basis

Issues: Need

Facts:

The deceased died in September 2015 aged 86 years.

The plaintiff was one of three siblings and he sought additional provision from the deceased's estate.

The defendants were a daughter and two grandchildren

In her last will made in August 2011, aside from minor gifts, the deceased gave $20,000 to the plaintiff, she devised a Wagga Wagga property to the defendants in equal shares and left the residue of her estate to the defendants in equal shares.

At the hearing, the Wagga Wagga property had been sold and the deceased's personal property had been distributed in accordance with the will and $504,739 was available for distribution and was held in a trust account by the defendant's solicitors.

There was no dispute that after 2006, the plaintiff had very little face to face contact with the deceased.

The plaintiff was 64 years old and married. She and the deceased had a falling out in 2006 following the birth of a grandchild and an estrangement in 2008 when the plaintiff criticised the deceased's alcohol consumption. The plaintiff and her husband owned a home with an estimated value of $753,000, they had superannuation of $529,000 and cash and a car. In total they had assets of $1,308,500 and no liabilities. The plaintiff received a job allowance of $480 per fortnight and her husband earned $1,109 per fortnight. The plaintiff's health was poor and she had a range of medical conditions. Expert evidence indicated she need 12.5 hours of gratuitous care a week from her husband and daughter and that commercial providers would charge $30,750 per annum for the level of assistance she required

All of the defendants put their financial circumstances in issue. One defendant and her husband had net assets of approximately $$1.6 million and they had a joint income of $4,844 per month. The defendant was 63 years old and she hoped to retire in the next few years. Another defendant had net assets of approximately $96,000 and he received an income an income of $3,657 per month. He was saving to buy a home which he hoped to purchase for $350,000. The third defendant and her husband had gross assets of approximately $498,000 and liabilities of $183,000. She and her husband received income of approximately $7,250 a month and as they had had their first child, they wished to purchase a larger house which would costs between $450,000 and $500,000.

Decision:

The court characterised the plaintiff's claim as that of an adult child who had lived independently of her parent for many years but who, at the date of the hearing, had virtually no working capacity, quite severe health problems and where her husband was 70 years old and retired. In addition, the couple's major asset their home was probably going to have to pay for alternative accommodation.

The court concluded that adequate provision was not made for the plaintiff in the will

The plaintiff submitted that appropriate provision ought to be between $100,000 and $150,000. The court determined that a lump sum of $60,000 should be provided which would enable the plaintiff to undertake bathroom renovations to accommodate her medical needs and assist in paying some of the continuing costs of rehabilitation and exigencies of life.

Next the court determined how the burden of the order should be borne. If costs were paid from the estate, the distributable estate would be $435,076 and each defendant would receive approximately $145,000. As the first defendant was in a better financial position than the other defendants, her children, the court determined that the burden of the order for the plaintiff's provision should provision should be borne out of her share unless the defendants came to an agreement otherwise.

Charlwood v Charlwood [2017] NSWSC 1033

Supreme Court of New South Wales

Coram: Hallen J

Date: 10 August 2017

Estate ($): $974,660 - Claimants' relationship: Son - Order for provision: $150,000 loan - Costs: Plaintiff - $107,691 (on the ordinary basis); defendant - $119,867 (on the indemnity basis)

Issues: Need

Facts:

The deceased died in May 2015, aged 90 years.

In his last will made in November 1997, the deceased appointed one of his sons the executor of his estate and he gave the whole of his estate to his sons the plaintiff and the defendant in equal shares as tenants in common.

The plaintiff sought further provision from the estate. The plaintiff's wife and their two children also sought provision from the estate. At the hearing, only the plaintiff's claim was pressed and the other claims were discontinued with no order as to costs.

The defendant filed a cross-claim in which he sought possession of a property at Austral, owned by the estate and occupation rent.

The estate's principal asset was the Austral property which at the date of the hearing had an estimated value of $970,000. Other assets gave the estate an estimated value of $1 million. It was conceded that the Austral property would have to be sold and when the costs of sale were deducted, the estate had an estimated value of $974,660.

The evidence established that the plaintiff and the deceased had a close family relationship throughout the plaintiff's life until the deceased's death. The plaintiff was involved in a serious car accident in 1999 and since then he had not been in regular, or full time, employment. He was 59 years old and he and his wife had little by way of available assets. Their major asset was a car with an estimated value of $14,000, pearls, a small amount of cash and little in the way of superannuation. The plaintiff and his wife received $2,068 per fortnight in pensions and their income was sufficient to meet their expenses.

The plaintiff's needs were for accommodation as the Austral property he and his family lived in would be sold and they would need somewhere to live and the care of an autistic child.

The defendant and his wife owned two properties worth $1.2 million, cash of $450,000, household goods and other assets which were of slight values. The couple had liabilities of $604,000. The defendant received a pension of $2,644 a fortnight and the couple's expenditure of $10,300 substantially exceeded their income. His evidence was that he and his wife were "partially separated" and he lived for the most part in their second property. He had poor health (depression, high blood pressure and ongoing back paid) and his "needs" were a new residence if he and his wife separated, a new car, an overseas trip and that he was relying on his entitlement from the estate to fund his living expenses and retirement.

Decision:

The court accepted that the deceased's will did not suggest that he considered he had a moral obligation to provide accommodation for the plaintiff and his family by leaving the plaintiff the Austral property. Conversely though, the will was made 18 years before the deceased's death and before the plaintiff and his family moved into the home an a permanent and full time basis and began caring for the deceased.

The court concluded that adequate and proper provision required that the plaintiff be provided with the stability and security that owning his own home would provide, but that provision should be by way of a loan of $150,000 from the defendant's share of the estate, secured by a loan over the property purchased. The benefit of this approach was that if the plaintiff did not purchase a property for more than he received from the estate or he chose not to avail himself of the loan, he would not need to. The period withing which the plaintiff was to advise the defendant of the purchase of a property was 6 months after the Austral property's sale. Further, any loan was to be repaid on the sale of any property purchased by the plaintiff, if the plaintiff vacated the property or within 3 months of the plaintiff's death. Interest was also payable. Finally, the court noted that the defendant would still have about $250,000 for his use which it was to be inferred should be sufficient for him.

Kohari v NSW Trustee & Guardian (No 2) [2017] NSWSC 1080

Supreme Court of New South Wales

Coram: Parker J

Date: 18 August 2017

Estate ($): $1,240,000 - Claimant's relationship: Son - Order for provision: $100,000 - Costs: See below

Issues: Need

Facts:

The deceased died in August 2014.

The deceased married in 1974 and he and his wife had two children and the plaintiff was one of them. The deceased and his then wife separated in late 1980 and he and the plaintiff had no contact for the rest of his life. The deceased believed his then wife had been unfaithful and the plaintiff was not his son.

In the deceased's last will made in December 2011, he left the whole of his estate to his de facto partner of 26 years.

At the deceased's death, he owned a St Peters property with an estimated value of $750,000, a half share with his de facto partner in an Eagleby property with an estimated value of $125,000, shares and cash with an estimated total value of $110,000. After the deceased's death, the St Peters property was compulsorily acquired for the WestConnex road project for $1,130.000.

When the proceedings began, the defendant put the plaintiff's paternity in issue. A DNA test was ultimately ordered by the Court over the parties' objection and test established that the plaintiff was the deceased's son.

The plaintiff was 39 years old, he was grossly obese and suffered from asthma, sleep apnea and cellulitis. He had not had a paying job for over 17 years. His wife with whom he had four children, also suffered from a range of medical conditions. The couple lived on welfare and received benefits totaling $2,100 per fortnight. There expenditure was $3,700 a month or $44,000 per year. The plaintiff and his wife had no assets of any value and they were "struggling to make ends meet".

The defendant was 69 years old and owned the Eagleby property and few other assets. She received a pension of $21,000 per annum and had expenses of $14,000 per annum. She was living at the Eagleby property but wanted to purchase a house at Moree.

Decision:

The court was not satisfied that the deceased considered when making his 2011 will, what provision should be made for the plaintiff and he failed to consider the possibility that he was the plaintiff's father. In addition, the deceased had challenged his mother's will and received provision for it, so that community expectations were that the deceased should have made provision for the plaintiff.

It was common ground that the deceased's partner should be treated as if she was a wife and that required that a certain minimum level of provision be made for her. The court determined that she had a legitimate expectation of being able to continue living in the St Peters property and otherwise, she would be able to provide for herself. The partner though did not want to continue living at the St Peters property and therefore the best expression of continuity would be to award her a sum of $750,000 which was equivalent to the property's value before the windfall associated with its compulsory acquisition for the WestConnex project.

The court held that adequate provision had not been made for the plaintiff and that provision of $100,000 acknowledged the plaintiff's status as the deceased's son and was a sum which might be used by the plaintiff as a starting point for him to make provision for he and his family.

The court said that it was entitled to take the plaintiff's needs into account but it was not obliged to do so and that the plaintiff's needs were relevant but not helpful in determining what provision should be made for his advancement.

The court undertook a check method to determine if a legacy of $100,000 was appropriate. It determined that the plaintiff might have been entitled to receive provision in his grandmother's will which would have meant he received $90,000 and that with the passage of time, a $100,000 figure was appropriate.

Kohari v NSW Trustee & Guardian (No 3) [2017] NSWSC 1431

Supreme Court of New South Wales

Coram: Parker J

Date: 3 November 2017

Estate ($): $1,240,000 - Claimant's relationship: Son - Order for provision:$100,000 - Costs: See below

Issues: Costs

Facts:

The proceedings were fixed for hearing on 9 March 2016. An issue was raised by the defendant about whether the plaintiff was the deceased's son. The plaintiff relied on an affidavit sworn by the plaintiff's mother that she had not been unfaithful to the deceased. The affidavit was served late and the defendant objected to it and claimed that it had not had an opportunity to investigate the matters raised in the affidavit. The hearing was vacated and an order was made that the plaintiff "pay the defendant's costs thrown away by reason of the vacation of the hearing date".

The defendant then filed a notice of motion seeking orders that the plaintiff undergo paternity testing. Orders were made for paternity testing (see *Kohari v NSW Trustee & Guardian* [2016] NSWSC 1372). In addition, orders were made that the plaintiff pay the costs of the testing and the defendant's costs of the motion if he was not the deceased's son.

A paternity test established that the plaintiff was the deceased's son.

On 21 March 2016, the defendant served an offer of compromise in which it offered to pay the plaintiff $100,000. In the Court's principal judgment, the plaintiff was awarded a legacy of $100,000.

The parties agreed that the defendant should pay the plaintiff's costs up to 21 March 2016 and the defendant should receive an order for its costs on the indemnity basis from 22 March 2016 onwards.

A notice to admit a facts that claimed the plaintiff was the defendant's biological son was served on 15 March 2016. On 16 March 2016, the defendant served a notice disputing that fact. As noted above, DNA testing established that the plaintiff was the deceased's son.

UCPR r 42.8(2) provides:

> "Unless the court otherwise orders, the disputing party must, after the conclusion of proceedings in which a fact in dispute is subsequently proved or is subsequently admitted by the disputing party, pay the requesting party's costs, assessed in an indemnity basis, being costs incurred by the requesting party:
>
> (a) in proving the fact, or
>
> (b) if the fact has not been proved - in preparation for the purpose of proving the fact."

Decision:

The defendant had no knowledge of the plaintiff's paternity and this of itself was good reason to depart from the usual consequences of UCPR r 42.8. Further, the costs of the DNA testing had already been dealt with by the court. An "otherwise order" was therefore made.

Leary v NSW Trustee and Guardian [2017] NSWSC 1113

Supreme Court of New South Wales

Coram: Ward CJ in Eq

Date: 23 August 2017

Estate ($): Not known - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: See below

Issues: Full and frank account of financial circumstances, need

Facts:

The deceased died in August 2014. She was survived by her second husband who died six months after her and by four adult children.

The plaintiff, aged 49, was the deceased's youngest child.

In the deceased's last will, she made two gifts to grandchildren and provided that the residue of her estate was to go to her four children, as tenants in common in equal shares. The gift was conditional in that monies advanced to the children during the deceased's lifetime were to be brought into account on distribution. The plaintiff was said to have been advanced $551,542 and other beneficiaries were advanced $372,351 and $102,256. The plaintiff denied that $551,542 had been loaned to him. Nothing appeared to turn on this though, as the court concluded the deceased intended the monies to be brought to account.

The deceased did not make provision for her husband as she believed his needs were provided for by a discretionary trust. She explained this in a statutory declaration that was sworn when the will was made. The deceased also made a further statutory declaration in which she declared that she had paid legal costs related to criminal proceedings the plaintiff was involved in and those activities caused her "worry and sadness".

The criminal proceedings related to the plaintiff's abduction of a child in contravention of Family Court orders. He was ultimately sentenced to 15 months imprisonment for this. In cross-examination, the plaintiff admitted this had caused the deceased much stress.

The plaintiff initially claimed he was homeless, he had no assets and he was on a disability pension. He suffered from a long term psychiatric illness, he had suffered multiple fractures to a leg in October 1987, he had a gambling and alcohol addictions and he had "recently squandered significant amounts of money gambling". The plaintiff also alleged that the will did not build in any form of protection which would prevent the plaintiff squandering his inheritance which of itself meant that adequate provision had not been made for him in the deceased's will.

Evidence obtained under subpoena indicated that the plaintiff had taken out insurance policies on the deceased's and her second husband's lives. He also made an affidavit in May 2017 in which he deposed that he had lied to his former solicitors about his assets and personal circumstances and that he had also lied to the Court. He then disclosed that he had obtained various monies from travel insurance and on the lives of the deceased and his step-father and that he had gambled about $250,000. He also disclosed that he had not been frank with the court about his living arrangements. The position therefore was that the plaintiff held significant assets in cash and shares when he was asserting that he was homeless, impecunious and dependent on a disability support pension.

The plaintiff admitted that he had lied to the court throughout the proceedings and the lies were calculated and designed to strengthen his case.

It was submitted for the plaintiff that he had confessed that he had mislead his solicitor and that he had sought to make amends by putting forward an accurate statement of his circumstances.

Decision:

For multiple reasons, the court concluded that the plaintiff's evidence was unreliable and in the absence of a full and frank account of his financial circumstances, it could not determine that inadequate provision was made for him in the will.

The court accepted that there may be cases where the absence of a protective trust or some other safeguard may be a relevant consideration when determining whether there was inadequate provision for an applicant. It did not accept though that the absence of a mechanism to safeguard the provision, will of itself be determinative of that threshold question.

The summons was dismissed.

The plaintiff was also directed to advise CentreLink in writing of matters raised in his affidavit evidence about his finances and personal circumstances.

Leary v NSW Trustee and Guardian (No 2) [2017] NSWSC 1226

Supreme Court of New South Wales

Coram: Ward CJ in Eq

Date: 12 September 2017

Estate ($): Not known - Claimants' relationship: Son - Order for provision: Summons dismissed - Costs: Plaintiff - $196,802.34 on the indemnity basis and $150,000 on the ordinary basis; defendant - $102,922.29 on the indemnity basis

Issues: Costs

Facts:

On 23 August 2017, the court dismissed the plaintiff's claim as it was not satisfied that the plaintiff had presented a full and frank account of his personal and financial circumstances and therefore it could not be satisfied that the plaintiff had been left without adequate provision.

The defendant made a series of offers of compromise before the hearing, acceptance of which would have placed the plaintiff in a far better position. In addition, the day before the hearing commenced and after the plaintiff had served an affidavit in which he disclosed that he had mislead the court and his solicitors, the defendant made a Calderbank offer to the effect that the proceedings be dismissed and there be no order as to the plaintiff's costs and that the defendant's costs be borne out of the estate.

The defendant submitted that the plaintiff should pay its costs on the indemnity basis, or in the alternative, that the plaintiff should pay the costs of the proceedings on the ordinary basis. The plaintiff submitted that he should bear his own costs of the proceedings and the defendant's costs should be paid out of the estate on the indemnity basis.

The defendant's best estimate was that the plaintiff would receive $294,711 pursuant to the deceased's will. He had been paid an interim distribution of $10,000 and $75,000 was paid to his solicitors for legal fees. On the defendant's calculation therefore, that left an entitlement of $209,711, plus any interest earned.

Decision:

The court recognised that the plaintiff chose to commence and to continue his application for provision on a false basis up until the eve of the hearing and this cause wasted costs to be incurred and for offers of compromise to be made that may not otherwise have been made. The plaintiff's conduct therefore called for an indemnity costs order to be made against the plaintiff up to the time of service of an affidavit disclosing his true financial position.

The court was not minded to make an indemnity costs order of the hearing as it concluded that the plaintiff did not have a wholly unreasonable argument about the adequacy of provision made for him, based on the likelihood he would squander any inheritance he received under the will. The court was also conscious of the fact that any indemnity costs order would consume much of the provision left for the plaintiff under the will.

The orders made were that there be no order as to the plaintiff's costs, that the plaintiff pay the defendant's costs on the indemnity basis up to 15 May 2017 and that such costs be paid

or retained out of the plaintiff's entitlement to distribution of the will of the deceased and that any shortfall in the defendant's costs be paid out of the estate on the indemnity basis.

Anderson v Hill [2017] NSWSC 1149

Supreme Court of New South Wales

Coram: Hallen J

Date: 30 August 2017

Estate ($): $0 but $650,000 in notional estate - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: Plaintiff - conditional costs agreement; defendant - $70,330 payable only when a property at Ermington was sold

Issues: Need

Facts:

The deceased died in May 2105, aged 70 years. By her will, and in the events which have happened, she left the whole of her estate to her second husband the defendant.

The plaintiff was one of five children from a prior marriage. The NSW Trustee and Guardian was appointed to represent the plaintiff as a tutor in the proceedings.

The deceased and the defendant jointly owned an Ermington property which passed to the defendant by survivorship and the defendant became the property's sole registered proprietor on the deceased's death. The defendant purchased the property with his former wife in about 1972, and when they separated in about 1984, he make a payment to her of $50,000 and her interest in the property was transferred to him. An interest in the property was transferred to the deceased in May 1993 when the deceased paid $56,500 into a joint bank account. The monies were used by the defendant and the deceased for household expenses. The parties also made contribution to rebuild and improve the property,. The deceased contributed $80,000 from an inheritance she received from her mother's estate and the plaintiff contributed $298,000 from inheritances he received.

The plaintiff sought an order designating the property as notional estate.

As there was no real property and little personal property which the deceased died seised, possessed of, or entitled to, in New South Wales a grant of administration of the deceased's will was not required and the defendant was appointed to represent the estate at the hearing pursuant to UCPR rr 7.8 and 7.10(2)(b).

The value of the Ermington property at the date of the hearing was between $1.3 million and $1.350 million. Therefore if the court made a notional estate order, the deceased's interest in the property had a value between $650,000 and $675,000.

The deceased and the defendant were married for 24 years.

The plaintiff was 45 years old, he had few assets, he received a disability support pension and a pension supplement of about $888 per fortnight. The court said that he lived "a modest life on the pension". The plaintiff suffered from paranoid schizophrenia.

The plaintiff sought a lump sum of $200,000 or a notional one-third of the deceased's share of the Ermington property. It was submitted that this level of provision would be adequate and proper to assist him with significant medical and dental expenses and to purchase specialised equipment for him to treat his medical conditions.

There was evidence that the plaintiff received a lump sum of $41,265 from his father's estate and that he spent none of this money on his "needs".

The defendant was 72 years old and his only significant asset was the Ermington property. He was an old age pensioner and he received an income of $808 per fortnight plus a small amount by way of dividend from shares. He had numerous medical conditions, he had not worked for 24 years and the court accepted his evidence that he would not be able to work in the future. He had lived in the Ermington property for 45 years and he made the major contribution to the property's acquisition. If an order for provision for the plaintiff was made, the Ermington property would either have had to be sold, or it would have been charged with an order for provision.

Decision:

The court acknowledged, that "looked through the prism of his financial and material circumstances", adequate provision had not been made for the plaintiff. The court though noted this was only one consideration, and also to be considered were the totality of the relationship between the plaintiff and the deceased, the age and capacity of the defendant, the size of the estate and the notional estate.

The court accepted that both the plaintiff and the defendant were in straitened financial circumstances, that the defendant had made a significant contribution to the deceased's assets by transferring an interest in the Ermington property to the deceased and using the consideration for joint expenditure. Further, the claims of a child in some cases may have to be relegated to a lower priority where there is a competing claim, such as that of a spouse.

In the circumstances, there was not a failure on the part of the deceased to make adequate provision for the plaintiff. The court then considered, if it was wrong on this point, whether a order would have been made designating the deceased's notional interest in the Ermington property as notional estate and concluded for a range of factors, that it would not have made an order designating the deceased's notional interest in the Ermington property as notional estate.

The summons was dismissed.

On costs, the court was mindful of the plaintiff's mental condition and that his claim had failed because of the nature and value of the deceased's estate, the defendant's strong competing claim and his contribution to that property. The court therefore ordered that there should be no order to the plaintiff's costs.

Prior v Kerrison [2017] NSWSC 1295

Supreme Court of New South Wales

Coram: Rein J

Date: 15 September 2017

Estate ($): $1,200,000 - Claimant's relationship: De facto partner - Order for provision: Title to a property, an interest free loan of $120,000 repayable on the plaintiff's death and a further legacy of $25,000 - Costs: It was agreed that each party's costs would be paid by the estate on the indemnity basis

Issues: De-facto partner, need

Facts:

The deceased died in November 2105.

The deceased's last will was made in November 2015. In the will he gave the plaintiff, his de facto partner of 30 years, a life interest in a property at Broken Hill until she married or entered into a de facto relationship on condition she paid expenses and maintained the property and $15,000 and the rest and residue of the estate was gifted to his son and daughter. The son and daughter were also appointed the estate's executors and trustees.

The deceased declared in the will that he had not made further provision for the plaintiff because he considered that he had supported her, and made adequate provision for her, during his lifetime. He also swore a declaration to the same effect and that he had built up assets over his lifetime for children to give them a "kick start", and because the plaintiff and he had agreed that she would give his assets to her children and he would give his assets to his children.

The estate comprised a number of properties, shares worth $47,500, cash of $217,000 and other minor assets. The estate had a net value of approximately $1.2 million. The Broken Hill property in which the plaintiff had a life interest, had a value of approximately $125,000.

A second claim on the estate was made by the deceased's former wife and that claim settled upon the defendants' agreement to pay her $80,000.

The plaintiff was 71 years old and had started a new relationship with another man. She owned a car and personal assets worth $34,000. She therefore owned no real estate. She spent approximately $1,300 on food and other items and she would like to continue traveling around Australia as she and the deceased had done before his death and that if she did move into a retirement village, she would like to move to one in Orange where her children lived. The evidence established that the costs of retirement homes in Orange ranged from $200,000 to $400,000

The defendants put their financial circumstances in issue. The daughter and her husband were divorced and she had some equity in the matrimonial home but her liabilities exceeded her assets. She wished to purchase a house for $450,000 and to have funds to embark on Family Law proceedings for a property settlement. The son was divorced, his net assets were approximately $120,000, he was in steady employment earning 121,000 a year and he too wished to purchase a house.

The defendants accepted that the will did not adequate provision for the plaintiff and that a

Crisp order should be made which would have the effect of making the life interest in the property more flexible to allow the property to be sold and the beneficiary to move location without diminishing the interest. The plaintiff opposed this and submitted greater provision was warranted given the length of the relationship.

Decision:

The court accepted that the deceased did not want to want to extend any provision to the plaintiff beyond a life interest in the Broken Hill property. However, when considering the length of the relationship, the plaintiff's circumstances and the inflexibility of the life interest, the court concluded that the title to the Broken Hill property should vest in the plaintiff ($160,000), she should have an interest free loan of $120,000 repayable on her death to provide a fund for expenses and the legacy left her in the will should be increased for $15,000 to $40,000.

The effect of the orders were that each defendant received $280,000 from the estate in the short term and $340,000 in the long term.

Tanev v Tanevski [2017] NSWSC 1301

Supreme Court of New South Wales

Coram: Parker J

Date: 28 September 2017

Estate ($): $790,000 - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: Not known

Issues: Extension of time

Facts:

The deceased died in 2005, leaving three children including the plaintiff who was the youngest child. The children all survived the deceased.

The deceased's will provided that her estate was to be divided between her three children.

The deceased and her late husband purchased a house as joint tenants and when the deceased's husband died in 2001, the property passed to the deceased by survivorship. The plaintiff had lived in the property since his marriage broke-down in the 1990s and he did not want it to be sold when his mother died, but to keep living in it. In February 2016, the other children (the defendants) demanded that the plaintiff vacate the house so it could be sold and the plaintiff commenced these proceedings. The defendants had obtained a grant of probate and were the property's registered proprietors.

The plaintiff's primary claim was that promises were made to him by his parents that he would ultimately receive the house and he alleged the defendants were estopped from asserting that they had an interest in the house and he sought a declaration that the house was held on a constructive trust for him by the defendants, or equitable compensation. Alternatively, he claimed the house had been purchases pursuant to a failed joint venture. If the plaintiff was unsuccessful in these claims, he sought an order that he receive increased provision from the deceased's estate.

The plaintiff had a major motor vehicle accident in 1978 and he claimed that because of the accident, he had been dependent on the deceased.

Decision:

The court was not satisfied that the alleged promises the plaintiff relied upon to establish his equitable claims were made and accordingly the claims failed.

The plaintiff's claim for a family provision order was made out of time as the deceased died in 2005. Because of the date of death, the former Family Provision Act 1982 also applied. The court was satisfied that the plaintiff was not aware that he had a right to make an application for provision before June 2007, that the estate had not been distributed and that the defendants had power to distribute the estate and these factors amounted to "sufficient cause" for failing to make an application before the 18 month time limit specified in the former act. The court though was not as a matter of discretion prepared to grant the plaintiff an extension of time to make an application, because the forensic prejudice which results from the lapse of time and the "general failing of memory" were not capable of being analysed and the factors that had to be addressed to determine the issue could not be

proved or disproved. In addition, the court considered that the Plaintiff had known since 2009 that he could take professional advice about his legal options and that he had not done so was his responsibility.

The court noted that it had been conventional that four factors had a bearing on the discretion to extend time (eg see *Hughes v Sharp* [2017] NSWSC 962 at [97] and above). The factors were: (1) the reasons for the lateness of the claim; (2) whether the beneficiaries under the will would be unacceptably prejudiced if time were extended; (3) whether there had been any unconscionable conduct by either side; and (4) the degree of strength of the claim by the party seeking an extension. The Court concluded that it was not in the interest of justice, having regard to the circumstances of the case to extend time.

In the event the court was wrong in its decision not to extend time, it also assessed whether it would have made an order for provision. The court accepted that the plaintiff's needs were greater than the defendants but concluded that it was not in a better position than the deceased to decide what provision should be made for the plaintiff and thus it concluded that adequate and proper provision was made for the plaintiff in the deceased's will.

Moreau v Moreau [2017] NSWSC 1333

Supreme Court of New South Wales

Coram: Slattery J

Date: 4 October 2017

Estate ($): $322,000 plus notional estate of between $670,000 and$700,000 - Claimant's relationship: Son - Order for provision: A home unit that comprised notional estate on condition that the defendant was paid $500 a month during her lifetime - Costs: Not known

Issues: Extension of time, need

Facts:

The deceased died in August 2011.

The deceased was survived by his son the plaintiff, his mother and a brother.

In his last the will, the deceased made no provision for the plaintiff, he appointed his brother as his executor and he gifted the whole of his estate to his brother. The will also provided that if the deceased's brother died within 30 days of the deceased's death, the deceased's mother was to be his executor.

The deceased's brother died without taking probate of the deceased's will. The brother's will operated to give the whole of his estate to his mother.

In October 2014, probate of the deceased's will was granted to the deceased's mother and she was joined as the defendant in these proceedings.

The plaintiff stopped living with the deceased when he was 17 years old.

The defendant contended that the deceased and the plaintiff had sporadic contact from this time until 2005 and from 2005, they had no contact. The plaintiff accepted that the deceased did not have any contact with him from mid-2007 and that the deceased's progressive illness (cancer) made him disinclined to keep up contact.

The deceased's estate comprised a home unit with a value of approximately $420,000, cash and a superannuation benefit. At the date of probate, the estate had a value of approximately $781,785. After probate was granted, the property was distributed to the defendant. At the hearing, the distributable estate was $322,361. The unit had a value of between $670,000 and $700,000.

The plaintiff and his partner received monthly incomes of $10,657 and their expenses were $9,921. They jointly owned a house with a gross value of approximately $1,010,000, vehicles, home contents and cash. The property was subject to a mortgage of $470,000.

The defendant was a French national and resided in a nursing home in France. Apart from the home unit distributed to her from the deceased's estate, she appeared to have nominal assets other than a home that was to be sold to which the court attributed a value of $73,500.

Decision:

The court accepted that it was some time after the deceased died that the plaintiff knew of his death and that he did not understand that he could bring a family provision claim until May 2015 and that he acted quickly after he became aware of his rights. In addition, the court found that the plaintiff had not engaged in any unconscionable conduct and indeed that the contrary had occurred as he had assisted the defendant to make an application for probate in October 2014. Finally, the court held that there was no prejudice occasioned to the defendant because of any delay. Time to bring an application was therefore extended up until the filing of the plaintiff's summons.

The court accepted that the deceased and the plaintiff had a good relationship until about four years before the deceased's death and they lost contact in circumstances that were not the plaintiff's fault.

It was found that the plaintiff had a strong moral claim on the deceased and that he had clearly identifiable financial needs. He had little capacity to reduce or discharge the mortgage on his property and that he had no real reserves to deal with any unexpected increases in household expenditure.

The court decided that provision should be made for the plaintiff in the sum of approximately $420,000, that the unit should be declared notional estate and that the plaintiff should receive the unit on condition that he pay the defendant $500 a month from the unit's income during the defendant's lifetime.

Larkin v Leech-Larkin [2017] NSWSC 1418

Supreme Court of New South Wales

Coram: Parker J

Date: 20 October 2017

Estate ($): $880,000 - Claimant's relationship: Son - Order for provision: Summons dismissed - Costs: Not known

Issues: Need

Facts:

The deceased was diagnosed with cancer in 2012 and died in February 2015 at the age of 88.

The deceased was survived by four children.

By the deceased's last will made in March 2013, she left her estate to the second oldest son (the defendant) who was also appointed executor of her will.

The plaintiff was the deceased's eldest son. The other children did not make claims for provision.

The estate's major asset was a property at Springwood that comprised two lots. One of the lots was sold by the defendant after probate was granted and after payment of various liabilities, approximately $130,000 remained. The remaining lot had a value of approximately $750,000. A house constructed on this lot had been the deceased's home since 1962 and the defendant had lived in this house for most of his life.

Over a number of years, the deceased and the defendant developed an extensive garden on the Springwood land that consumed significant capital. For some time the garden was open to the public but it did not make money and the capital expended on it was lost.

The plaintiff had lived independently of the deceased for almost 40 years. They also had a difficult relationship and the evidence was that they had no contact for seven years before the deceased's death.

The plaintiff was 68 years old and he suffered morbid obesity and he had a permanent disability in his left knee as a result of a motorcycle accident when he was 18 years old which might require a knee replacement in the future. He also required dentures as his teeth had fallen out, new glasses and he suffered from cellulitis, fluid retention and lymphedema. He lived with two of his children in an apartment in Sydney and he was subsisting with the help of his children. The plaintiff owned a block of land worth approximately $260,000 and he had other assets worth approximately $87,500. He also had liabilities of approximately $102,000

The defendant was almost 65 years old and was retired. The defendant raised his personal and financial circumstances as a consideration. He suffered from various health problems including Parkinson's disease, chronic asthma, type 2 diabetes, bi-polar disorder, and arthritis and like the plaintiff he too required dentures. He received an invalid pension. Though he had received a significant damages payout and superannuation when he retired, his evidence indicated he had few assets.

Decision:

The court noted that the plaintiff was a mature adult who had lived his whole adult life independently of the deceased. It held that it was not well-placed to determine the rights and wrongs of the breakdown in the relationship between the parties. Conversely, the defendant had shared the deceased's life for over 40 years and he was deeply involved in the garden project with her.

The court accepted that the defendant contributed the whole of his financial substance to the garden project he and the deceased undertook on the Springwood land and he had nothing left. It also held that there would be a real risk that if the Springwood property was taken from the defendant, he would be left with too little to be able to continue to live there, or to live independently as the deceased wished. These circumstances provided a justifiable basis for the deceased's decision to give the whole of her estate to the defendant and therefore the deceased did not fail to make proper provision for the plaintiff.

The summons was dismissed.

Reilly v Reilly [2017] NSWSC 1419

Supreme Court of New South Wales

Coram: Lindsay J

Date: 20 October 2017

Estate ($): Not known - Claimants' relationship: Daughters - Order for provision: $475,000 - Costs: Not known

Issues: Need

Facts:

The deceased died in December 2012, aged 88 years. He was survived by a wife and five children (a son and four daughters).

The deceased and his wife (the first defendant) were farmers on land near Forbes. Throughout their marriage they farmed two adjoining properties one of which was in the deceased's name and the other of which was in the first defendant's name.

The deceased's last will was made on 26 March 2003. In the will, the deceased intended to give his property to the plaintiff, but due to a clerical error, the plaintiff's name was not included in the executed will. The will gave the rest and residue of the deceased's estate to his daughters and it appointed the first defendant as the will's executor..

From a date no later than 2008, the deceased, suffering from dementia, began a descent into mental incapacity. There was no dispute that the deceased was mentally incapable of managing his affairs throughout 2009. In preparation for such a contingency, the deceased had executed an unrestricted enduring power of attorney in favour of the first defendant.

On 1 July 2009, the first defendant, as the deceased's attorney, transferred the deceased's property to her five daughters.

For some time the plaintiff had been farming on the deceased's property. The plaintiff commenced proceedings which joined his mother, his sisters (the second, third, fourth and fifth defendants) and a solicitor (the sixth defendant) which disputed that the beneficial interest in the deceased's property had been transferred to his sisters. In a cross-summons, the sisters sought possession of the deceased's property and in the alternative, orders for family provision from the deceased's estate.

The sisters personal and financial circumstances were: The second defendant was 55 years old, married and she and her husband had net assets of approximately $1.7 million. The couple had gross incomes of $142,000 a year, they hoped to retire in the next year or so. They had concerns whether their superannuation entitlements would sustain them during retirement and if further provision was made for them from the state they would look to travel, renovate a property they owned and purchase new cars. The third defendant was 53 years old and separated from her husband in 2015. She had two children who were still at school and who depended on her. She earned approximately $55,000 a year and whilst following a property settlement with her husband she owned her own home in Brisbane, she had modest assets and her capacity to meet ordinary living expenses was severely constrained. The fourth defendant was 52 years old. She and her husband had three adult children although one child suffered from a mild developmental disability which required him to receive ongoing support from his parents. She and her husband owned three farming

properties. They had assets of approximately $2.250 million. The fifth defendant was 47 years old and she was married with three teenage children. She earned approximately $175,000 per annum and her husband earned approximately $68,000 per annum. They had net assets of approximately $2.885 million.

The plaintiff was 50 years old and he had a substantial amount of property, including investment properties, a share portfolio, cash investments and superannuation. He had also received a $100,000 gift from his mother.

Decision:

The court determined that deceased's will should be rectified so that the plaintiff was recorded as the recipient of the deceased's property as the deceased intended this. The court also ordered the sisters to re-convey the property to the deceased's estate as there had been no ademption of the gift and that when the first defendant transferred the property she acted for the purpose of giving effect to her own personal view of what was fair as between her children and not for the purpose of advancing the interests of the deceased and the transfer of the property was both a fraud on the power and a breach of her fiduciary duty. As a fraud on a power the transfer was void or voidable and as a breach of fiduciary duty the first defendant was required to compensate the plaintiff for any loss. If the property was re-conveyed, there could be no loss.

The plaintiff also succeeded in negligence against the sixth defendant although only nominal damages are payable if the sisters re-convey the property.

On the assumption that the sisters would re-convey the deceased's property to the estate, the court held that each of the sisters should receive further provision from the estate: The second and fourth defendants each received $80,000. The fifth defendant received $60,000 as she was much wealthier than the others and in secure employment. The third defendant differed from her sisters and she received a legacy of $275,000. The legacies, in total were $495,000 and were to be charged against the deceased's property.

Hartley v Woods [2017] NSWSC 1420

Supreme Court of New South Wales

Coram: Lindsay J

Date: 20 October 2017

Estate ($): $31,588 plus notional estate of $400,000 ($431,588 in total) - Claimant's relationship: Dependent - Order for provision: $40,000 per plaintiff ($80,000 in total) - Costs: Not known

Issues: factors warranting a claim, need

Facts:

The plaintiffs (a nephew of the deceased, his wife and another nephew) lived with the deceased at her home between June 2003 and March 2009.

The deceased had no surviving children and the defendant was another nephew.

For most of the time the plaintiffs lived with the deceased they were viewed by her "with favour" and the plaintiff held appointments as the deceased's enduring attorney and enduring guardian. The appointments were revoked when the plaintiff and his family fell out of favour and the defendant and his family rose in the deceased's favour.

The first plaintiff was excluded from the deceased's last will despite provision being made for him in earlier wills.

In 2010, the deceased sold her home and began living with the defendant and his family in their home.

In January 2011 when a contract to sell the deceased's home was completed, the deceased's net worth was approximately $1.8 million comprising the property's net proceeds of sale of $905,000 and investments.

In March 2011, the deceased gifted $500,000 to the defendant and in September 2012, she gifted $375,000 to the defendant's bankrupt daughter. The latter payment was found not to have been made with the defendant's knowledge.

Immediately before and after the deceased's death, the defendant withdrew funds from the deceased's bank account. In addition, an insurance bond of $625,000 was allocated to the defendant and the balance to the third plaintiff. The consequences of these dealings were that at the time of death the deceased's estate comprised $31,588.57 in cash.

Decision:

The plaintiffs sought orders that the defendant account for monies received as a fiduciary, that the defendant received gifts as a result of undue influence, promissory estoppel and family provision.

It was held that as the deceased was an elderly woman with dementia, the defendant knew she needed assistance and this was why the deceased sold her home and began living with the defendant and his family and as there was an alienation of substantial property to the

defendant, a fiduciary duty and a presumption of undue influence arose and the defendant should account for the proceeds of $560,000 gifted to him during the deceased's lifetime.

The promissory estoppel claim failed as it was not found that the first and second plaintiff relied on the deceased's promise that she would gift them her home in her will.

The first and second plaintiffs were held to be "eligible persons" as they were partly dependent on the deceased (they received rent-free accommodation) and they were members of the household of which the Deceased was a member.

As the plaintiffs were "second tier" claimants, the court also had to find that there were "factors warranting" the making of orders and that the plaintiffs would generally be regarded as natural objects of testamentary recognition by the deceased and it was found that the deceased did make promises to the plaintiffs about leaving them her property and that when they lived with the deceased they were dutifully attentive to her.

The court then determined that although the plaintiffs had net assets of approximately $1,050,000, they had benefitted from about six years of rent-free accommodation and were better off financially than the defendant who had net assets of approximately $950,000, the plaintiffs were left without adequate provision. It was held that the insurance bond had been arranged with the intention of limiting or denying provision that could be made for the plaintiffs and therefore the proceeds of the bond in the defendant's possession should be declared notional estate otherwise the deceased's estate was insufficient for the making of family provision orders and costs orders. Each plaintiff was awarded $40,000 or approximately 9% of the adjusted estate.

Portis v Green [2017] NSWSC 1489

Supreme Court of New South Wales

Coram: Kunc J

Date: 1 November 2017

Estate ($): $476,688 - Claimant's relationship: Son - Order for provision: 60% of the estate (approximately $286,000) - Costs: Not known

Issues: Estrangement, need

Facts:

The deceased died in February 2016, survived by a son (the plaintiff) and a former wife.

The deceased's last will was made in August 2013. In the will, he gifted the entirety of his estate to the Museum of Freemasonry which was operated by the Museum of Masonry Foundation. In the will he also appointed two office bearers of the Masons to be his executors.

The estate had been converted to cash and had a value of $476,688.

The deceased had a close connection with the Masons and had been a member since 1986 and he worked as a voluntary curator of the Museum of Freemasonry for six years before his death.

A prior will the deceased made, left the deceased's entire estate to the plaintiff. Following settlement of family provision litigation involving the estate of the plaintiff's late brother, contact between the deceased and plaintiff ceased. The deceased then made his last will. The deceased also made a detailed statement to accompany the will which recorded the reasons for the change to his testamentary intentions which indicated he had seen the plaintiff five times over an unstated period.

The plaintiff was 55 years old and in good health. He worked in the earth moving industry and his monthly net income was $4,000 and his evidence was that he and his wife had been able to save approximately $400 a month after paying their monthly regular expenses. The plaintiff had modest net assets of approximately $123,600 and his marriage had recently ended. The plaintiff and his wife had joint assets of $384,000 excluding the matrimonial home which the wife wished to retain and the court assumed that when a property settlement occurred, those assets would be evenly split so that the plaintiff would receive $192,000 and he would therefore have net assets of $315,600

The Museum of Freemasonry was a charitable organisation, it had assets in excess of $1,000,000 and it earned a small net profit in the 2016 financial year. The defendants deposed that the deceased's bequest would be applied to advance the museum's purpose.

Decision:

The court concluded that estrangement was not a matter which should be taken into account against the plaintiff's claim. It then concluded that adequate provision had not been made for the plaintiff as his pending property settlement would leave him with "little to cope with the possibility of ill health and the vicissitudes of life." It then determined that a balance had to

be reached so that the deceased's testamentary intentions and the plaintiff's needs were both satisfied and this was achieved by an order that the plaintiff receive 60% of the estate which was approximately $286,000. This would enable the plaintiff to purchase a property for $500,000 and be debt free and still have superannuation of $93,000.

Bkassini v Sarkis [2017] NSWSC 1487

Supreme Court of New South Wales

Coram: Robb J

Date: 1 November 2017

Estate ($): $880,000 - Claimant's relationship: Husband - Order for provision: See below - Costs: Not known

Issues: "Crisp" order, extension of time, need

Facts:

The deceased died in May 2005 leaving her husband and three children.

The deceased's estate's principal assets were half-shares in two properties she owned with her husband the plaintiff. The deceased and the plaintiff purchased one of the properties as joint tenants in 1979 and in 1994, the deceased executed a transfer that severed the joint tenancy and she and the plaintiff became tenants in common in equal shares. This property was the deceased's and the plaintiff's matrimonial home and the deceased continued to live in the property. The deceased and her husband purchased the other property as tenants in common in equal shares in 1996 and they leased this property.

In the deceased's will made in April 2005, she appointed one of her daughters (the defendant) to be her executor and trustee. In the will, she gave substantially all of her property to the defendant to hold on trusts created by the will. The primary power given to the trustee was to apply to income to the "Income Beneficiaries" and to apply capital to the "Capital Beneficiaries" as the defendant saw fit. The "Income Beneficiaries" were defined to include the plaintiff, the deceased's children and any "remoter issue" and the "Capital Beneficiaries" were defined to include the deceased's children and any "remoter issue". The defendant was given broad powers to administer the trust and to distribute its income and capital. In a memorandum of wishes executed on the same day as her will, the deceased directed the defendant to administer the trust primarily for the plaintiff's benefit.

In 2013, the plaintiff and the defendant had a "falling out" when the defendant found out that the plaintiff's fiancée was living with the plaintiff in the former matrimonial home. The plaintiff then informed the defendant he was going to sell the properties and the defendant said he could not do so without her consent. Until this argument occurred, the defendant had been paying the rent from the second property to the plaintiff and she also stopped him receiving rent from a lodger. The plaintiff for his part changed the locks to the former matrimonial home so the defendant could no longer use her key to access the property.

The plaintiff initially commenced proceedings for trustees for sale to be appointed and for the properties to be sold, but he subsequently amended his summons to include a family provision claim.

The plaintiff applied for an order for family provision more than eight years after the expiry of the prescribed 18 month period contained in the Family Provision Act 1982. As a result he required leave of the court to make the application.

The parties also made various money claims against one another which included a claim for an occupation fee made by the defendant. For the most part, these claims were unsuccessful.

The testamentary trust had gross assets of approximately $1,670,000 and net assets of approximately $880,000.

The plaintiff had gross assets of approximately $1,662,000 and net assets of approximately $1,200,000. The court did not take account of properties the plaintiff owned in Lebanon as it decided they were not readily saleable and the court did not consider that the plaintiff's wife had access to any significant readily realisable wealth.

Decision:

The court held that the plaintiff should not be denied the opportunity to bring a family provision claim out of time as it was satisfied that it was only in May 2013 that he understood that he not received the deceased's interests in the properties in her will and that all of his rights to enjoy the benefits of those interests depended upon the exercise of the defendant's discretion under the testamentary trust.

The court concluded that proper and adequate provision for the plaintiff required him to be able to live in the former matrimonial home for life or as long as he choose to live there and that income from the other property should be used for his benefit. This did no more than reflect the deceased's wishes expressed in the memorandum of wishes. Conversely, the defendant had acted contrary to those wishes. The court though held that the deceased's interest in the former matrimonial home should not be transferred to the plaintiff but should be in the nature of a "Crisp" order so that the plaintiff would not be disadvantaged if he had to leave the property and to move into alternative accommodation. The court also accepted that the second property would need to be sold which would provide the plaintiff with capital to provide him some buffer against contingencies and give him a sum for some level of discretionary spending.

McCarthy v Tye [2017] NSWCA 284

Supreme Court of New South Wales, Court of Appeal

Coram: Basten JA; Macfarlan JA; Sackville AJA

Date: 6 November 2017

Estate ($): $704,000 - Claimant's relationship: The appellant alleged he was in a de facto relationship with the deceased, but the court below found he was in a close personal relationship with the deceased - Order for provision: $85,000 - Costs: Not known

Issues: De-facto relationship

Facts:

The deceased died in 2014 aged 66 years. Her estate comprised a real property and some cash with a value of approximately $704,000. After allowing for legal costs and a capital gains tax liability the estate had a value of approximately $529,000.

In the court below, the appellant claimed that he was in a de facto relationship with the deceased from 2003 until she died. The court found however, that based on the totality of the evidence which included various disclosures by the appellant that he was not in a de facto relationship, there had been no de facto relationship. The court below though did find that the appellant and the deceased had been in a “close personal relationship” and that there were “factors warranting” the making of a claim, that the deceased’s will did not make adequate provision for the appellant’s proper maintenance or advancement in life and that a family provision order should be made for him and given the appellant’s assets (which amounted to approximately $187,000), the modest size of the estate and other claims on the deceased’s estate, a legacy of $85,000 was appropriate.

In a real sense therefore, the trial judge’s rejection of the appellant’s claim that he was in a de facto relationship with the deceased was of little consequence.

The appellant contended that it was an injustice that his relationship with the deceased was not recognised by the court and that his claim to a more substantial legacy would have been strengthened if had been found to be the deceased’s de facto partner rather than someone in a “close personal relationship” with her.

The appeal was also filed nine months out of time. The respondent ultimately did not object to an extension fo time being granted to appeal and an order was made extending the time for the appellant’s notice of appeal.

Decision:

The court’s decision was unanimous. On the relationship question, the court held that the evidence was entirely consistent with the primary judge’s findings that the appellant and the deceased were not living in a de facto relationship as the date of her death, but were in a close personal relationship at that time. On the quantum question, the court held that the primary judge’s determination of the quantum of the family provision order was a true discretionary decision and was reviewable only in accordance with the principles in *House v King* and no appealable error had been shown.

The appeal was dismissed and the appellant was ordered to pay the respondent’s costs.

Yee v Yee [2017] NSWCA 305

Supreme Court of New South Wales, Court of Appeal

Coram: McColl JA, Gleeson JA and Simpson JA

Date: 28 November 2017

Estate ($): $718,109 but with notional estate approximately $3,000,000 - Claimant's relationship: Nephew - Order for provision: Appeal dismissed - Costs: Not known

Issues: Factors warranting a claim

Facts:

The deceased died in May 2013, aged 89 years,

The deceased was born in China in 1924 and he migrated to Australia in 1941. In 1949 he married. The deceased and his wife were the eldest members of their family groups in Australia and Chinese culture considered them to be “family patriarchs”. As such, they were expected to support family members of their respective family groups and from 1950 to the 1980's they assisted many family members to migrate to Australia from Hong Kong and Southern China by providing accommodation and employment. They also expressed a strong interest in the welfare of many members of their extended families.

The plaintiff was the deceased’s nephew. In 1961, when he was 10 years old, he was sent by his parents to live with the deceased, his wife and their two adopted children. In total, the plaintiff lived with the deceased and his wife for about 13 years, but apart from the first 10 or so years, this was not continuously.

After he separated from the mother of his first child, the plaintiff lived in apartments the deceased owned but he paid rent to do so. In 1981, the deceased gave the plaintiff a restaurant, although the business failed.

After 2004, when the plaintiff and his wife moved to a house they had bought in Baulkham Hills he saw the deceased five to seven time a year, generally at communal family gatherings. After the deceased was diagnosed with cancer in 2009 and until his death, the plaintiff had little contact with him

The deceased made seven wills throughout his life and in none of them did he make provision for the plaintiff, or anybody not a member of his immediate family.

The appellant was aged 62 when the deceased died and he was 64 when the hearing at first instance occurred. He and his wife had a monthly income of about $7,500 and expenditure of about $14,000. The appellant and his wife had about $300,000 of equity in their residence and an investment property and the trial judge accepted that if the value of their assets did not change within four years, they would run out of assets to finance their present lifestyle. They were sustaining their lifestyle, by juggling payments between credit cards that the trial judge concluded was an unsustainable debt spiral. Neither the appellant nor his wife had superannuation, their children suffered substantial medical problems, the children’s ongoing education had to be paid and their home required $30,000 in reasonable renovations.

The respondent and his wife had assets of approximately $4.8 million and they owned their own medical importing business.

The respondents conceded that the appellant was an eligible person as he was, at some time, wholly or partly dependent upon the deceased and a member of the deceased's household. However, they contested there any "factors warranting" the making of an order for provision in the appellant's favour.

The trial judge found the appellant was a witness who was able to distort facts to advantage his own case, that he gave answers in cross-examination without regard to their truth, that he was prepared to say whatever it took to maintain his case without regard to the truth and that he gave unreliable evidence. The trial judge also found that the appellant's, and his wife's, credit was seriously impaired as they had failed to provide accurate information when they had make an application to a bank for finance in 2014.

The appellant contended there were five factors that warranted his application which were: (1) the level of intimacy between the appellant and the deceased extended well beyond the relationship of nephew and uncle; (2) only the appellant and the deceased's two adopted children lived with the deceased and his wife as they grew up; (3) the appellant's relationship with the deceased was from the appellant's perspective a substitute for the appellant's relationship with his natural father; (4) the deceased played a prominent role in the appellant's life; and (5) the appellant had been treated as if he was more closely connected with the deceased within the family group.

The trial judge concluded that when the nature and quality of the contact between the appellant and the deceased was analysed there was little to support the appellant's case that the relationship was "well beyond that of uncle and nephew". The summons was dismissed and the appellant was ordered to pay the respondent's cost on the ordinary basis until 19 December 2014 and on indemnity basis thereafter.

The appellant's notice of appeal contained ten grounds that alleged factual errors were made and that the trial judge ought to have made an order for provision.

Decision:

The court (McColl JA, Gleeson JA and Simpson JA agreeing) held that the primary judge did not err in concluding that the plaintiff was not a member of the deceased's "inner circle" and that he was not "more closely connected" to Norman than other. Rather, the overall picture of the plaintiff and deceased's relationship was that of people who had an incidental family relationship and the trial judge had considered all circumstances that were relevant to the plaintiff's claim.

The court observed the "factors warranting" question involved an evaluative judgment relevantly requiring consideration of community standards and expectations of those making testamentary dispositions and therefore the trial judge was exercising a discretionary power and the appellant had to demonstrate that there had been some error of law or mistake of fact, or some other error appear, or that the decision is unreasonable (House v R).

Gleeson JA also noted that when a party seeks a notional estate order and the burden of the order will fall on other parties, all parties who would be affected by an order should be joined in the proceedings.

Sgro v Thompson [2017] NSWCA 326

Supreme Court of New South Wales, Court of Appeal

Coram: McColl JA; Payne JA and White JA

Date: 15 December 2017

Claimant's relationship: Daughter - Order for provision: Appeal allowed and an order that the respondent receive provision made in the court below was set aside - Costs: Not known

Issues: Need, testamentary intentions

Facts:

The deceased died in October 2014 aged 88 years. She was survived by her two adult daughters one of whom she appointed executrix of her estate. This daughter was the defendant in the court below and the appellant in these proceedings. The other daughter was the claimant in the court below and the respondent in these proceedings.

The estate's principal asset was the deceased's home which the primary judge recorded would have to be sold and which had a value of approximately $770,000 after selling expenses were allowed. The residual estate comprised cash and investments of approximately $24,400 but this had been spent in paying debts, funeral and testamentary expenses.

The parties' costs (in the court below) were estimated to be $92,000 (in total) and $2,580 of the estate's liability had been paid by the estate.

In her will made in August 2010, the deceased gifted her property to the appellant and the residue of her estate was left to both daughters in equal shares. Without an order for provision, the respondent would receive nothing from her mother's estate.

Both daughters had a good relationship with their mother and it was accepted that both were "loving and dutiful" daughters.

The trial judge ordered that provision be made for the respondent in a lump sum that equated to 40% of the net proceeds of sale of the deceased's home. His Honour also ordered that the parties' costs be paid out of the estate and included in the calculation of the net proceeds of sale. The trial judge estimated that the respondent would receive $268,400 by way of provision. The Court of Appeal recorded that the property sold for $820,000 and that the effect of the trial judge's order for provision was that the respondent would receive provision of $285,000

At the trial, the respondent was 52 years old and she, her husband and three adult children lived in their own home at Blacktown which had an estimated value of approximately $840,000. The home was subject to a mortgage of $527,000. The respondent and her husband had a weekly income of $1,262 and their expenses totaled $1,208. The respondent deposed that it was only when she received weekend shift allowances (she had a casual job with Seniors Help) that she and her husband's income equaled or exceeded their weekly expenses. She also deposed that she and her husband were in arrears in repaying a car loan and council rates. The trial judge noted that the couple's mortgage repayments were lower that they would be in the future because the lender had allowed them to enter into a concessional repayment schedule pursuant until the end of 2016 when they would be required to pay the lender's standard repayments.

The appellant did not raise her personal and financial circumstances as an issue.

It was accepted at the hearing that the deceased and her late husband had transferred an unencumbered property they owned in Merrylands to the respondent in 1985 and that it was known in the family that this was an early inheritance for the respondent and that the appellant would receive their other property (their home) when they died. The respondent and her husband sold the Merrylands property in February 1989 for $136,000 and the respondent and her family then lived with the deceased in the deceased's home for approximately four years. In about 1981, the deceased and her husband also purchased a hairdressing salon for the respondent which she sold several years later for $21,000.

The respondent accepted at the hearing that the comparatively large debt she and her husband owed was due to investment decisions they had made.

The appellant contended that: (1) the respondent's needs could be met from her financial resources; (2) the trial judge erred by giving no weight, or manifestly inadequate weight, to the provision made for the respondent by her parents during their lifetime and the deceased's intention was that the appellant would receive the deceased's property as the respondent had been given the Merrylands property; (3) the trial judge's reasons were inadequate and there had been no attempt to analyse principles and no elucidation about how the trial judge arrived at his decision to make the order the provision that he did; and (4) the trial judge erred in applying a two-stage test in the application of s 59.

It was also noted that counsel who appeared for the respondent in the court below was asked to specify what provision was sought said he submitted that her claim was for $200,000 and that the provision awarded to the respondent was more than one-third greater than this sum.

The respondent contended that the trial judge had taken all relevant considerations onto account and that his assessment that adequate provision for the respondent's proper maintenance and advancement in life had not been made was an evaluative judgment and it should not be interfered with. She also submitted that there was no error in the trial judge's assessment of the respondent's financial need.

Decision:

White JA wrote the leading judgment.

His Honour noted that whether a two-stage test was to be applied had been the subject of significant debate but the question should be of no real significance provided that the first stage of the inquiry was not misunderstood but that a risk of error arose if a two-stage approach was adopted and it was assumed the first stage required an evaluation of whether the applicant had been left without adequate provision and thereby there was a focus on the applicant's financial needs as the question was whether adequate provision was made for the applicant's proper maintenance, education or advancement in life. White JA then noted that the structural changes between the Family Provision Act and Ch 3 of the Succession Act meant that a two-stage approach was no longer appropriate.

White JA accepted that the trial judge considered that the dominant and determinative consideration was the respondent's financial need and this of itself did not involve an error of principle, but that the trial judge failed to properly consider the significance of the respondent receiving the Merrylands property in 1985 and that although he took account of this as a material consideration, he was wrong to find that the appellant's competing claim was foundered in her contributions to the deceased when it was founded upon what all members of the family recognised as her moral claim to the property upon her parent's death because

her sister had received an earlier inheritance of the Merrylands property. White JA also noted that in 2007, the deceased and her husband had considered whether the passage of time and the changes in their children's circumstances meant they should change their wills to give further provision to the respondent but they decided it would be inappropriate because "it has always been one house for each and [the respondent] already had hers." The deceased had also confirmed that position in her 2010 will. His Honour then repeated (and adhered to) what he had said in *Slack v Rogan; Palfry v Rogan* (2013) 85 NSWLR 253; [2013] NSWSC 522 that the court is not in as good a position as a capable testator to assess what maintenance or advancement in life is proper for an applicant having regard to all of a family's circumstances, including the relationships between the applicant and the deceased and the merits and claims of other family members, is not to put a gloss on the stature, rather it acknowledged the testator's superior position. The most important word in s 59(1)(c) is "proper" and until the court has identified what is proper maintenance, education and advancement in life for an applicant, it cannot assess whether the provision, if any, is adequate and what is proper requires an evaluative judgement that has regard to all relevant circumstances not merely the parties' financial circumstances and whilst the court would know the latter, it will only have an incomplete picture of the former.

White JA concluded that given the respect that he considered was due to the deceased's consideration of the competing claims of her daughters, he did not think that inadequate provision had been made for her, even though that provision was effectively nothing.

The appeal was upheld and the trial judge's order that te respondent receive provision was set aside.

Garcia Arenas v Fica; Crosby v Fica [2017] NSWSC 1769

Supreme Court of New South Wales

Coram: Parker J

Date: 19 December 2017

Estate ($): $618,000 approximately - Claimant's relationship: Daughters - Order for provision: See below - Costs: Plaintiffs in one matter - $82,000; plaintiff in the second matter - $62,000; defendant - $98,000

Issues: Need, testamentary intentions

Facts:

The deceased died in December 2015 aged 63 years.

During his lifetime, the deceased married three times. The deceased and his first wife had four children and two of these children made family provision claims. After his second marriage ended, the deceased had a relationship with another woman which resulted in the birth of another child and this child's mother as her daughter's tutor, also made a family provision claim.

In about 2011, the deceased was diagnosed with bowel cancer which remained with him for the rest of his life and which spread to other parts of his body before his death.

In September 2014, the deceased was introduced to a woman who was visiting Australia from the Philippines and they commenced a relationship. The woman came to Australia to live with the deceased in July 2015. The deceased's cancer had worsened by this time and his condition began to deteriorate. He was hospitalised in August and again in September. On 8 September he made his last will and on the next day, 9 September, he married his partner. As noted above, the deceased died in December 2015.

The deceased had also made a will in January 2014 in which he gave one of the plaintiffs a right of residence in a property he owned on condition that she continued to live in the property and she paid outgoings. If the plaintiff elected to cease living in the property or breached her obligations the will provided that the property was to be sold and divided into six shares, with each of his five children receiving a share and a grandson receiving a sixth share.

The deceased's last will made just before he married, gifted his estate to his new wife and it appointed a friend to be his executor.

At the hearing, the deceased property had an estimated value of $675,000 and it was subject to a mortgage of $36,000. The estate had few, if any other assets. One of the deceased's previous partners made a separate family provision claim which was settled on terms that she was to receive a legacy of $27,000 inclusive of costs. When the executors' costs of $98,000 were provided for, the estate had a net value of approximately $520,000.

The evidence established that the two claimants from the deceased's first marriage had a close relationship with the deceased. One of the claimant's was 43 years old, in 1999 she had cervical cancer and a radical hysterectomy but the cancer was in remission. In the 2016 financial she had a gross income of $16,300 and whilst she was working as a waitress and in a hairdressing salon her present income would generate approximately $13,000 a year

when her expenses were approximately $21,600 per year. She had few assets but she did have liabilities of $6,200 which included a Centrelink debt of $5,000. The other claimant was 41 years old and she had numerous health issues, She was unemployed, received a sickness benefit and she had separated form her husband. Her liabilities exceeded her assets.

The other claimant was 14 years old and was still at school. The child's mother had few assets. Until his death the deceased had paid child support for the child.

The deceased's wife was 53 years old and whilst she owned two properties in the Philippines one of the properties was occupied by her mother and brother and the other property was vacant.

Decision:

The defendant conceded that each plaintiff was an eligible person and that given the evidence, the deceased's last will failed to make adequate provision for each of the plaintiffs. The issue therefore was how much provision should be ordered.

The court accepted that the deceased's January 2014 will (and an instruction sheet that accompanied it) was clear evidence that the deceased anted his children to benefit from his estate, for one of the claimant's to have a place live and that he was on good terms with the claimants until 2014.

The court also accepted that the deceased had an obligation to make proper provision for his 14 year old daughter, particularly as the obligation to pay child support terminated on the deceased's death.

The court said it was significant that whist none of the claimants had contributed to the purchase of the deceased's property, the deceased's acquisition of the property was funded with money from his father's estate and it was to be inferred that the deceased's father would have contemplated that the money he left to the estate would benefit the deceased and the deceased's family. Community expectations therefore required the deceased to take this into account when he made his testamentary arrangements.

The court held that the testator's 2014 will contained a considered and understandable judgment of the competing claims on the testator's bounty but the 2015 will did not. The claimants had not engaged in any disentitling conduct and though it was understandable that the deceased would want to provide a benefit to someone who had provided him with physical and emotional support, his wife had made no contribution to the deceased's acquisition of property.

The court concluded that "proper" provision for the claimants required that:

1. The youngest claimant should receive a lump sum of $25,000 for her maintenance and education for the period until she turned 18 ($120 a week);

2. In lieu of a right of residence, the eldest claimant should receive a lump sum of $100,000 ($200 per week for 10 years).

3. Each of the claimants should receive $65,000 which was a sum equivalent to the one-sixth interest in the estate they received in the 2014 will.

Ikonomou v Panagopoulos [2017] NSWSC 1805

Supreme Court of New South Wales

Coram: Parker J

Date: 22 December 2017

Estate ($): $700,000 - Claimant's relationship: Wife - Order for provision: Summons dismissed - Costs: Not known

Issues: Need, testamentary intentions

Facts:

The deceased died in June 2016, aged 83 years.

The deceased married twice during her lifetime and the plaintiff was her second husband.

The deceased and the plaintiff married in August 1977 and they had no children together. The deceased though had a child from her first marriage (the defendant).

In her last will made in February 2014, the deceased appointed the defendant as her executrix and left the whole of her estate to her granddaughter, the defendant's daughter. The plaintiff was granted a six month right to reside in a property.

The deceased's principal asset was a half-interest in a house she owned with the plaintiff which had a value of $800,000. There had been no funds in the estate to pay the deceased's funeral and burial costs of $36,600 and these were paid by the defendant and the defendant's costs of defending the proceedings were estimated to be $60,000. Te estate therefore had a net value of $700,000.

The plaintiff's received the age pension which with supplements meant he received approximately $21,300 in income a year. His expenses were $27,600. Apart from his share of the half-interest in the property he owned with the deceased, he had few assets.

The deceased's' granddaughter was 25 years old, she lived with her parents, had few assets and she worked as a data entry operator on a semi-casual basis.

The evidence indicated that the plaintiff and the deceased had a difficult relationship, that they may have separated but continued to live under the same roof, that the deceased went to live in Greece for more than six months a year to get away from the plaintiff and that the deceased despised the plaintiff because he dressed up in women's clothing and he had sex with men.

The plaintiff contended that he should receive the deceased's half-interest in their property. He submitted that there was a rule that a testator had a duty to his widow, to the extent his assets permit, to ensure that she was safe in her home, that she had an income sufficient to permit her live in the style to which she was accustomed and to provide a fund to enable her to meet any unforeseen contingencies (see Luciano v Rosenblum (1985) 2 NSWLR 65 at 69-70), applied equally to a surviving widower. The plaintiff also contended that the prices of houses and town houses where he lived were beyond his means and that his needs were far greater that any needs the estate's beneficiary might have.

Decision:

The court did not accept that following a long marriage, the surviving spouse, by reason of that status alone, will be entitled to provision out of the deceased's spouse's estate sufficient to keep him (or her) in the same lifestyle as he enjoyed during the marriage and an entitlement to provision of this type must always be justified by reference to the circumstances of the particular case. The court also accepted that the plaintiff's prospects of acquiring further assets when compared with the estate's beneficiary, were minimal but this was not the point. The question was whether the deceased was subject to an obligation to satisfy the claimant's needs and the obligation overrode the dispositions the deceased had actually made, the nature of the parties' relationship and what level of provision was proper and what provision ought to be made for a claimant.

The court also noted that the when testamentary arrangements are apparently based on considered and understandable judgments by a deceased and there had been no radical or unforeseeable change in circumstances, the court will be reluctant to displace the dispositions made by the deceased, who may usually be assumed to have known far more about what really happened than the court can hope to know. Here, the deceased's decision not to make any further provision for the plaintiff apart from a six month right of residence was a clearly considered one that went back to a will made in 1999 and perhaps to a decision to transfer the property from a joint tenancy to a tenancy in common in 1979 and there had been no change in circumstances since the deceased's last will was made.

The court also concluded that the deceased's testamentary dispositions that excluded the plaintiff were understandable for three reasons: (1) the evidence did not establish that a 50/50 division of the property was unfair to the plaintiff; (2) the plaintiff had consented to the conversion of a joint tenancy into a tenancy in common in 1979 and that the plaintiff was aware of the deceased's testamentary intentions for a long time.; and (3) the plaintiff did not devote himself to the role of a homemaker.

The court also made these observations:

> "Whether the deceased made 'proper' provision for [the plaintiff] is a matter of applying 'community standards'. In my opinion, there is no single 'community standard' which defines in each factual situation what level of provision is 'proper'. I think that 'community standards' encompass a range of views. Some people in the community may believe that the marriage tie is so important that it confer an obligation, even in a dysfunctional marriage such as this one, for the spouses to provide for each other by will. But other may believe that it does not require full sharing of all the parties' assets and that if the parties choose to draw a dividing line between their assets and deal with them separately that is perfectly fair and reasonable. I do not think that the Court's role is to try to decide which view is 'better', if that were possible."

The court held that the deceased's testamentary dispositions were not outside the reasonable range of community expectations and that the deceased therefore failed to make "proper" provision for the plaintiff.