The Role of Discretion in Family Provision Claims

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Presented by Philip Wallis of Wardell Chambers

1. In the conduct of Family Provision Claims, it is necessary to consider, in addition to the "*science*" contained in Chapter 3 of the *Succession Act 2006 (NSW)* (**the Act**), the "*art*" of discerning how the Court, or more particularly the Judge hearing the matter, will exercise the discretion contained within the Act.

Eligible Person

2. The initial determination of whether a Claimant is an eligible person within the meaning of section 57 of the Act is, for the most part and despite lengthy definitions such as that for "*children*" in section 57(2), clear cut and includes spouses, de facto partners, children and former spouses.

3. It should be noted, however, that even the finding of a de facto relationship is not entirely without a degree of subjective assessment. The relevant definition is borrowed from section 21C of the *Interpretation Act 1987 (NSW)*, which provides that two people are living in a de facto relationship if:

> "*(2)(a) They have a relationship as a couple living together, and*
>
> *(b) they are not married to one another".*

4. Section 21C(3) states that all the circumstances of the relationship must be taken into account and then lists nine matters that, as a matter of discretion, may be considered where relevant, but none of which is obligatory or determinative of the issue. The matters to be taken into account includes matters such as:

   (a) the duration of the relationship;

   (b) the degree of financial dependence or interdependence; and

   (c) the degree of mutual commitment to a shared life.

5. In the assessment of slightly "*remoter*" claimants, a greater degree of subjective evaluation is involved. Such claimants include a grandchild of the Deceased or a person who was, at any time, a member of the household of which the Deceased person was a member; in each case only where the grandchild or person was, at any particular time, wholly or partly dependent on the Deceased person; and finally a person with whom the Deceased person was living in a close personal relationship.

6. Findings of "*dependency*" and "*being part of a household*", while in some cases clear cut, can involve a degree of subjective assessment where the dependency is not direct and financial, or the household living arrangements are not conventional [*examples*].

Inadequate Provision

7. A claimant having established eligibility to bring a claim faces the first major discretionary hurdle in establishing:

   (i) in all cases "*that at the time the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life has not been made by the Will of the Deceased person, or by the operation of the intestacy rules...*" (section 59(1)(c)); and

   (ii) in the case of the remoter eligible persons referred to above, that "*having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application*" (section 59(1)(b)).

8. Each of these tests provide ample opportunity for the exercise of subjective assessment in making what are substantially value judgments about matters on which reasonable minds might well differ.

Family Provision Orders

9. A claimant having established that she or he is an eligible person, that adequate provision has not been made for them, and, where relevant, that there are

factors warranting the making of the application, is then entitled to have an order made in their favour pursuant to section 59(2) of the Act, which provides:

> "*The Court may make such order for provision out of the estate of the deceased person* ***as the Court thinks ought to be made*** *for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made".*

10. When legislation speaks of orders that the "*Court thinks ought to be made...*", the scope for the exercise of discretion is clearly a wide one.

Claims by Estranged Children

11. The consideration of the exercise of discretion in all the areas that have been touched upon is beyond the scope of this paper and would take a considerable time to discuss in any proper level of detail. Accordingly, I will consider two relatively recent cases involving claims by children, born "*out of wedlock*", where there has been no or limited contact between the Deceased person and the Claimant child, as demonstrating the different approaches to the exercise of judicial discretion.

12. In the matter of *Mead v Lemon* [2015] WASC 71, the facts were, in brief, as follows:

    (i) the Deceased was aged 74 years at the date of his death in 2012;

    (ii) the Deceased had been married three times and had three children from a previous marriage, two of whom were Defendants in proceedings who were the residuary beneficiaries and who were aged 41 and 38 at the date of death of the Deceased;

    (iii) the Deceased made many Wills and Codicils, including his last Will dated 6 March 2012 and a Codicil of 11 March 2012 (his date of death being 26 April 2012);

(iv) the Plaintiff was 16 years old at the date of death of the Deceased and was born of a relationship to a woman who was not at any time married to the Deceased;

(v) the estate of the Deceased was described by the judicial officer at the first instance hearing, Master Sanderson, as "*colossal*". The value of the share of each of the two residuary beneficiaries was not less than $400,000,000 each, which the Master noted would produce an income of $24,000,000 per year at a reasonable rate of return in the order of 6.5%;

(vi) some provision was made for the Plaintiff under the Will by a complex discretionary testamentary trust, which could contain a fund of up to $3,000,000 and which vested on the Plaintiff attaining the age of 30, but allowed multiple ways in which other beneficiaries could be included and/or the trust might not vest;

(vii) the Plaintiff had only sporadic contact with her father. The Court's findings were that the evidence disclosed that there was not much interest by the Deceased in his daughter. He had had little extended time with her and was consistently late when collecting her for shorter visits. The Court found that:

> "*She did not have a close relationship with her father and that was of the Deceased's choosing*" [2015] WASC 71 at [40];

(viii) the Deceased provided little to the Plaintiff or her mother during the Plaintiff's childhood by way of material support. He paid childcare as obligated under legislation, school fees for a private college and some pocket money, but little more. Any gifts to the Plaintiff were of nominal value. The Deceased did not purchase a home in which the Plaintiff and her mother could live, although he was aware that they moved several times from one rented premises to another;

13. section 7(1)(c) of the Family Provision Act WA 1972 is in similar terms to section 57 of the Act, the test being whether "adequate provision for proper

maintenance, support, education or advancement in life" has been made for the claimant;

14. In discussing the termination of "*adequate provision*" (which under the Western Australian legislation is to be determined at the date of death of the Deceased), Master Sanderson said:

> "*Much judicial ink has been split attempting to define what has been meant by the expression 'adequate provision' in the section. In the end all that can be said is that what is adequate depends on the circumstances of the case - the size of the estate, the nature of the relationship between the claimant and the deceased, the claimant's present circumstances and other legitimate claims. Any attempt to refine the meaning of this section runs the risk of putting a gloss on the statute";*

15. The finding of the Court as to adequate provision was as follows:

> "*In my view it is clear the Will of the Deceased did not make adequate provision for the plaintiff. The starting point in reaching that conclusion is the size of the estate. The Deceased had a vast fortune and he was in the fortunate position of being able to provide for all of the parties who had a claim on his bounty. It may be that providing the plaintiff with a sum of $3,000,000 tied up in a trust could be regarded as adequate - although for reasons which follow I am not satisfied that is the case. But this structure does not guarantee the plaintiff $3,000,000. There is real prospects she might get nothing*" [2015] WASC 71 at [29];

16. Each of the parties produced actuarial evidence as to the likely future financial requirements of the Plaintiff. The Plaintiff's actuary estimated the amount needed to provide for the Plaintiff during her life was some $20,528,500 on the 3% discount scales and $15,371,000 on the 5% discount scales;

17. The Court noted that the difficulties with this approach included that the figures produced were highly dependent on the discretionary spending of the Plaintiff. Master Sanderson noted: -

> *"But the difficulties with this approach are rather more fundamental. It assumes some sort of entitlement on the part of the plaintiff to have each and every one of her needs met from the estate. It does not factor in the prospect of her earning a living; nor does it factor in any income earned by a partner. While it is of interest I was not persuaded this mathematical approach was the proper way to determine how the discretion should be exercised"* [2015] WASC 71 at [51];

18. In considering the exercise of discretion, Master Sanderson stated:

> *"As the Act itself makes plain and as was said in Bondelmonte v Blanckensee section 6(1) provides the Court with discretion. Once the jurisdiction question is answered in a plaintiff's favour then it is open to the Court to make 'such provision as it thinks fit'. The approach of the defendants was to say if a plaintiff is entitled to an award then that award should be no more than adequate provision for the proper maintenance, support, education or advancement of life of the plaintiff. With respect that puts a gloss on the statute.* ***The discretion in the Act is unfettered.*** *It must be exercised judicially and all relevant factors must be taken into account. But there is no warrant for assuming that the award should be no more than that which will provide adequate provision for the plaintiff.*
>
> *During the course of the hearing I was referred to dozens of cases. None bear comparison to this one. When it comes to exercising a discretion three factors are consistently found in the cases - the size of the estate, the needs of the plaintiff and the interests of other parties having a legitimate call on the bounty of the Deceased. From time to time other factors arise in particular cases. But these themes are universally present. The weight to*

be given to each of these factors varies between the cases as is to be expected. But the result is always what might be called a triangulation - a balancing exercise within the reference points provided by the three factors. But this case is different. The estate is massive and its value irrelevant in determining the outcome. No other individual will be prejudiced no matter what award (within reason) I make. That means there is no way of triangulating here; put another way there are no factors to weigh in the balance. There are no markers for an exercise of discretion";

19. Noting that the matter which he placed most reliance on in the exercise of his discretion was the size of the estate, the Master awarded a cash payment of $25,000,000 conditional upon the Plaintiff forfeiting any right or interest in the trust;

20. Not surprisingly, perhaps, the Defendants appealed the decision on a number of grounds but in particular, on the exercise of the discretion to make an order providing for the Plaintiff, once eligibility had been established;

21. on Appeal, Buss P, in the Supreme Court of Western Australia, in discussing the exercise of discretion, noted:

> *"In Bosch v Perpetual Trustee Co Limited [1938] AC 463, Lord Romer (delivering the advice of the Privy Council) observed that the discretionary power given to the Court at the second stage 'must always be one of great difficulty and delicacy' and 'must always be one largely of guess work', ...*
>
> *The Court is empowered to make such provision from the Deceased's estate as the Court thinks fit, but the Court is not empowered to award more than what is 'adequate' provision for the claimant's 'proper' maintenance, etc. See Coates (519) (Dixon CJ); Blore v Lang [1960] HCA 73; (1960) 104 CLR 124, 134 (Fullagar & Menzies JJ). Those propositions are derived from the statutory text. In particular, the words 'for that purpose' at the end*

of section 6(1) refer to the purpose identified earlier in section 6(1), namely ensuring that 'adequate' provision is made from the Deceased's estate for the claimant's 'proper' maintenance, etc. The text and purpose of section 6(1) qualify the Court's power at the second stage. The power is confined by the text and purpose to the making of orders which will ensure that 'adequate' provision is made from the Deceased's estate for the claimant's 'proper' maintenance, etc" [2017] WASCA 215 at [57]-[58];

22. The Court noted earlier authorities to the effect that a generous provision made to one child ought not be used to determine the provision to be made to a child for whom proper provision has not been made, in particular Buss P referred to the judgment of Fullagar and Menzies JJ in *Blore v Lang*:

> "*The measure to be applied is not what has been given to the one, but what the other needs for his or her proper maintenance, giving due regard to all the circumstances of the case. The Testators Family Maintenance Act is legislation for remedying, within such limits as a wide discretion would set, breaches of a testator's moral duty to make adequate provision for the proper maintenance of his family - not for the making of what may appear to the Court to be a fair distribution of a deceased person's estate among the members of his family"* (1960) 104 CLR 124 at [135];

23. It followed that Buss P found that the Master's error was to think that the discretion provided by section 6(1) of the Western Australian Act is unfettered, when in fact it is limited to what is required to make adequate provision:

> "*The phrase 'as the Court thinks fit' does not confer a discretion that is 'unfettered' or at large. The phrase must be read in the context of section 6(1) as a whole. The words 'for that purpose' at the end of section 6(1) refer to the purpose identified earlier in section 6.1, namely ensuring that 'adequate' provision is made from the Deceased's estate for the claimant's 'proper' maintenance, etc*";

24. The other Members of the Court, Mitchell and Beech JJ agreed with the President on this issue (see (2017) WASCA 215 at [267]);

25. The Supreme Court found it had sufficient material to re-exercise the discretion under section 6.1 and reduced the award from $25,000,000 to $6,142,000, being an actuarial calculation of the amount necessary to purchase a home for $1,500,000 (being approximately three times the median cost of a home in Perth) and an annuity of $100,000 per annum;

26. The Plaintiff in the original proceedings, sought special leave to appeal to the High Court, on the issue of the exercise of the limits of discretion in Family Provision claims and in particular, in claims involving very large estates where the size of the estate means that there is no competing claim;

27. Special leave was, however, recently refused.

28. The New South Wales legislation differs slightly from the Family *Provision Act (WA),* in that the Court's power to make an order is less limited and provides in s 59:

> *2) "The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made".*

29. Notwithstanding the difference in wording, it is likely that s 57(2) would be read down in the same manner so as to limit the order to being one for "adequate" or "proper" maintenance etc. of the Plaintiff.

30. In *Cameron v Mead* [2018] NSWSC 85 the Court considered another claim against a potentially large estate.

31. The facts briefly were as follows:

(i) the deceased, John Hemmes, died on 1 March 2015 aged 83

(ii) the Plaintiff was aged 25 at the date of death of the deceased;

(iii) the Plaintiff's mother was in a relationship with the deceased for a period of some 6 years ending shortly before the birth of the Plaintiff;

(iv) the deceased disputed paternity in Family Court proceedings and only paid child support after DNA testing (which he criticised) lead to a finding of paternity pursuant to the operation of s 12 of the Status if Children Act 1969 NSW;

(v) the deceased never subjectively accepted the Plaintiff as being his son and had no contact with him, which the court found the Plaintiff had no responsibility for;

(vi) the only material payments by the deceased to the Plaintiff were compulsory child support payments;

(vii) the Plaintiff attempted to contact the deceased during his adulthood

(viii) the deceased left a widow Merivale from a marriage of 60 years and 2 children aged 51 and 42 at the date of death of the deceased;

(ix) the deceased's will noted that the matrimonial home at Vaucluse (value at $34,000,000) was owned in joint tenancy with Merivale, left a bequest of $2,000,000 to a former trusted employee and the residue to the 2 children of his marriage to Merivale equally;

(x) while he lived an affluent lifestyle, his estate had a negative value at the date of his death;

(xi) no provision was made the Plaintiff;

(xii) the Summons was amended to claim against notional estate of the deceased including the Vaucluse home;

(xiii) the parties reached an agreement for the purposes of the proceedings to establish a fund of $4,126,342 for the purpose of meeting any claim or costs order and the Defendants agreed that no other beneficiary would raise competing need to defeat the Plaintiff's claim;

(xiv) the Plaintiff was living in rented accommodation in Glebe and was earning about $90,000 as a software designer.

32. The Defendant opposed orders being made on 3 bases:

(i) That adequate provision was made by the deceased by reason of the payment of child support amounting to some $300,000;

(ii) There was no relationship between the deceased and the Plaintiff beyond 'bare paternity'; and

(iii) The Plaintiff is a healthy adult male who can and should be able to make his own way in life. See [2018] NSWSC 85 at [41].

33. On the issue of bare paternity, the court accepted that this was insufficient to establish the mere fact of paternity to justify family provision relief and that something further was required. The Plaintiff relied on the fact that the absence of a relationship was not the fault of the Plaintiff but rather a situation of the father choosing to exclude the Plaintiff form his life. The court accepted this was the position:

> *The sad facts of this case do not readily fit the paradigm of an estranged relationship that is often encountered in family provision proceedings involving claims by adult plaintiffs. The plaintiff was never really given a fair opportunity to engage socially with the deceased, despite his manifest desire for such an engagement. There was no social relationship permitted by the deceased to be the subject of any form of estrangement. Towards the end of his life when approached by the plaintiff, the deceased not only rebuffed him, but sought to re-agitate the question of paternity determined two decades earlier by the Family Court, and to impose on the plaintiff personal responsibility for the absence of any personal encounter. The plaintiff did not seek – but the deceased most assuredly did not hold out to the plaintiff any prospect of – material gain. The plaintiff sought, but the deceased denied, an opportunity to bond.* [2018] NSWSC 85 at [46]

34. Similarly, the argument that child support payments were adequate provision for the Plaintiff from the estate of a father of the deceased's affluence failed.

35. The Plaintiff advanced cases for payment of the whole of the fund to be paid to him or alternatively a sum of some $3,000,000, while the Defendant argued that if there was to be any provision it should be measured in the hundreds of thousands of dollars.

36. Lindsay J found that the Plaintiff ought to be given a 'substantial' award he ought not to be established in accommodation beyond his immediate reasonably foreseeable needs.

37. His Honour found that an appropriate award was the sum of $1,750,000.

Philip Wallis