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Topic: Family Provision Application - recent developments and trends

This paper will address current costs issues; claims in large estates; claims in small estates; estranged applicants; the relevance and effect of prevailing community attitudes; different types of awards; the role of the executor and the impact of mediation and collaborative law approaches.

1. Introduction

Justice Allsop, President of the NSW Court of Appeal began his judgment in the case of *Andrew v Andrew* [2012] NSWCA 308 with:

[1] This is a difficult case. The difficulty arises from the need to apply a statutory test couched in evaluative language embodying human values and norms of conduct deeply personal to those involved and often incapable of clear expression.

Those words could well sum up the difficulty faced by the Courts in every family provision application.

Justice Allsop was considering an appeal in which the relevance of an estrangement (of some 35 years) between the applicant and her late mother was central.

His Honour's judgment together with those of the other Appeal Court Justices who sat on the appeal (Justices Basten and Barrett) highlights a number of the contemporary issues which the legal profession and the Courts must grapple with in this area of the law.

In my address I'd like to touch on some of the key issues and difficulties.

2. **Current costs issues**

I'd first like to refer to some recent comments and decisions concerning costs in these applications.

Forsyth v Sinclair (No 2) [2010] VSCA 195 per Neave, Redlich JJA, Habersberger AJA:

"We consider that it is a matter of concern that in many family provision cases the amount available for distribution among the competing beneficiaries is significantly reduced by legal costs. **Parties should not assume that litigation can be pursued safe in the belief that costs will always be paid out of the estate.** Every effort should be made to resolve the dispute before the costs get out of proportion." (Emphasis added) [citing *Szlacko v Travini* [2004] NSWSC 610 at [11] (Young J)].

2.1 *Capping Proportionality*

My first experience of proportionality (or really lack of it) was when a student of mine at the time asked how she should approach an interview she was required to have with a client of the firm's to explain that the family provision award was \$40,000 but that the firm's costs were \$60,000 and the client did not have the costs ordered to be paid from the estate.

Not dissimilar results occur from time to time, usually dictated by the terms of the costs order.

A significant recent decision dealt with both issues. In *Cerneaz v Cerneaz & Anor (No 2)* [2015] QDC 73 costs estimates of the applicant and respondents in an estate of less than \$800,000 totalled \$302,417.28 – some 38% of the estate. Smith DCJA remarked that:

"The surprising aspect of the matter is that it was not a complex matter and there was only a two day trial."

In the event His Honour capped both parties' costs, which resulted in costs amounting to a little over 28% of the total estate, which he considered reflected proportionally.

Judge Smith provides an excellent review of costs in family provision applications and refers to a number of cases where 'capping of costs' was discussed, such as *Gill v Smith* [2007] NSWSC 832 where the applicants received legacies of \$100,000 each, with costs capped at \$40,000. His Honour also referenced the remarks of McMeekin J in *Manly v Public Trustee of Queensland* [2007] QSC 388 at [114] where, in an estate of \$380,000, costs of \$180,000 were considered out of proportion to the work and difficulty involved and awarded costs on a standard basis.

Clearly, we should expect scrutiny of costs in these cases. However, it should be noted that in *Magur v Brydon* [2014] NSWSC 1931 Robb J observed that it would be unwise and impracticable of the court to act as a 'policeman' in relation to costs.

It is also important to note that family provision cases generally are not ones where costs follow the event (Gaudron J in *Singer v Berghouse* (1993) 67 ALJR 708 at [6]). More often than not reasonable proportionate costs of the parties are paid from the estate on an indemnity basis.

3. **Claims in large estates**

As is observed in *de Groot and Nickel* at [3.4] where the estate is large, emphasis is more on 'proper' than on 'adequate'. I describe it to clients as the difference between an applicant being entitled to 'bread and butter' in a normal estate but, where it is large, the applicant is likely to be awarded 'cream and jam' on the 'bread and butter'.

The recent case of *Darveniza v Darveniza & Drakos as Executors of Bojan Darveniza and Ors* [2014] QSC 37 shows what the 'cream and jam' can be. An award of \$3 million was made in favour of an adult son from an estate of \$27 million.

Mention should also be made of the Western Australian case of *Mead v Lemon* [2015] WASC 71 (currently on appeal) where Master Sanderson awarded \$25 million to the 19 year old ex-marital daughter of the testator in an estate where one estimate of its value was in excess of \$1 billion.

4. **Claims in small estates**

Considerable care needs to be exercised where the estate is small. Regrettably, some estates at date of death are of reasonable size but a global financial crisis or other disaster may subsequently reduce it to a small estate.

The regularly quoted approach in small estates is that enunciated in *Lanfear* [1940] 57 WN (NSW):

In an ordinary case, especially where the estate is a small one, it is the duty of the executors either to compromise the claim, or to contest it and seek to uphold the provisions of the will. For that purpose they should place all the relevant evidence before the Court relating, not only to the case generally, but to any particular circumstances which the Court should take into consideration relating to any particular gift in the will.

The court may dismiss an application with costs or make no order as to costs where the estate is small (see *de Groot and Nickel* at [3.7]). The remarks of Cohen J in *Jackson v Riley* (referred to and cited at [3.7]), where the net estate was \$25,000 are worthy of note:

In my opinion, the legal profession in both branches has an obligation to reduce the costs of litigation as much as possible when the amounts in dispute are so small. If the parties cannot reach a compromise then it seems to me, that by consultation, their legal advisers, both solicitors and counsel, should seek to find all means of defining the real issues and confining the evidence in relation to them. Where cross-examination will be unlikely to alter the substance of a witness's evidence, it should be dispensed with. The heavy expense of bringing those witnesses from distant places should be actively avoided.

A not dissimilar point was made by McMeekin J in *Collett & Anor v Knox & Anor* [2010] QSC 132 at [166]:

... the assumption that Mr Knox makes is that the court has no power to supervise or limit the executors in their expenditure of estate funds on litigation of this type. That assumption I examine more closely below. As a general proposition I consider

it accurate to assert that before embarking on expensive litigation the executors need to give careful consideration to what amounts they will expend and how best they should discharge their duties. Resort to generalisations that executors are entitled or obligated to uphold the will may provide no guidance at all in some cases. In my view this is such a case. Consistent with that view is the observation of Holmes JA in *Underwood & Anor v Sheppard*, a case involving family provision claims:

"The learned judge's observation that the obligation to consider the impact of costs on the estate applied with greater force to the executors than to the beneficiaries is unimpeachable. Executors bear a fiduciary duty to which they must have regard in conducting litigation affecting the estate; beneficiaries do not."

5. **Estrangement**

I have already referred to estrangement as a circumstance central to many cases these days. What affect should it have on the orders that might be made?

The relevance of estrangement could be said to have shot to prominence in recent times. For the first 75 years in the history of the legislation it featured in only two cases to my knowledge. The next 25 years to the year 2000 there were approximately 9 reported and unreported decisions. But since 2000, something of a flood of cases involving estrangement have been decided – 35 to 40 in fact.

The number of cases has been such that Bruce Nickel and I were able to categorise them for the 4th edition of our book into:

1. Estrangement caused by the applicant;
2. Estrangement caused by the deceased;
3. Fault on both sides; and
4. Estrangement but subsequent reconciliation.

We digested all the cases we know about in [2.9] of the text.

In the 2012 NSW Court of Appeal case of *Andrew v Andrew* (which I mentioned earlier) it seems that a further feature of significance in an estrangement case is whether or not the estrangement was accompanied with 'hostility'. The majority judgments of Allsop P and

Basten JA both draw a distinction between the fact of estrangement on the one hand and hostility or overt hostility on the other (see [21] and [49] and [50]). (I note that in some estrangement cases 'hostility' has been overlooked if not ignored by the Court. See, for example, *Foley v Ellis* [2008] NSWCA 288).

In light of the remarks made by two of the three Court of Appeal judges in *Andrew v Andrew*, perhaps 'estrangement without hostility' is something we may seek to look at. Even the level of effort an innocent party should go to (or has gone to) to repair the relationships could be of increased relevance.

Bruce Nickel has kindly provided me with a summary of two cases that will be digested in the next edition of our book.

1. *Morris v Smoel* [2014] VSC 32

Application by adult son (51 yrs) and his 9 yr old daughter.

Maxwell Vernon Morris died on 27 February 2010. He was survived by his second wife and three children from his first marriage (viz. Peter, Susan Smoel and Susan Wooster). His first wife died in 1989 and he married his second wife in 1990. By his will, the deceased left \$10,000 to Peter, a life interest in the residue to his wife and remainder to his two daughters.

At the date of death, his estate was worth \$1,802,182.80. The widow wasted the estate assets on litigation and other things and the estate was only worth \$194,346.55 at the date of trial. She brought a family provision claim which was heard on 23 and 29 April 2013 but she died on 24 September 2013 before judgment could be delivered. Her claim was dismissed.

The applicant, Peter, was a freelance website designer (born 1962). He was married in 1989 at age 27 and was divorced in 1995 at age 33. From 2002 to 2013 he lived with a Louise Stricke. Their daughter, Amy Summer Morris (the second applicant), was born on 24 November 2004. Peter and Louise separated in April 2014.

Peter claimed he had a difficult childhood. He left home at age 18 and rarely returned home. His sisters agreed that the deceased was "emotionally cool" to all his children. The deceased never met Amy, though she was 5 years and 3 months old when he died. Peter distanced himself from the deceased and had no contact with him during the last 10 years of his life. He made no attempt to see him even though he knew he had prostate cancer.

Orders: Peter's claim dismissed because of estrangement

Amy's claim dismissed.

2. *Hansen v Hennessey* [2014] VSC 20

Christa Meta Elisabeth Phillips died on 14 November 2010. She migrated to Australia from Germany after the war and married Gerhard Hansen in 1957. They were divorced in 1984. They had five children, viz. Doris (55), Ralf (53), Inge (52), Karen (46) and Michelle (42). The applicants were Doris, Karen and Ralf. The deceased was diagnosed with terminal pancreatic cancer in May 2010.

By her will dated 16 October 2010 (1 month before her death from pancreatic cancer), the deceased left \$40,000 to Michelle, two motor vehicles (a Mercedes Benz van and a Bedford truck) to the applicants and the rest and residue to Inge. The net value of the estate was \$176,238 (see [130]). Interest of \$25,114 should be added, giving a total of \$201,352. After specific gifts and costs, residue was \$122,638.

The deceased and all three applicants were estranged for the last two years of her life. Two of the three applicants say it was caused by the deceased but the trial judge held that it was not caused by the deceased (see [76]). In April 2009, Doris wrote to her mother saying she would not have any contact with her either in person, by telephone or by letter. In July 2010, two months after her mother had been diagnosed with terminal cancer, she wrote to her in the following terms –

[65] "You should also know that I will not get into a dialogue with you about anything, so please do not contact me again, and know that all future correspondence will be returned to you."

In early 2009 Karen wrote to her mother saying "Please do not write, call or contact me in anyway anymore".

At [144] Landsdowne AsJ concluded "that the testatrix did not have as at the date of her death any responsibility to make provision for the maintenance of Doris and Karen" and dismissed their applications on that basis.

In 1985, one year after her divorce, the deceased began living in a de facto relationship with Norman Phillips and this continued until his death in 1994. Relations between the deceased and the three applicants became very strained when they learned in January 2009 [22] that the deceased had been giving money to Inge (\$1,000 per month) from September 2008 [49].

Orders: Ralf \$19,000 because the deceased intended to make some provision for him but he was left a one-third share of a vehicle with no commercial value. The deceased did not have a responsibility to provide for Doris and Karen (because of estrangement) so their claims were dismissed. Both wrote to the deceased indicating they wanted to have nothing to do with the deceased.

6. **The relevance and effect of prevailing community attitudes**

At [2.20] of de Groot and Nickel we comment:

It is clear that the legislative changes in this area, which have been referred to briefly in Chapter 1 and above, have reflected changes in community attitudes.

However, the law governing family provision reflects prevailing community attitudes in another way: the approach of the courts in exercising their jurisdiction.

The President of the New Zealand Court of Appeal neatly encapsulated the approach in *re Wilson* [1943] 2 NZLR 359 at 362 when he said:

The point is obvious that the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time.

As Gibbs J stated in *Goodman v Windeyer* [1980] HCA 31; 144 CLR 490 at 502 (citing Sholl J in *re Hodgson* (1955) VLR 481 at 491-492):

There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards.

In the context of citing these remarks Basten JA in *Andrew's* case said at [35]:

The intervention of the court must resolve a tension of general consequence between the autonomy of the testator to dispose of his or her property on death and the perceived claims of family members for adequate provision. However, whether a sample of the general community would readily find consensus in resolving that tension in particular cases may be doubted. Further, there will undoubtedly be differences of opinion as to the appropriateness of excluding or limiting the provision for a particular person, resulting from perceptions and beliefs derived from cultural, religious and moral values. Judgments are littered with references to "disentitling conduct" (being a statutory concept in some jurisdictions), although community views about such conduct will undoubtedly vary considerably.

[36] The only guiding light, consistent with the rule of law, is the identification of community standards as reflected in current legislation. Thus, although the *Anti-Discrimination Act 1977* (NSW) and similar Commonwealth legislation does not apply to a testamentary disposition, being a private sphere of life, guidance may be obtained from the prohibited grounds as applied in relation to public activities. Since the recent inclusion of the statutory powers in the *Succession Act*, guidance should also be obtained from the list of permissible considerations in s 60.

Allsop said at [12]:

Accepted and acceptable social and community values permeate or underpin many, if not most, of the individual factors in s 60(2) [of the *Succession Act*] and are embedded in the words of s 59 [of the *Succession Act*], in particular "proper" and "ought". That such values may be contestable from time to time in the assessment of an individual circumstance, or that they may change over time as society changes and grows can be readily accepted.

Here it is worth noting the remarks of White J in *Slack v Rogan & Anor* [2013] NSWSC 522 at [125] – [127]. His comments begin with:

I know of no way of determining what the community would expect, or what its standards are, or values would be.

Little wonder that Basten JA has recognized that "the boundary between a permissible outcome and an erroneous outcome is not easily drawn" (at [46]).

To highlight the practical impact of these statements - identical facts (if they were possible to organise) separated by time clearly can result in a different outcome and that evolution is readily seen in the case law, a number of examples of which Bruce Nickel and I provide at [2.21] of our book. It means that great care is required in considering a decided case where the facts may resonate with those before a practitioner. Our case digests are helpful, we believe, but we are well aware that they are not relevant from a 'precedent' point of view.

6.1 *Crisp orders and portable life interests*

Crisp orders and flexible life interests are fairly recent developments that can be seen to reflect society changes.

The term 'Crisp order' derives from the 1979 decision of Holland J in *Crisp v Burns Philp Trustee Company Limited*, an unreported NSW case.

The orders tend to be most relevant in cases involving older spouses (see eg *Thomas v Pickering* [2011] NSWSC 572 and *Johnson v Wright* [2012] NSWSC 879 and *Kowalski v Kowalski & Ors* [2012] QCA 234) and take the form of setting aside a sum of money to be used to purchase a home for the widow or widower but, if the applicant requests, that home can be substituted for other more suitable accommodation over time, in particular, to purchase a home or right of residence in an aged care or nursing home facility for a lump

sum or periodic payment whether or not the cost or any part of it is recoverable on the applicant's death. Generally whatever is left would pass to remaindermen.

Ipp JA in *Milillo v Konnecke* (2009) 2 ASTLR 235 at [48] said:

A *Crisp* order may entitle a plaintiff, from time to time, to require the executor of a will to sell a home devised by the will, or otherwise owned by the estate, and to use the proceeds for purposes that may include purchasing another home for the plaintiff's use and occupation, or providing accommodation for the plaintiff in a retirement village or similar institution, or in like accommodation providing hospitalisation and nursing care. The flexibility provided by such an order underlies the notion that a *Crisp* order confers a "portable life interest".

Jenny McMillan in a paper she delivered at the 7th Annual Estate Planning and Business Succession Conference at the Gold Coast in March 2013 highlights the following in relation to the terms of a Crisp Order:

1. The trustee's obligation to use the trust fund to acquire a substitute property or to acquire a right to have aged care accommodation provided arises on request by the widow.
2. In relation to the purchase of aged care accommodation rights' the obligation to use the trust fund for that purpose on request exists whether or not the cost of such purchase or any part thereof will be recoverable on the beneficiary's death.
3. Holland J specifically anticipates that there may be doubts, difficulties or disputes as to the administration of the trust, in respect of which the trustee may need to apply to the court for advice or directions.

6.2 *Another practical response to current community attitudes (and recent legislation)*

The case of *Oswell v Jones & Ors* [2007] QSC 384 is another example of the Court not only responding to prevailing community attitudes but also to the need for orders to be practical and articulate with current legislative provisions.

The case involved an applicant who was severely disabled with cerebral palsy. She was in receipt of five social security benefits:

- (1) Disability Support Pension (means tested);
- (2) Pensioner Concession Card (conditional upon entitlement to receive pension);

- (3) Medical Aids Subsidy Scheme (conditional upon entitlement to receive pension);
 - (4) Adult Lifestyle Support Package (not means tested and paid by Disability Services Queensland directly to the Cerebral Palsy League); and
 - (5) Subsidy by the Department of Public Housing (means tested).
- The court was concerned with the paucity of the provision that the father had made to his daughter and turned its attention to what relevance the provision of social security had to the question.
 - His Honour agreed with Bryson J in *Whitmont v Lloyd* (Supreme Court of New South Wales unreported 31 July 1995) which was later approved by Sheller JA in *King v Foster* (NSWCA unrep. CA 40372/95) that:
 - The availability of a pension or other social benefit should be taken into account by the court where the available resources are not sufficient, particularly in small estates;
 - It may be appropriate for those benefits to continue to support the applicant (in whole or in part);
 - The award of the court can be moulded to allow these benefits to continue;
 - Social benefits are legitimate, involve no social stigma and are not disapproved of by the court; and
 - The court disapproves of this approach being used with wealthy estates where the estate can meet the needs of the applicant's maintenances, education and advancement.
 - His Honour then went on to observe:
 - The estate was substantial but not huge by the standards of the day;
 - The estate was not sufficient to make adequate provision for the applicant without recourse to social benefits;
 - In other words, even if the estate were wholly consumed by the applicant even then she may not have been provided adequate provision for life;
 - It was better that the applicant continue to receive benefits allowing some of the estate to be provided in the manner the testator intentioned; and
 - a special disability trust was the only option available to prevent the applicant from losing her benefit.

Accordingly he made an award from the estate to the maximum amount available under the law (at that time) of \$500,000 into a special disability trust for the applicant (such trusts were only available from 20 September 2006).

7. Different types of awards

Reference has already been made to Crisp Orders and portable life interests and to the orders made in *Oswell v Jones & Ors* [2007] QSC 384 (see Item 6.1 above). Recently provision was made for an applicant in the form of a testamentary trust (see *Griffiths v Craigie* [2014] NSWSC 1339). For a general commentary on a variety of other orders that have been made, see Chapter 8, *de Groot and Nickel*.

8. The role of the executor

The role of the executor has recently had some clarification which is worth noting. The longstanding view has been that, *inter alia*, it is the duty of the executor to uphold the will. But it's clear that upholding the will should not be approached as if the executor were General Custer making his stand at Little Bighorn in 1876.

At Item 3 above, I have referred to the remarks of McMeekin J in *Collett & Anor v Knox & Anor* [2010] QSC 132 in discussing claims in small estates.

Further emphasis of this point can be found in *Gwenythe Muriel Lathwell as Executrix of the estate of Gilbert Thorley Lathwell (Dec) v Lathwell* [2008] WASCA 256 at [4] where, backed by considerable authority, the court commented:

It is not enough that the trustees (or executors) honestly believe that they should engage in litigation; they must also act reasonably.

For cases where the executors went too far and were visited with the payment of costs personally see *Nowell v Palmer* [1993] 32 NSWLR 574 and *Cumming v Sands* [2001] NSWSC 507.

9. **Mediate/Settle**

Against this background of issues, it should not be surprising that settling these claims is an increasing imperative:

1. These applications are expensive, with some level of uncertainty as to who pays;
2. The range of outcomes can vary significantly;
3. Success at first instance can be a prelude to defeat on appeal;
4. Whatever the final outcome, family dynamics are likely to be worse not better;
5. Often the best outcomes are beyond the jurisdiction or interest of the court.

For example

- a settlement that provides a fund for a grandchild, which can be a suitable compromise between a warring parent and child;
- a division of chattels, especially family memorabilia (or copy photographs and videos). (The court would be unlikely to address chattels, except perhaps to see a widow awarded furniture of the matrimonial home).

10. **Conclusion**

While the ability to litigate underpins our work in this area, an early settlement is always worth pursuing, even before issuing proceedings - collaborative law practice is worthy of consideration.

11. **Reference**

de Groot, J and Nickel, B, Family Provision in Australia, 4th ed., LexisNexis Butterworths, Australia, 2012.