Relationship and moral claim after *Nicholls v Hall*[1]

17 September 2008

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1. Need and moral claim

In deciding any claim under the *Family Provision Act* 1982, the task of the Court is firstly to determine whether the applicant is an 'eligible person' within s6. This is a substantially factual inquiry as to whether the applicant falls within one of seven categories.

The next step is to determine whether "the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate … is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person": s9(2).

[1] *Nicholls v Hall & Ors* [2007] NSWCA 356.

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This is the first stage of the two-stage approach enunciated by the High Court in *Singer v Berghouse* (1994) 181 CLR 201.[2]

The terms 'inadequate' and 'proper' are not defined in the Act. They are value-laden terms because, on the subject of money, there is plenty of room for disagreement about what is 'proper' and 'adequate'. As such the Court has the difficult task of deciding whether a deceased person got it wrong. In doing so, the Court may have regard to anything at all that it considers to be relevant: s9(3)(d).

If the Court finds the provision made was inadequate, the next task is to decide what (if any) order for provision 'ought' be made: s7. This is Stage Two of *Singer v Berghouse*.

The word 'ought' – possibly even more subjective and fraught than 'proper' and 'adequate' – is similarly undefined.

In grappling with these tasks, judges have frequently invoked the concepts of 'moral duty' and 'moral claim'. While this practice has sometimes been the subject of disapproval,[3] it has recently been endorsed by a High Court majority[4] in *Vigolo v Bostin* (2005) 221 CLR 191.

Thus the Court may without inhibition approach FPA claims on the basis, *inter alia*, of an overarching inquiry as to whether a person who is dead acted in a way, while alive, that was morally right or wrong.

Major issues for determination	**Question of…**
Whether applicant an eligible person	Fact
Size of the estate	Fact
Financial circumstances of the applicant	Fact
Financial circumstances of the competing interests[5]	Fact
Contributions as between applicant and deceased	Fact
Relationship between applicant and deceased	Fact & morality
Relationships between competing interests and deceased	Fact & morality
In the case of paragraph (c) and (d) applicants: Whether there are "factors warranting" the making of the application	Fact & morality
Whether provision (if any) made for the applicant by the deceased is "inadequate" for "proper" maintenance, etc	Morality
What provision (if any) the court "ought" to make for the applicant	Morality

[2] In the case of category (c) and (d) plaintiff's, there is the intermediate step of determining whether there are "factors warranting" the making of the application: s9(1).
[3] See, eg, *Singer v Berghouse* [1994] 181 CLR 201 at 209 per Mason CJ, Deane and McHugh JJ; and *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24 at 29-31 per Kirby P.
[4] Gleeson CJ, Callinan and Heydon JJ.
[5] Ie, beneficiaries, co-plaintiffs and any disponees of notional estate.

In essence, the contest is one between relative **needs** and **moral claims**, within the constraints imposed by the size of the estate.[6] The stronger an applicant's moral claim, the less need must be shown. A relatively weak moral claim may to some extent be made up for by a high degree of need.

> *The discretion given by the Act is obviously intended to be very wide. The size of the estate is important, and there will commonly be needs and claims other than those of the applicant to be considered. But it is always, I think, primarily a matter of estimating need and moral claim.*[7]

2. "Bare paternity"

Whatever other factors add to or detract from the strength of an applicant's moral claim, it is generally held that the "closer" the relationship between an applicant and the deceased, the stronger the applicant's moral claim. By the same reasoning a majority of the High Court held in ***The Pontifical Society for the Propagation of the Faith v Scales*** **(1961) 107 CLR 9** that a 50-year-old applicant who had no contact with his father after the age of four had not established that the deceased had breached a duty in making no provision for him.
Dixon CJ stated:

> *In truth there is the bare fact of paternity and no other mutual relation: the case depends upon that fact and basically upon nothing else except all the arguments of right and wrong that may be considered to spring from that source and affect the situation of the parties as it existed at the testator's death": (1961) 107 CLR 9 at 18.*

Later in the judgment His Honour added:

> *If one really considers the situation of this old man in the closing stages of a long life in which his son has played no part at all, a son to whom his father has meant nothing and who did not even know him, it is hard to see why the testator, in the interest of his son, should be deprived of his complete freedom of testamentary disposition: (1961) 107 CLR 9 at 20.*

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[6] See discussion in de Groot and Nickel, *Family Provision in Australia* (Butterworths, 2001), pp13-16.
[7] *In re Sinnott* [1948] VLR 279 at 281 per Fullagar J.

In ***Gorton v Parks*** **(1989) 17 NSWLR 1** the testator had deserted his family shortly after the birth of the last of five children. Contact was minimal and sporadic and, as adults, two of the children had no relationship whatsoever with the testator. Bryson J considered and criticised the approach adopted by Dixon CJ in *Scales'* case and declined to follow it. He stated:

> *Dixon CJ did not expound the weight which he gave to the bare fact of paternity and nothing else; I regard that bare fact as of very great importance in morality. The idea that the moral obligations from paternity are diminished or do not exist if the parent withholds acknowledgement of the obligations or of the child appears to me to be an idea from a distant age. There have been large changes over long periods in the beliefs of the community about moral duty to children, and there seems in the distant past to have been some acceptance of a view that unless children were legitimate or were acknowledged by their father, he had no duty towards them: (1989) 17 NSWLR 1 at 10.*

In ***Walker v Walker*** **(unreported, 17 May 1996) BC9602381** the testator left the family when the applicant was aged about 14 and there was almost no contact after that. Referring to the statement of Bryson J quoted above, Young J (as His Honour the Chief Judge in Equity then was) noted that it had "become a favourite for counsel appearing for what might be called non-dutiful children in applications under this Act": BC9602381 at 23. His Honour took a somewhat different view, stating (at 32):

> *The fact of paternity is something to be taken into account, but it must be taken into account with all the other facts and circumstances of the case and the question asked, would the community think in all the circumstances that a wise and just testator should have made provision for his child?*

Young J ultimately did order that the plaintiff receive a small legacy.

In ***Lo Surdo v Public Trustee*** **[2005] NSWSC 1186** the testator had given up the plaintiff for adoption at birth and had no contact with him until he sought her out 23 years later. There was limited and sporadic contact over a number of years. Hamilton J concluded that the claim must fail. He stated[8]:

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[8] [2005] NSWSC 1186 at paragraphs 64-65.

In coming to this conclusion I have made the assessment required in Singer v Berghouse supra. I have also taken fully into account what has been said by Bryson J in Gorton v Parks supra to the effect that the bare fact of parenthood is of very great importance. I have also taken into account that the courts have said that that bare fact does not of itself generate a right, but is to be considered in the context of the whole relationship between the parties. Here, the testator gave birth to the plaintiff and then felt constrained to give him up. She was overjoyed at the reestablishment of contact, but upon his coming to Australia in 1964 the relationship between them did not flourish. It does not seem to me that on the evidence this failure can be attributed to her rather than to him; on the exiguous evidence the relationship just did not work and really did not exist in any substantial way during the only period in his adulthood in which they lived in the same country for any protracted period. I have found that no real contact was maintained between them during the 23 years before he returned to Australia. Again, I am unable to find what passed between them and whether there was any establishment or reestablishment of a relationship during his return in the year 2000.

On the evidence, I have been unable to reach the conclusion that a relationship between the plaintiff and the testator during adult life really came into existence or subsisted in any real way. Nor am I able to come to any conclusion as to who out of mother and son was responsible for this situation. Nor am I able to come to any satisfactory conclusion as to the extent or value of his assets. This is a case where what is established is the bare fact of parenthood. Viewing that fact in all the circumstances of the case (including those mentioned in this paragraph), it does not seem to me that it would be expected by the community that the testator would have to make a benefaction to constitute proper or adequate provision for the plaintiff. It is my conclusion that the plaintiff's claim fails.

3. Nicholls v Hall

In ***Nicholls and Hall*** **[2006] NSWSC 1377** there was no evidence that the testator knew that he had an ex-nuptial son until the testator was 64 years old and the plaintiff 36. In that year the testator met the plaintiff at a barbeque. Biological father and son met once more on the following day. They never met again, although they spoke on

the telephone on 11 occasions over the following nine years. The testator left his estate of $1.3 million to his three daughters in equal shares.

Young CJ in Eq found[9], inter alia, that:

- The plaintiff had “established little more than the mere fact of bare paternity” and did “not have a close relationship with his father at any time”;
- The plaintiff was “in a comfortable state of life”;
- The beneficiaries had “lived with the deceased all their childhood lives and had been in contact with him regularly up until his last days and two of the daughters had cared for him during the period of his instability”;
- Two of the three beneficiaries were “not wealthy but not poor”;

His Honour concluded[10]:

> *In my view the testator's duty to his daughters to provide for them in all the circumstances was much higher than his obligation to provide for his son.*
>
> *As the High Court judges said in Singer v Berghouse at p 210, that question is to be judged having regard "amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased and the relationship between the deceased and other persons who have legitimate claims upon his ... bounty."*
>
> *Although my mind has wavered, I consider that the question should be answered "No", in view of the factors I have discussed above.*

The plaintiff’s claim was dismissed with costs. The plaintiff appealed.

In ***Nicholls v Hall & Ors*** **[2007] NSWCA 356** the Court of Appeal upheld the appeal and ordered that the appellant receive one-seventh of the estate. In a combined judgment of Mason P, Hodgson and McColl JJA, the Court held that the trial judge

[9] [2006] NSWSC 1377 at paragraphs 42-46.
[10] [2006] NSWSC 1377 at paragraphs 48-50.

had erred in finding that the appellant had established "very little more than the mere fact of paternity".[11]

Their Honours stated:

> *Turning to the present case, so far as the applicant's relationship to the deceased is concerned, his moral claim depended on paternity, and on some additional factors. The appellant did not place weight on the absence of provision by the deceased for the appellant in his early years: so far as the evidence went, this was no fault of the deceased, because it was not shown that the deceased was aware of the existence of the appellant in those years. Still, it was an objective fact that the appellant did not have the benefit of assistance from a person responsible for bringing him into the world. As we have said, this was not relied on by the appellant, and we do not consider it a substantial factor in this case, particularly when it appears that the appellant has achieved reasonable success in his life so far. Another aspect is the appellant's search for and finding of his father, and then taking steps to establish a relationship with him. This relationship was established, not to a great extent, but to some extent; and it was a relationship that also involved re-establishing some relationship between the deceased and the appellant's mother, and establishing some relationship between the appellant and the deceased's daughters. The relationship between the appellant and the deceased clearly could have been greater and more satisfactory, and as found by the primary judge, its extent was exaggerated by the appellant. However, there is no suggestion that the failure of this relationship to blossom was the fault of the appellant any more than that of the deceased.*

Whilst holding that the evidence established that the relationship between the appellant and the deceased was more than "very little more than the mere fact of paternity", the Court considered the question of moral claim generally and, more particularly, whether "bare paternity" might be sufficient to support an order for provision under the Act. Their Honours stated[12]:

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[11] [2007] NSWCA 356 at paragraph 52.
[12] [2007] NSWCA 356 at paragraphs 42-43.

> *In assessing the strength of moral claims, the Court can have regard to (1) all aspects of the relationship between the applicant and the deceased, and (2) all aspects relating to needs of the applicant. These matters would be considered having regard also to (3) the size and nature of the estate, and to (4) other legitimate claims on the estate, each of which would also involve some consideration of the relationship of a claimant to the deceased and the needs of that claimant. When a moral claim has been assessed in that way, that does not determine whether an order should be made, but only informs what the Court would find to be "adequate" and "proper". Certainly, in our opinion, a finding that an applicant has been left without "adequate provision" for "proper maintenance" does not necessarily mean that the deceased failed in any obligation; although it can loosely be expressed in terms that there was a moral claim that, in the event, was not met.*
>
> *There are some statements in the cases that could be understood as meaning that, if there is nothing more than "bare paternity" in factor (1), the relationship between the applicant and the deceased, then the applicant cannot succeed. In our opinion, such an understanding would be plainly wrong. Even if a deceased never even knew of the existence of a child, if that child had a strong case on the other factors (that is, needs, size of estate and lack of competing claims), a court could find that that child was left without adequate provision for proper maintenance.*

However, the Court went on to expressly exclude sperm donors from the application of this principle upon the basis that "it is the persons who make use of the sperm rather than the sperm donor who are responsible for bringing a child into the world".[13]

Nicholls v Hall seems to stand for the proposition that the test for moral duty and moral claim is an objective one. As such, a testator can breach a moral duty even though he or she does not know that he or she owes that duty. The case also appears to prefer the view of Bryson J in *Gorton v Parkes* to that of the High Court in *Scales*. However, since the Court held that the trial judge had erred on the "bare paternity" question, this is obiter only.

[13] [2007] NSWCA 356 at par 44.

4. Conflict and estrangement

Conflict and estrangement (usually between child and parent) is almost certainly the most common basis for a submission that an order for provision should be declined. Nowadays these are seldom held to be disentitling. However, *combined with other factors*, a finding that conflict and/or estrangement were caused by the applicant may:

- lead to a finding that an applicant's moral claim is too weak, when weighed against those of competing interests, to warrant an order; or

- reduce the quantum of provision ordered.

It is important to note that, as between parents and children in particular, the Court will not readily hold that conflict or even a total breakdown in the relationship will extinguish an applicant's moral claim.

> *A wise parent will recognise that perfect harmony between parent and child is in the nature of things not to be looked for … Differences of outlook between different generations is not exceptional, it is the general rule, so some friction between parent and child or disappointment in a parent's hopes and expectations concerning his child will be accepted by the wise parent as almost inevitable. If it occurs, the parent who is just as well as wise will not allow such disharmony to blind him to the needs of his child for maintenance, education or advancement in life. The duty of a parent towards his child to provide for those needs on his death, if he can, continues in spite of such disharmony or disappointment and the statute obliges the court to consider whether it has been performed. The court must take in the whole scene and make the judgment that it considers that a wise and just parent would have made in the circumstances. Of course, as the statute provides, if the court considers that the character or conduct of the child has been such as to disentitle the child to any or any further benefit from the parent, it may refuse the child's claim.*[14]

In *Wentworth v Wentworth, Estate of G. M. Wentworth* (unreported 14 June 1991) Bryson J (as His Honour then was) stated:

> *I do not regard a state of estrangement or even hostility as necessarily bringing an end to any moral duty to make provision for an eligible*

[14] *Kleinig v Neal* [1981] 2 NSWLR 532 at 540, per Holland J.

> *person, whether wife, son, daughter or other. When there is an estrangement the application of s7 requires that it should be appraised and its causes should be considered. A long-standing severance of a relationship with a parent, or even a clearly-established termination of all communication is not in the present age regarded as necessarily putting an end to moral duty; it may do so, but whether it does calls for appraisal in each case and is not reduced to a clear principle. Respectful submission to paternal wishes, even if they are reasonable, is not a condition of paternal duty. A whole view of the relationship and the character and conduct of both parent and child should now be taken, and the influence of character can be complex. Sometimes people's characters cause them to be poorly disposed towards their parents, and the influence of this on a parent's moral duty is not solely adverse to the child: people's behaviour is influenced by their characters in ways from which few can escape, and of all people their parents have had most time and opportunity to influence character, understand it, become reconciled to it and tolerate its workings when unpleasant.*
>
> *In another age a different interpretation of the community's sense of moral duty was probably correct, but it is my task to interpret moral duty in my own times. The idealised just and wise testator of the present age knows now that he should not expect submission to his wishes, and knows that his children will be themselves no matter whether he likes it or not, and that they will feel free to interact with any hostile or unreasonable conduct of his own. Courts no longer attribute the characteristic of being stern to the idealised testator, reflecting a marked change in perceptions of moral duty since 1910 when Edwards J spoke in Allardice v Allardice (1910) 29 NZLR 959 at 973 of a father who was just and stern but not loving. Long periods of hostility or estrangement are not inconsistent with successful applications and the contribution of the testator is examined: see for examples Gorton v Parks (1989) 17 NSWLR 1, Howarth v Reed, Powell J unreported 15 April 1991.*

In the more recent decision of *Wheatley v Wheatley* [2006] NSWCA 262 (22 September 2006) Bryson JA reiterated the view he expressed in *Wentworth v Wentworth, Estate of G. M. Wentworth* (supra) and added:

> *The poor state of the relationship between Mr Wheatley and the testatrix, illustrated by the absence of visits during the last 13 years of her life, operates to restrain amplitude in the provision to be ordered. However … [emphasis added]*

5. Explanation and mitigation

Insofar as an applicant has behaved towards the deceased in a way that may be disentitling or could result in a reduction of provision ordered, evidence should be adduced as to how and why the behaviour came about. Apart from evidence as to the character and conduct of the deceased, it may also be necessary to adduce evidence of the facts of and surrounding the typical falling-out between the plaintiff and the deceased and/or the plaintiff's situation – including any psychological problems – at the relevant time(s). Evidence of any (albeit unsuccessful) attempts at reconciliation made by the plaintiff should be adduced in detail.

In deciding whether conduct is (wholly or partially) disentitling, the court will consider the conduct in question in the context of (a) the applicant's entire relationship with the deceased and (b) any (other) mitigating factors. In *Wentworth v Wentworth* (NSWCA, 3 March 1992, unreported), the Court of Appeal (Samuels AP, Priestley JA and Handley JA) stated:

> *If the plaintiff had any real control over her conduct and her engagement in argument and conflict, this behaviour would have extinguished the testator's duty to make provision for her. But she cannot stop herself. The plaintiff's propensity for involvement in conflict and litigation has elements of a disability, an incapacity for successfully grappling with life, and the plaintiff's claim is in the special class of claims by adult sons and daughters who are in some way disabled and in need of favourable parental treatment.*

In a similar vein, in *Walker v Walker* (NSWSC, 17 May 1996, unreported), Young J (as his Honour the Chief Judge in Equity then was) stated:

> *In family relationships, hurts are inflicted or suffered sometimes consciously, sometimes unconsciously. Sometimes a young child is brainwashed by a custodial parent to consider that the other parent has inflicted some harm which is all in the mind of the custodial parent. It is often impossible to work out whether the degree of separation between parent and child at the date of the parent's death is solely the fault of either or whether it has come about by factors too strong for either to*

> *control or somewhere in between. The important matter is not fault, but, whether in all the circumstances it would be expected by the community that the testator would have to make a greater benefaction than he in fact did to constitute proper or adequate provision for the plaintiff.*

6. Use of expert evidence in explaining a plaintiff's conduct

In at least two recent cases expert evidence has been adduced on behalf of an applicant to explain unpleasant conduct towards the deceased.

In *Dolman v Palmer* [2005] NSWSC 327 the applicant called two psychiatrists (one of whom was cross-examined) to provide a clinical explanation of her lack of contact with her father for the last 12 years of his life. On one view, at least, that evidence was crucial to the applicant's successful appeal (in *Palmer v Dolman* [2005] NSWCA 361) against the dismissal of her claim at first instance.

In *McDougal v Rogers* [2006] NSWSC 484 the applicant relied on a psychologist's report (apparently prepared for purposes unrelated to the case) to explain his estrangement from his father for the last six years of his life, which included a renunciation of the relationship and the applicant's changing of his name to that of his step-father. Brereton J stated:

> *The psychologist concluded that Jamie (then) had some adjustment difficulties, with quite an immature personality and very little insight concerning his problems. In the turbulent emotional context of the divorce of his parents, for which he apparently blamed his father and Mrs Rogers, and to cope with which he was then emotionally and intellectually ill-equipped, it is unsurprising that he took a simplistic approach which involved rejection of his father. Although it is regrettable that, with increasing maturity, he made no subsequent effort to repair the relationship, being as close to his mother as he is he would have felt under implicit pressure to continue to shun his father. In those circumstances, I do not think that, however objectively unreasonable his behaviour towards his father might appear, it was such as to extinguish any moral obligation his father otherwise had to make provision for him, and I would not, on account of the estrangement between him and his father, conclude that the court was precluded from being satisfied that the provision made for him was inadequate.*[15]

[15] [2006] NSWSC 484 at par 44.

Where an applicant's character, conduct and relationship with the deceased are important issues, the use of such expert evidence may be an effective means of limiting the court's ability to decide the case on the basis of normative and necessarily somewhat subjective moral criteria.

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17 September 2008