LEGALWISE SEMINARS – TRENDS IN FAMILY PROVISION LITIGATION
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1 The Widow Backlash – Crisp Orders, Life Estate, Fee Simple

Generally speaking, the testator has an obligation to the surviving spouse to ensure that the surviving spouse has secure accommodation, has an income sufficient to permit them to live in the style to which they are accustomed, and to provide a fund to enable her to meet any unforeseen contingencies - *Luciano v Rosenblum* (1985) 2 NSWLR 65. For some time, this was generally interpreted to mean that the surviving spouse would be entitled to the fee simple in the matrimonial home, and a life estate in the home would not be proper and adequate provision.

However, mixed families test this principle and may cause challenges – a testator must delicately balance their obligations to their first family and their surviving spouse. At one extreme, the testator leaves their estate to the second spouse and nothing to the first family, and at the other extreme the testator leaves their estate to the first family and nothing to the second spouse.

The testator may elect not to leave the surviving spouse a significant legacy because the testator may consider the surviving spouse to have limited needs - the surviving spouse may be entitled to an age pension so they have an income stream, and they have limited mobility or may be in a nursing home so they have limited opportunities to spend money. However, many healthcare costs are incurred in the final stages of life, and the surviving spouse may need to pay an accommodation bond for a nursing home. There is a risk that the surviving spouse may successfully challenge the testator's estate.

It may be that the person driving the surviving spouse's case is not the surviving spouse but the surviving spouse's children. The surviving spouse's children may have seen their parent caring and nursing after the deceased through a long illness, and feel that their parent "deserves" something for looking after the deceased. Or the surviving spouse's children may be driven by their own long term interests – if the surviving spouse is entitled to the deceased's house, then the deceased's house can be sold for the surviving spouse's accommodation bond, and the surviving spouse doesn't have to sell their own house (and the surviving spouse's children will ultimately be entitled to the surviving spouse's house).

The courts have become more alive to the surviving spouse's children's "windfall gain" and the real probable beneficiaries – *Milillo v Konnecke* [2009] NSWCA 109; *Nudd v Mannix* [2008] NSWSC 1228. Therefore, the courts may be reluctant to order that the surviving spouse is entitled to the house in fee simple if the real probable beneficiaries are the surviving spouse's children. A life estate may still not be enough – a surviving spouse should have flexibility of accommodation. And sometimes the surviving spouse will need to be given the house so that the house can be sold to generate an income stream, or the surviving spouse has made significant contributions to the house - *Robertson v Pearce* [2010] NSWSC 124. However, generally speaking, the courts favour a Crisp order (derived from *Crisp v Burns Philp Trustee Co Ltd* (NSWSC, 18 December 1979, unreported) – that the surviving spouse has a flexible movable life estate, so the surviving spouse can secure more appropriate accommodation, value returns to the estate when the surviving spouse dies - *O'Leary v O'Leary and Eccles* [2010] NSWSC 1347.

2 Just Sign Here – Binding Financial Agreements and FP Releases

The Family Law Act 1975 provides a regime of "binding financial agreements" for de facto and married couples that give couples an opportunity to make a binding agreement about how they will split their property in the event of a separation – *Part VIIIA including 90B (before marriage), 90C (during marriage) and 90D (after marriage) and Part VIIIAB including 90UB (before de facto), 90UC (during de facto) and 90UD (after de facto).* The agreement needs to include certain things, parties need to be separately advised, and each solicitor needs to certify that they explained the agreement to their client. However, the agreement does not need to be approved by a court.

A binding financial agreement may include a clause that each party releases the other party's estate. This is not binding - unlike a binding financial agreement, a release of family provision claims is only binding if the terms of the release are approved by a court – *section 95 Succession Act*. The estate may defend a family provision claim by attempting to have the clause approved by the court. However, the court may not approve the terms – the court has to consider whether it was to the releasing party's financial or other advantage, it was prudent for the releasing party to make the release, the provision made was fair and reasonable, and the releasing party has taken independent advice. In general terms, the court will only approve the release if they consider it would be roughly equivalent to what the court would otherwise order. Many binding financial agreements provide that the party releases the estate but do not make any provision – a provision of "nil" is unlikely to be to the releasing party's advantage, fair and reasonable, and prudent. Further, the surviving party may argue that the release only applies in the event that the parties separate and does not apply if the parties are still together when the deceased died.

In *Neil v Jacovou* [2011] NSWSC 87, the executor referred to the binding financial agreement. Slattery J carefully scrutinised the circumstances surrounding the agreement – that the testator's solicitor arranged for the "independent solicitor" and the widow only saw the solicitor for a few minutes, that the testator pressured her to sign a few days before the wedding - and then looked at what she would have been entitled to. Slattery J considered that the release was not to the widow's financial advantage, prudent, or fair and reasonable. He did not approve the release, and proceeded to consider the widow's family provision claim.

Note that an ex-spouse is still an eligible person if they can prove factors warranting – a former wife or husband, or a person who lived in the household and was wholly or partly dependant – *section 57(d) and (e) Succession Act*. However, the court may not order provision if there has been a property settlement – *Glynne v NSW Trustee* [2011] NSWSC 535

3 Not My Kid, Not My Problem – FP Claims by Step Children

Mixed families may cause problems between the children – her children and his children. The father dies and leaves it to all to his widow. His children don't want to upset a grieving step-mother by making a claim, let alone kick their stepmother out of the house. So they wait until she dies. And then she dies and leaves it all to her kids.

There may be mutual wills. But mutual wills is more than signing mirror wills. In *Birmingham v Renfrew* (1937) 57 CLR 666, Dixon J said

> "a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will"

There has to be an agreement – evidenced by a deed or a written agreement, or other evidence of an oral agreement that imposes the equitable obligation. The agreement has to be an agreement to make a mutual will *and* an agreement not to revoke the mutual will. Often the evidence doesn't quite get there - the father had an assumption, expectation or understanding but not quite a binding agreement.

Mutual wills have their own problems. A mutual will agreement does not defeat any family provision claim - a previous widow or estranged child may still make a claim against the deceased's estate – *Barns v Barns* (2003) 214 CLR 169. Further, it may not be prudent for a

person to make a mutual will. The surviving party may incur further moral obligations after the deceased party's death such as re-partnering and having further children and the mutual will agreement restricts their ability to provide for these persons. The surviving may generate significant assets after the deceased party's death, out of any proportion to the combined estate of the surviving party and the deceased party at the time of the deceased party's death.

Alternatively, there may be some sort of equitable estoppel. The widow said she would provide for his children, they relied on the representation to their detriment by not making a claim against their father's estate. Often the evidence doesn't quite get there – the widow never made any specific representations, his children did not bring proceedings for a number of reasons.

Alternatively, his children may make a belated claim against the father's estate. But his children are usually well out of time.

And so, his children strain to bring themselves within the definition of an eligible person. They are not the step–mother's child, so his children are only eligible under *section 57(e)* - that they are members of the household who are wholly or partly dependant on the deceased. Because they are only eligible under section 57(e), they need to demonstrate factors warranting – *section 59(1)(b)*, that is, factors that would make them natural objects of the testator's bounty - *Re Fulop* (1987) 8 NSWLR 679

There are a number of challenges. First, his children may not have been members of the household. Second marriages may occur later in life, and indeed some second marriages are deliberately delayed until all of the children have left home, so his children may only have lived with the father and the stepmother for a short period, if at all.

Second, his children need to show dependance. The recent case of *Siddle v Ellis* [2011] NSWSC 1169 is sobering – Macready AsJ held that the child was dependant on his own father, and not dependant on the father's de facto. Macready J accepted that the child's father's de facto was warm, close and supportive, and gave the child gifts, but she did not support the child. The estate was worth approximately $28,000,000, but the child's claim was dismissed and he received nothing.

This is an area which may need reform as step-families become more prevalent. This issue has been addressed in Queensland, which specifically provides that a child includes a step-child – *sections 40 and 40A Succession Act 1981* (Qld).

4 Just Say Sorry – Estranged Children

The list of factors in section 60 does not specifically refer to "disentitling conduct" except as part of "the character and conduct of the person before and after" the deceased's death – *section 60(2)(m).*

The deceased, in certain circumstances, is entitled to make no provision for a child, particularly children who treat their parents callously, by withholding without proper justification, their support and love in their declining years, even more so where that callousness is compounded by hostility - *Ford v Simes* [2009] NSWCA 351. The court may not order further provision if the period of estrangement is long, the estate is not large and there are competing claims on the bounty of the deceased. The court may not order provision where the applicant was "a torment" to the testator – *Madden Smith v Madden* [2012] NSWSC 146

However, the courts recognize that estrangement may arise from the attitudes or conduct of both the deceased and the child, and will analyse the underlying reason for the estrangement. The estrangement may be explained if the deceased sexually abused the child - *Williamson v Williamson* [2011] NSWSC 228, or if the deceased had provided limited support and emotional contact to the child after the divorce – *Palmer v Dolman* [2005] NSWSC 361. However, a family provision

claim is not intended to be compensation to a child for the deceased failing to be a good or responsible parent, or damages for abuse. However, where that conduct has the effect of depriving an applicant for provision of opportunities in life, or otherwise, and there is some causal connection between it and the applicant's need for provision, the court may take that into account in determining whether proper provision has been made – *Williamson v Williamson* [2011] NSWSC 228.

An important factor will be whether the applicant attempted to reconcile with the deceased. In *Andrew v Andrew* [2011] NSWSC 115, the applicant and the testator had limited contact for 35 years and the daughter rejected encouragement from others to communicate with the deceased. Hallen AsJ was not willing to increase the $10,000 legacy from the testator's $800,000 estate. In *Polistena v Mitton* [2011] NSWSC 931, the deceased had been an "extremely difficult person", a "hard, frugal, uncompromising woman". One of the estranged daughters had some contact with the deceased particularly towards the end of the deceased's life, and Hallen AsJ ordered further provision, whereas the other estranged daughter had no contact after she left home and her application was dismissed.

The NSW Court of Appeal has recently heard argument in *Bourke v Keep* – this may provide more clarity about the principles to be applied.

5 Equitable Estoppel – Family Provision for rich people

The court may consider certain factors in determining whether provision ought to be made, and the list has a focus on needs – the applicant's financial resources and needs - *section 60(2)(d),* the applicant's partners financial circumstances - *section 60(2)*(e), if the applicant has a disability - *section 60(2)*(f) and whether any other person is liable to support the applicant – *section 60(2)(l).*

This may make it challenging for an applicant who has secure employment, superannuation and a house (even if it has a mortgage). It is also challenging for an applicant who receives a significant absolute amount from the estate even if it is not a large relative proportion from the estate – in *Carey v Robson* [2010] NSWCA 212, the two daughters each received around $500,000. This was disproportionately considerably less than their brother who received the $4,500,000 property, but was still considered to be proper and adequate provision. It is also challenging for a person who is not an eligible person, such as an out-of-home carer

The applicant may consider making an equitable estoppel claim, that the parent represented that if the daughter moved into the house and maintained it they would be entitled to it - *Vukic v Grbin* [2006] NSWSC 41, or if the son stayed on the farm they would receive a 10 acre block - *Waddell v Waddell* [2011] NSWSC 1174, or if the son funded and arranged renovations the house the father would give the son the house – *Estephan v Estephan* [2012] NSWSC 52, or if the carers looked after the testator they would get the house when she died – *Saliba v Tarmo* [2009] NSWSC 581, or if the ex-wife agreed property settlement orders she would get the house when the testator died – *Delaforce v Simpson-Cook* [2010] NSWCA 84

This requires evidence of a specific representation, not just a general expectation or understanding - in the *Waddell* case, the plaintiff had evidence of the representation not only from members of the family but the plumber who came to fix a pipe and the family's agent at Flemington Markets, in *Estephan* Bergin J relied on evidence from two sisters, a brother in law, and a close neighbour, in *Duic v Duic* [2012] NSWSC 76, Einstein J considered that both parties failed to tell the truth and rejected their evidence and reconstructed the true state of affairs from independent contemperanous records and other witnesses – the uninvolved son and the local councillor. The representation does not need to say when – in *Estephan* the representation was not specific about when the house would be transferred – on the son's marriage, while the father was alive, or when the father died in accordance with a will.

The representation also needs to be made in circumstance that it was meant to be relied upon. In *Duic*, Einstein J said that where assurances are given that are intended to be relied on, then the other party's detrimental reliance makes the promise irrevocable. *Palagiano v Mankarios* [2011] NSWSC 61, the son claimed that when the son was 12, the father represented that the son should leave school, get a job and pay his wages to his parents to enable them to purchase a house, and the father would eventually leave the son a one third interest in the house. The son left school and paid all his wages to his parents for 17 years. White J was satisfied that the father made the representations. However, he was not satisfied that there was anything promissory in the statements made, as distinct from their being statements of the father's then intentions and expectation. He said that financial circumstances and family dynamics may change.

There needs to be detrimental reliance, such as not entering the property market – *Duic*, *Evans v Evans* [2011] NSWCA 92, providing physical care – *Estephan, Saliba v Tarmo,* financing renovations – *Duic, Vukic, Estephan,* not pursuing a family court settlement –*Delaforce v Simpson Cook* [2010] NSWCA 84*,* working on the farm – *Waddell.*

The court remedy is not the minimum equity – the prima facie entitlement is not to depart from the representation unless it is equitably harsh and exceeds what is justified by conscientious conduct – *Giumelli v Giumelli* 196 CLR 101, *Delaforce v Simpson Cook*. Further, even if the court is satisfied that the representations were made and the plaintiff relied on them, the court may consider that it was not unconscionable for the testator not to fully comply with the representations – for example, because the testator incurred significant new moral obligations - *Lewis v Lewis* [2001] NSWSC 321, or because

6 A Vague Idea – Testamentary Capacity

There is no single test for capacity under the general law – capacity is decided relative to the specific task – the particular business transacted or the particular legal instrument being executed - *Guthrie v Spence* [2009] NSWCA 369.

The classic test of testamentary capacity was set out in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 per Cockburn CJ

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

A person may have testamentary capacity even though a financial manager has been appointed. The Supreme Court or the Guardianship Tribunal may appoint a financial manager if the person is not capable of managing their affairs and there is a need for another person to manage their affairs – *section 25G Guardianship Act 1987*. However, a person may understand that they are making a will, understand the extent of their property and comprehend and appreciate claims on their testamentary bounty even though they cannot manage their affairs.

Indeed, *D'Apice v Gutkovich – Estate of Abraham* (No 2) [2010] NSWSC 1333, Mrs Abrahams had been diagnosed with moderately severe Alzheimer's dementia, but White J held she still had testamentary capacity.

A person may have testamentary capacity even though they may not know the *details* of the extent of their property. In *Kerr v Badran; Estate of Badran* [2004] NSWSC 735 Windeyer J explained at para 49

> "In dealing with the ***Banks v Goodfellow*** test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years….Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing "the extent" of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate."

In *D'Apice v Gutkovich,* Mrs Abrahams knew she had some flats in Maroubra (she owned a block of flats), and sometimes she remembered she also had an investment property in Coogee, said she owned a car but was not confident of the make of the car, and did not know the name of her bank (she had accounts with Westpac and BT). However, White J held that she had testamentary capacity.

Notably, the lawyer who prepared Mrs Abraham's will in *D'Apice v Gutkovich* asked very specific questions when taking instructions for her will. His detailed file notes are reproduced in the judgment and are a useful guide to taking instructions from older clients. Further, in *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275, Hallen AsJ sets out the solicitor's duties in taking instructions for a will at para 87 – 90, and says that more is required than merely reading the will to the testator and ensuring that the testator's signature is witnessed.

7 Under Pressure – Undue Influence

If the testator has testamentary capacity, there may be the possibility that the will may be set aside because it was procured through undue influence. This is a serious allegation and it is difficult to prove. In *Tobin v Ezekiel; Estate of Lily Ezekiel* [2011] NSWSC 81, Brereton J did not consider that the testator's will had been overborne, even though he accepted evidence that the testator's son bullied and threatened the testator, and the testator was frightened of him.

In contrast, in *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275, Hallen AsJ held that the testator did not have testamentary capacity, but said that even if she did have testamentary capacity he would set aside the will for undue influence. He said that the testator's son's consistent and repetitive pressure was more than an appeal to her sentiment or affection, and caused the deceased to prepare the will for the sake of a quiet life, and her free judgment, discretion and wishes were overborne. He said that the deceased's physical and mental strength were relevant factors in determining how much pressure was necessary in order to overbear her will. This is the first successful undue influence claim since *Callaghan v Myers [*1880] 1 NSWLR 351.

8 Costs

Courts are vigilant about the amount of costs incurred in estate matters, and a plaintiff's costs from the estate may be capped. For example, in *Gill v Smith* [2007] NSWSC 832, the successful plaintiffs were each entitled to $100,000 and entitled to costs from the estate but their costs were capped at $40,000 and such costs excluded the costs of certain affidavits which the court considered unnecessary.

In *Ireland v Retallack; Estate of Gordon* [2011] NSWSC 846, the testator's assets were owned by the testator and a number of companies and family trusts. The testator's will provided that the

testator's daughter receive the farm and that the executors do what was necessary to ensure that she received the farm, notwithstanding that part of it was owned by a company and part by a family trust. The executors engaged a number of leading tax, stamp duty and estate planning practitioners to advise on the most tax and stamp duty effective mechanism to transfer the property, and then sought judicial advice. Pembroke J said

> "In this muddle of irrelevant evidence and expert reports, the obligations imposed by ss 56(3) and (3A) of the Civil Procedure Act seem to have been left behind in a trail of myopic detail and unnecessary cost. Predictably, some of the most enthusiastic submissions were reserved for the question of the payment of costs on an indemnity basis out of the estate — as if the estate were nothing less than a milch cow."

Further, in *Brown v Grosfeld* [2011] NSWSC 1429, the executor incurred significant costs and claimed the costs from the estate on an indemnity basis. White J said that the order that the executor's costs be borne on an indemnity basis did not affect the beneficiaries' right to contend on passing of accounts that expense for legal costs should not be recoverable from estate because not properly incurred.

The court has also recently confirmed that indemnity costs may not be ordered even if the other party has made a Calderbank offer. In *Tchadovitch v Tchadovitch* [2010] NSWCA 316, Campbell JA confirmed the primary judge's decision that the rules relating to Calderbank offers are different to rules relating to UCPR 20-26 offers of compromise. The plaintiff needs to show that the estate acted unreasonably in rejecting the plaintiff's offer, and the rejection may be reasonable when the likely the range of outcomes were not clear at the time that the offer was made

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