

LEAN ON ME – DEPENDENCY IN FAMILY PROVISION CASES

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Section 57(1)(e) Succession Act 2006 (NSW) provides that an eligible person includes a person who is a member of the household or a grandchild, and who is wholly or partly dependant on the testator.

Classes of Applicants

There are a number of classes of persons who may fall into this category

- Step-children - testator's spouse's children from an earlier relationship;¹
- Grandchildren who are raised by the testator "in loco parentis"²
- Grandchildren who live with deceased grandparent and parent;³
- Testator's foreign relatives or friends who the testator sponsors to Australia;
- Ex-de facto (because section 57 only includes ex-wife or husband not ex-"spouse");⁴
- Informally adopted children (who miss out on intestacy);
- Foster child⁵
- siblings⁶
- Testator's child's ex-spouse⁷

The fact that a person is a member of a household is relatively objective. Generally speaking, the applicant lives in the same house as the testator, although it is possible to have one household and two properties.⁸

However, the concept of dependency may be more flexible, is a question of degree, an "evaluative judgment"⁹, may involve subjective concepts such as "emotional support" and may be difficult to demonstrate.

"Dependent"

In *Spata v Tumino*, Payne JA referred to the NSW Law Reform Commission reports in 1977 and 2005 which led to the current form of family provision legislation. He noted eligibility was expanded because the testator and the applicant may have developed a "special relationship". Payne JA said that the construction of "dependence" needs to be considered in this context.¹⁰

Similarly, in *Page v Page*, Basten JA noted that the issue is whether the relationship is such that it would create an *ongoing obligation* towards the applicant, that the person takes over social, moral and legal obligations, such that the community may expect provision to be made for the applicant's maintenance and advancement in life.¹¹

¹ *Spata v Tumino* [2018] NSWCA 17; *Diver v Neal* [2009] NSWCA 54; *Siddle v Ellis* [2011] NSWSC 1169

² *Fede v Dell'Arte* [2010] NSWSC 1113

³ *Sherborne Estate: Vanvalen v Neaves* [2005] NSWSC 593; *Simons v Permanent Trustee Co Ltd*; *Estate Hakim* [2005] NSWSC 223

⁴ *Marando v Rizzo* [2012] NSWSC 739

⁵ *Hamilton v Moir* [2013] NSWSC 1200 (\$80,000 for 18 months)

⁶ *Page v Page* [2017] NSWCA 141

⁷ *Oakes v Oakes* [2014] NSWSC 1312; *Clinch v Swift* (13 October 1988, unreported, Young J)

⁸ "Member of the household" connotes some element of permanence, frequency of contact, some degree of voluntary restraint upon personal freedom which each party undertakes, some element of mutual support and some element of community of resources – see *Oakes v Oakes* per Pembroke J at [3] to [6].

⁹ *Page v Page* per Sackville AJA at [92]

¹⁰ *Spata v Tumino* per Payne JA at [64] to [67]

¹¹ *Page v Page* per Basten JA at [11]

Dependent is a question of fact.¹² Dependent an ordinary English word. The Macquarie Dictionary defines “dependence” to mean.

“1 depending on something else for aid, support 2 reliance; confidence, trust”

In [Ball v Newey](#), Samuels JA said¹³

‘Dependent’ in the ordinary sense of the word, means the condition of depending on something or on someone for what is needed.

In [Re Estate of Hakim; Simons v Permanent Trustee Co Ltd](#), Palmer J said:¹⁴

"Dependence, is seen as the giving of financial or other material assistance by the deceased over a significant period of time in order to meet a need of the eligible person, with the result that the recipient has come ordinarily to rely upon that assistance."

In recent cases, the Family Provision List Judge, Hallen J says that dependents means¹⁵

“any person who would naturally rely upon, or look to, the deceased, rather than to others, for anything necessary, or desirable, for his, or her, maintenance and support.”

Financial and Emotional Dependence

Dependence includes financial dependence. This is relatively objective and may be relatively easy to demonstrate by bank statements and invoices. In [Petrobilos v Hunter](#) Hope JA said¹⁶

“No doubt one of the commonest forms of dependency is a financial one, in the sense that the dependence flows from the fact that accommodation, food, clothing and other necessities or amenities of life are provided by the person who owns or is otherwise entitled to the accommodation and pays for the other things.”

However, dependence may also include emotional dependence -otherwise, a person could not be dependant on a person who has no independent means. This may be more difficult to prove.

In [Petrobilos v Hunter](#), Hope JA said that the provision by a mother to her children, living with her, of the services essential for their well-being makes them partly dependent upon her, and the same considerations apply to a step-child or his or her step-mother when the child lives with the step-mother and is looked after by her.

In [Sammut v Kleeman](#),¹⁷ the grandmother provided some financial support such as paying for meals and school uniforms, but Hallen J said that the applicant was not dependant on the financial support because the testator was providing support to her own child and the financial support was minimal. However, he held that the applicant was dependant on the *emotional* support. The testator took the applicant to school and collected the applicant from school, the applicant stayed with her after school, she took him to social events and to the beach, took him on holidays, and the applicant looked to her for emotional support and succour.

Dependency involves the satisfaction of a need, but the need is not restricted to the requirements of basic necessities or substance.¹⁸

¹² [Page v Page](#) [2017] NSWCA 141 at [7], per Sackville AJA (with whom Leeming JA agreed on this point)

¹³ [Ball v Newey](#) (1988) 13 NSWLR 489 per Samuels JA at 491

¹⁴ [Re Estate of Hakim; Simons v Permanent Trustee Co Ltd](#) [2005] NSWSC 223 at [42]

¹⁵ [Fede v Dell'Arte](#) at [57] per Hallen J; [Sammut v Kleemann](#) [2012] NSWSC 1030 at [37] per Hallen J

¹⁶ [Petrobilos v Hunter](#) (1991) NSWLR 343 at 346 per Hope JA

¹⁷ [Sammut v Kleeman](#) at [64] to [75] per Hallen J

¹⁸ [Ball v Newey](#) at 492 per Samuels AJA

The period of dependence may be relatively short – in *Page v Page*, Sackville AJA acknowledged that a person may be partially dependant, even if it is only for a period of 14 months.

Direct not indirect

The testator must be providing direct and immediate support *direct to the applicant*. For example, it is not sufficient if the testator provides support *to the applicant's parent* which *incidentally benefits* the parent's child.

Therefore, in cases where the testator's child and grandchild moves in, the testator may assist the testator's own child, but the *testator's own child* is the grandchild's carer and provider.¹⁹ Therefore, the grandchild is not dependant on the testator. In *Shaw v Lambert*, Young J said

“In the case where a daughter comes into her father's house to look after him and, with his concurrence, brings her children with her, and it seems to me that whilst the children are dependent upon the mother and the mother may be dependent upon the father unless there are some other facts there is insufficient to show that the grandchildren are directly dependent upon their grandfather.”

Similarly, when a person moves in with the testator bringing their own children, the children may remain dependant on their own parent, and may not be directly dependent on the testator. For example, in *Siddle v Ellis*,²⁰ Macready J acknowledged that the testator had “affection and warmth” for her partner's son, they cared about each other's well being, but he was dependent on the testator's partner, the father, not the testator. Macready J said that the testator's partner was the primary carer, the testator did not attempt to alter that situation, and she regarded her partner as having that role.

However, there is a suggestion in *Spata v Tumino*, that indirect dependence may be enough provided that there was the actual fact of dependence. In particular, Payne JA referred to *Shaw v Lambert* and said

“the fact that the grandchild was dependent upon her mother does not, of itself, preclude a finding that the grandchild was also dependent upon her grandfather for accommodation,”²¹

Accommodation

Relying on a testator for accommodation may be dependence. However, the mere fact that a person lodges in a person's house without paying rent does not necessarily amount to dependence.²²

A person may rely on a testator for accommodation even if the testator does not own the house. In *Spata v Tumino*, the testator's *husband* owned the two houses that the applicant lived in. However, Payne JA said that the court needs to determine the factual question of who, in a practical sense, determined who lived in the matrimonial home. The evidence demonstrated that the testator had a right to determine who lived in her home. There was evidence that she invited the applicant to live in the home after his divorce. However, there was insufficient evidence to demonstrate that the testator encouraged the appellant to *remain* at the property or actively supported or participated in a decision to enable the testator to stay at the property for a prolonged period.²³ Accordingly, the applicant was not dependent on the testator.

More than minimal

The applicant does not need to be wholly dependant on the testator – the legislation expressly provides that it is sufficient if the applicant is *partly* dependant.

¹⁹ *Sherborne Estate: Vanvalen v Neaves* [2005] NSWSC 593, Palmer at [41]; *Simons v Permanent Trustee; Estate of Hakim*

²⁰ *Siddle v Ellis* per Macready at [73]

²¹ *Spata v Tumino* per Payne JA at [76]

²² *Tobin v Ezekiel* per Meagher JA at [109]-[111]

²³ *Spata v Tumino* per Payne JA at [84] to [87]; per Sackville JA at [143] to [152]

In [McKenzie v Baddeley](#),²⁴ the court said that “partly” does not require substantially dependant, but requires more than trivial or minimal, and perhaps means “significantly”. In *Morrison v Carruthers*, Bergin CJ referred to the Oxford Dictionary, and referred to “substantially” (“of real importance or value”) and “significantly” (“of real import”).²⁵

For example, in *Page v Page*, the mother was a widow with 6 young children, so when she was working the Deceased as the oldest child at 15 years old ensured the home was secure at night; ensured that the applicant and the other siblings left home in time for school; that household chores were completed by the sibling responsible; he prepared and served some meals; that he supervised homework and play periods, that the other children were in bed at a reasonable hour, and ready for school each day. Sackville JA said that the evidence was vague and any dependence was minimal in circumstances where the mother continued her role as head of the household, providing for the children and giving them directions.

Generous Gifts

A pattern of generosity, and occasional or regular gifts does not make a person dependant. Dependence needs to be considered *in the context of the applicant* – does the applicant *depend* on the gifts. Making generous gifts does not create an obligation, but may be characterised as voluntary support, generosity and indulgence.²⁶ In *Siddle v Ellis*, the testator gave gifts to her partner’s son and paid for a number of his expenses, but the applicant could not demonstrate that he was *dependent* on her.

In *Morrison v Carruthers*, Bergin CJ explained this by distinguishing between expectation and dependence. She said ²⁷

“It is important in this regard to draw the distinction between expectation and dependence. If an adult receives payment on a regular basis from the deceased and chooses not to obtain money from another available source because of the expectation of regular payment from the deceased, that does not amount to dependence within the meaning of that term in the Act. Financial dependency in the case of a healthy adult who is able to work means a necessity to rely on the deceased because there is no other source of finance available.

Although the Court’s task in this regard has been described generally as one involving the consideration of “past events and future probabilities”, I am of the view that in claims brought by healthy adult grandchildren who are able to work, dependence should be assessed by having regard to matters including: (a) the applicant’s cost of living showing the break up of expenses on a weekly/monthly/or other (depending on the particular circumstances of the case) basis; (b) the income of the applicant (excluding the amount received from the deceased); (c) the amount received from the deceased on a weekly/monthly/or other basis; (d) whether the applicant was able to work and earn income to meet the reasonable costs of living that was otherwise provided by the deceased; (e) whether other sources of finance/income were available to the applicant to meet those living costs; (f) whether the applicant was able to work and chose not to do so; and (g) if the applicant chose not to work, whether that choice was necessary in all the circumstances, for instance, to care for the deceased; or infants; or elderly or infirmed members of the family.”

Commercial Arrangements

A person may be dependant even if there is a commercial arrangement between the parents to the carer, or a foster child. However, in *Page v Page*, Basten JA said that the fact that there is a commercial

²⁴ [McKenzie v Baddeley](#) [1991] NSWCA 197

²⁵ *Morrison v Carruthers* [2010] NSWSC 430 per Bergin CJ at [12]

²⁶ [Pearson v Jones](#) [2000] NSWSC 799 per Master Macready; *Griffiths v Craigie* [2014] NSWSC 1339 at [138] per Hallen J

²⁷ *Morrison v Carruthers* per Bergin CJ at [12] to [13]

arrangement may not negate the dependency, but the critical issue is whether the relationship was such as to create an ongoing obligation once the commercial arrangement ended.²⁸

Cinderella Stories

A testator may leave everything to their second spouse and leave modest amounts to their own children. This puts children in blended families in an invidious position because eligible person does not include step-children.

The testator's children may make a claim against their parent. However, generally speaking, a testator's primary obligation is to their spouse.²⁹ The testator's children's application may be doomed to fail if the spouse has significant needs, especially if it would jeopardise the spouse's security of accommodation.³⁰ The testator's children's application may also incur the wrath of the spouse – which may turn the testator's children fear of getting nothing from the spouse into a harsh reality.

Alternatively, the testator's children may bide their time and make a claim against the spouse when they ultimately pass away. However, it may be very difficult to fall within the definition of "eligible person" if it was a later in life relationship and the children never lived with the spouse, or only lived with the spouse for a short time before they moved out, and were never really dependent.

The NSW Law Reform Commission considered this issue, but considered that any injustice was the result the child's failure to exercise their right to apply for an order out of their parents estate, that a person should only be entitled to claim from their step-parent if they developed a "special relationship" and it would otherwise encroach on the step-parent's testamentary freedom to make step-children eligible persons.³¹

In contrast, Queensland has directly addressed this issue by expressly providing that a stepchild is a "child" for the purposes of eligibility.³²

This issue may be able to be addressed by creating a mutual will. Notably, it is not enough that there are mirror wills – it is necessary to show that each of the two testators agreed that they would not change their wills without the other testator's consent.³³

²⁸ Page v Page per Basten JA at [11]

²⁹ [Luciano v Rosenblum](#) [1985] 2 NSWLR 65

³⁰ Morier v Liem [2016] NSWSC 582; Gersbach v Blake [2011] NSWSC 368; Camernik v Reholc [2012] NSWSC 1537

³¹ [2.6.25] NSWLRC Report on the [Testator's Family Maintenance and Guardianship of Infants Act 1916](#) (Report 28, 1977)

³² Section 40 and 40A, Succession Act 1981 (Qld)

³³ Birmingham v Renfrew (1937) 57 CLR 666