SPEAKERS NOTES

DO PARENTS HAVE AN OBLIGATION IN THEIR WILLS TO MAKE PROVISION FOR ADULT CHILDREN?

Most people would agree that a person making a will should provide for their spouse and any children who are young or dependant on them. But what about adult children? Opinion seems to be divided between, on the one hand, those who think the bond between a parent and a child is a lifelong thing and it is reasonable to think that a parent will provide for children of any age, and on the other hand, those who think adult children should make their own way in the world without expecting to inherit from their parents.

We have all heard of cases where adult children have made claims in the Supreme Court of NSW on the basis that either the provision made for them in a parent's will is insufficient, or in some cases, where no provision has been made for them in a will.

Parents who wish to make a will leaving little or no provision for their children will be warned by their solicitor that they are running the risk of the child bringing a court action claiming provision, which could end up costing the estate a lot of money. Whether the child's claim will be successful will depend on a number of factors, including the child's needs, the needs of other family members and the relationship between the parent and the child.

The parent might then ask the solicitor: "Why bother making a will when a will can be contested?"

An important message from today's talk is that it is much better to make a will than not to make one. A family provision claim can be made in an estate whether there is a will or not, but at least if there is a will you have an opportunity to provide for the people who you want to receive your assets. Just because someone can make a claim does not meant that they will. Not all claims are successful. Even if a claim is successful, the Court will only disturb the will to the extent it needs to make provision for the excluded child.

TESTAMENTARY FREEDOM – REALITY OR MYTH?

A person is free to set out, in a will, their intentions for the distribution of their assets after death, often referred to as "testamentary freedom". That freedom is not absolute in Australia, New Zealand (NZ), Canada and, to some extent, the United Kingdom (UK). Other countries have other arrangements for the share of a person's assets between spouses and children. Those shares are often defined by legislation, or by custom, so that in those countries, a distribution of a person's assets after death is fixed. Therefore, in effect there was no absolute testamentary freedom.

THE CONTEST BETWEEN TESTAMENTARY FREEDOM AND TESTAMENTARY DUTY

The concept of testamentary freedom was a feature of the 19th century, however towards the end of the 19th century it became apparent that testamentary freedom allowed some testators to ignore their responsibilities to close family members, particularly spouses and children.

It is interesting to note that in the dominions of Australia, NZ and Canada, in the late 19th century, these were cases where very wealthy men, left their widows and children unprovided for in their estates. These cases generated public outrage and agitation for legislative interference with testamentary freedom.

The first dominion to introduce a Testator Family Maintenance Act was NZ in 1900, although there had been earlier legislation in NZ as early as 1877 which entitled illegitimate children under 14 to apply for maintenance out of the estate of deceased parents. The idea of legislation to ensure proper provision for family members subsequently spread throughout Australia and eventually to Canada and the UK.

NSW FAMILY PROVISION

NSW introduced the concept of family provision in the Testator's Maintenance and Guardianship of Infants Act 1916, based upon the NZ legislation. This Act was replaced by the Family Provision Act 1982, and subsequently by the Succession Act 2006. In the main, the legislative changes were to broaden the class of persons entitled to make a claim, eg ex nuptial children and defacto partners.

All Australian States and Territories have family provision legislation. Some States refer, in the legislation, to "proper maintenance and support". NSW uses the term "proper maintenance, education and advancement in life".

The High Court, when required to consider the different legislation of the States, has encouraged uniformity of interpretation in its decisions.

However, in family provision claims, true uniformity cannot be guaranteed because each case depends upon its facts.

It is clear that in NSW, testamentary freedom and a person's absolute ability to make a will, free of statutory interference, is limited by the need for that person to make adequate provision for the proper maintenance of certain eligible people as set out in the Succession Act 2006 (NSW), and does sometimes result in a conflict arising between a person's absolute ability to freely make a will and the need to fulfil one's obligations to make adequate provision for the proper maintenance of certain "eligible persons".

SUCCESSION ACT 2006 (NSW)

The Act defines persons who may apply to the Court for a Family Provision order in respect of the estate of a deceased person.

These persons are defined as 'eligible persons' consisting of:

- a spouse
- a defacto partner
- a child
- a former spouse
- a grandchild who has been dependant on the deceased
- a person who was a member of the same household with and dependant on the deceased
- a person who was living in a close personal relationship with the deceased at the time of death. This group could include a person who went to care for the deceased, not a relative.

AN IMPORTANT PRINCIPLE

It must be noted that the Succession Act 2006 (NSW) –

"does not confer on any of the 'eligible persons' a statutory entitlement to receive a certain portion of a deceased person's estate, nor does it impose any limitation on the deceased's power of disposition by his, or her, will. It is only if the statutory conditions are satisfied, that the Court is empowered, under the Act, to alter deceased's disposition of his or her estate, to produce a result that is consistent with the purpose of the Act. Even then, the Court's power to do so is discretionary." Dugac v Dugac [2012] NSWSC 192, per AsJ Hallen.

THE BASIC PRINCIPLE – STEP 1

In order to make a claim, an applicant must firstly qualify as an 'eligible person'.

Therefore the Court, before proceeding further, must be satisfied that the applicant is an 'eligible person'.

THE COURT'S DISCRETION - STEP 2

The second step is for the Court to determine –

"whether adequate provision for the proper maintenance, education or advancement in life of the Applicant has not been made by the will of the deceased."

Therefore, to proceed further, the Court needs to be satisfied of the inadequacy or lack of provision provided for the "eligible person".

In this second stage, the Court is required to consider whether an order should be made, and if so, what order should be made.

WHEN FAMILY PROVISION ORDER MAY BE MADE – SECTION 59

The Court, must firstly satisfy itself that the applicant is an 'eligible person', then the Court "may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made."

WHAT THE COURT MUST CONSIDER

In making a family provision order, the Court has to consider the following matters:

(a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,

(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant,

(c) the nature and extent of the deceased person's estate and any liabilities,

(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant,

(e) if the applicant is cohabiting with another person-the financial circumstances of the other person,

(f) any physical, intellectual or mental disability of the applicant,

(g) the age of the applicant,

(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person,

(i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,

(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,

(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death,

(l) whether any other person is liable to support the applicant,

(m) the character and conduct of the applicant before and after the date of the death of the deceased person,

(n) the conduct of any other person before and after the date of the death of the deceased person,

(o) any relevant Aboriginal or Torres Strait Islander customary law,

(p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

THE COURT'S ROLE IN CONSIDERING THE RELEVANT FACTS

The Court, in taking into account the matters which the Court is required to consider, is not required to achieve a fair division of the deceased's estate.

Bryson J noted in Gorton v Parks (1989) 17NSWLR 1, said

"The Court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity, nor is the purpose of the jurisdiction conferred by the Act the correction of hurt feelings or sense of wrong, felt by the applicant. Rather, the Court's role is of a specific type and goes no further than the making of "adequate" provision in all the circumstances for the "proper" maintenance, education and advancement in life of an applicant."

Stephen J, in Cooper v Dungan (1976) 50ALJR 539, reminded the Court to be vigilant in guarding –

"against a natural tendency to reform the deceased's will according to what it regards as a proper total distribution of the estate, rather than to restrict itself to its proper function of ensuring that adequate provision has been made for the proper maintenance and support of an applicant."

The critical words for the Court's to consider are -

"proper maintenance, education and advancement in life".

Interestingly enough, the words "provision", "maintenance" or the phrase "advancement in life" are not defined, but have been judiciously determined, and are left to the exercise of the Court's discretion, based upon the relevant facts.

Provision was noted in Diver v Neale 2009 NSW CA54 at 34, as being a term which "covers the many forms of support and assistance which one individual can give to another." That support and assistance will vary over the course of the person's lifetime.

PROPER MAINTENANCE

Proper maintenance was held in Alexander v Janson 2010 NSW CA176 by Brereton J to be "proper maintenance is not limited to the bare sustenance of the claimants" but "requires consideration of the totality of the claimant's position in life, including age, status, relationship with the deceased, financial circumstances, the environs to which he or she is accustomed".

The phrase "advancement in life" in Mayfield v Lloyd-Williams [2004] NSW SC419 White J noted that the expression "advancement in life" is not confined to an advancement of an applicant in his or her younger years. It is a phrase that can extend beyond those younger years.

The Court has also commented that in larger estates, a more extravagant allowance for contingencies could be made, than would be permissible in a smaller estate and still fall within the concept of "maintenance and support".

PROVISION FOR ADULT CHILDREN – A VEXED QUESTION

It is interesting to note that in the USA, a number of states have legislation which provides, that irrespective of the terms of a will, a surviving spouse is to receive 3-50% of the estate, depending on the length of the marriage. Some states have an elective provision which allows the surviving spouse to take either an elective (forced) share of the estate, or to take whatever share they have been left in the will.

Philosophically there is a broad range of opinion about provision for adult children, ranging from equal making of provision for all their adult children, to the other end of the spectrum, that having nurtured these adult children and provided for them to a certain age, they should have no further call upon your estate and wish to dispose of their estate without concern for those children.

The proper provision for adult children and what provision is proper for any applicant, especially for an adult applicant, can be a vexed question, because the Succession Act, even though it prescribes the matters which are to be taken into account, does not prescribe the circumstances that do, or do not, "constitute inadequate provision for the proper maintenance, education and advancement in life of the applicant".

Some Judges have referred to this aspect of the Succession Act as being "a multi-faceted evaluative judgement" or "an intuitive assessment".

The outcome is based upon the Court's discretion and the facts presented to support the applicant's claim.

Recently Hallen AsJ in the matter of Dugac v Dugac [2012] NSWSC192, in considering in detail a claim by an adult child, provided a detailed list of applicable principles, these being:

"(a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.

(b) It is impossible to describe in terms of universal applicant, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life – such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an

unencumbered house, or to set his or her children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation.

(c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute.

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the application. But the Act does not permit orders to be made to provide for the support of third persons whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons.

(e) There is no need to an applicant adult child to show some special need or some special claim.

(f) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim.

(g) Although some may hold the view that equality between children requires that "adequate provision" not discriminate between children according to gender, character, conduct or financial and material circumstances, the Act is not consistent with that view. To the contrary, the Act specifically identifies, as matters that may be taken into consideration, individual conduct, circumstances, financial resources, including earning capacity, and financial needs, in the court's determination of an applicant's case."

However, his Honour in summary, states that he does not expect that the principles he has set out are to be elevated into rules of law. He further states:

"nor do I wish to suggest that the jurisdiction should be unduly confined."

He states that he is merely identifying them to provide:

"useful assistance, in considering the statutory provisions, the terms of which must remain firmly in mind."

TESTAMENTARY CONTROL

Most countries have some method of controlling testamentary dispositions, be it by custom, a forced share approach by way of statutory division, or Family Provision legislation, to ensure that adequate provision is made for the members of the family of a deceased person, and certain other persons in the estate of the deceased person.

It is important to remember that the Succession Act does not confer upon applicants, a statutory entitlement to receive a certain portion of a deceased person's estate, nor does it impose any limitation on the deceased's power of disposition by his or her will.

It is only if the statutory conditions are satisfied, that the Court is empowered, under the Act, to alter the deceased's disposition of his or her estate, to produce a result that is consistent with the purpose of the Act. Even then, the Court's power to do so is discretionary, and is not intended to rewrite the deceased's will, but only to alter it, if required.

CASE STUDIES

Case study: Dugac v Dugac [2012] NSWSC192

- This is an application by an adult child who was provided for in the will, but by the time the parent died, the legacies to the female child had all been disposed of.
- She was entitled to make an application, which she did, and Hallen AsJ considered her application in considerable detail.
- The problem which the applicant had was that she informed the Court that she would give all or most of any provision she received out of the estate to her own children.
- Hallen AsJ found that she was an eligible person, but since the applicant gave evidence that she intended to distribute any provision made for her, mostly to her own children, who were adults and able-bodied, and since the applicant did not demonstrate any obligation to provide for any of her children, Hallen AsJ dismissed her claim.

For other case studies involving claims by adult children see separate case notes on:

1. Cooper v McNiece; Munday v McNiece [2012] NSWSC 414
2. Keep v Bourke [2012] NSWCA 64
3. Collins v Mutton [2012] NSWSC 548

CASE STUDIES – CLAIMS BY ADULT CHILDREN

1. Cooper v McNiece; Munday v McNiece [2012] NSWSC 414

1.1 Decision by Macready AsJ on 27 April 2012.

1.2 Family provision claims by 2 adult children in respect of the estate of the late Edna May Munday, who died on 16 October 2008.

1.3 Her husband predeceased her and she was survived by five of her children. Two of them, Judith and Warren, are plaintiffs in the proceedings.

1.4 Another child, Anthony, survived the testatrix but died before the hearing – his estate went to a friend. Another son, Alan, predeceased the testatrix. Two other daughters, Pamela and Marilyn, were given notice of the proceedings but did make a claim.

1.5 Will – the deceased's will was made on 9 Oct 2006 and appointed Mr McNeice, the family accountant, the executor. In her will she gave a legacy to her daughter Judith of $10,000 and gave the residue of her estate equally between her sons Warren and Anthony.

1.6 Estate consists of:

(a) Deceased's home at Hilltop Avenue, Lake Heights – approx. $310,000 and $330,000;

(b) Investment property at Figtree – approx $400,000 and $420,000;

(c) Cash of $23,656.

(d) Gross value - $743,285 to $783,285.

1.7 Costs in these proceedings total $197,535.

1.8 Net value estate – approx. $545,750 to $585,750.

1.9 Family history - The deceased's husband was born in November 1913 and the deceased herself in March 1919. They married in 1940 and had a large family. Anthony was born in July 1942; Judith, 1946; Marilyn, December 1948; Alan, November 1952. Pamela, May 1956; and Warren in September 1966. Warren was substantially younger than the other children. Judith left school in 1962 and went to work as a cleaner. That was some four years before Warren was born. Judith married and left home in 1969.

1.10 Judith (plaintiff) – eligible person:

(a) 64 years old

(b) single – no dependants

(c) resides in a Housing Commission flat.

(d) $2,500 in household contents, $360 in superannuation and $29 in the bank. Her debts total $2,000.

(e) Works as a cleaner three days a week, a job she has been doing for many years. Her income from work is $400 per fortnight and she receives a part pension of $540 per fortnight. This is all consumed in her expenses.

(f) Judith's marriages have failed and she is almost at an age where she has to retire. Her education only took her to year 7 and, apart from some time off to raise children, she has worked in low paid jobs all her life.

(g) Her relationship with the deceased was always good but for most of her life since she left home she has lived in Sydney. She travelled to Wollongong to see her mother on a fortnightly basis.

(h) The reason for her receiving only $10,000 in the will seems to have been because her mother thought that the properties should stay with the male line.

1.11 Judith was seeking $350,000 to $599,000 to buy herself a 2 bedroom house. She originally sought $240,000 to $300,000 to purchase a single bedroom flat.

1.12 Warren (plaintiff) – eligible person and granted extension of time to commence claim:

(a) 46 years old

(b) single – no dependants

(c) lives in family home – purchased 1970

(d) Warren purchased a block of three units at Propane Street, Albion Park for investment purposes - valued at approx. $320,000. His parents assisted him with the purchase. The income from rental properties – approx. $1010 pw.

(e) 2 motor vehicles

(f) Share portfolio – lost value in GFC - $36,772.39

(g) Bank account $2,195 – query other accounts?

(h) Another flat at the home which was not let.

(i) Earned a little from what work he did, occasionally transporting stock in his Hilux truck. At most he would earn approx. $60 pw.

(j) Warren will be dependent on the rental income for his livelihood.

(k) He gave up work to look after his parents and all the evidence points to him being a devoted son to his parents. This included personal care and attention. He also did a lot of work at home and on the rental properties. He was provided substantially with Albion Park by his parents.

(l) Suffers from some problems and unlikely to work again.

1.13 His Honour said that Judith's claim for a house has to be seen in the context of the now small size of the estate and the pressing needs of Warren.

1.14 His Honour considered that Warren had a real need for accommodation and the family home would be ideal as it also earns some rent. Judith was fortunate to have a Housing Commission home. The attitude which the court should take in relation to the provisions of State accommodation and pensions was discussed by HH in Chan v Tsui [2005] NSWSC 82. His Honour considered that it was appropriate to take into account a pension entitlement but did not think the consideration of the pension entitlement of the plaintiff and its continuance in the future could assist in the formulation of proper provision for the plaintiff.

1.15 His Honour referred to King v Foster (Court of Appeal, unreported, 7 December 1995) in which Sheller JA referred with approval to the discussion by Bryson J in Whitmont v Lloyd (unreported, 31 July 1995) on the subject. At p 14 his Honour said:

'The protection of public funds from claims by indigent persons is not a purpose of family provision legislation but they are incidentally protected by the legislation, which was not enacted solely for protection of private interests and serves public policy: see Dillon v Public Trustee of New Zealand [1941] AC at 303, 304 and observations, not uniform in their import in judgments in Lieberman v Morris [1944] HCA 13; (1944) 69 CLR 69. In my opinion, the availability of Age Pensions and other social benefits is a circumstance which should be regarded, and particularly in small estates it may be appropriate to leave an applicant wholly or partly dependent on them or to mould the provision made so that their availability is preserved in whole or in part. The acceptance of benefits for which statute law provides is in every way legitimate, involves no social stigma and incurs no disapproval from the Court. It is not the Court's task to be vigilant to throw burdens off public funds and on to private estates. Still it is true that the legislation has a public policy purpose and it is not appropriate that where there is wealth in an estate it should be directed away from the less fortunate and successful of the eligible persons so as to enhance their claims to social benefits and maximise the resources of others; the Court should not disregard the interest of the public in public funds, which can receive incidental protection from the workings of this legislation. Where wealth is available it should be used to meet needs for maintenance, education and advancement of eligible persons. The significance of social benefits is related to the available resources. In my understanding this expresses the view on which this Court administers the legislation. See my observations in Wentworth v Wentworth (14 June 1991, unreported at 132) which appears not to have attracted criticism in the Court of Appeal (3 March 1992): "The testator should not have disposed of all the family wealth in ways of his own choosing and left the family's economic casualty to relative penury or dependence on social agencies." See too Parker v Public Trustee (Young J, 31 May 1988) and Thom v Public Trustee (Master McLaughlin, 2 April 1992), both noted in Leslie's Equity and Commercial Practice F30: 1010.'

1.16 Macready AsJ decided that:

(a) This was a small estate so it was appropriate to have regard to Judith's lifetime entitlement to accommodation.

(b) Warren should have the house at Hilltop Avenue, Lake Heights.

(c) The remaining assets after payment of costs should be shared equally between Judith and Warren.

2. Keep v Bourke [2012] NSWCA 64

2.1 Decision by Macfarlan JA, Barrett JA and Tobias AJA on 5 April 2012.

2.2 The deceased, Joyce Winifred Keep who died on 29 August 2009 aged 82 years. She had three children – Gwendolene, Graham and Marion.

2.3 The appellants, Gwendolene and Graham, are also the executors of her will dated 7 July 1992. The deceased gave the whole estate to them in equal shares.

2.4 Marion is the respondent and had little contact with her mother over a long period of time. For that reason the deceased made no provision for Marion in her will:

"I HAVE made no provision in this my Will for my daughter MARION GAY BOURKES [sic] because of her complete lack of concern or contact with me and other members of my family over a long period of time".

2.5 The estrangement existed between Mrs Keep and Marion for some 38 years and continued until Mrs Keep's death. It resulted from Marion's decision to marry against her parents' wishes. Her parents did not want Marion to marry her intended husband because he had been conscripted into the army during the Vietnam war and the parents said they were opposed to her marrying someone who ran the risk of injury or premature death. The parents were also worried about the cost of a wedding. They also expressed an opinion that Marion, as the younger daughter, should not marry before Gwendolene.

2.6 Marion and her mother saw one another on only five occasions after Marion left the family home shortly before her marriage in November 1971.

2.7 The estate consisted of the deceased's house at Hurstville and some cash. The net value was about $623,000.

2.8 In the first instance, Macready AsJ awarded Marion a legacy of $200,000 from the deceased's estate. That amount was reduced on appeal to $175,000.

2.9 Marion divorced – 4 adult children.

2.10 Gwendolene and Graham – never married.

2.11 All three parties had significant health problems and all three children are of very modest means.

2.12 The grounds of appeal were that the primary judge erred:

(a) In failing to find, as a matter of jurisdiction, that Marion was not entitled to provision under s 59, having regard to:

i. the estrangement;

ii. the statement in the will set out above; and

iii. the overriding competing claims of Gwendolene and Graham on Mrs Keep's testamentary bounty;

(b) In holding, notwithstanding the estrangement, that Marion was not barred from making a claim because Mrs Keep had "stridently refused to make any attempt at reconciliation on at least two opportunities when this could have occurred";

(c) In failing to reduce the provision in favour of Marion by reference to a finding that there was "a sense of a child treating her parent callously by not taking any steps to end their estrangement"; and

(d) In the context of the value of the estate, in fixing the quantum of Marion's entitlement at $200,000 when

i. there is no principle that the community expects a parent to leave her child in a position to own a home;

ii. the claims of Gwendolene and Graham to remain in the deceased's house should have been taken into account; and

iii. regard was not had to the absence of evidence that Gwendolene and Graham would be able to acquire alternative accommodation with the balance of the estate remaining to them.

2.13 The Court said that "An appeal court can alter a trial judge's decision concerning the jurisdictional question in a Family Provision Act application only in the same circumstances as it can alter a discretionary decision by a trial judge: Singer v Berghouse (No 2) [1994] HCA 40; (1994) 181 CLR 201 at 212; Vigolo v Bostin [2005] HCA 11 ; (2005) 221 CLR 191 at [82] 220; Clifford v Mayr [2010] NSWCA 6 at [67]- [74]. The conventional statement of the principles for appellate review of discretionary decisions is that in House v R [1936] HCA 40; (1936) 55 CLR 499 at 504-5."

Campbell JA then set out this well-known passage in the judgment of Dixon, Evatt and McTiernan JJ in House v The King [1936] HCA 40; (1936) 55 CLR 499 at 504-505:

"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

2.14 The Court said: "The judge's findings favourable to Marion's claim at the jurisdictional stage were made after a full consideration of the circumstances of both Gwendolene and Graham. His Honour recognised that neither of them works, that both are in bad health and on social security support and that they have lived in the Hurstville house all their lives and wish to continue doing so. In addition, each is single, has no dependants and is of very modest means. That assessment was made in company with a like assessment of Marion's situation: that she is divorced with four children one of whom is a son with disabilities who lives mainly with his father (although Marion wishes to have him stay with her periodically), that she too is of very modest means and lives in a small rented house on the Central Coast which is in poor repair, that she receives some social security support and that she too has health problems. At the time of trial, Marion was in part-time employment but, as I have said, evidence received without objection on the appeal was that an injury has made it necessary for her to give up that employment.

It is sufficiently shown, in my opinion, that the primary judge had appropriate regard to all these matters, as well as the estrangement, in approaching the matter as a whole; and that he therefore could not have failed to take them into account in making the inquiry that was necessary at the "jurisdictional" or "first stage"."

2.15 The court decided that: "In summary, the primary judge addressed all relevant matters going to jurisdiction. His assessment was made by way of appropriate "multi-faceted evaluative judgment" taking those matters into account (including the situations of Gwendolene and Graham). The estrangement and its circumstances were correctly viewed as not excluding Marion's claim on

jurisdictional grounds and the conclusion that the jurisdictional condition was satisfied was one warranted by the evidence. His Honour's decision that adequate provision for the proper maintenance or advancement of Marion was not made by Mrs Keep's will is not one calling for appellate intervention in accordance with the principles explained by this Court in Hampson v Hampson (above). The first two grounds of appeal are therefore not made out."

2.16 In deciding what order should be made for Marion the court had to consider the matters in s.60(2) of the Succession Act 2006.

2.17 The court agreed that Marion was entitled to some provision from the estate but that there must be a reduction in that amount of that provision recognising Marion's contribution to the estrangement, but given the factors mentioned by Macready AsJ at [78] of the judgment and the hurtful way in which her parents expelled Marion from the family, the court believed that the reduction should not be great. On that basis, the court reduced the original legacy of $200,000 awarded by Macready AsJ , to $175,000.

2.18 Marion, the respondent, was order to pay the appellant's costs of the appeal.

Collins v Mutton [2012] NSWSC 548

3.1 Decision by Hallen AsJ on 24 May 2012

3.2 Family provision claim by deceased's daughter, Judeth (sic) Collins.

3.3 Executor = Deceased's son, Gregory Mutton.

3.4 Facts:

- The deceased died on 30 November 2010. He was then aged 90 years.
- He married Doris Patricia Mutton in about 1943. She predeceased the deceased. However, despite remaining married to the deceased until her death in August 2005, they had separated, when the deceased met another woman, Gloria Walsh, with whom he lived until the mid-1990's.
- There were five children of marriage, namely Judeth, Gregory (born January 1953), Paul Francis Mutton, born in May 1948, Trevor Anthony Mutton, born in June 1950, and Richard Keith Mutton, born in April 1958.
- When Doris suffered a stroke, in about 1999, she moved back into the deceased's property at Long Jetty, which was then occupied by the deceased and Richard. The real property that she then owned (in which she had lived) was sold and the proceeds of sale were divided equally between Doris and the deceased.)
- Following Doris' death, the deceased and Richard continued to live together, until about September 2009. During this period, Richard was the deceased's primary carer (to the extent that he required care). Richard continued to live in the Long Jetty property after that time.
- Doris' estate (approximately $360,000) was divided between her five children equally.
- The deceased left a Will dated 19 May 2010, Probate of which was granted to Gregory on 23 February 2011.

- The deceased's Will gave his property at Long Jetty to Richard; a bequest of the deceased's share in three racehorses to Gregory absolutely; and the rest and residue of his estate to be divided, equally, between his five children.

3.5 The gross value of the estate was approx. $409,286 consisting of the property at Long Jetty ($220,000) and funds in bank, or in financial institutions, on deposit ($179,286). It also revealed that the deceased held an interest, as tenants in common in unequal shares, with Gregory, in a number of racehorses ($10,000).

(The deceased purchased a property at Bateau Bay for his son Gregory (valued at approx. $505,000) – not an estate asset).

3.6 The actual net distributable estate, after the payment of costs and expenses of sale of the Long Jetty property and the legal costs of the proceedings, was about $363,091.

3.7 The deceased's former partner, Gloria Walsh, could not be located at the time of the proceedings.

3.8 The plaintiff sought an order that the burden of any provision in her favour be borne out of the proceeds of sale of the Long Jetty property, devised to Richard absolutely.

3.9 Richard, despite being served with notice of the proceedings, took no part in the matter. Consequently, the court had no information in relation to his financial resources (including earning capacity) and financial needs, both present and future. It however relevant to note that Richard was his father's primary carer after Doris' death.

3.10 Trevor and Paul also did not take an active part in the proceedings.

3.11 His Honour said that "even though the value of the estate is quite small, all the relevant circumstances have to be considered before the court's decision is made. As has been said, "the smallness of the estate neither excludes jurisdiction nor full consideration": Re Clayton (dec'd) [1966] 1 WLR 969 at 971-2, per Ungoed-Thomas J."

3.12 His Honour then considered:

- whether the plaintiff was an eligible person –s.57 Succession Act 2006 (the Act);
- whether adequate provision for the proper maintenance, education and advancement in life of the applicant has not been made by the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both (s 59(1)(c) of the Act);
- if satisfied of the inadequacy of the provision made for the plaintiff, the court then considers whether to make a family provision order (s 59(2)), having regard to the matters referred to in s 60(2) of the Act;
- the court considered the meaning of "provision", "maintenance" "advancement in life", "support" "proper" and "adequate".

3.13 His Honour said "Whether the applicant has a 'need' is a relevant factor at the first stage of the enquiry. It is an element in determining whether 'adequate' provision has been made for the 'proper' maintenance education and advancement in life of the applicant in all of the circumstances: Collins v McGain [2003] NSWCA 190 at [42] (Tobias JA, with whom Beazley and Hodgson JJA agreed)."

3.14 When considering the applicable legal principles, the court said, at [89]: "Bryson J noted in Gorton v Parks (1989) 17 NSWLR 1, at 6, in relation to the former Act, that it is not appropriate,

to endeavour to achieve a 'fair' disposition of the deceased's estate. It is not part of the court's role to achieve some kind of equity between the various claimants.

The court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity. Rather, the court's role is of a specific type and goes no further than the making of 'adequate' provision, in all the circumstances, for the 'proper' maintenance, education and advancement in life of an applicant."

3.15 In relation to a claim by an adult child, the court noted the following general principles as providing useful assistance in considering the relevant statutory provisions [94]:

"(a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the close bonds of childhood are relaxed.

(b) It is impossible to describe in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life - such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation [McGrath v Eves [2005] NSWSC 1006; Taylor v Farrugia [2009] NSWSC 801].

(c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute: Taylor v Farrugia.

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant. (Re Buckland Deceased [1966] VR 404 at 411, per Adam J; Hughes v National Trustees Executors and Agency Co. of Australasia Pty Ltd [1997] HCA 2; (1979) 143 CLR 134 at 148, per Gibbs J; Goodman v Windeyer [1980] HCA 31; (1980) 144 CLR 490 at 498, 505, Per Murphy J). But the Act does not permit orders to be made to provide for the support of third persons to whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons. (Re Buckland Deceased at 412, per Adam J; Kleinig v Neal (No 2) [1981] 2 NSWLR 532 at 537, per Holland J in Equity; Mayfield v Lloyd-Williams).

(e) There is no need for an adult child to show some special need or some special claim: McCosker v McCosker; Kleinig v Neal (No 2); Bondelmonte v Blanckensee [1989] WAR 305; and Hawkins v Prestage (1989) 1 WAR 37, per Nicholson J at 45.

(f) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim: Hughes v National Trustees, Executors and Agency Co of Australasia Ltd at 149, per Gibbs J.

(g) Although some may hold the view that equality between children does not discriminate between children according to gender, character, conduct or financial and material circumstances, the Act is not consistent with that view. To the contrary, the Act specifically identifies, as matters that may be taken into consideration, individual conduct, circumstances, financial resources, including earning capacity, and financial needs, in the Court's determination of an applicant's case.

(h) In all cases under the Act, what is adequate and proper provision is necessarily fact specific.

(i) The Act is not a "Destitute Persons Act", and it is not necessary, therefore, that the applicant should be destitute to succeed in obtaining an order: In re Allardice, Allardice v Allardice (1910) 29 NZLR 959, per Chapman J at 966.

(j) The lack of reserves to meet demands, particularly of ill health, which become more likely with the advancing years is a relevant consideration: MacGregor v MacGregor [2003] WASC 169, per Templeman J at [182]; Crossman and v Riedel [2004] ACTSC 127, per Gray J at [49]. Likewise, financial security and a fund to protect against the ordinary vicissitudes of life, is relevant: Marks v Marks [2003] WASCA 297, per Wheeler J at [43].

(k) In a small estate, as this one is, it is important to remember what Salmond J said in In re Allen (Dec'd); Allen v Manchester [1922] NZLR 218, at 221:

"Applications under the Family Protection Act for further provision of maintenance are divisible into two classes. The first and by far the most numerous class consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary dispositions, the applicant is competing with other persons who have also a moral claim upon the testator. Any provision made by the Court in favour of the applicant must in this class of case be made at the expense of some other person or persons to whom the testator owed a moral duty of support. The estate is insufficient to meet in full the entirety of the moral claims upon it, in the sense that if the testator possessed more he would have been bound to do more for the welfare of his dependants. In such a case all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims."

(l) Where the Court is satisfied that provision ought to be made, then it is no answer to a claim for provision under the Act that to make an order would be to defeat the intentions of the deceased identified in the Will. The Act requires, in such circumstances, for the deceased's intention in the Will to be displaced: Kembrey v Cuskelly [2008] NSWSC 262, per White J at [45]."

3.16 Judeth did not have a particularly close relationship with the deceased. Gregory and Richard were closer to their father.

3.17 Judeth was in receipt of the aged pension. She was 66 years old. She rented her home. Her circumstances could only be described as very modest. Her adult son, who was in receipt of a disability pension, lived with Judeth.

3.19 The plaintiff sought a lump sum sufficient to enable her to purchase accommodation. She also sought an additional amount for the exigencies of life.

3.20 After considering the matters in s.60 (2) of the Act the court decided a family provision order should be made in favour of Judeth.

3.21 The court decide that it would not make an order giving Judeth the property at Long Jetty because that property had been Richard's home since about 1999 and the court did not wish to deprive Richard and his family of their home.

3.22 Alternatively, the Plaintiff submitted that she should receive, in lieu of her entitlement under the deceased's Will, a lump sum of $150,000 which she could use this amount to purchase a mobile home (about $135,000) and would have a small capital sum remaining to provide for exigencies of life.

3.23 The court formed the view that Judeth, in lieu of the provision made for her in the deceased's will, should receive a lump sum of $135,000 to be paid from the residuary estate. This would enable Judeth to purchase a modest mobile home or, would provide her with capital and income to meet exigencies of life.

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PRESENTATION SLIDES

THE LAW SOCIETY OF NEW SOUTH WALES

Law Society of NSW
Will Awareness Day 2012

Should parents provide for their adult children in their wills?

Should parents provide for their adult children in their wills?

What do you think?

YES? Your children are always your children.

NO? Your children should make their own way in the world and you should be able to exclude them if you want to.

IT DEPENDS? What if the parent has remarried? What if the parent and child are estranged?

Should parents provide for their adult children in their wills?

What is the law?

Children of any age can apply to the Court for provision to be made for them from a parent's estate.

Whether the Court will order provision for a child depends on a number of factors, including the child's needs, the needs of other family members, and the relationship between the parent and child.

Why bother making a will if it can be challenged?

This question is often asked of solicitors when they are advising a client who wants to exclude someone.

It is important to understand that:

- without a will you lose any say in how your assets are distributed, and
- even if a challenge is successful the court does not disturb a will more than it needs to to make provision.

Testamentary Freedom – reality or myth?

Testamentary freedom is the idea that a person is free to set out, in a will, their intentions for the distribution of their assets after death.

- In Australia – if certain people are not adequately provided for they can make a claim.
- NZ, Canada, UK are similar to Australia.
- In many other countries (eg. in Europe and Asia) there is no absolute testamentary freedom and forced heirship applies to decide how a person's assets are shared between spouses and children, often defined by legislation, or by custom.

Contest between testamentary freedom and testamentary duty

The concept of testamentary freedom was a feature of the 19th century British empire.

In Australia, NZ and Canada, in the late 19th century, there were cases where very wealthy men, left their widows and children unprovided for in their estates. These cases generated public outrage and agitation for legislative interference with testamentary freedom.

NZ introduced the *Testator Family Maintenance Act* in 1900.

The idea of legislation to ensure proper provision for family members subsequently spread throughout Australia and eventually to Canada and the UK.

NSW Family Provision

1916 - *Testator's Maintenance and Guardianship of Infants Act*

1982 - *Family Provision Act*

2009 - *Succession Act*

Over the years the class of persons entitled to make a claim has broadened, eg to include ex nuptial children and defacto partners.

All Australian states and territories have family provision legislation. Some states refer, in the legislation, to *"proper maintenance and support"*. NSW uses the term *"proper maintenance, education and advancement in life"*.

Who is eligible to make a claim?

- a spouse
- a defacto partner
- a child of any age
- a former spouse
- a grandchild who has been dependent on the deceased
- a person who was a member of the same household with and dependent on the deceased
- a person who was living in a close personal relationship with the deceased at the time of death.

Eligible is not the same as entitled

Just because an adult child is an eligible applicant does not mean that he or she will be entitled to share in the estate.

The Court may decide to make provision for an adult child, but it may also decide not to disturb the deceased's will.

Relevant factors include

- the child's relationship with the deceased parent
- the deceased's obligations or responsibilities to the child
- size of the estate
- financial resources and needs of the child
- financial circumstances of child's spouse
- any physical, intellectual or mental disability the child may have
- the child's age
- any contribution by the child to the parent's assets
- any provision made for the child by the parent
- any evidence of the testamentary intentions of the parent, including evidence of statements made by the parent
- whether the child was dependant on the parent before the parent's death,
- whether any other person is liable to support the child,
- the child's character and conduct

The Court's role

It **is not** the Court's role to:

- completely rewrite the will to make it fair
- ensure equality between siblings
- correct hurt feelings or sense of wrong

It **is** the Court's role to:

- ensure that adequate provision is made for proper maintenance and support

So how much is adequate provision for an adult child?

No simple answer – it comes down to what the Court thinks the community would expect.

If the child is financially secure and the estate is small the answer might be zero.

If the child is in financial need and the estate is large the answer might be a great deal.

Summary

You can make a will dividing your estate according to your wishes.

If you do not make provision for an adult child, that child will be eligible to make a claim.

If the Court decides that provision should be made for that adult child it will vary the terms of the will only to the extent necessary to make that provision.