Court of Appeal reins in generous family provision decisions in 2017

BY MICHELLE PAINTER SC

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Family provision cases involve careful exercise of judicial discretion. As with any case involving discretion, it is easy to indulge in 'armchair reasoning' and come to different conclusions than the trial judge. Reasonable minds can, and do, differ. Judges understand that. In explaining what many saw as a stunningly generous award ($750,000) to a deceased's former wife, Brereton J confessed that 'this is not an easy case … judicial minds may differ on it' (*Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin* [2017] NSWSC 10, at [79]).

His Honour was right; many minds – judicial and otherwise – did differ. What excited attention in *Lodin v Lodin* were the unusual circumstances of the vitriolic relationship between the deceased and the plaintiff, over many years after their divorce. The level of vitriol and persecution heaped on the deceased by the plaintiff led many to question how she could have been found to be a natural object of testamentary recognition. Another family provision case raised eyebrows in July when a man who had a friendship of sorts for, at most two years before the deceased died, was awarded $550,000 from her estate, due to their 'close personal relationship' at the time of her death (*Estate MPS, deceased* [2017] NSWSC 482).

These cases fuelled the familiar concern that family provision judges are too careless of testamentary intention and overly generous when exercising their broad judicial discretion to order further provision from a deceased's estate. These two cases were overturned by the NSWCA at the end of 2017. At about the same time the Court of Appeal also overturned another first instance decision of the Supreme Court. Running through the three unanimous judgments, we can detect a call for a more restrained and structured approach to the legislative scheme for family provision under ch 3 of the *Succession Act 2006* (NSW) (**'the Act'**).

Snapshot

- The NSW Court of Appeal recently overturned three generous first instance family provision awards, perhaps signalling a more structured approach to the judicial discretion in the *Succession Act 2006* (NSW).
- In *Lodin v Lodin*, the Court held that the factors relevant to whether a claimant is a 'natural object of testamentary recognition' must not be conflated with those relevant to whether an order for provision should be made.
- In *Sgro v Thompson*, the Court held that the adequacy of provision in a will is not to be determined solely by reference to a claimant's poor financial circumstances.
- 'Living together' for the purpose of assessing eligibility based on a close personal relationship requires more than 'repeat visits for a single purpose', as established in *Smoje v Forrester*.

Lodin v Lodin [2017] NSWCA 327

Primary judgment

Dr Lodin was the claimant's GP, and then her husband. The marriage lasted for just over a year before it irretrievably broke down. Despite obtaining a favourable property settlement after their separation, the claimant embarked on what can only be described as a 25 year persecution: she complained of his unethical behaviour to the Health Department, attempted to sue him in common law, made false complaints to Police that he sexually abused their daughter, kept him from seeing his daughter, and told him after his cancer diagnosis that she would make his 'wretched life not worth living' (*Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin* [2017] NSWSC 10, at [13]–[16], [30]). When he died and their only daughter stood to inherit his estate worth $5 million, the claimant sought provision from the intestate estate given that she was his former wife, and thus eligible pursuant to s 57(1)(d) of the Act.

The key factor motivating the trial judge's award of $750,000 was the contention that Dr Lodin's moral obligation to the claimant had not been discharged by their property settlement, due to the 'unusually enduring' impact of the marriage breakup (at [53], [81]). His Honour also thought there was 'something unbecoming' about a daughter being left with such a substantial inheritance while her mother was left with nothing (at [87]). What precisely was unbecoming was not explained.

Court of Appeal decision

The Court (per Sackville AJA; White and Basten JJA agreeing) allowed the daughter's appeal; finding that the primary judge had incorrectly considered the factors relevant to whether adequate provision was made when deciding the threshold issue of whether there were 'factors warranting' the claimant's appli-

cation for the purpose of s 59(1)(b)–(c) (*Lodin v Lodin* [2017] NSWCA 327, at [4]; [119]).

After analysing the legislative history (at [69]–[84]), Sackville AJA explained that while the broad discretionary factors provided in s 60(2) may bear upon questions of eligibility (per s 59(1)(b) 'factors warranting' and s 59(1)(c) 'adequate provision'), this does not mean that the issues for determination under the two subsections are the same (at [113]). In doing so, his Honour affirmed the extra hurdle imposed by s 59(1)(b) and that the phrase 'factors warranting' must be given real work to do, given that it singles out classes of claimants (such as ex-spouses and grandchildren) who do not claim 'as of right' as spouses or children of the deceased, but must show there are 'factors warranting' their making of an application. This is because 'secondary' claimants such as former spouses, or grandchildren, are not normally regarded as 'natural objects of testamentary intention'. They must show a social, domestic or moral obligation (beyond a mere familial relationship) on the testator to have provided for them (at [113]–[114]). An example of such an ongoing obligation would be where a separated couple has not reached a financial settlement prior to the death of a party (at [129]). Another example was provided in the recent decision of *Spata v Tumino* [2018] NSWCA 17, in which a claimant established that his deceased stepmother had a moral obligation to provide for him given that she had inherited most of his father's estate, and she had repeatedly promised to 'look after him' in her will (at [94]–[104]).

The factors relevant to this threshold inquiry are distinct from those bearing upon whether the provision was adequate and whether further provision should be ordered (at [117]). The consequence of this bifurcated approach is that a claimant may succeed in proving there are 'factors warranting' their application, but otherwise fail in obtaining an order for family provision (at [119]).

The 'factors warranting' that were relied on by the judge in *Lodin v Lodin* were the 'ample size' of the estate and the claimant's financial need. However, as pointed out by White JA, such factors are irrelevant to determining whether she was a natural object of the deceased's testamentary recognition (at [13]). In holding that the primary judge should have rejected the application at that stage of determining s 59(1)(b), Sackville AJA pointed to the fact that the marriage only lasted 19 months, ended a quarter of a century ago, and that any residual moral obligation had been discharged by the financial settlement and the deceased's unfailing child support payments (at [162]–[164]).

Takeaway lesson

Where a claimant is eligible to apply for family provision only by reason of s 57(1)(d)–(f) (i.e., as an ex-spouse, grandchild or close personal relationship), the judicial discretion cannot be approached as a single evaluative inquiry, rolling up questions of eligibility and factors warranting. Rather, it is essential to separately consider whether the claimant is a natural object of the deceased's testamentary recognition; that is to separately determine whether there are factors warranting the application.

An application for special leave to appeal to the High Court has been filed but as at the time of writing has not yet been determined, so the saga may not be over yet!

Smoje v Forrester [2017] NSWCA 308

The need for rigour in deciding a claimant's eligibility was also emphasised in the successful appeal of *Smoje v Forrester* [2017] NSWCA 308, a case in which I represented the appellant (the defendant estate at first instance).

Primary judgment

In *Estate MPS, deceased* [2017] NSWSC 482 (the parties' names were later identified in the NSWCA decision), the judge awarded the claimant $550,000 from the deceased's $2.5 million estate on the basis that they were in a 'close personal relationship' (at [131], [138]). The parties had been in a very brief, experimental sexual relationship in the 1970s but then lost all contact until 2012, at which point the deceased was terminally ill (at [15]–[16]). The claimant, and the deceased renewed their friendship and for the next two years the plaintiff provided intermittent care to the increasingly unwell testator, while she moved between a series of hospital rooms and motel rooms until she died in squalid conditions and covered in bedsores (at [67], [76]).

Court of Appeal decision

The Court (per Meagher JA, Basten and Macfarlan JJA agreeing) overturned the primary judge's decision on the basis that his Honour had erred in accepting the plaintiff was eligible and that he and the deceased 'lived together' in a close personal relationship as defined in s 3 of the Act (at [1], [2], [43]). The unchallenged testimony of all witnesses at the primary trial established that it would have been impossible for another person to live in the cramped and cluttered motel room which the deceased occupied in the months prior to her death (at [35]). Even if the claimant could prove that he sometimes slept on the floor overnight, Meagher JA held that repeated visits for the single purpose of providing care did not amount to the shared activity that is expected of two people who occupy a common space (at [39], [42]) and who 'live together'.

Takeaway lesson

While Meagher JA acknowledged that 'living together' does not require the living occur all at a single abode or that the two adults spend all their time together (at [42]), it was clear that the factual matrix in this case did not meet the threshold for what we ordinarily understand to mean by 'sharing a household', which connotes some degree of common routine and lifestyle. The judgment illustrates that while there is scope in the legislation to recognise unconventional relationships, this is necessarily limited by the natural meaning of the statutory language.

In this case as well, an application for special leave to appeal to the High Court has been filed.

Sgro v Thompson [2017] NSWCA 326

Once eligibility is satisfied, the decision to order further

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provision from an estate must be made with regard to *all* relevant circumstances.

Primary judgment

The claimant sought further provision from her deceased mother's estate, the primary beneficiary of which was her sister, who inherited the family home worth $800,000 (*Thompson v Sgro* [2016] NSWSC 1869, at [10]). Although the claimant had been awarded an equal share in the residue of the estate, this amounted to nothing after debts and expenses were paid (at [39]). The only real property in the estate was gifted to her sister. However, the claimant had already been gifted a home by her parents some years earlier, which she had sold and dissipated its proceeds in poor financial investments (at [102], [118]).

After considering the claimant's dire financial circumstances, the primary judge found the provision made for her was inadequate and ordered that the claimant receive 40 per cent of the proceeds from sale of the property inherited by her sister (at [134], [138]).

Court of Appeal decision

The basis of the Court's (per White JA; McColl and Payne JJA agreeing) intervention was that the primary judge had erred in finding that the claimant's sister had no competing claim on the estate other than her contributions to the deceased in her declining years (*Sgro v Thompson* [2017] NSWCA 326, at [78]). Rather, it was common knowledge in the family that the defendant would receive the family home, given that the claimant had already received a property by way of early inheritance. White JA held that it was an error of principle for the judge to have disregarded the sister's equally valid claim (she chose not to disclose her own financial circumstances) to the estate simply because the claimant was financially worse off (at [92]).

It is important to understand the Court's exploration of the underlying legal error in the primary judge's discretionary decision. Without reaching a concluded view as to the applicability of a 'two stage' approach to family provision cases under the Act (cf the former legislative scheme discussed in *Singer v Berghouse* (1994) 181 CLR 201, 211, where Mason CJ, Deane andMcHugh JJ held that the first 'jurisdictional question' was one of fact as to whether the applicant had been left without adequate provision and the second was a discretionary decision as to further provision), White JA held that a risk of error arises where the first stage of the test leads a judge to focus exclusively on a claimant's financial need when determining whether provision was adequate. This is because the inquiry should be directed to whether adequate provision was made for the *proper* maintenance of the claimant, not the more simplistic enquiry whether all their material needs have been met (at [71]–[74]).

Consequently, the issue was not so much that a two-stage test was being revived, but that one factor was given primary significance over the others, and the notion of 'proper maintenance' provided for in s 59(1)(c) had not been given full and proper consideration. Further (and comfortingly!), White JA reaffirmed that the Court should accord respect to the testator's superior position in deciding what is proper for the maintenance of their relative, having regard to all of a family's circumstances and the merits of other people's claims (at [86]–[87]).

Takeaway lesson

Sgro affirms that in deciding the question of adequate provision under s 59(1)(c), 'proper maintenance' must not be equated with 'financial need', such that poor, but less-deserving claimants are automatically entitled to further provision. Rather, the inquiry requires an evaluative judgment of *all* the relevant circumstances such as family history including prior generosity, as well as financial need at the time of the trial.

Concluding thoughts

These decisions demonstrate the Court of Appeal's insistence on a more disciplined approach to what is often considered the unbounded discretion of a judge to order further provision from a deceased estate. It is important to remember that certain factual considerations must be confined to their relevant inquiry within the legislative scheme. **LSJ**