Where there's a Will there's Still a Way: The Impact of Family Provision Claims on Even the Best Laid Succession Plans

Michelle Painter SC
Nine Wentworth Chambers

Learned Friends Professional Education Conference
Hong Kong
12 April 2017

1. In his satirical play titled *Woman of No Importance,* Oscar Wilde wrote that:

> "Children begin by loving their parents. After a time they judge them. Rarely, if ever, do they forgive them."[1]

2. Oscar Wilde could easily have been writing from the audience of the Sydney Supreme Court rather than rainy Ireland, watching a claim for family provision by an adult child who has definitely not forgiven their parent for depriving them of what they perceive as their rightful inheritance.

3. Parents are under no legal obligation to provide for their ablebodied adult children after their death. However, the operation of family provision legislation in NSW means that even the most well-prepared wills, formulated with a clear intention and capable mind, are amenable to extensive review and adjustment if the court believes a claimant has not received adequate provision. Today I'm going to discuss the tension between the court's willingness to substantially rewrite wills, and their ongoing lip-service to 'testamentary freedom'.

4. With this in mind, I would like to start by repeating a comment by Justice Pembroke in *Revell v Revell*, a case heard in 2016 which considered a privileged son's claim for further provision in his father's already generous will:

> [c]ourts do not rewrite the will of a deceased person simply because it appears to be unfair, unequal or unwise. Fairness and equality are not touchstones for relief under the Succession Act. Within the limits of the law, a testator may dispose of his estate as he sees fit. Adult children have no automatic right to a share in the estate of a parent…freedom of testamentary disposition…is an integral part of our law.[2]

[1] Oscar Wilde, 'Woman of No Importance' in *Complete Works of Oscar Wilde* (Wyman-Fogg Company, 1923) act II, 249.
[2] *Revell v Revell* [2016] NSWSC 947, [5].

5. Now, let's contrast this with the *raison d'être* of family provision applications, explained by Justice Hallen in another case heard late last year:

> the sole questions for the Court to determine are whether the Plaintiff has been left with inadequate provision for her proper maintenance, education and advancement in life and, if so, what, if any, further provision *ought to be made out of the estate* of the deceased for those purposes. It is this mandatory legislative imperative that drives the ultimate result, and it is only if the Court is satisfied of the inadequacy of provision that consideration is given to whether to make a family provision order.[3]

6. You would be forgiven for thinking that these two positions are incompatible as legal principles. And in many ways you would be correct. Justice Pembroke's articulation of testamentary freedom, although – of course – technically correct, is in practice no more than wishful thinking. While he correctly points out the nominal right of a testator to write out an ungrateful adult child from his or her will, this must be balanced against Justice Hallen's acknowledgement that the court's primary concern is not to enliven the intention of the testator, but to redress the inadequacy of the deceased's provision when considering the claimant's financial position. In this way, it is clear that the freedom of testamentary disposition is far from absolute and frequently yields to the 'natural obligations' a deceased is said to owe to family members.

Background and legislative scheme

7. It is essential to recognise how the operation of Australian's succession law is a product of our common law inheritance and colonial origins. In civil law countries, there is no such thing as testamentary freedom: so in most European countries as well as Japan, Scotland and South Africa, a deceased estate will be compulsorily divided among family members.[4] Even early medieval estates in England were automatically divided among living wife, child and the church, and the notion that individuals were free to devise their inheritance was only introduced in 1837 by operation of the *Wills Act*.[5]

8. However, the erosion of this legal principle began with New Zealand's *Family Maintenance Act* in 1900, which has been essentially retained in NSW by operation of Chapter 3 of the *Succession Act 2006* (NSW).

9. I turn to the technical requirements governing an application for provision. First, an application must be made within 12 months from the date of death unless there is sufficient cause for delay. Secondly, a claimant must satisfy a

---

[3] *Petkovic v Koutalianos* [2016] NSWSC 1817, [50]–[51] (emphasis added).
[4] Myles McGregor-Lowndes and Frances M Hannah, 'Every Player Wins a Prize? Family Provision Applications and Bequests to Charity' *The Australian Centre for Philanthropy and Nonprofit Studies* (Brisbane, 2008), 8.
[5] Joseph Dainow, Limitations on Testamentary Freedom in England (1940) 25 *Cornell Law Review* 337, 340.

threshold requirement. In order to do so, they must fit within one of six categories of an eligible person:

i. A husband or wife of the deceased;
ii. A person in a de facto relationship with the deceased;
iii. A child of the deceased (whether natural or adopted)

These three categories above are eligible by right.[6]

10. The scheme also recognises three further categories, which require leave of the court to make an application:

i. A former wife or husband of the deceased
ii. A person who was a dependent of the deceased and who was a grandchild or member of the deceased's household; and
iii. A person with whom the deceased was living in a close personal relationship at the time of death.[7]

11. In the next stage of assessment, courts traditionally undertook a two-stage inquiry as to whether adequate provision had been made, and then deciding what provision ought to have been made.[8] However, the more recent approach is to undertake a general evaluative assessment of these two questions for the purpose of section 59 by reference to the factors listed in section 60: those factors include the nature and extent of obligations and responsibilities owed by the deceased person to the applicant and the financial resources of the applicant.[9] Although section 60 does not explicitly provide for disentitling conduct, courts have inferred that a consideration of the claimant's character and conduct toward the deceased is relevant to the consideration of what is 'adequate and proper' in all the circumstances.[10]

The tension between disentitling conduct and testamentary freedom

12. Case law in recent years indicates that even where estrangement has occurred between the deceased and the claimant, this is not enough of itself to disentitle an application for further provision in a will. While disentitlement previously had to reach a high standard where for example, a claimant had acted 'callously, by withholding…their support and love in [the deceased's] declining years',[11] more recent cases have refused to order provision where both parties contributed to the estrangement.[12]

---

[6] *Succession Act 2006* (NSW) s 57.
[7] *Succession Act 2006* (NSW) s 56.
[8] *Singer v Berghouse* (1994) 181 CLR 201, 208–9.
[9] *Succession Act 2006* (NSW) ss 60(b), (d).
[10] *Hinderry v Hinderry* [2016] NSWSC 780, [120]–[121] (Hallen J).
[11] *Ford v Simes* [2009] NSWCA 351 [71] (Bergin CJ in Eq).
[12] Michelle Painter SC, Babylon Revisited: Equity, the Succession Act and Family Provision in New South Wales, [15].

13. However, the outcome of cases decided in 2016 and early 2017 in the Supreme Court suggest that the bar has been set very high before a court will determine that a misbehaving family member is disentitled from provision from a parent's estate. The following cases tell a cautionary tale.

14. First, to *Hinderry v Hinderry,*[13] where the claimant really didn't give Justice Hallen much of a choice. Michael was the adopted son of Wahib and Samera Hinderry, who died aged 89. Michael was only told that he was adopted in his late 20s, causing an identity crisis which he dealt with by turning to drugs, alcohol and other forms of anti-social behaviour.[14] He had a sorry history of violence toward his family members, and in particular toward his mother.

15. But it seems even an adopted mother's love is unconditional, as she left two of her properties to him, which constituted about 44% of the $1.7 million estate. Not satisfied, he applied for further provision in the belief that his mother had intended him to inherit her whole estate, and accused his cousins of having manipulated her into changing the will.[15] In his own words, his claim for provision constituted somewhat of a 'wish list': including a claim for purchase of a three-bedroom property in Newtown, Woolloomooloo or Darlinghurst in the order of $1.5-$2million.[16] This was a tall order for a man living in a boarding house and surviving on a Centrelink allowance after a failed music career (although there was no evidence of any effort on his part to pursue this career beyond childhood guitar lessons funded by his mother).[17] His legal counsel wisely modified the claim at trial to a more modest claim for a legacy of cash out of the estate.

16. The claim was resisted by the other beneficiaries (his cousins) on account of Michael's proven misconduct towards his mother. The court refrained from delving into all the sordid details, but referred to Michael's 'continual abuse and harassment' towards his mother.[18] Evidence was given by cousins of the family that Michael called his mother a 'whore' and threatened to kill her. On one occasion his cousins had witnessed him kick her full in the face. She would give him money in order to stop the threats and 'keep the peace'.

17. The deceased confided in her family that she was afraid of her son and feared him coming to the home whenever he was under the influence of drugs or alcohol.[19] This eventually pushed her to the point of taking out an AVO against him.[20] Yet even the AVO did not stop him from breaking into the

[13] [2016] NSWSC 780.
[14] Ibid [142]–[143].
[15] Ibid [27].
[16] Ibid [56].
[17] Ibid [196].
[18] Ibid [146].
[19] Ibid.
[20] Ibid [149]–[150].

house in the night and stealing his parent's property.[21] Consequently, Michael had a substantial criminal record.[22]

18. Unsurprisingly, Justice Hallen held that the family relationship between Michael and his mother was the key factor in the assessment of his claim, by reference to s 61(2)(a) of the *Succession Act 2006* (NSW). While noting that an order should not be withheld as punishment for bad conduct by the applicant, it is relevant to the moral assessment of whether provision 'ought' to be made.[23] Although Michel was assessed as displaying symptoms of manic depression and psychosis, his Honour held that this could not explain the extent of Michael's mistreatment, especially when his mother had only offered him love and support as her adopted son.

19. We can fairly characterise this case as an uncontentious example of conduct that is so egregious that on no view could the claimant be entitled to further provision. Criminal conduct, abuse and financial manipulation are intuitive bright-line boundaries of disentitling conduct.

Lessons from Hinderry

20. Justice Hallen quite rightly noted that there was little room in *Hinderry* for the view that community expectations would require the making of *additional* provision for Michael out of the deceased estate.[24]

21. I'd like to observe here that the fact Mrs Hinderry made *some* provision for Michael in her will was likely an important reason his claim was denied. As Justice Hallen's point illustrates, judges will often draw the line at awarding *extra* provision where the testator has put aside their grievances and devised some interest in the will for their relative. As we will see later, where the testator simply excludes a family member or fails to provide for them in a will, a court will be more likely to make an award. I'd wager that many people would prefer to choose the amount an undeserving relative will receive, rather than risking a court making an award for much larger provision.

Successful claims for further provision

22. This point will become clearer as we discuss the next two cases. In both the *Estate of May Berry*[25] and *Sellak v Sellak*,[26] parents arbitrarily divided their estates among their children. This opened their estates up to litigation by other beneficiaries who argued that the divisions did not account for their legitimate financial or emotional claims, especially on account of estrangement and alleged disentitlement.

---

[21] Ibid [161].
[22] Ibid [147].
[23] Ibid [305].
[24] Ibid.
[25] [2016] NSWSC 130.
[26] [2016] NSWSC 396.

23. The *Estate of May Berry* concerned two sisters' claims on their mothers estate after they had been estranged from their siblings and parents for many years. They had grown up in a very traditional household that revolved around the family business. The nine children were expected to contribute to the business, and as was the case in those days, the boys were sent off to work while the girls were expected to maintain the household.[27] The discipline and confined roles of this household led to fractured personal relationships from the perspective of these two sisters, which one of them claimed contributed to a mental breakdown later in life.[28]

24. This was worsened considerably after the women commenced litigious proceedings to enable them to be paid out of the family business. Both received a capital sum of around $300,00 and remained estranged from the family. Despite this, their mother' estate was to be divided into nine equal shares upon her death.

25. Both women sought further provision from the estate in order to improve their financial disadvantage that had flowed from their familial disassociation. A key factor in the award was that the sisters were not well-off, as one was living in public housing. They successfully modified the equal apportionment of the mother's will so that they got a greater share than their estranged siblings, and received an extra $300,000.

26. Although it was not explicitly characterised as disentitling conduct, their brother resisted the claim on the basis that their mother's moral and financial obligations for provision had been discharged by his sisters' 'socially disastrous' civil litigation.[29] The underlying implication of the court's analysis was that the sisters had brought about their own financial demise by subjecting the family to litigation and ungratefully extricating themselves from the family business. I struggle with the implication that the women were regarded as thankless because they sought to escape a hierarchical family business in which the women could never aspire to the higher levels of management or financial influence, yet had to content themselves to be dutiful housewives. While acknowledging that the women were successful in their provision claim, it is clear by the judge's 'intermittent hesitation' that they were regraded very suspiciously in their attempts to break free of the family.

27. In any case, this claim could probably have been avoided if Mrs Berry had adjusted the division of the estate to make allowances for the individual circumstances of her children, and explained why. Otherwise, claimants can challenge the testamentary intentions of the will by evidence of their overlooked financial hardship.

---

[27] *Estate of May Berry* [2016] NSWSC 130, [28].
[28] Ibid [28], [31].
[29] Ibid [48].

28. A similar situation arose in *Sellak v Sellak.* When Corrado Sellak died, he left his properties, cars and bank accounts to his beloved daughter, Tracey. The residue of the estate (a much lesser value) was to be divided among his sons and grandchildren in equal shares. The sons brought a claim against the estate for further provision, and in the process revealed some family secrets.

29. By the sons' account, Corrado, a single dad, raised his three children with love underscored by 'fear and respect'.[30] He was a strict disciplinarian and the children knew that if they failed to comply with his instructions, they could expect to be punished.[31] This attitude perhaps explains why Corrado would later punish his sons with a measly allowance from the will after their misbehaviour as adults.

30. The details of the family estrangement were displayed for the court in all their salacious detail. The elder son, Scott, had married his high school sweetheart Donna and moved out when he was 17. However, he proved to be an abusive husband, with Donna being forced to take out an AVO against him.

31. Donna sought comfort in the arms of her husband's younger brother, Bradley, and an incredible amount of time was spent in court ascertaining whether their relationship had started before or after the marriage separation.[32]

32. Scott could hardly bear such emasculation and shame, and withdrew from the family (except for checking in occasionally to threaten Donna and call her a 'slut').[33] It seems that Corrado was also very ashamed of his son Bradley, who was by now married to Donna. These simmering tensions hit boiling point when their cherished grandparents died, and Bradley visited the home to retrieve his possessions. Corrado found him there and accused him of stealing his mother's engagement ring and his own chainsaw. The most hurtful moment according to Bradley, was his father calling him a 'grub'.[34]

33. Corrado and his daughter Tracey ceased all contact with Bradley, while Scott was extended sympathy (despite his proven violence and threatening conduct) and allowed to live in the family home rent-free. Despite this, Scott claimed that the estrangement between Bradley and his brother should have resulted in differential treatment in the will.

34. In assessing the claim, Slattery J noted that any award he would make would be discounted on account of Bradley's estrangement. He found that Corrado's views against his son were not blameless, on account of the affair between him and Donna. The court at this point entered a very prurient and, in my opinion, inappropriate discussion of whether Donna was legitimate in responding to her first husband's violence by 'turning elsewhere for

[30] [2016] NSWSC 396, [12].
[31] Ibid.
[32] Ibid [29].
[33] Ibid [31].
[34] Ibid [39].

comfort'.[35] The judge concluded that, while it was understandable she left Scott, she turned for comfort to someone 'far too close'. [36] The characterisation of Donna as the hopelessly needy woman (and even as a passive object) is a regrettable aspect of this judgment.

35. In any case, the court relied on her affair to conclude that Corrado and Bradley were equally liable for the estrangement. Yet, in the absence of explanation, the court was unable to understand why Corrado had treated his sons equally in the will. Consonant with my earlier point about the illusion of testamentary freedom, the judge held that 'it is not ultimately necessary to resolve the issue of what the deceased thought' because he could infer now for himself that Corrado was silently punishing Scott for his violence, and Bradley for his infidelity.[37] With regard to their poor financial situations, the judge awarded both brothers $340,000. So we can see that although successful, neither man was ultimately vindicated by getting a greater share than his brother.

36. Perhaps if Corrado had made differential division among his sons in the will, and given reasons for doing so, the judge may have been less likely to intervene in the division of the estate. Rather, the inexplicable equal division between the brothers meant that the court was forced to infer for itself the familial factors that should inform a readjustment of the will.

Lodin v Lodin

37. But this award pales in comparison to the provision that was made in January this year for an estranged wife who had threatened to make her husband's life hell, and did everything in her power to keep this promise even after his death. In *Lodin v Lodin,*[38] Dr Mohammed Lodin's intestate estate of $5 million went directly to his daughter upon his death. However, her inheritance was reduced by her mother's provision claim, who was awarded an astounding $750,000 from the estate of her long estranged ex-husband (whom she had divorced some 25 years previously).

38. Magdalena first met Dr Lodin while he was her general practitioner, and she a married mother. Their interactions moved from the doctor's office to social squash playing, and eventually into a sexual relationship. When Magdalena became pregnant, they married and moved in together. Marital bliss was short-lived and the marriage fell apart after only 18 months.

39. Despite a favourable property settlement in the Family Court, Magdalena threatened to destroy her ex-husbands life if he did not give her more cash. In executing this promise, she informed the NSW Health Department of their doctor-patient relationship, which resulted in a finding of unsatisfactory

[35] Ibid [109].
[36] Ibid [110].
[37] Ibid [126].
[38] [2017] NSWSC 10.

professional conduct on Dr Lodin's part and saw him undertake compulsory ethics training. She then tried to make an application out of time to sue him for breach of professional duty. Next, she falsely told police that Dr Lodin possessed firearms and was going to kidnap their daughter, who she also claimed he had sexually abused. This resulted in him being arrested at the hospital where he worked, an incident he described as 'the most embarrassing moment in his life'.[39]

40. Whatever his relations with his ex-wife, Dr Lodin was punctilious in his child support payments and paid for their daughter to attend a prestigious private school. Although he had not indicated any intention of refusing to do so, Magdalena threatened that if Dr Lodin did not pay their daughters university fees, she would make what was left of his wretched life (at the time he was undergoing chemotherapy) not worth living, and that he would 'feel the wrath of Allah'. She later wrote a follow-up letter retracting the part about Allah. One daughter described her as 'toxic', and she is estranged from the other. In short, Magdalena carried into effect as best she could her stated aim of making his life a misery.[40]

41. With these circumstances in mind, it is difficult to see how she could be successful in getting anything further from her ex-husband. Justice Brereton quite reasonably dismissed Magdalena's argument that the testamentary obligation should be considered an atonement for their unprofessional sexual relationship. Even if this was a legitimate factor, his Honour found that Dr Lodin had sufficiently atoned for this conduct through the Department of Health investigation and the numerous criminal allegations she sought to make against him.

42. Nonetheless, Justice Brereton went on to cite numerous cases of longstanding marriages where an ex-wife finds herself in the 'predicament of insufficient financial resources'[41], and held that the moral obligations arising out of the Lodin marriage had not been discharged by the matrimonial financial settlement.[42] He found that the factors lending towards a 'clean break' of his moral and financial obligations towards her were outweighed by other, more important factors.

43. The most important of these was the fact (attested to by psychiatric evidence) that the marriage breakdown had an 'unusually enduring impact' on Magdalena, due to the exploitation and betrayal she suffered by a person in a fiduciary relationship (as her doctor).[43] Further, his Honour attributed Dr Lodin's ability to accumulate his wealth and assets to his ability to work 'untrammelled' by responsibility for a wife and child.[44] Finally, he found that

[39] Ibid [13]–[16].
[40] Ibid [79].
[41] See *Dijkhuijs v Barclay* [1993] NSWCA 137.
[42] Ibid [53].
[43] Ibid [81].
[44] Ibid [86].

there was something 'unbecoming about an estrangement under which the plaintiff is left in circumstances of considerable need' while the daughter whom she raised inherits in excess of $5 million. This is perhaps the most troubling aspect of this case. What is the criteria for 'unbecoming', and is this a factor which ought to inform the court's consideration? Why is it unbecoming that a child inherits her father's estate? Given the passage of time since their divorce, why was it unbecoming that Dr Lodin bequeathed his estate to his only child?

44. In light of the relative paucity of the matrimonial estate at the time of their property settlement and her indirect contribution to Dr Lodin's estate for the purpose of s 60(2)(h), it was held that Magdalena was entitled to $750,000 out of the estate.

45. I am cautious to criticise the discretionary decision of a judge who heard all the evidence and had the opportunity to observe the witnesses in court, particularly where Justice Brereton himself acknowledged that it was not an easy case, and one in which 'judicial minds may differ'.[45] In saying this, it is surprising to me that Magdalena's relentless hostility, active career sabotage and false criminal allegations were not enough to disentitle her from a claim on her ex-husband's estate.

What we can learn

46. Perhaps the most important lesson to take away from *Lodin* is to prepare a succession plan! Dr Lodin's solicitors had actually prepared a will expressly excluding Magdalena when he was first diagnosed with cancer in the 1990s. However, he failed to formally execute it – a decision I'm sure he would now regret.

47. Secondly, both *Berry* and *Sellak* illustrate the importance of the testator explaining their reasons for devising their estate to certain children or relatives. Although testamentary freedom is illusory, courts will hesitate before overriding a well-thought out provision. In support of this argument, I refer to Justice White's comments in *Slack v Rogan; Palffy v Rogan*:

> Plainly…courts have a duty to interfere with the will if the provision made for an eligible applicant is less than adequate for his or her proper maintenance and advancement in life. But it must be acknowledged that the evidence that can be presented after the testator's death is necessarily inadequate… The deceased will have been in a better position to determine what provision for a claimant's maintenance and advancement in life is proper than will be a court called on to determine that question months or years after the deceased's death when the person best able to give evidence on that question is no longer alive.[46]

[45] Ibid [79].
[46] (2013) 85 NSLWR 253, [17].

48. Thirdly, and perhaps controversially, it may be more worthwhile as a testator to grit your teeth and provide for an undeserving relative in your will rather than exclude them entirely. Despite being horribly mistreated by him, Mrs Hinderry's award to her adopted son was seen as more than generous by the court, such that they declined to make further provision for him. Although the idea may be unpalatable, it may be better to decide such an award yourself and to thereby mitigate the risk that the court will go above and beyond your grudging allowance.

49. This is especially pertinent when we consider that the standard for disentitling conduct in family provision claims has been placed very high. While Michael was barred from further provision in *Hinderry,* his egregious conduct seems unreasonable as a base-line standard for disentitling conduct. Moreover, judges are increasingly prepared to enforce enduring of moral obligations from prior relationships, and this obligation is more likely to be enforced where the claimant can prove their own financial hardship.

50. The best defence against family provision claims on a will is therefore to make your intentions as clear as possible, even if this means revealing salacious family secrets, or swallowing your pride to provide for an ungrateful child!

Michelle Painter SC
Nine Selborne Chambers