

All in the Family: Equity, the Succession Act and Family Provision

Michelle Painter SC

Learned Friends Conference, Galle, Sri Lanka

8 January 2015

1. Tolstoy wrote in *Anna Karenina* “Happy families are all alike; every unhappy family is unhappy in its own way.” He could equally have been writing, with uncanny powers of foresight, about the Family Provision List in the Equity Division of the New South Wales Supreme Court.
2. The Equity Division is where almost all family provision applications in NSW are brought. They come to the Equity Division by way of Chapter 3 of the *Succession Act 2005*.
3. Family provision applications seem to be booming. The demise of the personal injuries field seems to have driven solicitors whose business model is based on speculative fee agreements to harvest what is perceived as the “easy money” of family provision claims. One good aspect of this is that claimants who could never afford to bring a claim can now do so.
4. However, a troubling aspect seems – anecdotally at least – to mean that we have seen a boom in claims on small estates and with limited or no prospects. The practice of the courts with regards to costs, and what is perceived to be the historical generosity of the courts to grant provision (and to be slow to make an adverse costs order) has combined to result in a jurisdiction vulnerable to speculative poor quality claims brought with little regard for prospects but a high regard for fee harvesting. Examples of cases abound where serious and [admitted] ongoing drug addiction, gambling history, significant earlier provision which was burned through and vicious conduct toward an elderly parent were not considered sufficient to disentitle the claimant from the bounty of the estate of the deceased, all in circumstances where the deceased had deliberately excluded (or limited) the claimant from his or her testamentary intentions.

5. The jurisdiction is a generous one. Or is it? Has there been a signaling from the NSW Supreme Court that the generosity of previous years is under review and may be tightening? A few cases decided during 2014 would suggest so.

History

6. First, a little background.
7. The rules governing testamentary disposition are based on the cherished proposition that a testator is entitled to dispose of his or her property entirely as he or she thinks fit. Unlike civil law regimes, there are no laws requiring a spouse to make provision for the survivor, nor for a parent to make provision for a child, no matter the child's age. That position – of complete testamentary freedom – arises from the complex laws which we in Australia inherited from our colonial overlords.
8. Inheritance law's historical origins through English law to Roman Canon law meant that the succession of property on death was administered in a division of the English High Court containing the only other areas of law with Roman Canon origins- resulting in a curious division called Probate, Divorce and Admiralty.¹ Australian law did not bother with ecclesiastic courts – so the Supreme Courts had jurisdiction over this area.
9. The erosion of the principle of complete testamentary freedom was cemented by the 21st century's introduction of family provision law, beginning in New Zealand in 1900.
10. With the introduction of legislation permitting courts to redistribute a deceased's estate under family provision laws, the charade of the promise of testamentary freedom was exposed. A testator still had nominal freedom of disposition, but the expectations of a testator in relation to his or her obligations were being made very plain by the courts administering the legislation. A testator might not have a legal requirement to provide for her

¹ Alun Preece *The Impact of the Law of Inheritance on the Family* (a paper delivered at the 7th Australian Institute of Family Studies Conference, Sydney Convention and Exhibition Centre, 24-26 July 2000), 1.

spouse, but if she didn't, she could expect to have her will (as well as her character) scrutinised and very likely rewritten by the court.

Family Provision Jurisdictions

11. There are several distinct family provision schemes across Australia. They are:
 - (a) In New South Wales under Chapter 3 of the *Succession Act 2006* (NSW);
 - (b) In Victoria under s 91 of the *Administration and Probate Act 1951* (Vic);
 - (c) In South Australia under s 7 of the *Inheritance (Family Provision) Act (SA) 1972*;
 - (d) In Queensland under s 41 of the *Succession Act 1981* (Qld);
 - (e) In Tasmania under s 3 of the *Testator's Family Maintenance Act 1912* (Tas); and
 - (f) In Western Australia family provision is governed by s 6 of the *Inheritance (Family and Dependents Provision) Act 1972* (WA).

12. There is also territorial legislation: the *Family Provision Act 1970* (NT) of the Northern Territory and the *Family Provision Act 1969* (ACT) of the Australian Capital Territory.

13. Internationally, New Zealand (the first to make such laws), Canada, and the UK also have family provision legislation. India and Ireland have laws allowing partial provision.²

The Structure of the NSW Act

14. In New South Wales Chapter 3 of the *Succession Act* applies to applications for provision. This follows the repeal of the *Family Provision Act 1982* (NSW) on 1 March 2009. The relevant part of the *Succession Act* was based on the earlier FPA, and caselaw decided under the earlier Act remains relevant to a very significant degree.

² McGregor-Lowndes, Myles and Hannah, Frances M 'Every Player Wins a Prize? Family provision applications and bequests to charity' *The Australian Centre for Philanthropy and Nonprofit Studies* (Brisbane, 2008) 23.

15. An application must be brought within 12 months of the date of death, unless sufficient cause is shown to satisfy the court that an application may be brought outside of time.³
16. An “eligible person” (defined in s 57) may make an application. There are six categories of relationship with the deceased that make a person eligible. An eligible person can be:
 - (a) A husband or wife of the deceased;
 - (b) A person in a defacto relationship with the deceased;
 - (c) A child of the deceased (including natural and adopted children);
 - (d) A former wife or husband of the deceased;
 - (e) A person who was a dependant of the deceased **and** who was a grandchild **or** a member of the deceased’s household; and
 - (f) A person with whom the deceased was living in a close personal relationship at the time of death.
17. There is no discretion to expand the nature of eligibility. Importantly, family members who are not eligible include brothers and sisters and parents.
18. Courts have traditionally applied a two-stage process to family provision applications by eligible applications. This was laid down by the High Court in *Singer v Berghouse*.⁴ The first step is usually called the ‘jurisdictional question’, “Has the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life?”⁵ If this question is answered in the affirmative the court moves to the second stage: “What provision ought be made out of the estate of the deceased in favour of the applicant?”
19. The reforms introduced by the Succession Act has meant a review of the application of the test in *Singer v Berghouse*. *Andrews v Andrews* began a move away from the two-step process over the last 2 years in the New South

³ *Succession Act 2006* (NSW) s 58.

⁴ (1994) 181 CLR 201.

⁵ *Singer v Berghouse* (1994) 181 CLR 201, 208 (Mason CJ, Deane and McHugh JJ).

Wales Supreme Court, which is yet to be resolved.⁶ The clear suggestion is, however, that the test is similar, but not identical.

20. I now turn to examine the tension that has formed over the past couple of years between the perception that all applications under the *Succession Act 2006* (NSW) are likely to succeed, at least to some degree, and an increasing reluctance of courts to abide by the 'every player gets a prize' attitude.

The year in conceptual review – some trends

A trend of increasing numbers of family provision applications

21. The first trend manifests in the apparent increase in family provision applications. There are four underlying reasons for this increase in litigation. First, the notion of family has undergone significant change in Australia. Australians are more likely to divorce and to marry again. De facto relationships increasingly stand alongside traditional marriages. Second, there has been a value system shift, which has normalized and legitimized beneficiaries contesting a will. Third, and symbiotically there has been an increase in plaintiff law firms focused on family provision applications. Fourth, growing levels of wealth (especially the value of the family home) in Australia has resulted in larger estates.⁷

A trend towards greater acceptance of de facto and other relationships

22. The second trend ties in with the social shift towards accepting de facto relationships in Australia. This has been accompanied by nationwide legislative recognition of these relationships. Alternatively, relationships that have not been legally cemented may be recognized under the *Succession Act 2006* (NSW) through the categories of a 'close personal relationship' under s 57 (1)(f) and dependency under 57 (1)(e)(i) of the Act. These alternative pathways were demonstrated in *Amprimo v Wynn*, a case from July this year in which Ms Amprimo, who had first met the deceased when he frequented the establishment at which she was a prostitute, applied for a family provision

⁶ [2012] NSWCA 308 [26] (Basten JA).

⁷ McGregor-Lowndes, Myles and Hannah, Frances M 'Every Player Wins a Prize? Family provision applications and bequests to charity' *The Australian Centre for Philanthropy and Nonprofit Studies* (Brisbane, 2008) 6.

order out of his estate.⁸ Ms Amprimo and the deceased had a long and complex relationship over many years. The deceased had provided Ms Amprimo with an apartment for some but not all of the relevant period, and had paid her significant sums of money. They had lived together for some of the time although it was claimed that during that period they did not have a sexual relationship. Ms Amprimo continued to work as a sex worker from time to time, and this was known by the deceased. The court accepted that a de facto relationship might exist with a person whose occupation was that of a prostitute. (This seems obvious; it cannot be controversial that a sex worker is entitled to a “private life”.)

23. However, the nature of Ms Amprimo’s occupation was a factor to be taken into account by the court in determining whether the de facto relationship existed.⁹ In this case the plaintiff failed to establish any of the grounds advanced for a family provision order. The case is an interesting demonstration of the broad acceptance given to de facto relationships- and the reality that the nature of these relationships often makes proving them very difficult. For example, a factor which was considered to militate against a finding that there was a de facto relationship was that the plaintiff continued to work as a prostitute at various times.¹⁰ (Had Ms Amprimo been a lawyer I doubt the fact that she continued to earn a livelihood would have troubled the trial judge.) Counsel for the plaintiff said in submissions that the fact that the plaintiff was a prostitute did not concern the deceased and it ought not have concerned the Court.¹¹

A trend toward less generous awards?

24. Although it has long been accepted that certain disentitling conduct – such as adultery, violence and estrangement – cases in which an application was refused on those grounds are rare. As touched on earlier, the general perception is that most applicants for provision succeed, and that courts are reluctant to refuse relief and expose the plaintiff to a costs order.
25. As recently as *Andrews v Andrews* in 2012, although there had been a lengthy

⁸ *Amprimo v Wynn* [2014] NSWSC 991 (24 July 2014) [17].

⁹ *Amprimo v Wynn* [2014] NSWSC 991 at [40].

¹⁰ *Amprimo v Wynn* [2014] NSWSC 991 at [47].

¹¹ *Amprimo v Wynn* [2014] NSWSC 991 at [40].

and bitter period of estrangement which was not resolved at the time of death and the testator had set out her reasons for disinheriting her daughter in a letter,¹² and even though the mother's position was characterized as "entirely understandable and might have been shared by many parents", the Court of Appeal awarded the estranged plaintiff 5 times the amount left to her.

26. *Andrews* may be contrasted with the 2014 case of *Burke v Burke*. In that case the deceased also wrote a letter setting out her reasons for disinheriting her son. It was a short letter – nine paragraphs in total. The last lines of the testator's letter capture much of the sentiment behind the family provision debate:

In closing; I trust that if you are being petitioned to alter the wishes set down in my last will and testament, that you will take this statement into account when making a decision.

It is quite distressing to think that my wishes would not be honoured.

27. The court rejected the argument that *Andrews* had changed the law so that only the most egregious conduct by a child would deny the child provision.¹³ Rather, it was found that the majority in *Andrews* had merely rejected the notion that courts should *begin* with the principle that a testator is free to provide nothing.¹⁴ The Court of Appeal held that the court should accept that in *certain circumstances* testators are entitled to make no provision for their children, and that *Ford v Simes* remains good law. In that case, Bergin J (CJ Eq) held that there was no prima facie obligation to provide for children:

This is particularly so in respect of children who treat their parents callously, by withholding without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility.¹⁵

28. Rein J held that the deceased was entitled to regard the plaintiff as a person underserving of any benefit from her estate –the deceased's view that her son

¹² [2012] NSWSC 308 [57].

¹³ *Burke v Burke* [2014] NSWSC 1015 (25 July 2014) [35].

¹⁴ *Burke v Burke* [2014] NSWSC 1015 at [41].

¹⁵ *Ford v Simes* [2009] NSWCA 351[71] (Bergin CJ in Eq Tobias JA and Handley AJA agreeing).

wanted nothing more to do with their family was made out.¹⁶

29. *Burke* is not a standalone case. Three days earlier Black J handed down his decision in *M Raiola and I Raiola In Andreatta v M Raiola* in which family provision orders were denied to the 54 year old son of the deceased and the 61 year old daughter of the deceased.¹⁷ Estrangement (and inadequate evidence) loomed large amongst the factors for dismissal in that case. See too Hallen J's recent detailed analysis of cases concerning estrangement in *Underwood v Gaudron* [2014] NSWSC 1055.
30. An emerging strict interpretation of prevailing community standards and expectations is apparent in the *Wilcox* cases: *Wilcox v Wilcox* [2012] NSWSC 1138; *Wilcox v Wilcox (No 2)* [2014] NSWSC 88; and *Chapple v Wilcox* [2014] NSWCA 392. At first instance, Pembroke J began his judgment with words which must have sent a chill down the spine of the plaintiff's counsel:

This is a sorry case brought by two adult grandsons seeking orders the provision be made for them out of their grandfather's estate.

31. The plaintiff, Robert Wilcox, a 46 year old single man, was described as having a "highly developed and unhealthy sense of entitlement" in his grandfather's pastoral properties. Encouraged and financially supported by his grandfather he boarded at The King's School. From 1993 he had no real connection with the pastoral enterprise of his grandfather.¹⁸ His case was conducted on the basis that an award of land was the only acceptable outcome and a monetary award was rejected on emphatic terms. Although the case has attracted attention because of the stringent way in which Pembroke J dealt with the plaintiff's sense of entitlement, it is also illustrative of court's reluctance to grant a family provision claim where an order for provision would require the division of pastoral holdings. This is especially the case when a pastoral business is 'borderline viable', and beset, as Australian farming often is, by drought and unpredictability.¹⁹

¹⁶ *Burke v Burke* [2014] NSWSC 1015 at [57].

¹⁷ *M Raiola and I Raiola In Andreatta v M Raiola* [2014] NSWSC 967 (22 July 2014) [51].

¹⁸ *Chapple v Wilcox* [2014] NSWCA 392 (18 November 2014) [82].

¹⁹ *Chapple v Wilcox* [2014] NSWCA 392 at [95].

32. At first instance, even taking into account the character and failings of the plaintiff, the trial judge found that despite the respondent choosing to make a subsistence living operating a tree lopping business rather than using his training and skills, and having had limited contact with his mother (the respondent) and his grandfather (the deceased) a provision of \$387,000 in installments was appropriate.²⁰
33. The case was appealed and judgment handed down on 18 November 2014. On appeal Basten, Barrett and Gleeson JJA unanimously rejected Robert Wilcox's application for provision. In doing so the court reiterated the general rule that grandparents do not have a responsibility for make provision for grandchildren.²¹ This is a principle that operates with respect to s 59(1)(c) of the Act.²²

Conclusion

34. In the first of the *Wilcox* cases (2012), Pembroke J dealt with a common misconception in these sorts of cases (at [16]):

There is sometimes a misconception by claimants in family provision cases that the court's role is to achieve 'an overall fair' disposition of the deceased's estate. This is wrong and muddled.

35. On of the most difficult tasks for a barrister in any litigation is to convince the client to view his or her case in an objective way. This proves impossible for most litigants. It is especially difficult in family provision cases, given the overlay of family resentments and the emotional responses which are provoked.
36. Most cases for provision achieve some level of provision for the claimant. Claimants are even more likely to succeed when one factors in compulsory pre-trial mediations (introduced in 2008). The ubiquity of family provision mediations has led the Chief Judge in Equity, Justice Bergin to remark there

²⁰ *Wilcox v Wilcox* (No 2) [2014] NSWSC 88 (21 February 2014).

²¹ *Chapple v Wilcox* [2014] NSWCA 392 (18 November 2014) [17].

²² *Chapple v Wilcox* [2014] NSWCA 392 (18 November 2014) [20] (Basten JA).

were now three certainties in life – death, taxes and mandatory mediations in Family Provision cases.

37. A few recent cases, including those discussed briefly today, suggest that a sterner, less generous approach is gathering momentum. Disentitling conduct is receiving a serious review. The expressed wishes of testators in cases involving disentitling conduct are given weight, perhaps a little more than before.

38. 2014 did not see an end to the enduring conflict between the notion of testamentary freedom and the reality of a burden of testamentary duty – expressed as “community expectations” imposed in practice by the courts in family provision cases brought under the Succession Act. That tension remains unresolved.

Michelle Painter SC
St James' Hall Chambers

All in the Family: Equity, the Succession Act and Family Provision

Resources

Succession Act 2005 (NSW)

<http://www.legislation.nsw.gov.au/>

Amprimo v Wynn [2014] NSWSC 991

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2014/991.html>

Andrew v Andrew [2012] NSWCA 308

<http://www.austlii.edu.au/au/cases/nsw/NWCA/2012/308.html>

Burke v Burke [2014] NSWSC 1015

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2014/1015.html>

M Raiola and I Raiola In Andreatta v M Raiola [2014] NSWSC 967

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2014/967.html>

Wilcox v Wilcox [2012] NSWSC 1138

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2012/1138.html>

Wilcox v Wilcox (No 2) [2014] NSWSC 88

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2014/88.html>

Chapple v Wilcox [2014] NSWCA 392

<http://www.austlii.edu.au/au/cases/nsw/NWCA/2014/392.html>

Ford v Simes [2009] NSWCA 351

<http://www.austlii.edu.au/au/cases/nsw/NWCA/2009/351.html>

Underwood v Gaudron [2014] NSWSC 1055

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2014/1055.html>