

Exes and Blasts from the past: In what circumstances does a deceased have a moral duty to make provision for old flames?

Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin
[2017] NSWSC 10

Estate MPS, Deceased [2017] NSW SC 482

What factors led the courts to make provision for a former spouse and a person in a close personal relationship? Do these cases depart from the law surrounding family provision for ex-spouses and close personal relationships?

Family Provision Matters

Procedurally exact whereas the substantive law is highly arguable:

- procedure dictated by Practice Note No. SC EQ 7 Supreme Court - Family Provision
- Don't look a gift horse in the mouth: Family Provision Applications 09/06/2015 – Justice Hallen highlights the practicalities (this is secured link to NSW Bar CPDs, may be available at Law Society)
- My Family Provision Primer

Pre-trial steps

One-year limitation

The plaintiff's **ANNEXURE 1** affidavit

Big or Small Estate – Costs

Directions hearings – first in 28 days 10am Friday

Mandatory Mediation - <500k court annexed ½ day

General Test for Provision

If eligible person (s57(1)(d) former wife / husband; s57(1)(f) close personal relationship) 2 stage approach:

- determine whether applicant left with inadequate provision for his or her proper maintenance, education and advancement in life
- if yes, assess what provision ought to be made from estate

Singer v Berghouse (No 2) (1994) 181 CLR 201 at 210

Section 60

60 MATTERS TO BE CONSIDERED BY COURT

(cf FPA 7-9)

(1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:

- (a) whether the person in whose favour the order is sought to be made (the "applicant") is an eligible person, and
- (b) whether to make a family provision order and the nature of any such order.

(2) The following matters may be considered by the Court:

Section 60(2) Considerations

(a) family / other relationship of A and deceased, incl nature and duration	(f) physical, intellectual or mental disability of A(s) or beneficiaries	(l) whether another person liable to support A
(b) nature and extent of any obligations or responsibilities owed by dec to A(s), other beneficiaries	(g) age of A at application	(m) the character and conduct of A before and after the date of the death of dec
(c) nature / extent deceased's estate, incl notional and liabilities	(h) contribs (finan or ors) by A to estate or to welfare of dec or his / her family, before / after death, where no adequate consideration received	(n) the conduct of any other person before and after the date of the death of dec
(d) financial resources (incl earning capacity) and financial needs, present and future, of A	(i) provision made for A by deceased during his / her lifetime or from estate	(o) any relevant Aboriginal or Torres Strait Islander customary law
(e) if A cohabits, financial circs of other person	(j) evidence of testamentary intentions of dec incl statements of dec	(p) any other matter Court considers relevant, at time of the dec's death or at time the application is considered
	(k) whether A maintained, wholly or partly, by dec before death and extent	

Lodin v Lodin Pre-Divorce Facts

May 1984 Plaintiff saw deceased as a patient

October 1984 Plaintiff and her first husband separated

December 1984 relationship became intimate

1986 defendant daughter of deceased and plaintiff born

September 1988 moved in and lived together

April 1990 separated under one roof

January 1991 he left that home completely

Daughter lived with plaintiff and other child of plaintiff from first marriage

April 1992 deceased applies for Family Court settlement of property interests

Post-Divorce Facts (1)

December 1992 judgement in FC proceeding; Plaintiff lost appeal June 1993

February 1993 Plaintiff and daughter vacate matrimonial home

June 1993 threat: “If you don’t give me an additional \$60,000 I will destroy your life and make a complaint to the NSW Health Department Complaints Unit about you”; June 1993 complaint made about sexual relationship patient. July 1994 deceased found guilty of unsatisfactory professional conduct, reprimanded, undertake ethics course

June 1993 denied access to daughter

September 1993 plaintiff informs police re firearms, threats to kidnap daughter, police serve summons for AVO at hospital where deceased worked, he resigns from hospital; May 1994 AVO proceeding dismissed

August 1993 Plaintiff seeks extension of time to bring civil suit for negligence. In April 1998 this action settled and discontinued on basis each party bear own costs

December 1994 allegation of sexual abuse of daughter, police interview – no action taken

Post-Divorce Facts (2)

1994-1999 plaintiff and daughter live in rental accommodation

July 1995 deceased applies for divorce and made absolute December 1995

1996-98 deceased has cancer of bowel and has treatment

March 1997 solicitors of deceased advise him to and in April 1998 a will drafted leaving all to daughter and explicitly excluding plaintiff – never executed

Plaintiff makes regular application for increase in child support. Does not disclose bursary daughter had at a private school

1997 plaintiff has car accident – neck spasms, back pain for several months

1999 plaintiff sells her property and buys a home with a mortgage (assistance from first husband)

July 2002 – second car accident – serious whiplash injuries. Receives DSP

Post-Divorce Facts (3)

2004-2006, at plaintiff request, deceased increases child maintenance until daughter ends tertiary study

2008 third car accident

2008-2009, the plaintiff wrote she “would make what was left” of his “wretched life not worth living”, that he had “wasted” his “energy tormenting us over the years”, and “....you will most certainly feel the wrath of Allah! directed towards yourself”. Sends later letter apologising.

Deceased June 2014

Plaintiff attended deceased's funeral

Four s57(d) Settled Categories

1. a divorce is followed by spouse's death before Family Court settlement of financial matters
2. where the husband and wife have not finally settled all their property dealings at the time of the divorce
3. where deceased paid maintenance at time of death to ex-spouse and after death such maintenance was not adequately maintained
4. where, despite the divorce, there was some dependency on the deceased as at the date of death e.g. ex-spouse falls gravely ill shortly after divorce and due to “residue of affection” the deceased had assisted him or her

O'Shaughnessy v Mantle, (1986) 7 NSWLR 142 at 147–8

General Bar to Ex-spousal Claims

Existence of a final matrimonial financial settlement under (CTH) *Family Law Act 1975* will usually pose a significant obstacle to overcoming that hurdle, because typically it would be thought that the purpose of such a settlement (whether by agreement or by order) is to enable each party to embark on a new life afresh, untrammelled by further obligations to the other. **But this is not invariably so...**

Lodin at [52]

Fifth Category Revisionism: Case Law (1)

Citing *Dijkhuijs v Barclay* “factors...vary in accordance with the circumstances of the case...not be limited to pre-conceived classes or categories, or be determined by special factors”.

Family Law Act finality, “clean break” principle of property settlement “must be read in conjunction with the competing public ... in the FPA “with its reforming inclusion of a specific entitlement of a former spouse to claim”

Dijkhuijs v Barclay (1988) 13 NSWLR 639 at [652G-653G], 655D.

Fifth Category Revisionism: Case Law (2)

The Act recognises that Australians have freedom to leave their property by their will as they wish with one exception. The exception is that a person must fulfil any moral duty to make proper and adequate provision for those whom the community would expect such provision to be made before they can leave money as they wish. Thus, in these cases, one does not ask if the will is fair, one does not ask if the testatrix divided her property equal, one does not as a judge ask how would I have made a will had I been the testatrix. What must be asked is did the testatrix fail in her moral duty to those who have a claim on her.

Stewart v McDougall NSWSC, Young J, 19 November 1987, unreported

New Fifth Category?: One Thrives While the Other Merely Survives

Justice Brereton concludes:

At [57]: Applying that to the case at hand, his Honour proceeded to explain that the “clean break” principle was not paramount, and that an ex-wife of a long marriage finding herself in the predicament of insufficient financial resources was the kind of circumstance which could be considered to be a factor warranting the making of an application for provision.

At [61]: Thus while the existence of a final matrimonial financial settlement is an important factor, it is not conclusive. What emerges from the cases is that there will be factors warranting the making of a claim by a divorced former spouse, even where there has been a matrimonial property settlement, if at the date of the hearing of the family provision application there remained an undischarged moral obligation to the applicant.

Section 60(2)(m), (n)

?

Disentitling Conduct (1)

Court highlighted - plaintiff's misleading information to CSA; post-divorce persecution of the deceased; her non-disclosure of Rebecca's bursary

Cited *Wentworth*: I do not regard a state of estrangement or even hostility as necessarily bringing an end to any moral duty to make provision...If the plaintiff had any real control over her conduct and her engagement in argument and conflict, this behaviour would have extinguished the testator's duty to make provision for her. But she cannot stop herself. The plaintiff's propensity for involvement in conflict and litigation has elements of a disability, an incapacity for successfully grappling with life

Wentworth v Wentworth (NSWSC, Bryson J, 14 June 1991, BC9101896) at 125-7.

Disentitling Conduct (2)

Lodin finding per Justice Brereton at [92]:

A similar “disability” can be seen in the present plaintiff’s attitude and conduct towards the deceased since their separation; her persecution of him through multiple proceedings in diverse forums; and her propensity for conflict with others...

In circumstances where no provision was made for her, those same matters which constitute factors warranting the making of her claim, also lead to the conclusion that the plaintiff has been left with inadequate provision for her proper maintenance and advancement in life...

Order made for \$750,00, being about 15% of the estate

Justice Brereton's Conclusion

At [90]:

In my judgment, the combination of the unusual and enduring impact of the relationship and marriage on the plaintiff, her care responsibility for the defendant for 15 years after the matrimonial property settlement and associated indirect contribution to the deceased's estate, the respective post-divorce deterioration in her circumstances and great improvement in those of the deceased, the relative paucity of the matrimonial estate at the time of the property settlement compared to the amplitude of resources now available, and her current circumstances of need which are in part attributable to her relationship and marriage with the deceased, and where the only other claim on his testamentary bounty is that of the defendant for whom ample will remain after making proper provision for the plaintiff, amount to circumstances which made the plaintiff, at the time of the deceased's death, a person who ought to have been an object of testamentary recognition by him, and thus constitute circumstances warranting the making of her claim.

Some Thoughts on *Lodin*

Has the deceased thrived while the applicant just survived since Family Court settlement?

Former de facto under s57(1)(e)? - wholly or partly dependent member of the household at one time

Don't die intestate if you want to exclude someone. State reasons for exclusion

Use approved release of rights to apply for a family provision order *Succession Act*, s 95. Can apply before / after death; apply to notional estate

Is estate of sufficient size for ex-spouse claim to be made?

If there is “disentitling conduct”, can it be construed as a “disability” leading to it being a factor in favour of making the claim for provision?

Eligibility in close personal relationship

SUCCESSION ACT 2006 - SECT 3, 4 DEFINITIONS

3 A "**close personal relationship**" is a "cpr" (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care

4 A cpr is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

(a) for fee and reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

Estate MPS Claim

Approximate net value of estate 2.5m.

Plaintiff claimed:

- served the deceased as her carer
- to have lived with her while maintaining separate residences
- to have been substantially maintained by her between August 2012 and October 2014.

Estate MPS Facts

- Dec born in April 1943, died intestate 6 October 2014 aged 71 years.
- No family other than def brother aged 67 in ill-health (suffering Parkinson's Disease), in retirement.
- The plaintiff met dec as a friend since about 1979 when had a sexual relationship with her and her partner JWJ, as a threesome, over a period of around six months.
- Plaintiff and dec substantially went their separate ways until chance meeting August 2012.
- Plaintiff had long term same-sex relationship and partner died in November 2009.
- In August 2012 dec was terminally ill, living in a French's Forest hotel while arrangements being made for more permanent accommodation, or death.
- Plaintiff many years on a disability pension – judge inferred due to mental health.
- August 2012 plaintiff lived alone in a small rental cottage in Manly.

Challenge to eligibility

Def claimed 3 impediments to 57(1)(f) eligibility to s3(3) – 3(4):

- never living together
- payments made by dec to plaintiff activated the exclusionary provision in s3(4)(a)
- plaintiff had substantially abandoned the dec towards the end of her life, so not living in a close personal relationship at the time death

Fee and reward exception

At [37]:

The concept of living together is essentially relational; not constrained by formalities, though it might be attended by formality; not constrained by geography, though it might ordinarily be expected to have a geographical dimension; not constrained by a physical, or sexual, relationship, though that too might be present. It might be viewed as involving a quasi-family relationship, though care needs to be taken not to substitute expository gloss for the legislative text.

Living Together Eligibility

The concept of living together in section 3(3):

- does not necessitate the existence of a single residence
- accepts people can live together in more than one residence and have more than one home they separately occupy from time to time
- it is not a prerequisite people spend all of their time together
- should be adaptable to the reality of domestic life in this respect
- constrained not by a requirement that people live together as a couple
- focuses on the quality of a relationship rather than mere physical proximity
- might be associated with concept of “family” in its broadest sense, importing social intimacy rather than a formal, blood tie, sexual relations as a prerequisite.
Relationship that is close
- personal and attended by provision with domestic support and personal care

Fee and / or reward

Nothing turns on the distinction “and / or”

At [35]:

Consider “...the dominant, causative factor(s) in the provision of domestic support and care: Is it, or are they, found in the parties personal relationship or in the prospect or fact of material gain? A dominant commercial imperative in the provision of domestic support and care might reasonably be seen as inconsistent with the concept of a family provision order”.

s60(m) Conduct disentitling

Alleged CD after death:

- Plaintiff's 000 call after discovered dec's body – in turn affirms and denies a friend of dec, that if he called a doctor she would never get out of hospital
- Conversation between plaintiff and manager of hotel – seen as attempting to exclude the dec's solicitor from estate management
- Note written by plaintiff to show dec level of money spent on carers and suggesting would spend less if he cared for her
- Comms between plaintiff and his bank, stating he worked “for” his “aunty” as a “carer” as he was resisting a creditor
- “You’ve got to survive somehow” admission to court when acknowledged he would lie to Centrelink about earnings beyond DSP
- Refusal to state to Court current address when claiming to be homeless

73 On balance, I hear an authentic voice speaking truth; but, it can be acknowledged, another ear might hear a different message.

Findings (1) - Eligibility

106 I accept the Plaintiff's evidence..., he was "living together" with her (each providing the other with "domestic support" and he providing her with "personal care") within the meaning of section 3(3).

107 It is not to the point, in terms of jurisdiction, that the plaintiff's "support" and "care" were not of a high quality. It was well intentioned, although both inappropriate and inadequate. It was received, albeit at times grudgingly, voluntarily, by a person herself not free of poor judgement.

Findings (2) – Fee and Reward

108 The “domestic support and personal care” provided ... was not “for fee and [or] reward” within the meaning of section 3(4)(a). Any payment of money made by the deceased to the plaintiff, and any expectation of the plaintiff that he might be paid money or otherwise benefit, was an incident of the parties’ relationship, not, in intendment or effect, a quid pro quo. Theirs was a domestic, not a business, arrangement. It was built upon a pre-existing friendship, renewed personal contact and shared grieving for lost partners. These were the dominant, causative factors in the provision of support and care, not the prospect or fact of monetary gain.

Findings (3) – Conduct disentitling

76 I do not exclude the possibility that, at the time the plaintiff spoke to the hotel manager, a manipulative, acquisitive side of his personality came to the fore. However, the fact that it did (assuming that it did) can be explained by his disability. The hotel manager records that, as the plaintiff spoke, “he was becoming more angry as he was shaking his head, waving his arms and raising his voice.

132 The plaintiff’s disability and the deceased’s accommodation of it, in her peculiar determination to avoid nursing home accommodation and professional palliative care, take this case out of the ambit of any concept of “disentitling conduct” that might otherwise find fertile ground for operation .

Findings (4) – Conduct disentitling

110 Had he been a stronger, more stable personality, he might have succeeded, where nobody else did, in persuading her (or in forcing her) to submit to professional, palliative care; but, as it was, as she was and as he was, he probably paid too much, not too little, regard for her subjective, reclusive preference to die in squalor as she did. The manner of her death was tragic, but responsibility for the tragedy cannot be sheeted home to the plaintiff, himself a tragic, marginalised person in whose close company she chose to live.

Order for Provision

128 That element of dependency, coupled with the plaintiff's marginalised lifestyle associated with his disability, and the absence of any testamentary provision made for him by the deceased, mandate a finding (for the purpose of section 59(1) (c)) that adequate provision for the proper maintenance, education or advancement in life of the plaintiff has not been made by the operation of the intestacy rules in relation to the estate of the deceased, according to which the plaintiff has no entitlement to participate in the estate.

Sum of \$550,000 granted to be administered under protection

Appellate consideration

Both matters were appealed, appeal hearings are completed and judgement served

Recent folly in presuming appeal outcomes

Update paper to be provided by me on handing down of appeal decisions

Role of Barrister in Family Provision

Armstrong Scalisi Holdings Pty Ltd v Piscopo (Trustee), in the matter of Collins [2017] FCA 423

- Engaging barristers and doing so early in litigation provides much better value to clients.
- Costs can be blown out of proportion when solicitors prepare litigation and only engage a barrister shortly before trial.

Barrister role:

- Advice re evidence (esp. eligibility), prospects, quantum before filing - revised after admin affidavit and again in affidavit in response to estate reply
- Draft / settle affidavit(s), draft Summons
- Subs for mediation, representation at mediation
- Pursue matter if mediation fails

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