

## Making a family provision claim in NSW against the estate of a parent you barely knew. Is the mere fact of paternity enough?

By Martin Pooley, Senior Associate

Even where a child was unaware of the existence of one of their parents for most, or all of their lives, and there is little or no relationship between the child and their parent, there are circumstances where the child can still successfully make a claim for provision from their late parent's estate.

The following paper dealing with "bare paternity" cases is not intended to include a situation where a deceased has been a sperm donor. The law is that, it is the persons who make use of the sperm rather than a sperm donor who are responsible for bringing a child into the world.

Where a Court is considering whether to make a family provision order and what order, if any, ought to be made for the applicant, the question for the Court as set out in s59 of the Succession Act 2006 is whether the deceased has failed to make adequate provision for the applicant's proper maintenance, education, and advancement in life at the time when the Court is considering the application. The second question for the Court is what order for provision, if any, ought to be made. In determining these two questions the Court will need to consider all of the circumstances of the case and the list of factors set out in s60(2) of the Act.

The first factor in s60 (2)(a) is the nature of the relationship between the deceased and the party seeking provision. In "bare paternity" cases this relationship may have been of a very minimal nature or quite non-existent. Inevitably there will be some examination of the reasons why there was no relationship and what efforts were made by the parties to establish or re-establish that relationship. The lack of any meaningful relationship will be taken into account by the Court but will not necessarily be an impediment to making a successful application as the child may have a strong case on the other factors in Section 60 including:

1. The child may be in difficult financial circumstances or have health issues which create a need for financial assistance;
2. The deceased's estate may be of a sizeable nature and capable of providing some provision to this child without unduly affecting the legacies of the other beneficiaries;
3. The competing claims of the other beneficiaries on the deceased's estate having regard to their financial position, their relationship with the deceased, and contributions to the deceased's assets, may be relatively weak;
4. The deceased may have made little or no financial contribution to support the child during the child's lifetime and this child's advancement in life may have been adversely affected as a result of this abandonment;

## **Case Study 1 – Nicholls v Hall [2007] NSWCA 356**

### **Nature of the relationship**

In this case the deceased had a brief relationship with a woman in 1959. He was unaware that there was a child born of this relationship until 36 years later in 1995 when his son contacted him. The deceased was married at this time and had three daughters.

The deceased only met his son on two occasions in 1995. Their first meeting was at a barbecue, and their 2<sup>nd</sup> meeting was on the following day. Over the next 8 years there were five phone calls initiated by the son, and six by the deceased up to September 2003. They did not enter into any correspondence, exchange any cards, send gifts, or develop their relationship any further. The deceased died in November 2004 and had no contact with his son in the 14 months prior to his death. The son did not attend his father's funeral.

### **Value of the deceased's estate**

The deceased's estate had a nett value of about \$1,300,000 and it was left in equal shares to his three daughters.

### **Financial circumstances of the deceased's three daughters**

The deceased's three daughters were aged 39-43 years and had modest financial circumstances prior to an interim distribution to each of them of \$263,333. They were living in country towns with their husbands. The equity in their homes or land was not of great value, they had mortgage debt, and they and their husbands were earning modest incomes. Two of the deceased's daughters had a number of dependent children and the daughter with no children had a stronger financial position than the other two daughters.

The three daughters all had a close relationship with their father over the course of his life.

### **Financial circumstances of the son**

At the time of the appeal the son was 47 years of age and married with four dependent children aged between eight and sixteen. Both he and his wife worked as school teachers and they lived in a house in Dubbo worth \$350,000 with a mortgage of \$280,000, they had other assets of \$118,000, and other debts of \$8,000.

### **Decision of Justice Young in the first instance- no award of provision**

Justice Young made findings that:

- i. the son did not give full details of his assets,
- ii. exaggerated the relationship between himself and the deceased,
- iii. provided an insincere excuse for not attending the deceased's funeral,
- iv. that his relationship with his father was not close and little more than bare paternity,
- v. that the plaintiff's financial position was comfortable in that he and his wife owned their own home and were both earning a reasonable income,
- vi. that the three daughters of the deceased had strong competing claims as they had modest financial circumstances and they had a strong relationship with the deceased.

Justice Young did not consider that the son had been left without adequate provision for his proper maintenance, education and advancement in life, stating “In my view the testator’s duty to his daughters to provide for them in all of the circumstances was much higher than his obligation to provide for his son”.

The proceedings were dismissed with costs.

### **Decision of Court of Appeal - son awarded one seventh of deceased’s estate**

The Court of Appeal reversed the decision of Justice Young and provided an award to the son of one seventh of the deceased’s estate, leaving each daughter two sevenths of the deceased’s estate.

In setting out the case law in relation to these types of cases the Court of Appeal stated at paragraph 43 of its judgement:

**“There are some statements in the cases that could be understood as meaning that, if there is nothing more than “bare paternity” in... the relationship between the applicant and the deceased, then the applicant cannot succeed. In our opinion, such an understanding would be plainly wrong. Even if a deceased never even knew of the existence of a child, if that child had a strong case on the other factors (that is, needs, size of estate and lack of competing claims), a court could find that that child was left without adequate provision for proper maintenance”.**

At paragraph 45 of the judgement they state that:

“Our view is also supported by what Bryson J said in *Gorton v. Parks* [\(1989\) 17 NSWLR 1](#) at 9-10, to the effect that **“the bare fact of paternity” is “of very great importance in morality”.**

At paragraph 49 of the judgement the Court stated that in arriving at its decision it took into account:

- i. The son did not have the benefit of assistance from a person responsible for bringing him into the world.
- ii. The son searched for and found his father. He then took steps to establish a relationship with him.
- iii. That the relationship was established, not to a great extent but to some extent, and it was a relationship that also involved re-establishing some relationship between the deceased and the son’s mother, and establishing some relationship between the son and the deceased’s daughters.
- iv. That there was no suggestion that the failure of this relationship to blossom was the fault of the son any more than that of the deceased.
- v. That taking account of the competing claims of the deceased’s daughters, the estate although of moderate size, was still capable of sustaining some provision to the son of say \$175,000 which would of left \$350,000 to each daughter.
- vi. That Justice Young’s finding that the son established very little more than the mere paternity was an error and that the plaintiff established some matters of substance in regards to the relationship as set out in point iii.
- vii. As regards the needs aspect of the claim, he established needs, particularly those associated with the large mortgage on his house and concerns about the future health and employment of himself and his wife.
- viii. That but for the Will the son would have shared the estate on an intestacy basis equally with the deceased’s daughters.

It was ordered that the son should receive one seventh of the deceased’s estate and each of the daughters should receive two sevenths.

## **Case Study 2 – Kohari v NSW Trustee & Guardian [2017] NSWSC 1080**

### **Nature of the relationship**

In this case Justice Parker dealt with a claim by a 38 year old son who had no contact with his father since his parents had separated when he was eighteen months old. The son's father left the matrimonial home because he believed that his wife had been unfaithful and that the eighteen months old child was not his son. There was another older child of this marriage and a step child.

After the separation the father had no further contact with his youngest son but continued to have contact with his older child who subsequently came to live with him.

About eight years after the father separated from his wife he started a relationship with another woman and then lived with her for the next 26 years until his death. In the last nine years of the father's life he was extremely ill and his de facto partner spent a great deal of time caring for him in a committed relationship.

The youngest son made two attempts to contact his father and establish a relationship but the father refused to respond to these written communications. The father also told his relatives that this child was not his son and this limited the son's involvement with his grandparents and possibly prevented him receiving a legacy from his grandmother's estate.

### **Son's financial position**

The son's circumstances were very dire in that he was 38 years old, had no qualifications, had been unemployed for 17 years, was obese, reliant on social security, and supported a wife and four children in rented premises. He had no assets and debts of \$25,000.

### **Paternity disputed and DNA testing**

When the proceedings began the executors of the deceased's estate disputed that the plaintiff was the deceased's son and it was proposed that a DNA test be conducted. This was resisted by the son and his mother. However the Court ordered that the test be undertaken over their objections. The DNA test established that the deceased was in fact the plaintiff's father.

### **Value of the estate**

The estate was worth \$1,040,000 most of which was comprised of the proceeds of the sale of the deceased's home in St Peters which was compulsorily acquired by the government for a motorway.

### **Competing claims of the deceased's de facto partner**

The deceased's partner had a strong competing claim as she needed a home and her only asset was an investment property in Eagleby Queensland which she jointly owned with the deceased worth \$250,000 where she was temporarily residing after the forced acquisition of the St Peters home where she resided. The de-facto wished to purchase a home in the Central Coast which was estimated to cost \$630,000.

At the time of the hearing she was 69 years of age and receiving a pension of \$405 per week. She had \$12,500 in cash and anticipated she would receive \$300 per week from the renting of her investment property at Eagleby which was worth \$250,000. She had diabetes and other health issues.

### **Award of provision- \$100,000 to the son**

Justice Parker awarded the son a legacy of \$100,000 and in doing so commented that the son's financial circumstances appeared to be, at least in part, of his own making. He did not consider that it was reasonable for the son to expect to receive an unencumbered home from his late father but considered that it would be reasonable to give him a deposit to assist him to purchase a home.

Justice Parker considered that the deceased's de facto partner had a very strong competing claim on the deceased's estate and that it was a common ground between the parties that the relationship that she had with the deceased "should be treated as a marriage".

He noted that the deceased's behaviour towards his son was wrong and unjustified, as he was the father of this child, but did not consider that the son's present needs had anything to do with the conduct of the deceased.

### **Case Study 3 – Lo Surdo v Public Trustee [2005] NSWSC 1186**

The Court of Appeal decision in *Nicholls v Hall* is to be contrasted with the Supreme Court decision two years earlier in *Lo Surdo v Public Trustee* where Justice Hamilton did not award any provision to a son who was given up to an orphanage at birth and despite being reunited with his mother at the age of 23 had little contact with her thereafter.

#### **Nature of the relationship**

The deceased gave birth to her son in 1940 in Sicily and gave her child up on birth to an orphanage. Her son was subsequently adopted by a Sicilian family. In 1951 the deceased migrated to Australia and was subsequently joined by her 13 year old daughter in the following year.

In 1963 the son then aged twenty three made enquiries about his mother and sent letters to her in Sydney. The deceased was initially overjoyed to have contact from her son and wrote to him and supported his migration to Australia. After the death of the deceased's husband in 1964 she withdrew that support but the son's application was subsequently sponsored by the deceased's daughter.

When the son arrived in Australia with his wife and children in December 1964 they lived with the deceased's daughter for three months before renting their own premises. During this period the son attended two family occasions and met his mother on a number of occasions when she visited her daughter's home. The deceased's daughter claimed that the deceased expressed reservations about her son shortly after his arrival claiming that "he has a strange character". The defendant's daughter claimed that the deceased stopped visiting her at her home whilst her son was living there and that the deceased told her that her son and his family did not ever visit her at her home at Redfern.

The deceased's son lived in Australia for approximately three years before returning to Sicily in October 1967. The son's evidence failed to explain what relationship he had with his mother after the initial meetings in this 3 month period whilst he was living with his sister. The sister alleged that there was little or no contact between the son and his mother thereafter. The son then left Australia without telling either the deceased or his sister.

After returning to Sicily the son claimed that he corresponded with his mother each year and then telephoned her about twice every year from the nineteen seventies. The deceased's daughter disputed that there was any such communication. However the deceased's daughter visited her brother and stayed with him on four occasions between 1970-1992 and maintained a relationship with him.

In April 2000 the son returned to Australia to visit his mother, five months before her death. He remained in Sydney for just over two months and during this period he stayed with his sister. The son claimed that on a number of occasions he asked to be taken to visit his mother but that his sister kept putting him off. Finally he went and found his mother without his sister's assistance and there were apparently two subsequent visits. After the son's return to Sicily in June 2000 he claimed that he wrote to his mother on two occasions before her death in September 2000.

### **Size of the deceased's estate**

The deceased's estate at the time of her death included three properties at Redfern, Leichhardt, and Bargo which had a value of \$808,009 in 2000. The deceased left all of her estate to her daughter.

The estate assets were fully distributed to the deceased's daughter in 2001 and the Redfern property sold. By the time of the hearing in 2005 the remaining properties had increased in value by over \$300,000 such that the distributed estate was worth about \$1.1M .

### **Financial circumstances of the deceased's daughter**

The deceased's daughter had a very strong financial position with assets of \$2,153,000 which included a home at Chiswick worth \$1,100,000, an apartment in Sicily ,and all of the deceased's estate.

### **Financial circumstances of the son**

The son who was 65 years old claimed that he was separated from his wife but had yet to agree upon a property settlement. The son's wife presently lived in their matrimonial home and he had temporary lodgings near a commercial property he owned. The son owned a two thirds interest in a 450 m<sup>2</sup> block of land for which he had development application approval to build a three story building. There was no evidence as to the value of this property. The son was a qualified pastry cook and up until April 2001 he conducted a pizzeria which afforded him a living. On 31 July 2005 he became entitled to a pension of about 400 euros per month.

The son's claim was relatively modest in that he was seeking provision to buy a small apartment in Messina which could be purchased for a cost of approximately \$100,000. He also sought provision to pay existing debts approximating \$58,000. (say 10% of the estate plus costs).

### **Decision of Justice Hamilton – no award of provision**

In Justice Hamilton's findings he determined that the evidence as to the plaintiff's financial circumstances was far from clear or satisfactory and that it was simply unclear as to what was the value of the plaintiff's commercial property or what assets the plaintiff would have left from his property settlement with his wife. Justice Hamilton noted that the plaintiff was a very unsatisfactory witness and that he came to the conclusion that he was a witness of little credibility.

Justice Hamilton also found that the deceased's daughter was also an unsatisfactory witness as she had failed to disclose to the executor that the deceased had a son and subsequently claimed in her evidence that she ceased to believe that that the plaintiff was her brother.

Justice Hamilton found that on the evidence that there was no contact between the deceased and her son during his residence in Australia other than the initial visits when he first arrived and on two family occasions during the 3 month period he was living with his sister. His Honour also determined that from 1968-2000 that the contact between the son and the deceased was perfunctory and almost non-existent. He did not accept the son's claim that he contacted her about twice a year over this period. He did accept that on his return in 2000 the son did contact his mother and visited her on a few occasions but His Honour declined to find that any relationship of any substance was continued or re-established between the deceased and her son on this visit.

In His Honour's conclusions he found that notwithstanding that the deceased was overjoyed to hear from her son in 1963 the relationship between them did not flourish on his return to Australia. The relationship just did not work and really did not exist in any substantial way during the only period in his adulthood in which they lived in the same country for any protracted period. He found that no real contact was maintained between them during the 32 years before he returned to Australia in 2000 and that what passed between them in 2000 was not any establishment or re-establishment of the relationship.

On the evidence His Honour was unable to reach the conclusion that the relationship between the son and his mother during adult life really came into existence or subsisted in any real way. Nor was he able to come to any conclusion as to who was responsible for this situation. Nor was he able to come to any satisfactory conclusion as to the extent or value of the son's assets. He concluded that this was a case where what was established was the bare fact of parenthood and viewing that fact in all of the circumstances of the case, it did not seem to His Honour that it would be expected by the community, that the deceased would have to make any provision for her son

#### **Comments.**

Arguably in my view this claim might have succeeded if the son had properly explained his financial position and in doing so identified some reasonable financial need. It would also have assisted if he could have explained the problems he experienced in developing a relationship with his mother. The son's case did not fail simply because no relationship was established with his mother. (Justice Robb also commented on this case at parags 344-346 of his judgement in the Lado Causillas case below).

#### **Case Study 4 - Lado Causillas v NSW Trustee and Guardian; Bentancor Lado v NSW Trustee and Guardian [2015] NSWSC 1204 (27 August 2015)**

In this case Justice Robb provides a detailed summary of the case history relating to bare paternity cases on pages 50 to 57 of his judgement and states that these cases provide support for the proposition that:

**"A child will not necessarily fail to establish the threshold test in s 59(1)(c) of the Act, or be disentitled to a proper provision under s 59(2), in cases where the relationship between the applicant and the deceased parent is only one of "bare paternity", where that term is used to describe a situation where the parent has been responsible for the conception and birth of the child, but there has been no true relationship between the parent and child for a considerable period before the death of the parent, if ever. The parent's responsibility for bringing the child into the world leads to the assumption of a duty to be concerned for the child's welfare that may entitle the child to the making of a family provision order, even in an extreme case where the parent did not become aware of the birth of the child. The entitlement to an appropriate family provision order does not, however, flow from the mere fact of a parental relationship. All relevant circumstances must be taken into account, and there may be occasions when the responsibility of the child for the estrangement between the child and the parent will diminish or negate the parent's duty to be concerned with the welfare of the child".**



## Summary of Facts

In this case Justice Robb dealt with the claim by the deceased's wife and his 37 year old son with whom the deceased had had little or no contact for over 37 years. The son had essentially been abandoned by the father from the day of his birth. The deceased's wife was left to bring up and support her son as a single mother in Uruguay. The deceased's wife and son then struggled and lived a very hard life in Uruguay for the next 37 years.

The monies available in the estate were about \$1,500,000 and the deceased had left his entire estate to his two sisters in Australia who had relatively comfortable financial positions and did not have strong competing claims against the deceased's estate.

The deceased's son did not take any significant steps to find his father and establish a relationship. His Honour considered that this was understandable because of his father's conduct.

Justice Robb awarded the son and the mother \$450,000 each, leaving \$300,000 each for the two sisters of the deceased.

## OLDER CASES IN BRIEF

### Walker v Walker [1996] NSWSC 188

In this case Justice Young in dealing with a situation where the testator left his wife and children when the plaintiff was about fourteen years of age and they had no contact thereafter made a comment in his judgement that **“the fact of paternity is something to be taken into account, but it must be taken into account with all the other facts and circumstances of the case and the question asked, would the community think in all the circumstances that a wise and just testator should have made provision for this child?”**.

### Gorton v Parks (1989) 17 NSWLR 1

In this case Justice Bryson was dealing with a case that involved a father who had deserted his family when his children were very young and contact thereafter was very minimal. In his judgement Bryson J in commenting on the approach taken by Chief Justice Dixon in the case of the Pontifical Society for the Propagation of the Faith v Inland Revenue Commissioners (1961) 107 Comm LR 9 stated that **“Dixon CJ did not explain the weight which he gave to the bare fact of paternity and nothing else. I regard that bare fact has a very great importance in morality. The idea that the moral obligations from paternity are diminished or do not exist if the parent withholds acknowledgement of the obligations or of the child appears to me to be an idea from a distant age”**.

## Conclusion

Claims involving bare paternity are complex and there is no guarantee of success. At Diamond Conway we have a number of very experienced lawyers who can give you the best opportunity of succeeding with your claim.

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