

## FAMILY PROVISION CLAIMS IN NSW MADE BY ADULT CHILDREN WHERE THEIR PARENT HAS RE-MARRIED AND MAY HAVE CHILDREN FROM THE 2<sup>ND</sup> MARRIAGE

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With the frequency of divorce and the general increase in life expectancy of people in Australia, second marriages are not uncommon. The problem that exists for children of the first marriage is that any inheritance they might have expected to receive from their parent may end up being received by their parent's second spouse and the children of this second marriage.

The second spouse might promise to these children that he or she will leave them a substantial legacy, but for a range of reasons this may not occur on the death of the second spouse.

The further dilemma for the adult children of the first marriage is, that if they do not make a family provision claim at the time of their parent's death, they will not necessarily be eligible to make any claim against their parent's second spouse on his or her death. The exceptions to this are:

- i. where they were at any particular time wholly or partly dependent on the 2<sup>nd</sup> spouse and at that particular time or at any other time a member of the household of which the 2<sup>nd</sup> spouse was a member; or
- ii. where they were living with the 2<sup>nd</sup> spouse in a close personal relationship at the time of the 2<sup>nd</sup> spouse's death and either of them was providing the other with domestic support and personal care.

### Case study 1- *Haertsch v Whiteway* [2020] NSWCA 133 (3 July 2020)-appeal from decision of Lindsay J.

This is an unusual case as it involves a situation where a daughter did not make a claim against her father's estate when he died and his entire estate was received by his 2<sup>nd</sup> wife with the exception of legacies of \$25,000 to each daughter. She then made a claim against her father's estate 14 years later when the 2<sup>nd</sup> wife died. The daughter was not eligible to make any claim against the 2<sup>nd</sup> wife's estate so she sought leave to bring a late claim against her father's estate and seek to have certain property of the 2<sup>nd</sup> wife's estate designated as notional estate of her father's estate. The claim had to be dealt with under the Family Provision Act 1982 (not the Succession Act 2006) which was operative at the date of the father's death.

At first instance the daughter's claim was successful and she was awarded \$250,000 in addition to the \$100,000 legacy she received under the 2<sup>nd</sup> wife's will. On appeal that decision was overturned on the basis that the judge was in error in designating certain property of the 2<sup>nd</sup> wife's estate as notional estate.

Dr Whiteway died on 14 July 2003 aged 74 and was survived by his 2<sup>nd</sup> wife aged 47 to whom he had been married for 16 years. There were no children of this marriage.

Dr Whiteway had two children from his first marriage, Elizabeth aged 57 and Jane 60 years of age. When Dr Whiteway's first wife died in December 1985 he received all of her estate, the value of which was not explained at the hearing. Dr Whiteway gave each of his daughters \$30,000 as a gift from their mother's estate.

The terms of Dr Whiteway's 1996 will were that he left \$25,000 to each of his daughters and left the balance of his estate to his 2<sup>nd</sup> wife. His estate comprised a house at Burradoo where he had lived with his 2<sup>nd</sup> wife, worth \$1.35M and investments worth \$540,743.

The house at Burradoo was owned by Dr Whiteway prior to his 2<sup>nd</sup> marriage and was sold by his 2<sup>nd</sup> wife in 2011 with the funds being used by her to purchase a unit in Bowral for \$740,000. She then retained this unit during her lifetime and it formed part of her estate. At the time of Dr Whiteway's death his 2<sup>nd</sup> wife was working as a nurse and owned other assets in her name.

Dr Whiteway's 2<sup>nd</sup> wife died on 18 November 2016 leaving no issue. In her will she left her estate valued at \$1.9M to various siblings, nephews, nieces, a friend, and included \$100,000 legacies to each of Dr Whiteway's daughters Elizabeth and Jane. Mr Haertsch was the executor of the 2<sup>nd</sup> wife's will.

Elizabeth then issued proceedings against her father's estate seeking additional provision and against the 2<sup>nd</sup> wife's estate for a declaration that her estate was held on trust for her insofar as it might have been inherited by the 2<sup>nd</sup> wife from the estate of Dr Whiteway pursuant to an estoppel by representation claim.

The 2<sup>nd</sup> wife's estate was not solely comprised of assets she received on Dr Whiteway's death as during the course of her marriage she had inherited \$470,000 from relatives. She also had assets prior to her marriage and worked as a nurse earning income both before and after Dr Whiteway's death.

When Dr Whiteway executed his final will he also prepared a statement where he explained that he left the majority of his estate to his 2<sup>nd</sup> wife because his wife was relatively young and the desire to provide her with security into the future. He also stated that his daughters who were at that time 33 and 35 years old, were not in any financial need.

The 2<sup>nd</sup> wife executed seven wills between 1997-2016 in which she made substantial provision for Dr Whiteway's two daughters, but with each successive will the provision to them diminished. Part of the plaintiff's claim was that the 2<sup>nd</sup> wife had made statements to her after she married Dr Whiteway that she was conscious of a moral obligation to her husband if not to her and her sister, to make testamentary provision for them from wealth which had come to her by reason of her marriage to their father. The plaintiff pleaded an estoppel by representation claim in regards to these statements.

The position of Elizabeth was that she had lost her job in July 2016 (about 2.75 years prior to the hearing date) and was unemployed. She had suffered two failed marriages and was living alone. She had a history of ill-health involving severe depression and hypertension and had only recently qualified for income protection income of \$140,000 per annum subject to monthly review. Her prior income is not detailed in the judgement but it is suggested she previously held a corporate position. She had sold her home in Prahara and was now renting and living off the capital (how much is not detailed in the judgement). She also had \$400,000 in superannuation. The judge noted that aged 57 years she was not well placed to resume her business career and that she faced an insecure future.

## **Decision of Lindsay J**

In dealing with Elizabeth's application to extend the time to make this claim Lindsay J accepted that the delay was sufficiently explained by her reasonable expectation of benefit from the 2<sup>nd</sup> wife's estate, the respect she paid to the 2<sup>nd</sup> wife by deferring any claim until after her death, and the assurances from the 2<sup>nd</sup> wife of future benefit from her estate. He further determined there was no material prejudice to any person in dealing with the application out of time and that she had a strong case for further provision. He also was of the view that had Elizabeth made her claim at the time of her father's death it was likely she would have been granted additional provision.

In relation to the notional estate order, Lindsay J identified that the proceeds of sale of the Burradoo house funded the purchase of the Bowral unit for \$740,000 and that the proceeds of \$966,035 from the recent sale of this unit by Mr Haertsch who had transferred this property into his name as executor, up to the sum of \$740,000, could be designated as notional estate of Dr Whiteway's estate for the purpose of paying the lump sum and the costs of these proceedings.

Justice Lindsay then awarded Elizabeth \$250,000 in addition to the \$100,000 legacy under the will. He also ordered that her costs assessed on the ordinary basis be paid out of the notional estate.

The estoppel by representation claim was not successful as it was determined that the statements made by the 2<sup>nd</sup> wife to Elizabeth were not intended by her to be relied upon by Elizabeth as giving rise to proprietary rights in her estate and the statements were too uncertain to ground an estoppel.

### **Court of Appeal overturns the decision of Lindsay J**

The main issues in the appeal were:

1. Whether the property of the 2<sup>nd</sup> wife's estate was able to be designated notional estate of Dr Whiteway's estate;
2. Whether the primary judge erred in granting Elizabeth an extension of time in which to make her application.

In relation to the first question the Court of Appeal decided that the primary judge was in error and a notional estate order could not be made in these circumstances. The reasoning of the court was that s24 of the Family Provision Act which dealt with notional estate orders in respect of distributed estate is concerned with persons by whom property becomes held as a particular and direct consequence of a distribution from the deceased's estate. In short, the estate funds held by the executor Mr Haertsch from the sale of the Bowral apartment were not held by him as a result of a distribution from Dr Whiteway's estate

Meagher JA stated "Mr Haertsch as Stephne's (the 2<sup>nd</sup> wife's) personal representative did not become a legal or beneficial owner of property as a result of a distribution from Dr Whiteway's estate" and "In its terms s24 does not invite a chain of causation inquiry to determine whether property held by any person or subject to a trust would not have been so held by that person were it not for the distribution to Stephne (the 2<sup>nd</sup> wife) of the Burradoo property or other property forming part of Dr Whiteway's estate. Rather, parag (b) identifies a single event involving the personal representative parting with an asset....and property became held by a person."

Although unnecessary to do so the court also dealt with the issue of whether an extension of time should have been granted and determined that the general assurances given by the 2<sup>nd</sup> wife to Elizabeth were not sufficient justification or excuse for the application not being made in time. Further the primary judge erred in not taking into account the prejudice to both the 2<sup>nd</sup> wife, the other beneficiaries, and her estate in granting the extension especially where Elizabeth's claim was a much stronger claim than it had been at her father's death.

This case is illustrative of the dilemma faced by children of a first marriage. Had Dr Whiteaway's daughter made a claim on her father's estate when he died, she might have received some additional provision. But then again it might have been a very modest sum having regards to her secure financial position at that time and the strong competing claim of a relatively young 2<sup>nd</sup> wife. However by not making any claim at the time of her father's death she left herself in a position where she had to mount a very difficult claim where there were numerous hurdles to succeeding.

### **Case study 2 – Wheat v Wisbey [2013] NSWSC 537 – Hallen J**

In this case the deceased had 4 children from his first marriage and 2 children from his second marriage. On his death in April 2011 at the age of 79, the deceased left all of his estate to his 2<sup>nd</sup> wife to whom he had been married for 33 years.

The deceased's assets were all held jointly with his 2<sup>nd</sup> wife and comprised a rural property at Berry worth \$1.3M and cash of about \$650,000. The deceased and his 2<sup>nd</sup> wife lived at the Berry property where they bred and trained horses.

The deceased's 2<sup>nd</sup> wife was 68 years old, retired, and bred horses as a hobby. Beyond the assets she jointly held with the deceased, she owned a car worth about \$70,000 and some livestock.

Three of the daughters of the deceased's first marriage issued proceedings seeking provision from their father's estate.

Justice Hallen noted in his judgement that although each of the deceased's daughters maintained contact with their father the relationship was not particularly close after he re-married, but that may have been because he was living with his second family

The financial position of each daughter was secure but each of them had limited savings or superannuation for their imminent retirement. Justice Hallen determined that each of them established a reasonable need for a lump sum to address future contingencies.

Cheryl was 60 years of age and married. She and her husband owned a farm property worth about \$600,000, owned two cars worth \$14,000, had \$7,800 in savings, and \$90,000 in superannuation. Cheryl was receiving Newstart and previously held a job with a modest income. Her husband was receiving a carer's pension. Justice Hallen noted her limited savings and super, **and awarded her \$50,000.**

Lorraine was 59 years of age and married. She and her husband had recently sold their home worth \$400,000. They owned a car and a caravan worth \$35,000. Lorraine had \$320,000 in super and her husband had \$120,000 super. They had savings of \$4,000 and Lorraine was currently receiving Newstart and looking for work. Her husband was retired and receiving a disability pension. Justice Hallen noted their limited savings and **awarded her \$35,000.**

Diane was 56 years of age and married. She and her husband owned a home worth \$700,000 and owned two cars worth \$14,000. Diane only had \$15,000 in super and her husband \$140,000. They had savings of \$10,000. Diane earned \$10,000 per annum working casually and her husband earned about \$70,000. Justice Hallen noted that they had a small amount of super and **awarded her \$40,000.**

In this case the 2<sup>nd</sup> wife was not elderly and in the absence of any superannuation or other assets the cash she received from the jointly held account would need to last her for many years up until her death. Clearly, she had a very strong competing claim against the deceased's children and this restricted the amount of provision that could be awarded to them.

### **Case study 3 – Theoctistou v Theoctistou [2013] NSWSC 1487 – Lindsay J**

In this case the deceased was married twice and had 2 children from each of his marriages. On his death he left \$50,000 to each of his children totalling \$200,000 with the balance of his estate left to his second wife to whom he had been married since 1959.

The deceased's estate comprised two apartments each worth \$300,000, \$203,000 in cash, a car worth \$12,000, and a house jointly held with his 2<sup>nd</sup> wife worth \$360,000.

The deceased's 2<sup>nd</sup> wife who was aged 86 years owned 3 apartments worth \$900,000 and under the deceased's will would receive two further apartments in the same building worth \$600,000 plus the jointly owned home where she resided. She had \$176,000 in savings and lived off the rental income from the apartments. In the last 12 months she had loaned \$280,000 to her sons.

The deceased's 61 year old son from his first marriage issued proceedings against his father's estate seeking additional provision. His financial position was very dire as he and his wife owned their home worth \$400,000 but they had debts of \$400,000. He earned \$204 per week and his wife \$650 per week. The deceased's son had worked in various trade and labouring jobs over his working life but had a stroke in 2006 and cancer in his right eye in 2013. He clearly had a very pressing need for financial assistance.

The deceased had previously given his son \$100,000 six years earlier in 2007 when his son had a stroke.

Justice Lindsay noted that the deceased's son had very limited income earning capacity, was dependent on his wife's income, and was on the verge of being destitute. He awarded the deceased's son **a lump sum of \$250,000 in addition to the \$50,000 left to him under the will.**

Interestingly as the deceased's son lived with his father and his 2<sup>nd</sup> wife for a period of his childhood he would be eligible to make a family provision claim against his father's 2<sup>nd</sup> wife on her death.

### **Case study 4 – Bates v Cooke [2015] NSWCA 278 – Appeal from a decision of Kunc J**

When June Cooke died aged 62 years she was survived by her husband Robert Cooke to whom she had been married for 25 years. June had two children from her first marriage and one child with her second husband Robert. Robert also had 2 daughters by an earlier marriage.

By wills made in 2006 June and Robert had left their whole estate to each other and in the event that either predeceased the other the gift over was in favour of all 5 of their children equally.

At the date of her death June and Robert jointly owned 3 properties worth \$2.15M but had debts of \$1,265,000 leaving a net value of \$885,000. They also had a superannuation fund of \$2,150,000. Their total assets were worth about \$3M but the non-joint assets of June were \$1,075,000.

Bradley who was one of June's sons from her first marriage, made a family provision claim against his mother's estate. Bradley was 43 years old and married to Leanne. He was an electrician earning \$70,000 per annum after tax. He and his wife owned their home in Blacktown worth \$460,000 and an investment property in Katoomba worth \$360,000 where his wife Leanne operated a bed and breakfast business. They had debts of \$687,000 but Leanne was shortly to receive an inheritance of \$180,000. Bradley had superannuation of \$61,000 and Leanne had \$109,000.

Bradley's claim was initially put on the basis that he was concerned that there was no guarantee that Robert Cooke would adhere to the scheme set out in his and the deceased's mutual wills and that Bradley would not in the future be able to make any claim against Robert Cooke's estate as he was not eligible. The relief that was sought was provision of one fifth of the assets of the marriage ie \$625,000. After Kunc J raised his concerns about this approach to Bradley's counsel during the course of the hearing, the nature of the provision that was then sought, altered to whether or not provision should be made to enable Bradley to build a suitable amount of superannuation upon which to retire.

Bradley without any expert financial evidence claimed that he would need \$700,000 on retirement to address his needs, and his counsel submitted calculations that an additional \$189,000 was needed now to achieve that sum.

Justice Kunc noted in his judgement that Bradley's financial problems could be alleviated by the sale of the Katoomba property, Leanne obtaining employment, and the application of Leanne's inheritance to reduce their debts. They would then still own their home worth \$460,000 and have debts of \$214,000 which was manageable. Bradley and Leanne had no children and had 20 years of working life ahead of them.

Kunc J also noted that their debt and inability to make contributions to their superannuation had arisen from the purchase of the Katoomba property, the losses incurred on the bed and breakfast business at that property, and their decision to retain that property and spend more money on that property, stating "Their decision to retain the Katoomba property is economically questionable and has the effect of making their financial position much worse than it would otherwise be".

Kunc J went on to conclude that it was not appropriate in accordance with community standards to extend provision to alleviate a need which was being caused by Bradley's deliberate and economically risky decision to spend further money and incur losses on the Katoomba property. In this regard he referred to the decision in *Walker v Walker* NSWSC 1024.

Justice Kunc went on to state by way of an alternative line of reasoning that even if he did not take into account the effect of the Katoomba property on their finances he would have arrived at the same conclusion because Bradley has 21 years of working life ahead of him to build up his superannuation, he and his wife already had \$170,000 in superannuation, they owned their own house with a modest mortgage, they had no dependents, his wife could seek employment, and he was satisfied that Robert Cooke would honour his agreement with his late wife that on his death he would leave his estate to their five children equally, but noting that there may be innocent reasons why that may not occur, including if the estate is depleted in the period up until his death.

Kunc J did not award Bradley any provision and he was ordered to pay the defendant's costs of the proceedings. In doing so he accepted that in appropriate cases ensuring that an adult son has sufficient funds for retirement is a proper matter for a family provision order, however for the aforementioned reasons this was not one of those claims.

## Court of appeal – some error in judgement but appeal fails

The decision of Kunc J was appealed broadly on the basis that the primary judge erred in:

1. finding that the appellant was precluded from claiming provision by reason of his own improvident investment decisions; and
2. finding that there was no real risk that the respondent would change his will to reduce the entitlement of the appellant as a beneficiary and that he wrongly took into account the possibility that he would benefit from the respondent's will in the future.

Although the Court of Appeal found some error in the primary judge's rationale in his initial approach where he took account of the effect of the Katoomba property on Bradley's financial position, it found no error in his alternative rationale which excluded the effect of the continuing ownership of the Katoomba property.

Sackville JA identified the error as follows "the difficulty with the Judge's first approach is that it elevates a matter that might properly be weighed in the mix of factors to be considered into a principle that effectively disqualifies an adult claimant. His Honour interpreted community expectations to disentitle an adult child with financial needs from claiming a family provision order, if those needs were created by well intentioned but improvident investment decisions".

However, Sackville JA did not find any error in respect of the primary judge's rationale in his alternative approach. In dealing with the issue of whether the primary judge was in error to take into account that Bradley may receive some money in the future from the respondent's estate he determined that this was not an error and that it was only one element which was weighed with other elements as to whether to make a family provision order.

Sackville JA concluded that if it had been necessary to re-exercise the Court's discretion he would have reached the same decision as the primary judge as the evidence did not provide a sufficient foundation for Bradley's claimed retirement needs and for the reasons set out in the primary judge's second rationale with the exception of the reference to the prospect of Bradley possibly receiving a legacy from the respondent in the future. Those reasons included Bradley's age, his employment status, his good health, the absence of dependants, the "manageable" mortgage, the ability of Leanne to seek employment if she wished, and their superannuation.

In relation to the lack of evidence to support the calculations submitted in respect of Bradley's superannuation claim, Sackville JA and Leeming JA noted that:

- i. Bradley's need for \$700,000 in superannuation appeared to be derived from his evidence that he would probably need this sum to retire comfortably but the basis for this sum was not provided;
- ii. the calculations assumed that the net balance would increase by 3% per annum without any explanation of the basis of this return on the funds;
- iii. the calculations took no account of Leanne's existing superannuation;
- iv. the calculations assumed that Bradley's wage would remain unchanged at \$70,000 and that the contribution rate would not change from 9%;
- v. the calculations were based on Bradley's after- tax income of \$70,000 rather than pre-tax income of \$100,000.

Sackville JA stated "in more finely balanced cases, a claim for an order to build up superannuation entitlements should ordinarily have a more solid foundation in the evidence. The appellant's claim lacks such a foundation". Having said that, Sackville JA indicated that the absence of more detailed evidence as to the appellant's retirement needs was not necessarily fatal to his claim but taking into account all of the other relevant matters he would not be satisfied that the Will did not make adequate provision for the appellant's maintenance and advancement in life.



This case shows how important it is to set out in great detail a plaintiff's financial position, current expenditure, and identify their existing and future financial needs. Further where those future needs are not readily quantified (e.g. reducing existing debt levels, quotes for future medical or dental expenses, quotes for building repairs, website material identifying the likely cost of whitegoods, cars, or a home), that it may be necessary to obtain an expert report from an accountant to establish a future financial need, especially where the need for future provision is not obvious.

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