

Release of Rights to Family Provision Claims

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While an individual is free to leave their property as they see fit upon their death, Chapter 3 of the *Succession Act 2006* (NSW) ('the Act') places a significant restriction on a testator's testamentary freedom. The Act confers on certain individuals a statutory right to make family provision claims out of the testator's estate, contrary to his or her testamentary intentions. Nevertheless, this right may be waived by the individual on whom the right is conferred. However, as is discussed below, doing so is not simply a matter of opting out; it requires the approval to the Supreme Court to prevent that person bringing a claim later. To get that approval the people seeking it must satisfy a number of criteria.

Family Provision under the *Succession Act 2006* (NSW)

Under Chapter 3 of the Act, an eligible person has the right to make an application to the Supreme Court of New South Wales for provision out of a deceased estate.¹ The Court's function here is to step into the shoes of the deceased and determine whether adequate provision has been made for the proper maintenance, education, or advancement in life of the applicant,² and if not, make provision in favour of the Applicant which in its discretion is adequate and proper.³ Under the Act, an eligible person in relation to the deceased is either:⁴

1. A *de jure* spouse;
2. A *de facto* spouse;
3. A child;
4. A former *de jure* spouse;
5. A grandchild;
6. A person who, at any particular time, was partly or wholly dependent on the deceased;
7. A person who, at any particular time, was a member of the household which the deceased was a member; and
8. A person with whom the deceased had a close personal relationship at the time of the deceased's death.

¹ *Succession Act 2006* (NSW) ss 59(2), 60(1)(b) ('SA').

² *Ibid* s 59(1)(c).

³ *Singer v Berghouse (No 2)* (1994) 123 ALR 481, 486 (Mason CJ, Deane and McHugh JJ).

⁴ SA s 57(1)(a)-(f).

Release of Rights

Section 95 of the Act states that a person eligible to make a family provision claim, may release his or her right to bring such a claim. However, this release is subject to the approval of the Court,⁵ and in doing so, the Court must consider whether:⁶

1. It is to the advantage, financially or otherwise, of the person making the release;
2. It is prudent to make the release;
3. The terms of the release are fair and reasonable; and
4. The person making the release sought independent advice and has given due consideration to that advice.

It becomes clear from the criteria listed above, that the Court's deliberation is directed at a rather broad set of factors, and consequently, the process of approving a previously agreed release is by no means a formality, and instead requires the Court's careful consideration.⁷

Without the Court's approval, a release is not binding on parties, and its status is merely that of a statement of the parties' intentions.⁸

It is also of particular note that an application to approve a release may be made before or after the death of the person whose estate is the subject of the release.⁹

Circumstances Giving Rise to a Release

As a class of eligible persons, releases under Section 95 are not uncommon between former *de jure* spouses. Where divorcing parties are settling their financial affairs by way of a Binding Financial Agreement or other deed, it is prudent practice to include a release clause into the terms of such agreements as a means of excluding one another from making a claim on their respective estates later.

Another common circumstance where releases occur are instances where a parent makes a gift to one of their children during their lifetime and the parent believes it will be unnecessary to give anything further to that child upon the parent's death.

Often, a release under Section 95 is agreed to as part of a settlement at the conclusion of a litigated dispute between family members. As for example, where a mother and son may be involved in a dispute, and a term of the settlement is that the son would not challenge his mother's will in the event of her death. This was the case in *Oxley v Oxley* [2014] NSWSC 1606.

Oxley v Oxley [2014] NSWSC 1606

This case involved Mrs Oxley who made an application to the Supreme Court to have a release approved under Section 95. The defendant in the matter, Mr Oxley, was the Plaintiff's son. The facts in the case are straightforward, and may be stated briefly.

⁵ *Ibid* s 95(1).

⁶ *Ibid* s 95(4)(a)-(d).

⁷ *Boardman v Boardman* [2012] NSWSC 1257, [53] (Lindsay J).

⁸ *Ernst v Mowbray* [2004] NSWSC 1140, [25] (Young CJ in Eq).

⁹ SA s 95(2).

The Plaintiff owned a property in Pagewood in New South Wales, and the Defendant was living at the property. On 16 December 2013, the Plaintiff, on the basis of unpaid rent, sought possession of the property by initiating proceedings in the Supreme Court against her son. On 18 July 2014, the parties reached an agreement to settle the matter. The terms of the agreement were:

1. the Defendant to vacate the property;
2. the Defendant to release his rights to any family provision claim against the Plaintiff's estate;
3. the Plaintiff to forgo any unpaid rent;
4. the Plaintiff undertook not to alter her will which had made equal provision for each of her three children, including the Defendant; and
5. the parties to bear their own costs.

The Plaintiff then made an application to the Court under Section 95 of the Act to approve the Defendant's release of his right to bring a family provision claim in the event of his mother's death. At trial, the Defendant failed to appear and orders approving the release were made in his absence.

Despite the Defendant's failure to appear, Hallen J was nonetheless required to discharge the obligation imposed on His Honour by Section 95(4) to consider all the circumstances in the case. While the case did not involve any contentious issues, largely by virtue of the Defendant's non-appearance, the case does however provide a helpful illustration of the Court's deliberative process in determining applications made under Section 95.

In reviewing the authorities, His Honour provides a succinct summary of the law, and an insightful look into the interplay between the factors to be considered in Section 95(4)(a)-(d).¹⁰ As for example, His Honour gave much weight to the fact that the Plaintiff had still made provision for the Defendant in her will, and under Section 95(4)(a), this was to the financial advantage of the Defendant.¹¹

Conclusion

While Section 95 of the Act is clearly drafted and is not plagued by any ambiguity, its application may not be so straightforward. As seen in *Oxley v Oxley*, even where an application to approve a release is not contested, the Court must still embark on the process of determining whether a release should be approved in light of the criteria outlined at Section 95(4)(a)-(d). The implication here is that even though parties fully agree to a release, whether as a result of a divorce settlement or by other agreement, the release may not be binding on parties where the Court is not satisfied the relevant criteria has been met. So in practice, it is imperative that legal practitioners are aware of such requirements when advising clients on releases under Chapter 3 of the Act. At Diamond Conway, our wills and estate lawyers are highly experienced in family provision matters, including those concerning releases, and if you are considering any such applications, our lawyers would be happy to assist you.

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¹⁰ *Oxley v Oxley* [2014] NSWSC 1606, [68]-[78] (Hallen J).

¹¹ *Ibid* [79] (Hallen J).