

Children Estranged From Their Father For 21 Years After Father's Divorce Make Successful Claim Against His Deceased Estate

By Martin Pooley, Senior Associate

In the recent Supreme Court decision in *Poletti v Jones [2014] NSWSC 715* (4 June 2014) two daughters who were estranged from their father for 21 years after he divorced their mother successfully brought a family provisional claim against his estate.

The Family's Position

The background to these proceedings is that John Poletti died on 15 May 2012 leaving 85% of his estate to his eldest son Mauro and 15% to his son Marco. He did not leave anything to his two daughters Patrizia and Doriana from whom he had been estranged for 21 years after his divorce from their mother. In the statement written by the deceased in 2010 accompanying his final Will, he set out the reasons for excluding his two daughters and the reasons included:-

1. He had had no contact with his daughters or their children for over 20 years.
2. His daughters had intervened in his family law proceedings and encouraged Marco to also intervene on the side of his wife.
3. He had assisted his daughters' husbands with jobs and loans to buy properties in the past.

Both daughters who were aged in their early fifties had modest financial circumstances in that they were both working and expending most of their income on living expenses. Patrizia who was a widow had assets totalling \$500,000 and Doriana who was married had joint assets totalling \$720,000.

Mauro who elected not to disclose his financial position was viewed by Slattery J as an able bodied son with few family responsibilities who was actively involved in what appeared to be a successful business.

Marco who was not a party to the proceedings provided some evidence as to his financial position as a competing beneficiary and the Court noted that his needs appeared to be similar to that of his two sisters.

Mauro claimed that he had provided substantial financial assistance to his late father and had made a direct financial contribution to the preservation of his father's assets that were now comprised in the estate. Mauro argued that he was the effective source of the assets in the deceased estate and contended that it was only as a result of his personal intervention that his father maintained financial solvency during the 1990s. He also claimed to have been responsible for his father's care throughout the last years of his life.

The estate had a net value of approximately \$2.3 million.

Initial Decision of the Court to benefit the daughters

Slattery J awarded each daughter the sum of \$450,000 together with their costs of the proceedings. No specific order was made as to how the burden of this award was to be shared between the two brothers such that the effect of this decision would be that each daughter would receive roughly 19.5% of the estate, Marco's share would be reduced from 15% to 9% and Mauro's share from 85% to roughly 52%.

In relation to **the issue of estrangement**, Slattery J determined that neither daughter had consciously decided during the course of the family law proceedings between their parents that they would cease all communications with their father. He formed the view that the daughters "*temporarily retreated from the emotional turmoil of the previous three years of the Family Court proceedings and that what began as a temporary situation slowly crystallised into a more permanent form over the years as estrangement, and became the default position from which neither the plaintiffs nor the deceased departed.*"

He further found that the estrangement continued partly because of the conduct of the deceased and his son Mauro. Reference was made to legal proceedings that the deceased commenced in 1997 against his daughters for the recovery of monies which was calculated to and had the effect of alienating his daughters even further. Further the sacking of Patrizia's husband from the father's business together with Mauro's growing control over his father's life, and Mauro's hostility to his sisters aggravated the situation.

Slattery J determined that the deceased's daughters were not the authors of the estrangement and that it was reasonable for them to assume that any attempts at reconciliation were likely to be fruitless. He went on to say in his judgment that although the estrangement did not prevent them from obtaining an order for provision, that the estrangement must be taken into account and reduce what they would otherwise have received if there had been no estrangement.

In relation to the competing claim made by Mauro on his father's estate resulting from his financial contributions to his father's assets and other financial support, Slattery J was of the view that Mauro had derived other benefits from his father's business and his father's ongoing contribution to the business which off-set the financial assistance he provided to his father.

His Honour also took into consideration the numerous Wills executed by the deceased after his divorce a number of which did acknowledge his daughters' claim on his bounty. As late as 2007 the deceased had included provision for his two daughters.

Appeal Proceedings [2015] NSWSC 107 (27 April 2015) – Provision for daughters reduced

The decision of Justice Slattery was appealed by Mauro in his capacity as executor. On appeal the award to the two daughters was reduced to a 15% share of the net estate which roughly equated to \$390,000 and the burden of this provision was ordered to be met by Mauro from his 85% share of the net estate. The purpose of this order was to ensure that the award of provision to the deceased's two daughters did not diminish the monies that were otherwise to be received by their brother Marco.

The issues for determination on appeal were whether the trial judge erred in:-

- (i) Not applying a two-step approach under Section 59 of the Succession Act.
- (ii) Making an order for provision in favour of the respondents despite:-
 - (a) their 21 years long estrangement from the testator and;
 - (b) their lack of demonstrated need
- (iii) Finding that in return for claim contributions to his father's estate and well-being the appellant (personally or through his companies) received benefits from the testator limiting his competing moral claim; and
- (iv) With respect to the intervener (Marco Poletti) failing to consider whether his interest was disproportionately reduced.

In dismissing the appeal in relation to all of the above grounds with the exception of ground (iv), the Court held in the majority judgment of Justice Basten:-

- (i) Section 59 and 60 of the Succession Act 2006 may require a two-stage process however this was not a case in which the pre-condition to the making of an order and the terms of an order needed to be separately addressed. Basten J referred to his judgment in *Andrew v. Andrew* and repeated that the legislation no longer dictated that a two-stage process was required in circumstances where a rigid demarcation of issues along those lines would be artificial. The issues to be determined by the Court are:-
 - (1) whether the applicant is an eligible person
 - (2) whether a family provision should be made, and
 - (3) the nature of any such order.

He repeated the point raised in the High Court by Justices Callinan and Heydon in *Vigolo v. Bostin* where it was said “*adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question of whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances.*”

- (ii) There was evidence that the testator and his son Mauro bore part of the responsibility for the estrangement for example suing his daughters for minor loans in 1997 and Mauro not communicating to his sisters his father’s regret over not seeing his daughters and grandchildren. The Court of Appeal was further of the view that his daughters had identifiable but moderate needs.
- (iii) There was no objective material put before the Court by Mauro which contradicted the trial judge’s assessment of the contributions he made to his father and the resulting benefits he received from his father.
- (iv) It was accepted that the trial judge erred in making provision for the two daughters in excess of the monies their brother Marco was left by his father under the Will.

The Court of Appeal noted that the award made by Slattery J to the deceased’s daughters was on any view generous but noted that the Court should not intervene unless the result was manifestly unreasonable in the sense of it being outside a reasonable range. Although the Court did not consider the sum awarded to be unreasonable, it was troubled by the fact that the effect of these orders in the absence of a burdening order was that Marco’s share would be diminished from 15% to 9.2% which was unfair in the circumstances where he had never been estranged from his father and his financial circumstances were comparable to his sisters.

The award of provision was therefore adjusted to give each daughter 15% of the net estate. Marco would retain his 15% and Mauro would bear the burden of the 30% awarded to his sisters leaving him with 55% of the 85% he was originally intended to receive.

Conclusions

- Where there has been a lengthy period of estrangement it is important that the plaintiff explain why they failed to maintain contact with the deceased and how the estrangement came about.
- That a lengthy period of estrangement will have a discounting effect on the amount of any provision awarded to a plaintiff and can in some circumstances disentitle them from any award of provision (see *Burke v. Burke [2014] NSWSC 1015* – 25 July 2014)

- There is a degree of unpredictability in the manner in which different judges of the Supreme Court of NSW have dealt with family provision claims involving lengthy periods of estrangement and that children who cease contact with their parents for lengthy periods of time in the final years of their parents life should not be overly emboldened by the generous nature of the award made in this case.

Disclaimer

This document was prepared by Diamond Conway Lawyers. It contains information of a general nature only and is not intended to be used as advice on specific issues. Opinions expressed are subject to change. Although Diamond Conway gathered the information contained in this document from sources deemed reliable, and has taken every care in preparing the document, it does not guarantee the document's accuracy or completeness. Diamond Conway disclaims responsibility for any errors or omissions.