

Family provision claims in NSW by widows who are left an annuity

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Tony Atkinson at Diamond Conway has recently been involved in Supreme Court and Court of Appeal proceedings in the case of *Steinmetz v Shannon* [2019] NSWCA 114 (17 May 2019) which raised very interesting questions about widows who are left annuities in a deceased's will and whether this is adequate provision. Notions of the reluctance to interfere with testamentary freedom were also addressed in this claim by a widow for additional provision from her husband's estate.

Size of estate - \$6.65M

In this case Mr Steinmetz died on 4 October 2016 at the age of 68 years and was survived by his second wife aged 62, a daughter aged 40, and a son aged 35, both of whom were from his first marriage. Mr Steinmetz's estate at the time of the original Supreme Court proceedings was worth approximately \$6.65M and comprised 4 properties in Crescent Head worth approximately \$2.6M, shares worth \$2.45M, superannuation worth \$1.4M and other assets.

The will – second wife to receive \$52,000 annuity and house contents

In Mr Steinmetz's will he left his second wife his house contents, items they had obtained together, and an annuity of \$52,000 per year to be paid in quarterly instalments and indexed each year. The balance of the estate was essentially left to his two children. The will did not require any of the estate assets to be held by a trustee or the deceased's children to secure the ongoing annuity.

In this Will Mr Steinmetz stated that he wanted his estate "to remain as a whole for his children and grandchildren" and that he believed that it enabled his wife to live comfortably for the rest of her life.

28 year relationship between Mr Steinmetz and his second wife

Mr Steinmetz and his second wife had been in a relationship for 28 years since 1988, 23 years as de facto partners and 5 years as a married couple. They maintained separate assets and finances but Mr Steinmetz provided his second wife with ongoing financial support.

Over the course of their relationship they always owned separate homes but spent time together in each other's homes for differing periods over the course of their relationship. Mr Steinmetz had been ill for many years prior to his death and his second wife had cared for him for 15 years which allowed him to continue living in his home without an independent carer.

Competing claimants

The children of Mr Steinmetz worked and did not have any special financial needs. In any event the size of Mr Steinmetz's estate was more than ample to provide provision for them irrespective of the provision that was being sought by Mrs Steinmetz in these proceedings which was for a capital sum in the amount of \$2M.

Prior wills – more generous provision to second wife

In 2013 Mr Steinmetz requested that his brother prepare a will in which he left his home at Crescent Head to his second wife, gave her a life interest in his superannuation funds, and one-third of the residue of his estate.

Shortly after the preparation of this will in 2013 Mr Steinmetz requested his son in law who was also a solicitor to prepare another will in which he gave his wife a license to live in his house as long as she wished or until she entered into another relationship, and a life interest in his superannuation.

Second wife's financial position - assets of \$706,880

The second wife owned her own apartment in Crescent Head worth \$250,000, she had \$300,000 in superannuation, \$104,380.00 in cash, investments of \$34,000, and a car worth \$14,000. Her total assets were estimated to be approximately \$706,880.00. She was retired and was living quite frugally with her expenditure not exceeding her income which included at that time the \$1,000 per week she was receiving from the annuity.

Decision of Pembroke J – second wife's application for additional provision rejected.

Pembroke J rejected the second wife's application for additional provision. In summarising the reasons for this decision Justice White JA in the Court of Appeal noted some of the following matters relied upon by the trial Judge:

- a. The deceased sought and obtained his wife's concurrence to the terms of the Will before he executed it.
- b. The indexed annuity would enable Mrs Steinmetz to continue to live in her home unit with an expected annual surplus of income over expenditure of approximately \$34,000 per year.
- c. That although Mrs Steinmetz would not be in a position to live extravagantly, she did not do so when she was married.
- d. That Mrs Steinmetz would not have the benefits, the security, the holidays, the comforts and the additional financial advantages that she enjoyed during her relationship with the deceased.
- e. That the relationship between Mr and Mrs Steinmetz always retained a quality of independence.
- f. That Mr Steinmetz and his wife retained financial independence although he did pay for their mutual expenses of entertainment, holidays, household expenses at his property, and fuel for her car.
- g. That Mrs Steinmetz's evidence as to her wish to move from Crescent Head to Port Macquarie was insufficient to justify genuine need and that her apartment in Crescent Head was adequate for her requirements.
- h. That respect had to be given to the deceased's freedom of testamentary disposition.

Court of Appeal decision - \$1.75M lump sum ordered for the widow in lieu of the annuity with the other gifts to the widow in the will unchanged.

Brereton JA - main judgment

In Justice Brereton's judgment he states in summary of his position "in the context of a marriage of this length, in which on any view the appellant had made sustained and substantial contributions to the welfare of the deceased, where there was no-one else responsible for her maintenance, with an estate of this size, and absent any competing claim, provision which did not allow her to retain the benefits, the security, the holidays, the comforts and the additional financial advantages that she enjoyed during her relationship with the deceased, was not adequate for her proper maintenance and advancement."

Testamentary freedom

Brereton AJ stated "testamentary freedom is not one of the factors referred to in Section 60(2) of the Succession Act 2006" and quoting Justice White's decision in *Slack v Rogan* [2013] NSW SC522 he stated that "the Act is to be applied according to its terms, and not confined by notions of reluctance to interfere with freedom of testation".

What provision ought to be made to a widow?

Justice Brereton in addressing the question of what provision as a matter of community standards ought to be made for a widow referred amongst other cases to Justice Powell's decision in *Elliott v Elliott* SC 18 May 1984 (unreported) where he said "the testator's duty to his widow of a long standing and harmonious marriage as requiring, at a minimum, provision of security in her home for the rest of her life and the capacity to change it; an income sufficient for her to live in a reasonable degree of comfort; and a fund for modest luxuries and contingencies."

Updated perspective on mature relationships with degree of independence

Justice Brereton in commenting on the fact that Pembroke J appeared to have afforded significance to the fact that the relationship between Mr and Mrs Steinmetz was a mature one between persons who came together in mid-life who retained considerable financial independence and sometimes physical distance stated as follows:

"the fact that their formal marriage came relatively late in their very long co-habitation makes little if any difference. The circumstances that each retained a degree of independence, and that the appellant did not co-mingle her assets with those of the deceased, is of slight significance; what is more significant is that on any view she was not withstanding that she had her own assets and income, at least partly dependent on him" and "as his spouse of 28 years during which his estate was conserved if not accumulated, her support and care for him must have to some measure contributed indirectly to the conservation of his estate" and "She made sustained and substantial contributions to the deceased's welfare particularly in his very long illness" and "That they might not have spent every night together in the same home is of no import; that was how they ordered their married life."

Applicant's needs not limited to necessities

In relation to the Pembroke J's comments about Mrs Steinmetz's future needs Brereton J stated that: "the jurisdiction is not solely needs based" and "the jurisdiction is not limited to maintenance but extends to advancement in life, which encompasses improvement and enhancement of the claimant's position" and "to the extent that "needs" are relevant, no narrow view of that notion limited to the necessities or essentials of life is to be taken".

Problems with annuities

In relation to annuities generally Justice Brereton stated "the arguments against annuities include the need in an acrimonious relationship to bring about a clean break between the parties" but that "a clean break could be achieved by buying the annuity from a financial institution with no need for any trust." "However, an annuity suffers from the disadvantage that it is not as flexible as a capital sum" and "with a responsible and mature beneficiary it may be seen as unduly rigid and paternalistic" and "there are undoubtedly cases in which an annuity may be an appropriate means of providing for a beneficiary where the beneficiary is not well equipped to manage a large capital fund, or where it is necessary to balance the claims of a surviving spouse against those of the children".

Why this annuity was not adequate provision

Justice Brereton said "there was nothing to suggest that Mrs Steinmetz would be otherwise than prudent in the management of what was bequeathed to her nor to suggest that she would be troubled with the stress and anxiety having to manage a large capital sum".

Justice Brereton noted in this case that the annuity was not charged on the estate but a personal obligation imposed on Mr Steinmetz's children as a condition of their gifts. Further that quite apart from the form and enforceability of this annuity that:

"to leave a 65 year old widow reliant for the rest of her life on quarterly payments by the children of the deceased's husband's first marriage rather than placing her in control of her own resources, is in this day and age not an appropriate form of provision for a widow who is well and truly capable of managing her own affairs" and it is not only rigid and paternalistic but demeaning and controlling.

Lump sum of \$1.75M in lieu of the annuity, with other gifts unchanged

In determining the lump sum of \$1.75M Justice Brereton allowed a sum of \$1M dollars to enable her to acquire appropriate accommodation and the further sum to maintain her in the style and station which she enjoyed during the testator's lifetime. He further noted that Pembroke J had stated that the estate was ample to accommodate the widow's claim without causing hardship to the deceased's children.

White JA – decision

Widow's concurrence with the terms of her husband's will

In Justice White's judgement he found error in Pembroke J giving any weight to the fact that Mrs Steinmetz concurred with the terms of her husband's will. This will was prepared shortly before Mr Steinmetz died and was executed by him in hospital shortly before an operation in which there was a chance that he would not survive the operation. Justice White noted that Mrs Steinmetz gave evidence that she quickly read the will but did not comprehend it because she was more concerned about her husband's health. When she stated that she was happy with anything she would receive from her husband under the will she explained that she replied in this way because she did not want to upset her husband in his extremely fragile state prior to this operation. Further she did not know the value of the deceased's assets and there was no opportunity for a considered and informed assessment. Justice White did not consider that her concurrence was evidence that the deceased had made out proper provision for her proper maintenance or advancement in life.

Financial needs and proper maintenance

Justice White also found error in that Pembroke J equated what was adequate provision for the Mrs Steinmetz's proper maintenance with a need for provision of financial necessities. Pembroke J dismissed Mrs Steinmetz's evidence that she wanted to be able to move from Crescent Head to Port Macquarie as expressing a preference rather than a need. Justice White noted that if the preference was soundly based that it would inform what was Mrs Steinmetz's proper maintenance.

Provision inadequate having regards to community standards/moral duty

Justice White agreed with Justice Brereton's judgement that having regard to the size of Mr Steinmetz's estate which was ample to meet all competing claims, the provision of an index annuity of \$52,000 per annum was manifestly inadequate provision for Mrs Steinmetz's maintenance having regard to her moral claims on the deceased's estate when she had been his de facto partner or wife for 28 years, including 15 years as his carer.

Reluctance to interfere with testamentary freedom

Justice White agreed with Justice Brereton's comments that the application of section 59 to make a family provision order is not confined by notions of reluctance to interfere with freedom of testation, but that section 59 confers on the Court power to interfere with testamentary dispositions or entitlements on intestacy only to the extent that it considers that adequate provision has not been made for the proper maintenance, education or advancement in life of the applicant.

Simpson JA – decision

Justice Simpson in her judgement noted that the annuity under this Will had numerous deficiencies in that no asset of the estate was identified to secure the quarterly annuity payments and the amount was essentially a personal obligation imposed on the deceased's two children stating:

"the widow should not be in a position of having to take action to secure her entitlement nor should she be dependent for the rest of her life on the quarterly compliance by both of the deceased's children with their obligations" and "Mrs Steinmetz is entitled to the security of a lump sum by which she would be able to manage her own life and affairs."

Cross referencing to a property settlement scenario

Justice Simpson was in agreement on the lump sum proposed by Justice Brereton in the sum of \$1.75M but did not agree with his analysis that consideration as to what the widow might have received under Section 79 of the Family Law Act 1975 which provides for the alterations to property interests of parties to a marriage in the context of a dissolution of marriage could be used as a "cross check" in considering the award of provision . Under that legislation Justice Simpson noted the Court is given a wide discretion to make such orders as it considers appropriate and that the factors to take into account under that legislation are different to those under the Succession Act.

Appeal to High Court unsuccessful

The executors of Mr Steinmetz's estate sought leave to appeal the decision of the Court of Appeal in the High Court but this leave application was rejected.

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