Inheritance Claims

Introduction

There has been an increase in claims being made for provision out of deceased estates in recent years. There are a number of reasons for that. Firstly, the increase in 'blended families' resulting from second (and subsequent) marriages. Secondly, the family home (particularly in the eastern States) has become far more valuable in recent years meaning that there is a much bigger pot to be fought over. Rising house prices also mean that potential claimants (usually adult children) are often servicing a larger debt on their own home, thus increasing their motivation to make a claim. Meanwhile, in the rural setting, there has been a cultural shift in that it is no longer the expectation that the eldest son, or any other son, who has worked the family farm will get the family farm.

Another potential driver comes not from potential claimants but from lawyers. Cuts to personal injury claims and ever increasing competition in other areas has led to an increase in lawyers marketing inheritance claims.

The Basics

Inheritance claims in South Australia are entirely regulated by the *Inheritance (Family Provision) Act* 1972. It is a short Act and it is relatively easy to follow.

Who Can Claim?

This is set out in Section 6 of the Act.

The potential claimants are:

(a) A spouse – married or de facto.

(b) A divorced spouse.

(c) A child.

(d) A step-child: but only where the step-child was maintained wholly or in part or was legally entitled to be maintained wholly or in part by the deceased immediately before their death.

(e) A grandchild.

(f) Parents and siblings: but only those who satisfy the Court that they cared for or contributed to the maintenance of the deceased person during their lifetime.

Time Limits

A claim must be brought within six months of a Grant of Probate or a Grant of Letters of Administration.

What happens if the Estate has already been distributed?

An executor or an administrator of an Estate is under no obligation to give potential claimants an opportunity to bring a claim. The executor can carry on with the administration of the Estate, including a distribution, so long as they have not received notice of a claim from a potential claimant.

Generally speaking, an executor should not proceed with a distribution after they have been put on notice of a claim. If they do, the executor can be found personally liable to pay any amount later awarded to a claimant.

An executor will not be found personally liable if they lawfully distribute the Estate once three months have elapsed after they were put on notice of a claim and they have not been served with Court proceedings (even if the six month time limit has not yet expired).

How are claims assessed?

This question is impossible to answer simply. The experts in the area will tell you that the best advice that you can give a testator faced with the prospect of challenges against their estate is for them to either spend it all or give it all away during their lifetime.

The principles governing applications for family provision in estate matters are set out in section 7 of the Act, which provides:

7—Spouse and persons entitled may obtain order for maintenance etc out of estate of deceased person

(1) Where—

(a) a person has died domiciled in the State or owning real or personal property in the State; and

(b) by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life,

the Court may in its discretion, upon application by or on behalf of a person so entitled, order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled.

The Court therefore has a discretion therefore to re-write the testators will. In fact, any order of the Court granting provision (or further provision to a claimant) is framed as an order varying the disputed will.

There are hundreds of cases where the section 7 of the Act (and its interstate counterparts) have been considered. While the Courts have attempted to establish a set of guiding principles, they invariably return to asking the same question: *"What would the wise and just testator have done?"* The answer to this question is usually answered in an intuitive way, having regard to all of the circumstances of the case.

Justice Lovell of the South Australian Court has recently reviewed and considered the principles in the case of *Butler v Tiburzi [2016] SASC 108*. The following paragraphs and case references in this part of the paper are extracts from His Honour's judgment.

The inquiry as to whether adequate provision has been made involves a two-stage process. The first stage calls for a determination of whether the plaintiff has been left without adequate provision for his or her proper maintenance, education or advancement in life (this has been referred to as the "jurisdictional question"). The second stage, which only arises if that determination is made in favour of the plaintiff, requires the Court to decide what provision ought to be made out of the testator's estate for the plaintiff.

The relationship between "proper" and "adequate" was discussed in *McCosker v McCosker*[1] where Dixon CJ and Williams J stated:[2]

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1 (1957) 97 CLR 566.

2 *McCosker v McCosker* (1957) 97 CLR 566, 571.

"*…As the Privy Council said in Bosch v Perpetual Trustee Co (Ltd) the word "proper" in this collocation of words is of considerable importance. It means "proper" in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance, education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent."*

The expression "advancement in life" is not confined to an advancement of an applicant in his or her younger years.[3] The principles applicable to a claim by an adult son or an adult daughter are the same that apply to other claimants.[4]

Where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies including a lack of adequate superannuation funds.[5] An adult child's lack of reserves to meet the demands of advancing years, particularly of ill health, is a relevant consideration.[6]

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3 *Lloyd-Williams v Mayfield* [2005] NSWCA 189.
4 *Bowyer v Wood & Ors* (2007) 99 SASR 190.
5 *Taylor v Farrugia* [2009] NSWSC 801.
6 *MacGregor v MacGregor* [2003] WASC 169 [179].

In *Vigolo v Bostin*[7] the majority of the High Court held that when the jurisdictional question was being considered a court could have regard to considerations of a moral claim and moral duty. They are considerations which connect the general but value–laden language of the statute to the community standards and give it practical meaning.[8] However, a moral claim cannot be a claim founded upon considerations not contemplated by the Act. A court should not rewrite the will simply by reference to notions of fairness.[9]

The question of estrangement is often an issue. Estrangement of a child and parent should not ordinarily result, on its own, in the child not being able to satisfy the jurisdictional requirement. However it is a factor that can be taken into account. The Court should take into account the whole of the circumstances regarding the relationship. It is for the Court to evaluate all the relevant circumstances, including a period of estrangement and the circumstances of that estrangement, when considering the jurisdictional question.[10]

Determination of the second stage of the enquiry, should it arise, involves similar considerations to that under the first. As the Court needs to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, this assessment will largely influence the order which should be made.[11] The Court will have to take into account other persons who have a moral claim on the estate.[12]

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7 (2005) 221 CLR 191.
8 *Bowyer v Wood & Ors* (2007) 99 SASR 190 [44].
9 *Worladge & Anor v Doddridge & Ors* (1957) 97 CLR 1.
10 *Burke v Burke* [2015] NSWCA 195.
11 *Singer v Berghouse* (1994) 181 CLR 201, 210.
12 *In re Allen (Deceased); Allen v Manchester & Anor* [1922] NZLR 218.

The basic principle the Court should consider is that explained by Salmond J in the case of *In re Allen (Deceased); Manchester & Anor;*[13]

"The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances." [14]

This test has been followed and applied many times by the High Court.

The exercise of the discretion has been compared with "assessing damages" in personal injury matters and the "instinctive synthesis" approach to sentencing in the criminal courts. What is required is that a court take into account all relevant circumstances and give them due weight.[15]

Who pays the legal costs?

Legal costs in litigation generally follow the event: that is, the loser pays. Historically, that has not been the case in Inheritance Disputes. The general rule in those disputes is that costs are paid out of the estate.

The Supreme Court has recently sounded a warning to would-be challengers to Estates on the question of costs. While not going so far as displacing the general rule, the Court has reminded litigants that the awarding of costs in any litigation is at the discretion of the Court. The Court has flagged that it will exercise that discretion so as to award costs against an unsuccessful challenger in certain circumstances: For Example, where the

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13 [1922] NZLR 218.
14 [1922] NZLR 218, 220.
15 *Grey v Harrison* [1997] 2 VR 359.

party has been untruthful or where they have failed to properly attempt to settle the matter before trial.

Can Claims be avoided?

There are a number of vehicles that a testator can employ to attempt to avoid claims against their estate.

It is important in any case for a testator to carefully explain their reasons for choosing to leave a family member out of their Will. Many of the disputes that come before the Court are factual disputes, for example, whether a payment made to a claimant by the testator during their lifetime was a gift or a loan.

Some practitioners include the testator's reason for leaving out a family member in the Will itself. Others do not, thinking that it may bring undue attention to the issue.

If a testator does have a clear and cogent reason for leaving somebody out, that should at least be recorded in a file note or perhaps a letter to the testator when the Will is made.

The most practical way to avoid a claim, apart from dissipating the estate entirely during one's lifetime, is to shift assets outside of the estate.

Often, a testator's principle asset will be their home. If they wish to favour one child over another (or others) they can, during their lifetime, add that child to the title as a joint tenant. The property will then pass to the child immediately upon the testator's death via the right of survivorship. The asset does not then fall into the Estate and cannot attacked via an Inheritance Claim. There will be stamp duty payable on the transfer based on the value of the share in the property being transferred to the beneficiary.

Another vehicle is to nominate a favoured beneficiary as a Nominated Beneficiary under the testator's superannuation policy. As a general rule, super does not fall into a person's estate and is payable at the discretion of the Trustees of the Fund. Monies paid directly to a Nominated Beneficiary will therefore be immune from challenge via an Inheritance Claim.

In both examples above, the Court will have regard to provision made to a preferred beneficiary via an inter vivos gift of property or a through a super fund when weighing up the competing interests of various claimants, however that will be academic if there are no other assets available to make provision to an otherwise worthy claimant.

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