GREENWAY CHAMBERS

# ASPECTS OF CHAPTER 3 OF THE SUCCESSION ACT 2006 AS CONSIDERED BY THE NSW COURT OF APPEAL

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**Not all eligible persons are equal**

"Eligible persons" pursuant to the Act are those as described in s.57.

(1) The following are:

"**eligible persons**" who may apply to the Court for a family provision order in respect of the estate of a deceased person:

(a) a person who was the spouse of the deceased person at the time of the deceased person's death,

(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,

(c) a child of the deceased person,

(d) a former spouse of the deceased person,

(e) a person:

(i) who was, at any particular time, wholly or partly dependent on the deceased person, and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,

(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

Note : Section 60 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order. An application may be made by a tutor (within the meaning of the Civil Procedure Act 2005 ) for an eligible person who is under legal incapacity.

*Note : "De facto relationship" is defined in section 21C of the Interpretation Act 1987.*

(2) In this section, a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the Property (Relationships) Act 1984 , at the time of death, a reference to the following:

(a) a child born as a result of sexual relations between the parties to the relationship,

(b) a child adopted by both parties,

(c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the

man is presumed, by virtue of the Status of Children Act 1996, to be the father (except where the presumption is rebutted),

(d) in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the Status of Children Act 1996,

(e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1998 ).

As can be see from s.59(1)(b) some classes of eligible person have more work to do to obtain an award than others.

"59 When Family Provision Order May Be Made

(1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:

....

(b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of "eligible person" in section 57 -- having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application.

...."

So if you are representing a former wife or husband of the deceased or a grandchild of the deceased (or a person who falls into the category of s.57(1)(e)(i)) or a person whose eligibility is based upon them being in a close personal relationship at the time of the deceased's death, then simply being an eligible person is not enough to excite the Court to consider whether or not adequate provision was made pursuant to s.59(1)(c).

What more needs to be shown are "circumstances of the case" which demonstrate that "there are factors which warrant the making of the application".

I will set out below the Court of Appeal's approach to applicants who fell within two of the relevant categories of eligible person.

**Former wife**

The Court of Appeal in *Lodin v Lodin* [2017] NSWCA 327, 15 December 2017, determined an appeal from Brereton J, brought by the administrator of the deceased's estate against an order made by Justice Brereton that the deceased's former spouse be paid a provision out of the estate. The deceased died intestate leaving a significant estate in excess of $5 million. The deceased's only natural daughter was appointed the administrator of the estate and was the sole beneficiary.

The plaintiff was the administrator's mother and former wife of the deceased.

As Sackville AJA states at [20] of the Judgment:

> "A striking feature of this case is that the deceased and the respondent separated on 5 April 1990, about 24 years before the deceased died and were divorced on 29 December 1995, nearly 19 years before his death. The deceased and the respondent

cohabited only for a period of about 19 months, although Rebecca was born in February 1986, 2½ years before they commenced to live together."

As is stated in paragraph 44 of the Judgment, the respondent, after having failed in an appeal in the Family Court to increase her share of the property settlement Informed the deceased that unless he paid her an additional $60,000 she would "ruin his life". That was in 1993.

The respondent then did her best to live up to her word having lodged a complaint with the NSW Health Department Complaints Unit within 9 days of her threat, denying access to his daughter, suing him at common law for alleged breach of professional duties, which proceedings came to nought, erroneous complaints to the Police that he owned firearms and was looking to kidnap Rebecca, complaints to the Police that he was sexually abusing Rebecca which complaint came to nothing again, and for the remainder of his life harassed, threatened and cajoled him with regard to him paying her money.

His Honour Justice Brereton in his original decision found that the circumstances of the respondent relevantly included the following:

"[35]. She currently resides in a one bedroom unit in Katoomba, which she rents at $269 a week. The disability support pension, of approximately $20,000 per annum, is her main current source of income, in addition she receives interest on her deposit. She estimates her expenses (presumably including the rent, to be about $30,000 per annum) which are about $600 a week.

[36]. She remains diabetic and has chronic pain and restrictions from her spinal injuries suffered in the 2000 motor vehicle accident ... she requires surgery

> for a bunion on her left foot (estimated $10,000), and for spinal stenosis in her lower spine (estimated $10,000 to $20,000). She also requires some dental work ($6,000). She has also been advised to purchase exercise equipment ($5,000).
>
> [37]. She lives alone and is not in any relationship. She has fraught relationships. She is estranged from Rebecca who does not speak with or see her. She has a limited relationship with Alana ..."

Alana mentioned there, is the stepdaughter of the deceased.

In deciding to grant the respondent an amount of $750,000 from the estate Justice Brereton put particular emphasis on the fact that this was a sizeable estate and it did not seem to him appropriate that the deceased's daughter should be the recipient of an estate worth in excess of $5 million whilst her mother, living in relatively hard circumstances received nothing. As can be seen from the Court of Appeal judgment this line of reasoning was in error.

White JA at [5] of the Judgment:

> In *Re Fulop Deceased* (1987) 8 NSWLR 679 McLelland J said (at 681) that the difference between the two sets of classes of applicants then identified in s 6(1) of the Family Provision Act 1982 (NSW) was that lawful and de facto spouses and children are generally regarded as natural objects of testamentary recognition, whereas former spouses, some time -dependent grandchildren or household members are, as such, not generally so regarded. This led McLelland J in *Re Fulop Deceased* to identify that the factors which warrant the making of an application by

> eligible persons falling within the second category are those which give him or her the status of a person who would be generally regarded as a natural object of testamentary recognition by the deceased (at 681). In *Re Fulop Deceased* each of the applicants had lived with the deceased as children, namely as stepson and foster daughter, and this provided the factor that made them natural objects of the deceased's testamentary bounty. The distinction drawn in *Re Fulop Deceased* is also true of the classes of eligible persons in s 57(1)(a), (b) or (c) on the one hand, and the classes of eligible persons in s 57(1)(d), (e) and (f), to which s 59(1)(b) applies, on the other. (paragraph 5 of the judgment).

As can be seen, the question is whether or not a person falling within the relevant category can demonstrate circumstances which would show them to be the natural object of the bounty of the deceased.

This point is picked up and elaborated by Sackville AJA at [114] as follows:

> ... "in order to satisfy s.59(1)(b) an applicant must therefore establish that there are circumstances that justify regarding him or her as the natural object of the testamentary recognition by the deceased. Those circumstances must go beyond the bare fact of a familial (or, in the case of a former spouse, are previous familial) relationship. The factors relied on must be such as to demonstrate a social, domestic or moral obligation on the testator to make some provision for the claimant."

In upholding the appeal Sackville AJA had regard to a number of matters he considered relevant to the consideration necessary pursuant to s.59(1)(b) which, in this case, related to

the marriage having been effectively over for 25 years before the deceased's death, a financial settlement in the final orders from the Family Court having been made many years before the deceased's death, the conduct of the respondent both in what was described as "her relentless persecution" of the deceased and in her failing to disclose financial information to the deceased and to the relevant government authority, the fact that her circumstances related partly to her having suffered physical injuries in motor vehicle accidents many years after the relationship ended and that there was no evidence that whatever medical or psychiatric conditions of the respondent were that they had any relationship to the deceased or the past relationship between the deceased and the respondent.

**Grandchildren**

The Court of Appeal in *Chapple v Wilcox* [2014] NSWCA 392, (18 November 2014), heard an appeal against a decision by Justice Pembroke in which his Honour had ordered provision be made from the deceased's estate for the benefit of a grandchild of the deceased.

The deceased left his entire estate to his daughter (being his only child), Mrs Wilcox. She was also the executrix of the estate. The application was made by one of her sons (her other son having commenced but settled an application).

Justice Pembroke ordered provision he made for the grandchild by the immediate payment of $107,000 (to cover a tax debt) and seven annual payments of $40,000 commencing after a period of two years.

In upholding the appeal Justice Basten at [11] states:

"The critical issue, not clearly addressed in the sons of the primary Judge, is why a generation skipping order for provision was appropriate."

Further at [14], his Honour goes on to say:

"14. There may be circumstances in which widely held community standards might expect a grandfather to make some provision for his grandchildren, for example where they had maintained a strong relationship and where there was reason to doubt the willingness or the ability of the parents to make adequate provision for their children. However, such considerations will always be influenced by the fact that the grandchildren are themselves mature adults. In the present case, relevant community values will be affected by the nature of the estate. Quite particular values might operate with respect to farming properties which are subject to fluctuations in relation to debt and revenue depending on natural events and particularly drought. They may also be affected by the financial viability of an estate and its capacity to support those owning or managing it, if broken up and part disposed of.

15. It was a failure to give adequate consideration to these matters which was, in my view, the critical error on the part of the primary Judge. Once those matters are taken into account, it is not possible to identify any social, domestic or moral obligation on the part of the testator to provide for the claimant. In other words, there were no sufficient factors to warrant the making of the application for the purposes of s.59(1)(b) and the application should have been dismissed."

Both Justice Basten and Justice Barrett, who wrote substantive judgments in this matter, referred to and adopted the reasoning of Hallen J in *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [113]. Those principles are stated in paragraph 17 of the judgment of his Honour Justice Basten to be as follows:

> "(a) As a general rule, a grandparent does not have a responsibility to make provision for a grandchild; that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition.
>
> (b) Where a grandchild has lost his or her parents at an early age , or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes in loco parentis, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one or more of his or her grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to to that of a parent than a grandparent , with direct responsibility for the grandchild's life, a position more akin to that of a parent , with diect responsibility for the granchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally
>
> (c) The mere fact of a family relationship between grandparent and grandchild does not, of itself establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created in a particular case by reason,

for example, of the care and affection provided by a grandchild to his, or her grandparent.

(d) Generosity by the grandparent to the grandchild, including contribution to the education of the child, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent. It has been said that a pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.

(e) The fact that the deceased occasionally, or even frequently, made gifts to,or for, the benefit of the grandchild, does not, in itself, make the grandchild wholly, or even partially dependant on the deceased for the purposes of the act.

(f) It is relevant to consider what inheritance, or financial support, a grandchild may expect from his, or her parents."

Justice Barrett at [66] and [67] of the Judgment emphasises that the matters set out by Justice Hallen cannot be and should not be read as rules of law so as to constrain the discretionary powers of the Court pursuant to s.59. This being said it is instructive that both Justice Barrett and Justice Basten go on to apply the reasoning of Justice Hallen in *Bowditch* to the facts of the appeal before them and to allow the appeal and therefore to find that the grandson did not establish that there were "factors which warrant the making of the application".

Whilst a determination cannot be made with regard to s.59(1)(b) until all the relevant material is known, such a determination needs to be made before the evaluative and comparative steps are taken to determine if adequate provision has been made for the applicant and then further, if adequate provision is found not to have been made what such provision should be. Despite this the Court of Appeal, following on from the decisions at first instance in both *Chapple* and *Lodin* appear to have engaged in an evaluative exercise (at least partially) as part of the preliminary determination. This can be seen from the detailed recounting of the respondent's circumstances and needs in *Lodin* and also the detailed recitation of the circumstances of Mrs Wilcox in *Chapple*. This concentration tends then to blur the provisions of s.59(1)(b), 59(1)(c) and s.60.

## Other "eligible persons" – application of the discretion in s.59(1)(c) and s.59(2).

### Adult children

The Court of Appeal in *Smith v Johnson* [2015] NSWCA 297, 30 September 2015, heard an appeal against a decision of Kunc J. The respondent in the matter was one of three adult children of the deceased. The deceased's Will left her estate valued at about $2.3 million to be equally divided amongst her three children. The respondent however by his having incurred considerable debt to the estate prior to his mother's death was left in a position where he was not entitled to any cash payment.

Justice Kunc, having regard to the financial and other circumstances of the respondent ordered that provision be made to the respondent in an amount of $500,000 following the forgiving by the estate of monies owed to it by the respondent. In upholding the appeal, Ward JA at [5] of the Judgment states as follows:

> "By way of general observation, I note that Andrew's conduct has diminished the value of the estate, has dissipated his assets and has no doubt caused his family much grief. To the extent that he has chosen, in effect, to fritter away in ill-advised litigation that which would otherwise have come to him by way of inheritance under his mother's Will, the position in which he finds himself is wholly of his own making. Community expectations as to the provision to be made for adult children would not, in my view, extend to the making of provision over and above that which Mrs Johnson made for her son and which, absent any further forays into the litigious sphere should enable him to acquire accommodation adequate for his needs with a buffer for his ongoing needs."

His Honour Justice Sackville at [62] of the Judgment states the general principles adopted by the Court of Appeal with regard to the provision to be made for adult children in the following terms:

> "(a)The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support,as the bonds of childhood are relaxed
>
> (b)It is impossible to describe in terms of universal application, the obligation, responsibility, or community expectation, of a parent in respect of an adult child. It

can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life, such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances , to provide an unencumbered house, or, to set his or her,children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it,there might be such an obligation.

(c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependant of a parent, the community usually expects the parent to make provision to fulfill that ongoing dependency after death if he or she is able to do so .But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute.

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependant child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant.

(e) There is no need for an applicant adult child to show some special need or some special claim.

(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant. In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased.

(g) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim"

It was a significant part of the case for the respondent that he needed sufficient provision to allow him to purchase what he considered to be appropriate accommodation. This argument found some favour with Justice Kunc at first instance, however, Justice Sackville at [85] of the Judgment states as follows:

"Nonetheless, an assessment of needs, particularly where it is directed to such an important matter as the nature and cost of accommodation required by an applicant, must have a sound evidentiary foundation. In my view, the evidence in the present case does not support his Honour's finding that Andrew required a two-bedroom unit. The evidence established that Andrew **desired** a two-bedroom unit, not that he **needed** anything larger than a one-bedroom unit. His Honour therefore made a material error of fact which vitiated both his determination that the Will did

not make adequate provision for Andrew's maintenance or advancement in life and his decision to award Andrew $500,000 "in hand"".

**Community standards**

One of the benchmark Court of Appeal decisions in this area is *Andrew v Andrew* [2012] NSWCA 308, 28 September 2012. The primary judgment is delivered by Justice Allsop (Allsop P as he was then).

At paragraph 12 his Honour states:

> "The accepted and acceptable social and community values permeate or underpin many, if not most, of the individual factors in s.60(2) and are imbedded in the words of s.59, in particular "proper" and "ought" that such values may be contestable from time to time in the assessment of an individual circumstance, or that they may change over time as society changes and grows can be readily accepted. Customary morality develops "silently and unconsciously from one age to another", shaping law ... The relationship between law and morals or morality depends, of course, on the context of the enquiry ..."

Further at [14], his Honour continues:

> "In a broad evaluative judgment based necessarily upon community values, the task should be expressed broadly and not by precise rules, lest particular rules or duties expressed by reference to one age's values come to distort later evaluative assessments by the imposition of the earlier age's rules and values."

And further at [16], the following:

> "If I may respectfully paraphrase Sheller JA in *Fraser* at 46, the Court in assessing the matter at s.59(1) and the order that should be made under s.59(1) and (2), should be guided and assisted by considering what provision, in accordance with perceived prevailing community standards of what is right and appropriate, ought be made."

The Court has struggled with the application of what is considered to be "prevailing community standards" with a number of Judges expressing discomfort and finding themselves in the position of an arbiter of that particular standard.

**Widows**

The Court has long devoted attention to the consideration of whether or not a Widow stands in a special position with regard to what could be considered to be obligations placed upon a testator.

The matter was carefully considered by the Court of Appeal in *Steinmetz v Shannon* [2019] NSWCA 114, 17 May 2019.

As the head note summarises, the appellant was the second wife of the deceased, who left an estate of approximately $6.8 million. The deceased in his Will left the appellant an indexed annuity of some $52,000 for the remainder of her life with the remainder of his estate being left to the adult children of his first marriage.

The appellant sought to increase her provision. She was at the time of the application some 65 years of age.

The appellant and the deceased had been married on 30 December 2011, prior to their marriage they had been living in a de facto relationship since July 1988. The deceased died on 4 October 2016. The Will had been made in September 2016 whilst the deceased was awaiting surgery.

His Honour Justice Brereton at [101] states as follows:

> 101. The question of what provision ought as a matter of community standards be made for a widow has been addressed in numerous cases, and the obligations of a testator towards a surviving spouse have often been described. In *Elliott v Elliott*,[12] in a passage that would later be endorsed by Young J in *Court v Hunt*,[13] Powell J (as he then was) described the testator's duty to his widow of a longstanding 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. His Honour said:
>
> I take the view – which view I believe, is supported by the authorities – that, in a case such as this, where the marriage of a deceased and his widow has been long and harmonious, where the widow has loyally supported her husband, and assisted him to build up and maintain his estate, the duty which the deceased owes to his widow can be no less than (to the extent to which his assets permit him to achieve that

result) first, to ensure that his widow be secure in her home for the rest of her life, and that if, either, the need arises, or the whim strikes her, she has the capacity to change her home; secondly, that she have available to her an income sufficient to enable her to live in a reasonable degree of comfort and free from any financial worries; and, thirdly, that she has available to her a fund to which she might resort in order to provide herself with such modest luxuries as she might choose, and which would provide her with a hedge against any unforeseen contingency or disaster that life might bring.

102. To similar effect, in *Luciano v Rosenblum,*[14] which is perhaps the case most often cited in this context, Powell J said:

It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies.

103. In *Paton v Public Trustee,*[15] Young J, in dealing with a long but relatively unhappy marriage, said:

Whilst if there was a very large estate it may be that there would be a different result in an application under the Act between a happy marriage and an unhappy marriage, there is a basic minimum which the community regards as necessary for testators to provide for their spouses where their marriage has been of medium to long duration. Those basic necessities include a secure roof over the remaining spouse's head and at least a small capital sum.

104. The "broad general rule" referred to in *Luciano v Rosenblum* was echoed by the Court of Appeal in *Golosky v Golosky*,[16] in which Kirby P (as his Honour then was), with whom Cripps JA agreed, said that in the absence of special circumstances, it will normally be the duty of a testator to ensure that a spouse is provided with accommodation appropriate to that which she or he has been accustomed, and to the extent that the assets available permit, a fund to meet unforeseen contingencies:

(c) Consideration of other cases must be conducted with circumspection because of the inescapable detail of the factual circumstances of each case. It is in the detail that the answer to the proper application of the Act is to be discovered. No hard and fast rules can be adopted. Nevertheless, it had been said that in the absence of special circumstances, it will normally be

> the duty of a testator to ensure that a spouse (or spouse equivalent) is provided with a place to live appropriate to that which he or she has become accustomed to. To the extent that the assets available to the deceased will permit such a course, it is normally appropriate that the spouse (or spouse equivalent) should be provided, as well, with a fund to meet unforeseen contingencies; see *Luciano* (above) 69 to 70;
>
> (d) A mere right of residence will usually be an unsatisfactory method of providing for a spouse's accommodation to fulfil the foregoing normal presupposition.

However, his Honour Justice Brereton (with whom Justice White agreed) states in paragraph 106 that observations such as those made with regard to what could be referred to as the "widows rule" did not hold the status of a law but more reflect guidelines to give assurance and provide guidance. His Honour then refers to the statements of Basten JA and Barrett JA in *Chapple v Wilcox* to the same effect. In other words, the "guideline" should be seen as being a reflection of "prevailing community standards".

The effect however of such guidelines is to effectively create a special provision for widows that will need an examination of the particular circumstances to move the Court away from the "guideline".

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**24 February 2020**