



DEPENDENCY ISSUES IN FAMILY PROVISION CASES

CARMEL LEE

GREENWAY CHAMBERS

Introduction

- Grandchildren
- Member of Same Household:
 - *Dependency*
 - *Nieces and Nephews*
 - *Step Children*
 - *Friends*
- Factors Warranting

Dependence on the Deceased

Succession Act 2006 (NSW) s57(1)(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,

Dependence on the Deceased

Succession Act 2006 (NSW) s59(1)(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 or the application ...

GRANDCHILDREN

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***Chapple v
Wilcox***
**(2014) 87
NSWLR 646**

The Deceased left his estate to his only child. Two grandchildren brought family provision proceedings.

On appeal, only one grandchild's claim was still on foot.

The Court approved of guidelines earlier laid down by Hallen AsJ on claims brought by grandchildren.

***Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [113]**

- (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 that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.

Bowditch v NSW Trustee and Guardian [2012] NSWSC 275 at [113]

(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.

***ChaBowditch v NSW Trustee and
Guardian*** [2012] NSWSC 275 at [113]

(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 partially, dependent on the deceased for the purposes of the Act.

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

Chisak v

Presot

[2021]

NSWSC 597

The Deceased left her estate to four friends and her granddaughter in equal shares. Granddaughter brought FP claim.

No real sense of dependence – only brief periods of visitation.

Granddaughter not an eligible person. No provision ordered.

***Lester v
Lester; In the
Estate of
Dulcie Brown
[2020]
NSWSC 958***

Three grandchildren and son-in-law of deceased brought FP claims.

Not in dispute that the grandchildren were eligible persons.

Lester v Lester; In the Estate of Dulcie Brown [2020] NSWSC 958

Denise and Megan:

- Denise had acted as a full-time carer from at least October 2013.
- Megan would help to provide assistance to deceased. She would stay with the deceased as needed to ensure someone was around to provide care.
- **Factors warranting the application.**

***Grover v NSW
Trustee and
Guardian***
[2012]
NSWSC 1048

Grandchild sought provision out of grandfather's estate.

Claimant had not finished high school; had been unemployed; had a number of encounters with the criminal justice system.

Claimant and Deceased had rekindled a relationship towards the end of the Deceased's life.

Did not restrict consideration to financial dependence, and put heavy emphasis on emotional dependence. Awarded **\$225,000**.

**MEMBER OF THE
SAME
HOUSEHOLD**

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***Indjic v
Stojanovic***
[2020]
NSWSC 470

Plaintiff claimed eligibility primarily as a de facto partner. In the alternative, claimed she was a member of the same household and dependent.

Court did not accept either ground of eligibility. Critical of the way dependency ground was framed: claimed Deceased was not dependent on her, rather than the other way around.

Not an eligible person.

No provision made

NIECES AND NEPHEWS

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***Purnell v
Tindale***
[2020]
NSWSC 746

Nephew made a claim on his aunt's estate.

Relied on childhood events to establish dependency. Court did not find the significance nor the duration of support to be persuasive.

Not an eligible person.

STEP-CHILDREN

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***Spata v
Tumino***
[2017]
NSWSC 211

Stepson lived in the same household as the Deceased for some months. Deceased provided household care during this time.

Primary judge noted that there are differing rationales for establishing dependence when the claimant is an adult versus a minor child.

Primary judge did not think there was dependence, but rather a relationship of convenience.

***Spata v Tumino* [2017] NSWSC 211**

“A convenient division of labour and responsibility between able-bodied adults does not create a case of dependence. It is not reliance on another for the satisfaction of a need. Thus an able-bodied husband in remunerative employment would not be said to be (even partly) dependent on his wife just because, in the way they arranged their affairs, she was the primary homemaker and parent and cooked the meals, cleaned the house and did the laundry.

...,

John did not become Gina’s dependent on account of the domestic services that she provided when he returned to 24 Platts Ave, although he once again became dependent on Ross for accommodation. Nor did Gina’s provision of comfort and solace when he was distressed in the circumstances of his marriage breakdown create a dependency; while dependence is not limited to financial or material dependence, the existence of an emotional relationship alone is insufficient.”

***Spata v
Tumino***
[2018]
NSWCA 17

Stepson appealed. Key issue was not in respect of dependence by the provision of household care, but rather, dependence by the provision of accommodation.

CoA held that a restrictive reading of 'dependent' would subvert the intention of the legislation.

However, in this case, it was the Deceased's husband who invited the claimant to stay with them. The claimant was not dependent on the Deceased.

***Cooper v
Atkin*** [2020]
NSWSC 828

Stepdaughter sought provision out of the Deceased's estate.

Not a close relationship, although eligibility was not in dispute.

Limited dependence bore heavily on the Court. No provision ordered for the Deceased.

Appeal dismissed in [2021] NSWCA 82.

***Cooper v Atkin* [2020] NSWSC 828**

“The evidence does not suggest that she was supported by the deceased, to any significant extent, educationally, or emotionally. On reviewing, particularly the medical, evidence, that she was the daughter of his wife, led the deceased to simply acquiesce to Kristi’s presence in their home, for those relevant periods.”

FRIENDS

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Wilson v Porada;
The Estate of
Peter Wolfgang
Porada, late of
Pericoe [2017]
NSWSC 818

Claimant argued she had been in a de facto relationship with the Deceased, or alternatively was a member of the same household and dependent, or in a close personal relationship.

Court accepted she was dependent on the Deceased between 2004–09. Eligibility established.

Found there to be factors warranting as well.

***Wilson v Porada; The Estate of Peter Wolfgang Porada,
late of Pericoe [2017] NSWSC 818***

“It would be hard to accept that ex de facto partners would generally have the benefit of an inference in their favour of factors warranting. But here the deceased chose to maintain a civil relationship with his ex de facto partner for the sake of the children whose company he clearly enjoyed. Despite the aggravation and anxiety she caused him, he still chose to allow Ms Wilson a place in his life. He clearly consented to her organising social functions with him and having some degree of a life together. She was more than just an ex-partner to him and in my view for this reason there are factors warranting.”

***Rakovich v
Marszalek***
[2020]
NSWSC 589

Claimant was a close friend of the Deceased of over 30 years. The Deceased passed away intestate and the estate was held for the benefit of his nieces and nephews.

No dispute as to eligibility. The two lived together and the claimant provided significant assistance to the Deceased.

"[The Deceased] was a surrogate father, or as he described himself, a "stepfather". ... Over the more than 30 year relationship, they developed an affectionate, emotional, and an enduring, relationship, which only came to an end with the death of the Deceased".

Awarded **45% of estate.**



Factors Warranting

Miller v Ryan;
Payne v Ryan
[2015]
NSWSC 1713

Found that the whole of the circumstances did not demonstrate any real dependence.

Not eligible persons. Also noted that even if they were, there were not any factors warranting the application.

***Miller v Ryan; Payne v Ryan* [2015] NSWSC 1713**

- The notion of a 'household' is not the same as a notion of a 'house'. Among other things, living in the same household 'connotes some element of frequency of contact, some element of mutual support and some element or community of resources'.
- Being a member of a household 'in the broad sense of family is a collective group living in a home acknowledging the authority of a head, the members of which, with few exceptions, are bound by marriage, blood, affinity or other bond, between whom there is an intimacy and by whom there is felt a concern with, and an interest in the life of all that gives it a unity'.
- One must look for 'elements of permanency, involving a consideration of the frequency and intimacy of contact, an element of mutual support requiring some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes and involving an element of community of resources'.

Miller v Ryan;
Payne v Ryan
[2015]
NSWSC 1713

Found that the whole of the circumstances did not demonstrate any real dependence.

Not eligible persons. Also noted that even if they were, there were not any factors warranting the application.

***Hartley v
Woods***
[2017]
NSWSC 1420

Nephew and his wife sought provision out of the Deceased's estate.

Considered to be close members of the Deceased's family, and lived with her for a few years.

Dependence established and factors warranting found as well. Due to small size of the estate, provision of **\$40,000** was ordered.

Gill v Garrett
[2020]
NSWSC 795

Friend lived with the Deceased and sought family provision. Already entitled to \$200,000 under the Will.

Claimant had a negative influence on the Deceased's life – influencing him into heavy drinking, convincing him to give significant loans to others and himself, etc.

Claimant was an eligible person. However, no factors warranting.

Appeal dismissed in [2021] NSWCA 117.