Family Provision Claims By De Facto Partners Against Deceased Estates

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A person with whom the deceased person was living in a de facto relationship at the time of the deceased's death is an eligible person to make a claim against the deceased's estate pursuant to Section 57(1)(b) of the Succession Act 2006.

The meaning of de facto relationship for the purposes of the Act is defined in S21C(2) of the Interpretation Act 1987 as being:

(i) that the claimant and the deceased had a relationship as a couple living together and,

(ii) they were not married to one another or related by family

A de facto relationship can exist even if one of the persons was legally married to someone else or in a registered relationship or interstate registered relationship with someone else. The parties could also have been of the same gender.

In determining whether two persons are in a de facto relationship as a couple the following matters are to be taken into account under S21C(3) of the Interpretation Act:

(a) The duration of the relationship

(b) The nature and extent of their common residence

(c) Whether a sexual relationship existed

(d) The degree of financial dependence or inter-dependence and any arrangements for financial support

(e) The ownership, use and acquisition of property

(f) The degree of mutual commitment to a shared life

(g) The care and support of children

(h) The performance of household duties

(i) The reputation and public aspect of the relationship.

However, it is not usually necessary to establish all of those matters.

Case Study 1 – successful claim is made by the deceased's de facto partner notwithstanding that she only lived with him 3 nights a week and otherwise lived with her parents. The award of provision was made from notional estate as the majority of the deceased's assets were held in a family trust and a superannuation fund controlled by the deceased.

In the case of ***Frisoli & Anor v. Kourea (2013) NSWSC 116 (23 August 2013)*** Justice Slattery dealt with a family provision claim by an alleged de facto partner of the deceased and the competing claims of the deceased's two children from his first marriage in a situation where the deceased did not leave a Will and the majority of his assets were held in his family trust and his superannuation fund.

The deceased's assets

The estate of the deceased only comprised minor items of personality as the deceased had placed his assets into a family trust and into his superannuation fund. The principal asset of the family trust was a home in Rozelle worth approximately $1.5 million where the deceased had lived with his brother. The deceased and his two children were the beneficiaries of the trust and the deceased had controlled the trust.

The superannuation fund was worth $282,000.

Financial position of the claimants

The de facto Ms Kourea was 38 years of age and was earning $920 nett income per week. As the nominated beneficiary of the deceased's life insurance policy she received $370,000 on his death. She also had $48,500 in superannuation.

The deceased's son was studying at university whilst working part-time. He owed $43,322 in HECS fees, earned $475 per week, and had assets of $4,700.

The deceased's daughter was also studying at university, owed $12,000 in HECS fees, and received $590 per month in youth allowance.

Competing family provision claims

In this case if Ms Kourea was accepted to be the deceased's de facto partner she would have been entitled to the whole of the estate pursuant to Section 113 of the Succession Act 2006, if not the deceased's children would have shared the estate pursuant to Section 127. However as the estate had little assets other than the personality worth $40,000 the real contest related to the competing family provision claims which were directed at the funds in the family trust and in the superannuation fund which the parties sought to have designated as notional estate.

Was Ms Kourea the de facto partner of the deceased?

Justice Slattery determined that they were in a de facto relationship from 2002 – 2009 on the basis of the following circumstances:

(i) There was a sexual relationship for a 10 year period from about 1999 to 2009 and the deceased was not involved with any other women during this period.

(ii) From 2002 – 2009 Ms Kourea stayed overnight three nights a week at the deceased's home but spent the other four nights at her parent's home as she was unwilling to live with him until they were married. They also shared holidays together over this period.

(iii) Ms Kourea kept personal items in the deceased's bedroom including a toothbrush, bathrobe, perfume and other personal items.

(iv) Ms Kourea was financially dependent on the deceased in that he paid for her health insurance, holidays, legal fees, and she received substantial gifts from him. He also used her credit card.

(v) Ms Kourea cleaned the Rozelle home of the deceased on a fortnightly basis and regularly cooked meals for the deceased and his brother.

(vi) In March 2001 the deceased gifted Ms Kourea $70,000 from his father's estate

(vii) In October 2001 the deceased nominated Ms Kourea as the beneficiary of his life insurance policy. She was subsequently given a power of appointment in respect of the deceased's family trust.

(viii) In April 2009 the deceased and Ms Kourea consulted the deceased's solicitors to prepare a Will. In this meeting the deceased unambiguously identified Ms Kourea as his de facto partner and indicated that they intended to get married in the future and have children. The deceased told his solicitor that he wanted Ms Kourea to control his family trust when he died and that she would otherwise be an equal beneficiary of his estate with his son.

(ix) Ms Kourea was involved in the decoration of the deceased's Rozelle home after it was renovated in 2002 and regularly bought items for this home.

(x) Ms Kourea and the deceased used the same email address.

Notional estate

After determining that Ms Kourea was an eligible person by way of being a de facto partner of the deceased His Honour determined that deceased had not made adequate provision for Ms Kourea or his two children and that there were inadequate funds in the estate to make any provision for any of them without designating those funds in the family trust and superannuation fund as notional estate.

All parties agreed that these funds should be designated as notional estate and His Honour saw no impediment to this approach as there were no third party interests in the trust.

The judge's decision – 50% to the de facto, 50% to the children.

Although Ms Kourea's counsel submitted that she should receive all of the assets in the family trust so that she could continue to reside in the deceased's home, Slattery J rejected this approach.

His Honour stated that the nature of her relationship with the deceased fell short of the category of spouse entitled to a security in her own home and an income sufficient to permit her to live in a state to which she was accustomed. He also noted that the deceased had instructed his solicitor that he wanted his son and Mrs Kourea to benefit equally from his estate.

Justice Slattery then made orders that the assets in both the family trust and the superannuation fund were to be designated as notional estate and directed that Ms Kourea was to receive 50% and each child 25% of these assets after the payment of all liabilities. His Honour noted that this would involve the sale of the deceased's Rozelle home unless some other arrangement could be reached between the parties.

Close personal relationship or other dependent relationship

Had Ms Kourea been unable to establish that she was in a de facto relationship with the deceased she could have claimed eligibility pursuant to S57(1)(e) of the Act as a person who was at any particular time wholly or partly dependent on the deceased and who was at some time a member of the household of which the deceased was a member.

Alternatively she could have claimed pursuant to S57(1)(f) of the Act that she was a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death. In addition to establishing a close personal relationship it is required that the party prove that they were living with the deceased and one of whom provided the other with domestic support and personal care.

Case Study 2 – De facto partner of 7 years with little assets or income failed in her claim to receive the majority of the deceased's $780,000 estate to the exclusion of the deceased's two children from his former marriage, and was left to pay the estate's legal costs as well as her own legal costs.

In the matter of ***Fordham v. Burrell [2010] NSWSC 685 (11 August 2010)*** Master Macready dealt with a claim by a de facto partner where the deceased had left his estate in equal one-third shares to his de facto partner, his 39 year old son, and 37 year old daughter, i.e. $260,000 each.

Background of the relationship

The deceased was divorced in 1986 and met Ms Fordham in 1995 when he was 57 years of age. Thereafter they regularly stayed over at each other's residences and then lived together from late 2001 to June 2008 being a little less than 7 years.

The deceased was in ill health for the last 5 years of his life before dying at the age of 69. When the deceased was diagnosed with cancer in 2003 his son returned to England with his family and moved into his father's home to care for him whilst he was having chemotherapy. Ms Fordham resigned her job as a shop assistant with David Jones in December 2003 and looked after the deceased for the next 6 months after he had surgery. The deceased subsequently paid for Ms Fordham to attend a course to train as a medical secretary.

On 27 November 2006 the deceased made a Will leaving 75% of his estate to his two children and 25% to Ms Fordham. Under pressure from Ms Fordham shortly before his death, he increased her share to one-third of his estate in a Will dated 17 April 2008. Notably Ms Fordham had taken 6 months off work without pay in February 2008 to look after the deceased during the final months of his life.

The de facto's circumstances

Ms Fordham was 58 years of age and had no dependent children but two adult children and a number of grandchildren. She lived in rented three-bedroom accommodation paying $300 per week and worked as a secretary at St George Hospital earning $382 per week. She had savings of $7,000, superannuation of $33,000, a gift of the deceased's car and debts of $3,500.

Children's circumstances

The deceased's daughter was single, earned $1,200 net per week, had savings of $195,000 and debts of $40,500. She was renting an apartment and intended to use her inheritance to buy an apartment.

The deceased's son was married with two children and earned $3,019 net per week, owned a home worth $760,000, and had a mortgage of $512,000.

Both children had a very good relationship with their father.

The de facto's needs

The de facto's counsel indicated to the Court that Ms Fordham wanted to purchase a 2 to 3 bedroom townhouse in the St George area which would cost in the range of $450,000 to $535,000, a fund for contingencies, and to purchase a new car. With the $260,000 she would otherwise have received from the deceased's estate, she would not have been able to secure ownership of a property without a substantial mortgage. Her claim was framed on the basis that she should receive the whole of the estate.

Judgment in favour of the children

Master Macready in dismissing Ms Fordham's claim for additional provision made the following observations:-

(i) It was a de facto relationship of 6 years and 9 months, late in the deceased's life which did not involve taking care of children and where Ms Fordham's contribution to the assets of the estate was minimal.

(ii) Ms Fordham's claim was not comparable to a long term relationship where she assisted the deceased to build up his estate and he owed her a duty to ensure that she was secure in his home for the rest of her life with an income to live in a reasonable degree of comfort free from financial worry as described by the Court of Appeal in *Elliott v. Elliott (CA 24 April 1986 unreported)*. In this case the deceased had referred to Ms Fordham moving in with him temporarily and made it clear it was never his intention to marry her.

(iii) The 2008 Will was made when Ms Fordham was making demands that the deceased alter his Will to give her a greater share.

(iv) The needs of the deceased's children could not be ignored simply because of Ms Fordham's needs. Master Macready considered that both children, although gainfully employed, also had need for assistance with the cost of purchasing a home, high mortgage repayments and supporting their families.

(v) Although Ms Fordham had a legitimate need for assistance in the provision of accommodation, the estate was relatively small and he had to take account of the competing needs of the deceased's children.

(vi) That although Ms Fordham had made a real contribution to the deceased's welfare at the end of his life and through his period of illness, the terms of the 2008 Will properly reflected her contribution and he states "*In my view the deceased got it right*".

Commentary on case law

In reviewing the cases in relation to widows, de factos and other long term relationships Macready A.J. made the following points:-

(i) "*There have been many statements in judicial decisions, including decisions in the Court of Appeal generally to the effect that primacy of some kind is accorded to claims of widows for proper maintenance and advancement in life including continuance of housing arrangements which they enjoyed during the lifetime of their late husbands. These statements are not altogether uniform in expression, and should be understood as made in each case in relation to the facts under consideration; "widow takes all" is not a rule which has been or could be established by judicial decisions ..... a rule which was once followed which practically prevented ordering provision for an adult son who is fit to work has been abandoned*".

(ii) He quoted Justice Ipp in *Bladwell v. Davis and Anor. [2004] NSWCA 170* as saying "*I agree with Bryson J.A., for the reasons His Honour has stated that it would be an error to accord to widows generally primacy over all other applicants regardless of circumstances and regardless of performance of the stages of consideration described in* Singer v. Berghouse. *I would add however that where competing factors are more or less otherwise in equilibrium the fact that one party is the elderly widow of the testator, is permanently unable to increase her income, and is never likely to be better off financially, while the other parties are materially younger and have the capacity to earn more or otherwise improve their financial position in the future, will ordinarily result in the needs of the widow being given primacy."*

(iii) He also quoted from Hodgson J.A. in *Marshal v. Carruthers* where he said: *"Although the Family Provision Act does in some respect equate de facto spouses with de jure spouses, this does not in my opinion make the existence or otherwise of a marriage irrelevant. In my opinion a formal and binding commitment to mutual support through good times and bad, other factors being equal, adds strength to a legitimate claim. In my opinion also the strength of a claim can be affected by the length of a relationship and contributions to the relationship. One factor which may be particularly important in a claim by a woman is that a woman may have to the detriment of her own financial prospects taken a major role in raising the children of herself and the deceased."*

Case Study 3 – Long-time de facto partner made claim for provision from her partner's estate and receives modest sum as a result of the competing needs of her partner's sons from a former marriage and because she had already received on his death their jointly owned home and substantial monies from his life insurance policy.

In the recent decision of ***Lawrence v. Martin [2014] NSWSC 1506 (31 October 2014)*** Justice Hallen dealt with a claim by the de facto partner of a deceased man where no provision had been made for her in his Will.

Background

Mr Rodriguez died on 1 June 2013 at the age of 63 years and was survived by his de facto partner Ms Lawrence with whom he had been living for the past 16 years and two sons from his first marriage who were 41 and 36 years of age respectively.

The deceased had not updated his Will after his divorce in 1999 and as a result all of his $1.6 million dollar estate was left to his two children as the legislation revoked the beneficial disposition to a testator's former spouse in these circumstances.

Although no provision was made for Ms Lawrence she received on his death his life insurance policy benefit in the sum of $229,000 and their home in Ashbury which was in their joint names and was worth $1.5 million with a mortgage of $78,054. Both Mr Rodriguez and Ms Lawrence had made financial contributions towards the purchase of this home and a previous home with Mr Rodriguez contributing approximately two-thirds and Ms Lawrence contributing one-third of the purchase price.

The Estate

By the time of the hearing the estate had a nett value of $1,124,000 taking into account the costs of each of the parties.

Financial position of the de facto

Ms Lawrence was a 60 year old woman employed as a payroll manager earning a gross income of $7,400 per month and owned the following assets:-

1. Home in Ashbury - $1.5 million ($78,054 mortgage)
2. An investment unit - $490,000 to $575,000 ($431,344 mortgage)
3. Superannuation - $168,000
4. Cash - $18,409
5. A 2006 Toyota Corolla
6. Shares - $4,010.

Ms Lawrence's claim as submitted by her counsel was that she needed approximately $660,000 to discharge both of her mortgages, to purchase a new car, to carry out repairs on her home, and to have some funds to allow her an early retirement.

Financial position of the deceased's sons

The deceased's eldest son who was 40 year of age was qualified as a civil engineer and married to a school teacher. He lived with his wife and two children in a unit in Dee Why worth approximately $515,000 to $671,000 and they had a mortgage of $174,000. They also had combined superannuation of $120,000 and HECS debts of $81,738. The eldest son had recently been retrenched and was only working on a casual basis as he could not secure a permanent position of employment.

The youngest son of the deceased who was 36 years of age worked as a blind fitter. He had difficulty in holding his employment due to his bipolar disorder. He had little assets other than the $129,498 he had received from his father's superannuation on his death. His total assets were $148,000. Justice Hallen noted that the youngest son clearly had special needs and had a strong competing claim against Ms Lawrence.

The judge's decision – de facto receives $350,000 (approximately 30% of the estate)

Justice Hallen rejected the submission by Ms Lawrence's counsel that she should receive approximately $660,000 to essentially discharge all of her mortgages and to allow her funds to retire and otherwise purchase a new car. However he did consider that she had been left with inadequate provision by the deceased and awarded her a lump sum of $350,000 plus her legal costs on an ordinary basis.

In making this award Justice Hallen noted that Ms Lawrence had already received approximately $1 million as a result of the death of the deceased with the transfer of his joint interest in their Ashbury home and the payment of $229,000 in superannuation. He noted that the sum of $350,000 could be used in a range of ways to substantially reduce her mortgage liabilities and then provide funds for the other needs that she identified.

In making this award to Ms Lawrence he commented that **she had made substantial financial and other contributions to the acquisition, conservation and improvement of the assets of the deceased**, and that the de facto relationship was a genuine loving relationship where she had made a significant contribution to his welfare, that Ms Lawrence had no reasonable prospect of improving her income, and that **she was likely to stop working in a few years** with the result that her income would be significantly reduced. However he also took into consideration the deceased's stated intention to leave each son with a house and the special needs of the deceased's youngest son.

Conclusion

Where a de facto partner has been provided for in the deceased's Will but seeks additional provision to the detriment of the other beneficiaries, he or she should keep in mind that the award of additional provision is a discretionary exercise and there is no guarantee that the court will order that the de facto partner receive additional monies, particularly where there are competing claims by other eligible persons.