Family Provision claims by former wives or husbands of a deceased person in NSW

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Eligibility

Former wives or husbands of a deceased person are eligible to apply for provision from the estate of their late former spouse pursuant to section ***57(1)(d) of the Succession Act 2006***. The fact that they may have had a final matrimonial financial settlement under the Family Law Act 1975 does not preclude former spouses from making a family provision claim unless there has been an approved release of rights to apply for a family provision order pursuant to s95 of the Succession Act 2006.

Factors warranting the making of an application

However former wives and husbands face an additional hurdle not faced by current spouses, children, and de facto spouses, in that beyond establishing that the deceased has failed to make adequate provision for their proper maintenance, education, and advancement in life and that an order for provision ought to be made, they must first establish, having regard to the circumstances, there are factors warranting the making of the application. (see s**59(1)(b)** of the Act.)

The factors referred to in s59(1)(b) have been interpreted by the Court to mean **circumstances which would lead to a conclusion that the applicant should be regarded as a natural object of testamentary recognition**.

CASE STUDY

Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin [2017] NSWSC 10

In this case Justice Brereton was dealing with an estate worth approximately **$5 million** where the late Dr Lodin, who died in November 2014, left his entire estate to his only daughter Rebecca Lodin. Dr Lodin did not make any provision in his Will for his former wife, Magdalena who was the mother of Rebecca Lodin.

Magdalena made a successful family provision claim against Dr Lodin's estate securing an award of $750,000 plus costs notwithstanding that they had been separated for 25 years, they had only co-habited for 18 months before separating, there was no ongoing financial dependency other than child support, and their matrimonial property had been divided pursuant to orders made by the Family Court 22 years earlier.

Relationship between Magdalena and Dr Lodin

- **1978 to October 1984** – Magdalena was in a relationship and then marriage with David Melov. They had one child.
- **May 1984** – Magdalena consulted the deceased as a medical practitioner. They then started seeing each other socially to play squash and Magdalena started making social visits to Dr Lodin's surgery.
- **December 1984** – Magdalena started a sexual relationship with Dr Lodin with whom she had been a friend since mid-1984. Magdalena remained living with her husband Mr Melov whilst separated but still under the one roof until April 1986.
- **February 1986** – Magdalena gave birth to Rebecca who was fathered by Dr Lodin. Mr Melov then moves out of their home in April 1986.
- **September 1988**- Magdalena after marrying Dr Lodin moved into his home with her two children. In November 1988 Magdalena received $80,000 from her property settlement with Mr Melov.
- **April 1990** – after 18 months of cohabitation Dr Lodin and Magdalena separated but continued living under the one roof. Dr Lodin stayed for a further 10 months.
- **January 1991** – Dr Lodin left his home. Magdalena and her children then resided in Dr Lodin's home rent free for a further two years until January 1993.
- **8 December 1992**-after a hearing judgement was entered in the Family Court in regards to Dr Lodin and Magdalena's dispute over the division of their matrimonial property.
- **29 December 1995** – decree nisi of divorce granted.

Family Court proceedings with Dr Lodin

In December 1992 the Family Court determined Magdalena and Dr Lodins's property dispute awarding her a sum of $55,000 and Dr Lodin's Toyota Camry motor vehicle. At the time of the hearing Dr Lodin's assets were worth $330,000 and included his home in Bangor. Magdalena's assets were worth $106,000 and included her home in Mollymook.

Magdalena appealed the decision of the Family Court and this appeal was dismissed in June 1993.

At no stage did Dr Lodin pay spousal maintenance to Magdalena or support her after she moved out of his home. Dr Lodin paid Magdalena child support for Rebecca and agreed at Magdalena's request for this child support to be extended until after Rebecca completed her university studies. Dr Lodin also paid for Rebecca's school fees and bought her a car.

Magdalena's conduct after the Family Court proceedings

Justice Brereton noted that after losing her appeal proceedings in the Family Court, Magdalena telephoned Dr Lodin and said to him "if you do not give me an additional $60,000 I will destroy your life and make a complaint to the NSW Health Department Complaints Unit about you".

On 17 June 1993 Magdalena made a complaint to the NSW Health Department Complaints Unit that Dr Lodin had engaged in an inappropriate relationship with her whilst she was his patient. Dr Lodin was found guilty of misconduct and ordered to attend a course in ethics.

From June 1993, Magdalena denied Dr Lodin access to their daughter Rebecca and by October 1993 Dr Lodin issued proceedings in the Family Court to obtain access to his daughter.

On 31 August 1993 Magdalena commenced proceedings in the Supreme Court to seek an extension of time to sue Dr Lodin for damages for breach of his professional duty. These proceedings were not ultimately discontinued until nearly 5 years later on 30 April 1998.

On 10 September 1993 Magdalena complained to the police that Dr Lodin had threatened to kidnap their daughter Rebecca and that he possessed firearms. Proceedings were then brought by the police against Dr Lodin seeking apprehended violence orders. These proceedings were dismissed in May 1994 after a hearing in the Local Court.

In December 1994 Dr Lodin was interviewed by the Police following statements made by Magdalena to the Police in relation to allegations of mistreating Rebecca, including sexual abuse. After investigating the matter the police did not take any action against Dr Lodin.

In about 2008 Justice Brereton noted that Magdalena wrote to Dr Lodin that unless he paid Rebecca's university fees, she "would make what was left" of his "wretched life not worth living".

Other relevant history relating to Magdalena's circumstances

Between 1992-1995 Magdalena completed a visual arts degree. In 1996 she completed further studies in desktop publishing and business courses. She then worked for one year in 1997 as an administrative assistant.

In 1997 Magdalena had a car accident that caused her neck and back pain for several months.

In 1998 she completed a diploma in reflexology and then worked as a reflexologist on a casual basis for 2 years in 1999 and 2000.

In 1999 Magdalena purchased an apartment in Rosebery with financial assistance from her first husband Mr Melov.

In 2000 Magdalena had a second motor vehicle accident which resulted in severe back pain and difficulties with walking. As a result of this accident she was unable to work and then went on a disability support pension. She subsequently received $72,500 in compensation plus costs in respect of this accident.

In March 2007 Magdalena asked Dr Lodin for spouse maintenance but he rejected this request.

In March 2008 Magdalena had a third motor vehicle accident and from this accident she received $90,000 in compensation.

In October 2008 Magdalena sold her Rosebery apartment and bought a home on the South Coast for $230,000. She subsequently sold this house in July 2015 and had been renting since that date a one- bedroom unit in Katoomba for $269 per week whilst retaining $253,000 in cash, $40,000 in shares, and a $30,000 car.

Magdalena's financial needs

Magdalena was 62 years of age and had no prospect of obtaining any employment. She was a diabetic and had chronic back pain. She lived alone in rented premises, was estranged from her daughter Rebecca who did not speak to her nor see her, and she had a very limited relationship with her other daughter.

Magdalena's claim was put on the basis that she needed to purchase a house in the Blue Mountains area.

Rebecca's relationship with Dr Lodin and her financial circumstances

After Rebecca and her mother moved to Sydney in 1994 and up until 1998 she usually saw her father about once a month. From 1998 to 2001 she saw him about 2 to 4 times a year. From about 2002 when she was 16 years of age contact with her father ceased and she did not see him for the last 13 years of his life. She claimed that she sent letters and presents to him whilst at university but that she received no response. She stopped sending these letters by the age of 21.

Rebecca was aged 30. She and her partner had combined assets of about $200,000 , both had university qualifications, and both were earning incomes of about $1,400 gross per week.

Case law- factors warranting the making of Magdalena's claim s59(1)(b)

In reviewing the case law Justice Brereton began with the Supreme Court decision in **O'Shaughnessy v Mantle (1986) NSWLR 142** where Justice Young identified a number of situations which would give rise to a moral duty upon a testator to provide for a former spouse.

1. Where there has been a divorce but a spouse has died before financial matters have been resolved by the Family Court;
2. Where the husband and wife have not finally settled all their property dealings at the time of the divorce;
3. Where maintenance was being paid to the ex-spouse as at the date of the deceased's death and the orders for maintenance were inadequate to provide for the ex-spouse after the death of the paying spouse;
4. Where despite the divorce there was some dependency on the deceased as at the date of death;
5. Where spouses have separated but the divorce had not become absolute;

Justice Young went on to say that where there had been an order of the Family Court in respect of the matrimonial property of the parties it would be very difficult for a former spouse to establish there were factors warranting the application because s81 of the Family Law Act was aimed at finally breaking all financial relations between the parties. However he described one exception to this general proposition as being:

"Where there was a very small estate and whilst the parties are alive it was only possible to give a pittance to the claiming spouse because the other spouse needed funds to maintain his own life but now one spouse is dead , the barrier to giving the other spouse the whole of the family property has vanished".

Justice Brereton went on to note that subsequent decisions of the Court of Appeal did not follow the approach taken by Justice Young.

In reviewing the subsequent Court of Appeal decisions in regards to applications by former spouses Justice Brereton noted that in **Holcombe v Holcombe [1993] NSW CA 137** "the Court of Appeal held (in the context of an application by former wife) that the status of a person who would be regarded as a **"natural object of testamentary recognition" is determined by the circumstances in which a moral duty may arise between the testator and the alleged eligible claimant**. Gleeson CJ described the O'Shaughnessy list [ie the 6 examples previously set out on page 5] as providing a useful but not exhaustive indication of when that might be so".

Justice Brereton went on to note that in **Dijkhuijs v Barclay (1988) 13 NSWLR 639** "the Court of Appeal held that **the factors which warrant the making of an application… by a former spouse will vary in accordance with the circumstances of the case and that such cases should not be limited to pre-conceived classes or categories, or be determined by "special factors**". Kirby P, with whom Hope JA agreed, said that the "public policy" in finality of financial dealings by property settlements ordered by the Family Court of Australia must be read in conjunction with the competing public policy expressed by Parliament in the Family Provision Act".

Justice Brereton notes that Justice Kirby further stated in **Dijkhuijs v Barclay** that **"the clean break principle" was not paramount,** and that an ex-wife of a long marriage finding herself in the predicament of insufficient financial resources was the kind of circumstance which would be considered to be a factor warranting the making of an application for provision".

Mahoney JA in the **Dijkhuijs v Barclay** decision stated that " the plaintiff may be a former spouse who, on dissolution of the marriage, received what on any view she was entitled to have and there may have been no further relationship between them … But, at the deceased's death, she may have a financial need. In such circumstances, **the fact that the plaintiff has established that she was a former spouse and has a financial need would not, as such, entitle her to an order. It would be necessary for her to establish that, in some way…. the deceased had a duty to her which involved that he should have provided for her financial need**".

Justice Brereton in summarising the Court of Appeal decisions stated that "while existence of the final matrimonial financial settlement is an important factor, it is not conclusive. What emerges from the cases to which reference has been made is that there will be factors warranting the making of a claim by the former spouse, even where there has been a matrimonial property settlement, if at the date of the hearing of the family provision application there remained an undischarged moral obligation to the applicant. This is an area in which there is wider than ordinary scope for differences of opinion between reasonable minds, and it could not be said that there was a clear single "community standard" as to when one divorced spouse will be regarded as having an undischarged obligation to the other".

Justice Brereton then referred to the High Court decision in **Smith v Smith (1986) 161 CLR 217**, where Mason, Brennan, and Deane JJ referred to **"persuasive reasons" for the preservation of a party's entitlement to make an application for a Family Provision order,** notwithstanding a final matrimonial financial settlement **– including the possibility of a substantial subsequent change in the parties' circumstances.**

Justice Brereton confirmed that a change in the financial circumstances of one or both parties after a matrimonial settlement could possibly provide circumstances warranting the making of a Family Provision order. However, he goes on to state that **"that is not to say that a mere change in circumstances will necessarily suffice: the judgement as to whether there are circumstances warranting must have regard to "all the circumstances of the case (whether past or present)".**

Judgement

Justice Brereton in forming a view as to whether Magdalena should be regarded as the natural object of the testamentary recognition by the deceased noted the following matters that did not assist her :

i.the relationship had ended 25 years ago,

ii. there had been a final matrimonial financial settlement in which the disparity of earning capacity and the plaintiff's ongoing care of their child had been taken into account by the Court with no ongoing obligations except in respect of child support,

iii. Dr Lodin punctiliously performed his child support obligations.

iv. the plaintiff's attitude to the deceased since the end of their relationship had been one of relentless hostility, and she carried into effect as best as she could her stated aim of making his life a misery.

However Justice Brereton believed that those considerations were outweighed by the following matters in her favour being:

v.That the marriage and its breakdown had an unusually enduring impact on the plaintiff and in this regard he referred to psychiatrist reports prepared in 1993 and 1994 which suggested that Magdalena's chronic depressive state arose from the circumstances of her relationship with Dr Lodin which she perceived as involving a betrayal and exploitation by Dr Lodin when he was in a fiduciary relationship with her.

vi.That Magdalena's earning capacity after the determination of her property claim was very limited as a result of her obligation to care for her two young children and the injuries she then suffered in three motor vehicle accidents at the time when she was in a position to resume working.

vii.While the plaintiff struggled financially Dr Lodin prospered untrammelled by the responsibility of a wife or a child. Dr Lodin's ability to accumulate assets was facilitated by Magdalena's assumption of responsibility for the care of Rebecca for the following 15 years, and this was effectively an indirect contribution to the deceased's estate.

viii.The deceased's estate comprised ample resources to make adequate provision for the plaintiff, and to still provide a most substantial endowment for Rebecca. "And there is something unbecoming about an arrangement under which the plaintiff is left in circumstances of considerable need, reliant on a social security pension, while the daughter whom she raised inherits in excess of $5 million".

In summary Justice Brereton stated at para 90 and 91 that **" the combination of the unusual and enduring impact of the relationship and marriage on the plaintiff, her care responsibility for the defendant for 15 years after the matrimonial property settlement and associated indirect contribution to the deceased's estate, the respective post-divorce deterioration in her circumstances and the great improvement in those of the deceased, the relative paucity of the matrimonial estate at the time of the property settlement compared to the amplitude of the resources now available, and her current circumstances of need which are in part attributable to her relationship and marriage with the deceased, and where the only other claim on his testamentary bounty is that of the defendant for whom ample will remain after making proper provision for the plaintiff, amount to circumstances which made the plaintiff, at the time of the deceased's death, a person who ought to have been an object of testamentary recognition by him, and thus constitute circumstances warranting the making of her claim. This is so, notwithstanding her provision of misleading information to the Child Support Agency in 1992, her post-divorce persecution of the deceased (which must indeed have made his life a misery), and her non-disclosure of Rebecca's bursary".**

Award of provision- $750,000 plus costs

Justice Brereton awarded Magdalena a legacy of $750,000 on the basis that in addition to her existing savings of $250,000, an additional $300,000 would allow her to buy a modest home in the Blue Mountains area for $550,000.

He also calculated that a capital sum of $399,316 would allow her $450 a week for the next 24 years being her estimated life expectancy. A further $50,000 would cover her requirements for medical treatment and provide a small fund for contingencies.

This decision has been appealed by Rebecca Lodin and the appeal is yet to be determined.

Section 95 of the Succession Act 2006- Release of rights

Where a former spouse has agreed to a release of their rights to make any future Family provision claim against their former spouse's estate and notional estate, and such release has been approved by a judge in the Supreme Court, he or she would not be able to make a Family provision claim against their former spouse's estate.

In considering whether to approve such a release the Court is required to consider whether the release is to the advantage, financially or otherwise of the releasing party, whether it is prudent for the releasing party to make the release, whether the agreement for the release is fair and reasonable, and whether the releasing party has received independent legal advice and has given due consideration to that advice.

The Court does not always approve these agreements notwithstanding that former spouse is receiving some additional benefit that he or she would not otherwise have received as part of the settlement of their dispute over the matrimonial pool of assets. Further it should be noted that the Court has the power to approve a release that is sought in relation to a **part** of the deceased's estate rather than the whole of the estate