Family Provision Claims by Widows in NSW

By Martin Pooley, Senior Associate

Where a Court is considering whether to make a family provision order for a widow and what order, if any, ought to be made, the question for the court as set out in s59 of the Succession Act 2006 is whether the deceased has failed to make adequate provision for the applicant's proper maintenance, education, and advancement in life at the time when the Court is considering the application. The second question for the Court is what order for provision, if any, ought to be made.

In determining these two questions the Court will need to consider all of the circumstances of the case and the factors set out in s60(2) of *the Act* which include:

i. the relationship the widow had with the deceased;
ii. the nature and size of the estate;
iii. the financial resources and the needs of the widow, other claimants and beneficiaries;
iv. the nature of any obligation owed to the widow and to other claimants and beneficiaries;
v. any provision made to the widow during the deceased's lifetime;
vi. the testamentary intentions of the deceased;
vii. the character and conduct of the widow and any other relevant person before and after the deceased's death;
viii. contributions made by the widow to the deceased's assets
ix. and the other factors set out in s. 60(2).

In cases involving widows, the nature of their relationship with the deceased is usually very close and arises from a formal commitment to mutual support. Accordingly the deceased has a strong moral obligation to make proper and adequate provision from his estate for his widow.
In the decision of *Khreich v NSW Trustee & Guardian [2012] NSWSC 1299 Associate Justice Hallen (as he then was) at para 112 of his judgement set out a number of general principles as being relevant to a claim by a widow of the deceased. I will not set out all of these principles but quote the following:*

1. "As a broad general rule, and in the absence of special circumstances, the general duty of the deceased to his widow, to the extent to which his assets permit him to do so, is to ensure that she is secure in the matrimonial 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. Generally speaking, the amount should be sufficient to free her mind from any reasonable fear of any insufficiency as she grows older and her health and strength fail".

2. "A wife, particularly of many years, has a primary right to be considered by her husband, but the extent that he should provide for her is to be governed by her needs, both at present, and in the foreseeable future. It is also governed by the claims and circumstances of the competing claimants, whose positions also have to be weighed with their needs and merits".

3. "The Court is not to approach the assessment of what is proper [provision] by attempting precisely to replicate the way of life that the deceased and the applicant widow planned to have had he survived".

4. Quoting Justice Bryson from Bladwell v Davis [2004] NSWCA 170 "Defeat of the opponents' claims does not necessarily follow from a demonstration, which the claimant can make, that all her needs with respect to income, home renovation, and provision for contingencies cannot be met if any provision is made for the opponents....the claims and circumstances of the opponents also have to be weighed, and they too have their needs and merits".
5. Quoting Justice Ipp in Bladwell v Davis "Where competing factors are more or less in equilibrium the fact that one party is the elderly widow of the testator, is permanently unable to increase her income…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."
6. "Where, after competing factors have been taken into account, and it is possible to do so, a widow ought to be put in a position where she is mistress of her own life, and in which, for the remainder of her life, she is not beholden to executors, or trustees and, still less, to remaindermen".
7. **"**Usually, a mere right of residence [in the matrimonial home] will be an unsatisfactory method of providing for a widow's accommodation. This is because a widow may be compelled, by sickness, age, urgent supervening necessity, or otherwise, with good reason, to leave the residence".
8. "The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage".

The above principles would have similar application to widowers and a surviving long term de-facto partner.

Case Study 1- Clifford v Mayer [2010] NSWCA 6 (10 February 2010)

In this case the deceased died leaving a 35 year old de facto partner and three children of that relationship aged 4-8 years. The deceased and his partner had been living together for a 7 year period with a one year period of separation early in the relationship.

The deceased died in December 2006 and in his Will he left the matrimonial home at Lane Cove which at the time of the hearing was worth approximately $900,000 to his three children in equal shares as tenants in common to be received by them upon the youngest of them attaining 21 years of age. The deceased gave the rest and residue of his estate to his partner.

The deceased and his partner had been living in the matrimonial home since October 2004 and had previously lived in a number of other residences. This home was purchased with the intention that it would be the family home for their children as they grew up as it was conveniently located for their schooling and had other amenities.

The Will did not give the deceased's partner any specific right to live in the matrimonial home and there was no provision for the manner in which the outgoings and maintenance expenses connected with the home should be met until the youngest child in 17 years hence reached 21 years of age. There were no assets vested in the executors other than the matrimonial home that could be used to pay these ongoing expenses.

The deceased's partner had assets of $133,850 and had been left the residue of the estate which was approximately $140,319 bringing her total assets to $274,169. Her claim was on the basis that she needed an unencumbered home to raise her 3 children having regard to the limitations on her earning capacity with the need to care for 3 young children.

The deceased's partner was an accountant and although she had the skill to earn a reasonably high income, she had the practical impediment of looking after 3 young children.

Judgement- the widow received the matrimonial home subject to a $270,000 charge in favour of the children.

Although the application by the deceased's partner for additional provision was initially dismissed by Associate Justice McLaughlin, on appeal the Court of Appeal ordered that the deceased's partner was to receive the matrimonial home subject to an equitable charge in favour of the trustees of the estate in the sum of $270,000 to be held on trust for her three children in equal shares as tenants in common to vest when the youngest of the children reached 21 years of age. The sum of $270,000 was to accrue interest at annually at CPI rates and be secured by a caveat lodged by the trustees.

This charge in favour of the deceased's children effectively ensured that they would in the future receive some inheritance from their father's estate and protected this sum from the risk that they could receive nothing if their mother re-married or entered into a de facto relationship.

Orders were also made allowing the deceased's partner in the future to sell the matrimonial home provided that the proceeds were predominantly used in the acquisition of another property in Australia, subject to the ongoing charge. It was also ordered that if there were any surplus funds arising from the purchase of the replacement property these funds were to be paid to the trustees to be held on trust for the deceased's children in part payment of the monies owed to them under the charge. This order allowed the widow the flexibility to change residences but prevented her from expending any part of the proceeds of sale or investing the proceeds in some venture which would place the childrens' monies at risk.

Case Study 2 – Clark v Ro [2016] NSWSC 1877 (21 December 2016)

In this case the deceased died in January 2015 at the age of 67 leaving a wife aged 61, a former wife, a son from his first marriage aged 40, and an adopted daughter from the first marriage aged 47. At the time of the deceased's death the deceased was living with his second wife and her 29 year old son from her former marriage.

The deceased left his entire estate to his second wife. The deceased's estate included his home in Annandale which was worth $950,000 and other assets bringing his gross estate to a value of $1,255,000 before taking account of the costs of the legal proceedings and the costs of possibly selling the deceased's home. If these costs were taken into account there was roughly $1,020,000 in the estate.

The deceased's 40 year old son who was married with two young children issued proceedings seeking provision from his late father's estate.

The deceased's relationship with his second wife spanned 15 years. They began living together in 2001 and were married in 2008. The deceased purchased his home in Annandale in 2008 where he resided with his 2nd wife up until his death.

After the deceased's death his son and adopted daughter each received $44,185 from his Care Super fund. His second wife received $88,370 from this fund.

The deceased's son and his wife had nett assets of about $45,000 and were living in rented premises. Although the deceased's son had worked in the IT industry in recent years earning between $100,000 -$160,000 per annum, he had for reasons that were not clear, been unemployed for the past 12 months. His Honour noted that the deceased's son had a bachelor of commerce degree and a master of business administration. The deceased's son indicated that he now wanted to complete a teaching qualification and become a secondary school teacher. His wife had teaching qualifications and was working casually as a school teacher earning $54,000 a year. Within their self-managed superfund they owned a property worth approximately $339,555 which had a mortgage of $189,555 leaving equity of approximately $150,000. They also had other debts totalling $103,000.

During the course of the deceased's lifetime he had provided financial support for his son which included a deposit of $25,000 in 2000 to purchase an apartment, $20,000 to purchase a car in 1998, and $20,000-$30,000 in assistance after his children were born to help his son with living expenses.

The deceased's second wife lived in the deceased's Annandale home from where she conducted her tailoring business. Her income and general expenditure was not explained in His Honour's judgement. The deceased's second wife claimed that the house was in a dilapidated condition and in need of $270,000 in repairs. She acknowledged if these repairs were carried out that the home would increase in value.

The deceased's second wife also owned another property in Annandale worth $1,350,000 which was subject to a mortgage of $316,000. This property was rented and the rental payments covered the majority of the mortgage repayments.

The deceased's second wife resided in the matrimonial home with her 29 year old son who was on a disability pension.

During the course of their relationship the deceased's second wife provided him with domestic services and nursed the deceased in the last 6 months of his life when he was ill. She had also paid rent whilst she lived with the deceased in rented premises from 2001-2008.

Justice Hallen accepted that the deceased's son had a good relationship with his father and that the deceased had a loving relationship with his second wife.

The deceased's son explained his needs as being to pay off his debts, the cost of retraining as a teacher, a deposit on a home, a fund for contingencies, and monies for living expenses whilst he was retraining. These figures totalled $550,000.

Judgement – son received $130,000 plus costs

In Justice Hallen's judgement he noted that the deceased's son had already received $44,000 from his father's superannuation fund such that a further legacy of $130,000 would allow him to pay off his debts and leave a small capital sum for exigencies of life. His Honour did not consider the estate was large enough to meet all of the son's claims.

The deceased's 2nd wife would then have received from the deceased's estate assets worth about $900,000 after the payment of both side's legal costs of the proceedings which were estimated to be about $177,000. She also had about $1 million equity in her investment property such that her net assets totalled about $1.9 million dollars.

Case Study 3 – Milillo v Konnecke [2009] NSWCA 109 (15 May 2009)

In this case Justice Young dealt with an estate worth $498,000 mostly comprised of the deceased's home which was worth $400,000.

In the deceased's Will he left his widow who was aged 58, a life interest in their home and their home was to pass on his widow's death to his four daughters from his first marriage. The deceased had been in a relationship with his widow for 15 years.

The widow issued proceedings seeking additional provision from her late husband's estate on the basis that she did not wish to continue to live in the matrimonial home as the stairs to this property were too steep and she wished to purchase another property elsewhere.

This was an unusual case in that the widow had bone cancer and her doctor had provided a diagnosis that she had a 50% chance of living another year and a 25% chance of living beyond two years.

The widow's financial circumstances were that she had $250,000 in liquid assets, a $35,000 car, $8,534 in shares, was in receipt of a pension and $100 per week rent from a granny flat at the matrimonial home.

The circumstances of this case were also complicated by the fact that when the deceased separated from his first wife he had made an agreement with her that he would leave his home to their four daughters and in return she would not make certain claims against him in relation to the property settlement. The deceased made his new partner whom he subsequently married, aware of this agreement and they kept their assets separate. When the deceased's partner moved in to his home she sold her own home and gifted the proceeds to her children.

In the course of the hearing the deceased's children, at His Honour's invitation provided an undertaking to the deceased's widow that they would not sell the deceased's home whilst she was alive, without her consent.

Justice Young observed that in the ordinary case it would be insufficient for a man to leave his widow with only a life estate in the matrimonial home, and that at the very least he must make provision for the executors to be able to sell the home and purchase other suitable accommodation as the widow ages, and her circumstances change. However in this case where the widow was not seeking a portable life estate but was seeking a capital order to purchase another property Justice Young was unwilling to make that order.

Matters that influenced His Honour were that the widow's short life expectancy meant that any capital gift to her would probably result in a windfall to her children, that any capital gift to the widow would be contrary to the agreement that the testator had made with his first wife, that as the estate was small the only way a capital gift could be made to the widow would be by selling the matrimonial home and this would mean that the deceased's daughters would not receive what the deceased had intended.

Judgement- widow's claim dismissed

While acknowledging that this was a very much a borderline case Justice Young observed that he was unable to conclude that in all of the circumstances the testator did not make adequate provision for his widow. Accordingly the widow's claim was dismissed.

The decision of Justice Young was appealed and in the appeal proceedings counsel for the widow argued that Justice Young should have considered a "Crisp Order", otherwise known as a a "portable life estate", that would have allowed the widow to require that the executors sell the matrimonial home and purchase with the proceeds an alternative home, apartment, nursing home accommodation, or hospital bed accommodation where she would have an ongoing right of residency up until her death.

The Court of Appeal rejected this argument as the widow had always sought a capital sum and had never submitted at the original hearing that she wanted in the alternative a portable life estate. Further no evidence was ever submitted to support this alternative proposition.

Case Study 4 – Kohari v NSW Trustee & Guardian [2017] NSWSC 1080

In this case Justice Parker dealt with an estate worth $1,040,000.00 where the deceased left his entire estate to his de facto partner of 26 years. The deceased did not leave any money to the two sons of his first marriage.

The plaintiff in this case was the youngest son of the deceased with whom he had no contact since the child was 18 months old because the deceased did not think he was the father of the child. The deceased had left his wife and children because of his suspicions of his wife's infidelity and had nothing further to do with his youngest son thereafter. DNA testing in these proceedings established that deceased was in fact the father of his youngest son.

As a young adult the plaintiff wrote to his father on two occasions in an attempt to establish a relationship with his father but there was no response to these communications.

The youngest son's circumstances were very dire in that he was 38 years old, had no qualifications, had been unemployed for 17 years, was obese, reliant on social security, and supported a wife and four children in rented premises. He had no assets and debts of $25,000.

The partner of the deceased had looked after the deceased through 9 years of illness providing him ongoing personal care and carrying out all household work.

The deceased's partner had a strong competing claim as she needed a home and her only asset was an investment property in Queensland worth $250,000 which she jointly owned with the deceased. The rent from this property of $300 per week provided her with an income to supplement her pension of $405 per week. The deceased's partner wished to purchase a home in the Central Coast which was estimated to cost $630,000 and needed additional monies for further contingencies.

Judgement – son receives legacy of $100,000

Justice Parker awarded the son a legacy of $100,000 and in doing so commented that the son's financial circumstances appeared to be, at least in part, of his own making. He did not consider that it was reasonable for the son to expect to receive an unencumbered home from his late

father but considered that it would be reasonable to give him a deposit to assist him to purchase a home.

Justice Parker considered the deceased's behaviour towards his son to be wrong and unjustified.

Justice Parker considered that the deceased's partner had a very strong competing claim on the deceased's estate in that it was common ground between the parties that the relationship should be treated as a marriage. He considered that "when assessing the minimum appropriate provision to be made by the testator to a surviving spouse following a long marriage such as this, the dominant consideration is indeed continuity in this sense".

Justice Parker determined that it would have been reasonable for the deceased's partner to expect to continue to live in the deceased's home at St Peters in Sydney had it not been compulsorily acquired by the government. However as the deceased's partner did not wish to remain living in St Peters and was intending to live on the Central Coast where houses were cheaper there was some scope with the $1 million dollars realised from the acquisition of the St Peters home to provide some provision to the son. In formulating his decision to award the deceased's son $100,000 His Honour considered the deceased's partner should as a minimum receive $750,000 from the deceased's estate, being the value of the St Peters home as at the date of the deceased's death in August 2014.

Case Study 5 - Bladwell v Davis & Anor [2004] NSWCA 170 (4 June 2004)

In this case the deceased died at the age of 84 leaving a de facto partner aged 67 years with whom he had lived for the past 28 years. The deceased also had a former wife and 2 children of that marriage.

In the deceased's Will he left $40,000 to each of his children, $20,000 to his granddaughter, and $10,000 to each of the three children of his partner. The deceased and his partner jointly owned the home where they lived which was valued at $400,000. The assets of the estate totalled $313,000, excluding the matrimonial home which passed directly to the deceased's partner.

Both children of the deceased sought additional provision from their father's estate on the basis that they were in difficult financial circumstances and had otherwise maintained a good relationship with their father, in circumstances where he had not provided any maintenance to their mother after their separation in 1971.

The deceased's 44 year old son was divorced and had the sole care and the responsibility for three teenage children aged 16-19 years. He was employed as a school teacher and was living in rented accommodation in Noosa. He had little assets other than a 20 year old car which had a value of $1,000. His income was barely meeting his expenses. The son was looking for additional provision to assist him to purchase his own residence.

The deceased's 42 year old daughter was previously married, but was now living in a de facto relationship and looking after 4 children aged 2-13 years. She was not working and was reliant on her partner's income and family allowance payments. She was living in a property in Warilla which she had purchased in 1992 for $100,000 with a $50,000 mortgage. This property was now worth $200,000 but the mortgage had increased to $168,000 such that she had little equity.

The position of the deceased's partner was that she was aged 67 and in receipt of a pension. She had a number of ongoing health problems and resided in the matrimonial home. Her needs included a new car, improvements to her home, and an investment fund to supplement her pension.

Judgement- son has legacy increased from $40k to $80k, daughter from $40k to $60k

Master McLaughlin awarded additional provision to each of the deceased's children increasing the daughter's legacy to $60,000 and the son's legacy to $80,000. The application seeking leave to appeal this decision was rejected by the Court of Appeal.

Conclusion

Family provision claims which involve widows are complex. At Diamond Conway we have a number of very experienced lawyers who can assist you.