

Shared Households and Eligibility in Family Provision Claims

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

Supreme Court of New South Wales | Young AJA | 24 November 2015

Family Provision Claim – Nieces of Deceased – Factors Warranting Making of an Application – Claim Dismissed

SUMMARY

In these proceedings, the two plaintiffs sought an order for provision from the estate of the late Mervyn Vincent Sheehan pursuant to Chapter 3 of the *Succession Act* 2006 (NSW) (a “family provision order”). Applications for Family Provision Orders allow eligible persons to make claims for provision in circumstances where the deceased left them with inadequate provision for their proper maintenance, education or advancement in life.

Ari Katsoulas

Second Floor Wentworth Chambers

Tel. 02 8915 2006

Level 2, 180 Phillip Street

Sydney NSW 2000

DX400 SYDNEY

The Applications

The applicants/plaintiffs were adult nieces of the deceased aged 70 and 72 respectively at the time of hearing. The applications were brought within time being 12 months from the date of death of the deceased. The gross sum of the estate was not insignificant at \$4.63 million.

The applicants contended they were eligible persons pursuant to section 57(1)(e) of the Succession Act 2006 (NSW) that provides:

(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:

[...]

(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,

The applicants submitted that they both shared a household with the deceased between 1946 and 1950.

In turning to evaluating the applications His Honour identified four questions to be determined:

1. Were the plaintiffs and the deceased part of the same household between 1946 and 1950?
2. Were the plaintiffs dependent on the deceased at any time (particularly 1946 to 1950)?
3. Are there factors warranting the plaintiffs making an application under the Act?
4. If the previous questions are answered favourably to the plaintiffs, what orders should be made on their application?

1. Did they share a household with the Deceased?

A wide definition of household was adopted. A household is a "flexible, bearable and some extent imminent. Among other things, living in the same household connotes some element of frequency of contact, some element of mutual support and some element of community of resources." [26] However, one must still look for elements of permanency and mutual support. [28]

In the current application, the applicants shared the house with the deceased between the age of 0 and 5, and 3 and 7 respectively. Therefore, the relationship is not one where the applicants could contribute – however, evidence was put before the court that the deceased did contribute to the care and support of the applicants.

His Honour was satisfied that the applicants were members of the same household and that the Act does not preclude prospective applicants from being members of a household on the basis of infancy or health.

2. Were the Plaintiffs Dependant on the Deceased?

Dependency is both financial dependence and a degree of emotional dependence between the parties. [35]

The applicants lead inferential evidence that the deceased must have made financial contributions to the household at the time of shared residency. The Court was not satisfied of the evidence of financial dependence – being evidence of what happened 70 years ago at a time the applicants were too young to understand the financing of the household.

In considering emotional dependence, the evidence of the applicants was discounted as it was (1) evidence from a young age; (2) from over 70 years ago, and (3) uncorroborated.

His Honour was not satisfied on the balance of probabilities that there was any dependence on the testator by the applicants between 1946 and 1950 – the only relevant times.

In the absence of such, His Honour concluded that the applicants were not eligible persons.

3. Are there Factors Warranting the Making of an Application?

In order for a Court to make an order for provision to individuals eligible by virtue of section 57(e), there must be factors which warrant the making of the application (s 59).

What factors referred to in section 59 of the Act warrant the making of an order for provision? The Court followed McLelland J in *Re Fulop* (1987) 8 NSWLR – they are the factors which render the applicant an eligible person and give her the status of a person who would be regarded as a natural object of testamentary recognition by a deceased.

Or, as put by His Honour at [41], the question is:

whether the plaintiffs are sufficiently close to the prime source of eligible persons that members of the community would consider that the testator owed them an obligation to consider their situation when making his will. In other words, are they to be treated in much the same category as children?

The Court was not satisfied that the applicants had factors warranting an order for provision.

4. What Order for Provision Should be Made?

Notwithstanding negative answer to the prerequisite, His Honour considered an appropriate order for provision.

His Honour noted the following:

- Both applicants have a house;
- Both applicants have an income;
- Both applicants are not in good health;
- The existence of competing claims on the deceased's bounty;
- The size of the estate.

In these circumstances, His Honour considered an appropriate cash legacy in the circumstances would be \$100,000 to meet medical bills, take the odd holiday and to have a “nest egg in reserve.” [62]

Conclusion

The plaintiffs’ actions were dismissed as “purely speculative.”

For Practitioners

- It is imperative that testators are advised on who may have a claim to their bounty and if any provision should be made.
- The age or infirmity of an applicant at the time of being a member of a household is not a bar to eligibility.
- Being a member of a household is not synonymous with being a member of the same house.
- Dependency is both financial and emotional.
- Factors warranting an application are those factors which would make the applicant to be considered an object of testamentary recognition by the deceased.
- Orders for provision are subjective balancing the need of the applicant against the size of the estate and other competing beneficiaries.

Read the Full Case: [Miller v Ryan; Payne v Ryan \[2015\] NSWSC 1713](#)

15 March 2016

Ari Katsoulas is a Sydney Barrister practising in Will Disputes, Contested Wills and Family Provision Claims.

Second Floor Wentworth Chambers
Tel. 02 8915 2006
Level 2, 180 Phillip Street
Sydney NSW 2000
DX 400 SYDNEY