CPNS Current Information Sheet 2008/8

From testamentary freedom to testamentary duty

What is the problem?

Charities are seeking to strategically position themselves to benefit from the expected intergenerational wealth transfer from the baby boomer generation. Bequests are needed to resource the increasing capital requirements of charities as the welfare system is wound back due to demographic and fiscal pressures. Is this strategy flawed?

Case 1:

The case of Edwards v Terry\(^1\) is illustrative of the issues involved. A deceased left 40% of her estate to the Salvation Army, 40% to the Royal Blind Society, 5% to her executor and 15% to her only child, a son aged 56. Pursuant to family provision legislation, the court granted her son 71% of the estate, which, with the 5% to the executor, limited the charities to 24% of the estate instead of the original 80%. This was despite the fact that the son had a troubled relationship history with his parents, including assaults on both, with an apprehended violence order being in place at one point.

Case 2:

In Hunt v Delaney,\(^2\) two of three siblings made a family provision application from their mother's estate. In the mother's will, the entire estate had been left to the St Vincent de Paul Society and the Royal Blind Society in equal shares. She also requested that her body be privately cremated and that her family not be notified of her death. The siblings had had no contact at all with their mother since she had abandoned them at a very early age, some 48 years previously, but were awarded a total of $350,000 out of a net estate of $430,000. The bequest to the charities was thus reduced by 81%.

How is it that the clearly stated philanthropic intentions of a will-maker can be overturned in favour of family members or other claimants?

The original purpose of family provision law was to enforce the proper maintenance and support of a will-maker's spouse and children. Family provision laws were introduced into Australia from New Zealand, and spread to Canada and the UK. No other jurisdictions have such laws. In the 108 years since their introduction in New Zealand, family provision laws have had their influence extended through judicial interpretation and active promotion of the priority of family claims on estates as part of public policy. Testamentary freedom, although never completely dominant in English law, is now seriously challenged in Australia.

To what extent are charities losing charitable bequests through family provision claims?

A review of major reported cases shows that charities have been deprived of bequests, or had bequests substantially reduced, as a result of the primacy of family claims. Most family provision disputes do not reach court, either because there is compulsory mediation required, or because there is an informal family settlement. However, our survey of 46 major reported cases involving bequests to charity in

\(^1\) [2002] NSWSC 835. For a similar case where an only son had a very poor relationship with the testatrix, his mother, see Wheatley v Wheatley [2006] NSWCA 262.

\(^2\) [2005] NSWSC 764.
Australia and New Zealand shows that the charities involved lost the entire bequest in six of the cases, had their bequests substantially reduced in 35 of the cases, and prevailed against the family claimant in only five of the cases. Of the successful family provision claimants, 34 cases involved spouses and/or adult children (including step children and adopted children), four cases involved other family members, two cases had non-family claimants, and one case had a same sex partner claimant. The trend to support the concept of family, and a broadening concept of family, in case law is clear, and is grounded in public policy in both countries. In more recent years, as the concept of ‘family’ has been extended to include de facto partners, same sex partners, wider family, and various dependants not envisaged by the framers of the original legislation, the primacy of family claims has become even more difficult for charities to overcome.

What is family provision legislation?

Current legislation on family provision in Australia varies from state to state, and there are variations in wording in the legislation. Queensland, Tasmania and Victoria refer to ‘proper maintenance and support’. New South Wales, South Australia, the Northern Territory and the Australian Capital Territory use the term ‘proper maintenance, education and advancement in life’, while Western Australian legislation has the term ‘proper maintenance, support, education or advancement in life’. Despite these differences, the High Court has encouraged uniformity of interpretation in its decisions. Whilst true uniformity of interpretation cannot be guaranteed in the cases, since each will turn on its facts to some extent, and the jurisdiction is wholly discretionary, the differences in wording do not appear to have caused undue confusion.

Is anything being done about this situation?

In a 1997 report, the National Committee on Uniform Succession Law, in its final report to the Standing Committee of Attorneys General, recommended the curtailment of family provision in the uniform laws. It suggested that the only appropriate applicants should be a husband, a wife, a non-adult child, or a person for whom the deceased person had a responsibility to make a provision (as defined in the Victorian Administration and Probate Act 1958). De facto spouses were not included. However, in a supplementary report of 2004, de facto spouses were included, and this was reflected in the model Family Provision Bill 2004 which accompanied the report. Clause 6(1) of the Bill lists:

- the wife or husband of the deceased person at the time of the deceased’s death,
- a person who was, at the time of the deceased person’s death, the de facto partner of the deceased person,
- a non-adult child of the deceased person.

Clause 7(1) further provides that a person to whom the deceased owed a responsibility to provide maintenance, education or advancement in life may apply for provision.

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3 Succession Act 2006 (NSW) section 57; previously, Family Provision Act 1982 (NSW) sections 7, 8, and 9(2); Administration and Probate Act 1958 (Vic) section 91; Succession Act 1981 (Qld) section 41; Inheritance (Family Provision) Act 1972 (SA) section 7(1); Inheritance (Family and Dependents Provision) Act 1972 (WA) section 6(1); Testator’s Family Maintenance Act 1912 (Tas) section 3(1); Family Provision Act 1970 (NT) section 8(1); and the Family Provision Act 1969 (ACT) section 8(1).

4 Succession Act 1981 (Qld) section 41(1); Testator’s Family Maintenance Act 1912 (Tas) section 3(1); Administration and Probate Act 1958 (Vic) section 91.

5 Succession Act 2006 (NSW) section 59(1)(c); previously, Family Provision Act 1982 (NSW) sections 7, 8, and 9(2); Inheritance (Family Provision) Act 1972 (SA) section 7(1); Family Provision Act 1970 (NT) section 8(1); Family Provision Act 1969 (ACT) section 8(1).

6 Inheritance (Family and Dependents Provision) Act 1972 (WA) section 6(1).

7 In Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494, Dixon CJ made this clear, stating that: ‘The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided’ (at 506-507). In the same case, Fullager J, at 517, said that ‘…the searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach’.

8 The National Committee’s Final Report to the Standing Committee on Family Provision (No. 28, December 1997).

9 This meant a child less than 18 years of age. Currently, adult children can apply for provision and will be successful in most cases.

The recommended approach therefore combines a status criterion and a circumstances criterion for application. The status of the applicant as wife, husband, de facto partner or minor child will be considered, or, if persons other than those listed in clause 6(1) apply, a circumstances approach based on whether the deceased had responsibility to make provision for the applicant will be used. Adult children would clearly fall into the ‘circumstances’ category in this regime, presumably based on dependency.

What can be done to restore the balance?

It is difficult to understand why, in 2008, an adult of full capacity and understanding cannot choose to leave the entirety of his or her estate to charity, after having provided for any surviving spouse (including a de facto partner or same sex partner of more than 2 years standing), and dependent children (defined as those under (say) 21, or even 25). In the absence of more profound law reform proposals on inheritance law generally, it would seem advisable that charities should support the current uniform family provision law proposals, and lobby for the model bill to be adopted, minus any notional estate provisions which do not generally assist charities in pursuing bequests. This would provide a limited applicant pool, and be a move towards testamentary freedom to leave a charitable bequest in a will.

Further research directions

Further research is required to explore the dynamics of the decision making process of charities facing a family provision application, the drivers behind the apparent increase in family provision applications, and public attitudes to charities in this context. In this paper only reported cases involving bequests to charity have been reviewed, but the vast majority of cases are settled through negotiation or mediation well before court proceedings. An understanding of the issues in unreported cases may additionally assist in the law reform process and give all concerned an insight into the themes underlying, and drivers behind, family provisions claims. The usefulness of charities being represented in mediations and court cases needs also to be considered.

These issues will be pursued through semi-structured interviews with those who play a part in contesting and/or settling family provisions claims. This proposed research is intended to interview eastern seaboard specialist estate lawyers in private practice and trust companies who have a recognised practice with advising clients about such matters. This will include those who specialise in wills and estate law and also litigation lawyers who often appear for family claimants. Specialist mediators who regularly mediate family provision claims will also be interviewed. In addition, representatives of charities with active bequest programs will be interviewed about their views on such claims and experiences.

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12 Notional estate provisions are currently operative only in New South Wales. These make assets which have been previously distributed while the deceased was alive come back into an estate, and thus be available for any family provision claim. As an example, in *Quek v Beggs* (1990) 5 BPR 11 (NSW), two substantial real estate properties given to a church while the deceased was alive, were declared to be notional estate, and were awarded to the children of the deceased who had made a family provision application.
This information sheet is part of a series of research projects on bequests and planned giving funded by the E F and S L Glayas Trust and the Edward Corbould Charitable Trust under the management of the Perpetual Trustees Company. Many issues require further investigation, including practical considerations for charities in pursuing bequests in wills, and a further report will be forthcoming from CPNS on this topic.

The Information Sheet was issued on 07 November 2008. Events, policies and laws alter rapidly – you should take independent advice before acting on any matter raised in this publication.