BLENDED FAMILIES: RECENT TRENDS IN FAMILY PROVISION CLAIMS

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By Darryl Browne

Australians are living longer, healthier lives. Consequently, second (or subsequent) marriages later in life are an increasing demographic reality. Often the couple will have children from their previous marriages. While those children may be happy for their respective parents in their new relationship, there is often a concern among those children that when their natural parent dies, the assets of their previous relationship should be applied only for the children of that previous relationship'.

With these words, Kunc J commenced his reasons for decision in *Lowe v Lowe (No 2)* [2015] NSWSC 16. *Lowe* is one of three decisions given in the last three months of 2015 resolving a family provision claim arising from blended families. Although the inheritance arrangements made by the blended couple in each instance were distinctly different, in each case the court essentially maintained the arrangement made by those couples.

Snapshot

- The contest between the deceased's obligations to a second wife or husband and obligations towards adult children by the first wife or husband is familiar in family provision claims.
- In three family provision claims at the end of 2015, the courts essentially maintained arrangements made by the blended couple in the face of challenges from the deceased's child and surviving spouse.

Claim by deceased's child

The first case in time was *Bates v Cooke* [2015] NSWCA 278, an appeal from a decision of Kunc J (reported as *Bradley Bates v Robert Henry Cooke* [2014] NSWSC 1259). The deceased was June Cooke. She had been married for more than 25 years to Robert Cooke. She had two children from her first marriage, one of whom was the plaintiff/appellant, Bradley. June and Robert had one child together. Robert had two daughters by an earlier marriage. By their wills made in 2006, June and Robert had left her and his whole estate to the other.

The gift over was in favour of all five children equally.

June's estate had minimal value, but she had a substantial 'notional estate' at death, being an interest in a Self Managed Super Fund (SMSF) worth $1,050,000 and joint tenancies in two properties. Apart from his interest in the superannuation fund and joint ownership, Robert was the sole owner of the matrimonial home worth $1.3 million. Bradley (June's son from her first marriage) was 43 years old, married, and an electrician earning $70,000 p.a. He and his wife owned two parcels of real estate with a net value of $216,000. They had combined superannuation of $170,000.

Bradley frankly acknowledged that he was activated by the motivation for many family provision claims in the familiar context of blended families, namely that there was no guarantee that his step-father would adhere to arrangements made in 2006 to divide his estate equally among the five siblings. Bradley knew that if Robert changed his will, Bradley would be unable to make a family provision claim in relation to Robert's estate since he would not be an 'eligible person' in relation to that estate. This concern led Bradley to initially seek relief to secure a one-fifth interest in 'the assets of the marriage'. During the trial, the claim was re-shaped as a claim for provision to build a suitable amount of superannuation for his retirement.

The trial judge found that Bradley had not established that his mother had not made adequate provision for his proper maintenance and advancement in life, ie he had not satisfied the first stage of the conventional two-stage approach identified in *Singer v Berghouse* [1994] HCA 40; (1994) 181 CLR 201; (1994) 123 ALR 481. In large part, the trial judge's decision was based on a conclusion that provision should not be made for Bradley to alleviate a need generated by a deliberate and economically risky course of action concerning an investment property. Kunc J stated that as a competent adult, Bradley should take responsibility for and accept the consequences of the investment decision rather than look to provision out of his mother's estate to ameliorate those consequences. Those consequences of a significant debt and interest burden had produced a commensurate inability to build up his superannuation.

The Court of Appeal's decision was delivered by Sackville AJA, with whom Meagher JA and Leeming JA mostly agreed. The Court accepted that, in appropriate cases, ensuring that an adult child had sufficient funds for retirement was a proper matter for an order for provision under the Act. In this case, the extent of the deceased's notional estate meant that such a provision could be made with minimal impact on Robert's lifestyle and the overall scheme of the inheritance arrangement whereby the survivor's estate was to go to Bradley and his siblings equally. However, the Court of Appeal noted that Bradley did not claim that he had an immediate need that enlivened an obligation on the deceased to provide for his maintenance and advancement in life. His case was that he wished to build up his superannuation for his retirement, expected to be some 20 years in the future.

Lastly, the Court observed that a claim for an order to build up superannuation entitlements should ordinarily have a solid foundation in the evidence. Bradley's claim lacked such a foundation. He had therefore failed to show appealable error. His appeal, like his claim, was dismissed with costs.

Claim by widow one

In the case of *Lowe v Lowe (No 2)* [2015] NSWSC 16 (referred to above), the plaintiff was Diana Lowe. She and the deceased, Francis Lowe, had been in a relationship for eight years, the last four as a married couple. It was the second marriage for both of them.

Mr Lowe was survived by three adult children, the defendants. By his will made in 2012, $20,000 was bequeathed to each of his six grandchildren. He gave Mrs Lowe his personal effects. (The meaning of this was the subject of the decision in *Lowe v Lowe* [2015] NSWSC 48). Mr Lowe gave Diana a right of residence in his property at the matrimonial home for up to 18 months after his death with the option to purchase the home when that period expired. Diana owned her own home, which was worth $1.3 million.

The will provided that she could purchase the matrimonial home for the lower of the value of that home (which was worth $1.4 million) and her house with the estate paying the transaction costs of the transfer.

That testamentary provision was crucial to the outcome of the proceedings. The judge found that there was an 'arrangement or understanding' between Mr Lowe and Diana that they would keep their assets and financial affairs separate and that they did so. The judge felt that nothing had happened during the course of the marriage which had significantly changed Diana's personal circumstances, such as a significant decline in health. In those circumstances, giving significant weight to the arrangement she had with Mr Lowe, the judge decided that adequate provision for Diana would be an amount that would ensure she was neither worse nor better off than she had been at the start of her relationship with Mr Lowe. She had identified the need to perform work to her house at a cost of $73,525. The judge recognised Diana's life expectancy of approximately 10 years. She had a short fall between income and expenses of $7,300 p.a.

Weighing all those factors, the Court determined that Diana receive additional provision of $100,000 from the deceased's estate of $3.3 million. This amount was intended to ensure her position was no better or worse than her circumstances at the time she began her relationship with Mr Lowe.

However, Diana will see very little of this $100,000. This is because five months before the hearing she rejected a *Calderbank* offer of $230,000. Because of that fact and the rejection of an earlier offer, she was ordered to pay the defendants' costs on the ordinary basis up to 8 June 2015 and thereafter on the indemnity basis: see *Lowe v Lowe (No 3)* [2015] NSWSC 1800.

Claim by widow two

The third case in time was *Thompson v Thompson* [2015] VSC 706. The plaintiff, Gwenneth Thompson, was the widow and second wife of Jack Thompson. They had commenced living together in 1979 and married in 1987. They bought an apartment in Collingwood as tenants-in-common in equal shares in 1997. They lived there until his death. By his will, also made in 1997, the deceased gave the contents of the home to Gwenneth, as well as his car, $15000, and a life interest in his half share of the apartment. The rest of the estate of $673,000 was given to his two adult children from his first marriage.

Gwenneth sought an absolute interest in the deceased's half share of the apartment. The Court noted that, as a long-standing second wife, the plaintiff's proper maintenance and support was foremost but the competing claims of the adult children, the relatively small size of the estate, and the wishes of the testator that his adult children should benefit from his estate after the death of the plaintiff, were significant factors in the consideration of what further provision should be made for her. It ordered that further provision for Gwenneth's proper maintenance and support be provided by an extended portable life interest in the Collingwood apartment (as described in *Milillo v Konnecke* [2009] NSWCA 109 and sometimes called a *Crisp* order).

Conclusion

These decisions can be summarised as follows. In the context of a non-existent estate but largish notional estate, the arrangement made by the Cookes withstood challenge from the deceased's child. In the context of a largish estate, the arrangement made by the Lowes withstood challenge from the surviving spouse. And in the context of a smallish estate, the arrangement withstood challenge from the surviving spouse. The common feature is a clear and unequivocal arrangement of the blended couple. **LSJ**

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