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BLENDED FAMILIES AND FAMILY PROVISION CLAIMS

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There is an increasing incidence of blended families in Australia. This is partly driven by longer life expectancy and increasing divorce rates, providing more opportunities for a testator to re-partner in a significant second (or third) relationship after the divorce or death of their first partner.

The testator's children and the testator's second partner each have legitimate expectations in relation to the testator's estate. The testator and the second partner may have had a relatively long relationship, even if the relationship only started later in life. The testator's children may consider that their parent's money is "family money" that should flow to them, and not lost to the second partner and ultimately the second partner's own children. The disappointment may lead to family provision claims against the testator's estate.

Claiming against parent – accelerated inheritance and the wrath of the step-parent

The family provision legislation may effectively compel a testator's children to claim against the testator's estate. This is because the testator's children are automatically eligible applicants against the testator's estate, but there may be difficulties claiming against the testator's spouse's estate – in NSW, step-children are only eligible if they were members of the household and wholly or partly dependant on the step and there are factors warranting their application[1], and in ACT, step-children are only eligible if they were maintained by the step-parent immediately before death,[2] and in Queensland, step-children are only eligible if their parent's marriage or de facto relationship with the testator subsisted at the date of the testator's death or the parent had predeceased the testator.[3]

However, the testator's children are then pitting themselves against the testator's spouse. Justice Hallen has said that it is relevant to consider the principles relating to a widow who is an applicant when considering the claims of a widow as a competing *beneficiary.*[4] The courts generally consider that the community expectations are that the testator's primary obligation is to the testator's spouse before the testator's children; where the spouse is likely to be older than the children and have limited or no earning capacity and limited or no opportunity to accumulate superannuation or a buffer against contingencies; and where the spouse is likely to be older and have greater medical needs. Generally speaking, the testator should ensure that the widow has secure accommodation, an income stream and a buffer against contingencies.[5]

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[1] Section 57 Succession Act 2006 (NSW)
[2] Section 7 Family Provision Act 1969 (ACT)
[3] Section 40 and 40A Succession Act 1981 (Qld)
[4] *Morier v Liem* [2016] NSWSC 582 at [182]; *Clark v Ro* [2016] NSWSC 1877 at [109]; *Hogan v Hogan* [2013] NSWSC 1405 at [131]; *Camernik v Reholc* [2012] NSWSC 1537 at [160].
[5] *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24; *Bladwell v Davis* [2004] NSWCA 170

The testator's children's claims are particularly challenging where the testator's estate substantially consists of the testator's house, or the testator's interest in a house, and the testator's spouse is living in the house. The courts may be reluctant to order a spouse, particularly an elderly spouse, to sell the matrimonial home to provide for the testator's children.[6]

The testator's children may be content to allow the testator's spouse to continue living in the house, and may be seeking for the spouse's fee simple to be converted into a life estate so that the testator's children have a remainder interest, or that the spouse's promise to leave the testator's children provision in the spouse's estate. It may be possible to negotiate on this basis. However, this application may ultimately fail at trial – the court needs to determine whether proper and adequate provision as been made "at the time when the court is considering the application" and will make an order that the court thinks ought to be made having regard to the facts" at the time the order is made",[7] and Justice Hallen has cautioned applicants that this means that the court has no jurisdiction to order a remainder interest or an interest in the spouse's estate because the court has no idea what the applicant's financial circumstances will be when the spouse ultimately passes away which is some unknown date in the future.

Notably, even if the testator's children are able to negotiate a remainder interest, this may not preserve the testator's capital – the spouse may insist on a portable life estate, which may will give an opportunity for capital appreciation if the spouse purchases real estate, but the spouse may incur transaction costs when the spouse purchases new real estate and ultimately enters assisted living or a nursing home, and there may be compulsory fees and commission from assisted living or a nursing home. This issue may be ameliorated by an interest free loan rather than a portable life estate, which at least preserves capital but there is no interest and the spouse may live for some time.

Notably, even if the testator's children are able to negotiate a share of the spouse's ultimate estate, the spouse may dissipate her estate. The testator's children may be able to negotiate that the spouse does not enter into any relevant property transaction such as making gifts, donations or forgiving loans. However, the testator's children cannot properly restrict the spouse from spending her own money for her own purposes such as travelling, clothing, hair and beauty…

Claiming against step-parent – eligibility – member of household + dependance

The children may delay making a claim against their own parent's estate, so as not to disturb the step-parent's final years, particularly if they have a personal relationship with the step-parent. However, the children may then have difficulties making a claim against the step-parent's estate.

As stated above, a step-child does not automatically have a claim against the step-parent's estate.

As stated above, In NSW, step-children are only eligible if they were members of the household and wholly or partly dependant on the step and there are factors warranting their application.

The step-children may have been adults where the parent commenced a relationship with the step-parent. The adult step-children may have already left home when their parent commenced a relationship with the step-parent, or may have left shortly thereafter, so it may be difficult to demonstrate that they were a member of the household, let alone dependant.

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[6] *Camernik v Rehole* [2012] NSWC 1537, Hallen J at 160 (f); *Morier v Liem* [2016] NSWSC 582 at [252] to [253]; *Gersbach v Blake* [2011] NSWSC 368 per Hallen J at [181]

[7] Section 59(1)(c) and (2) Succession Act 2006 (NSW)

The step-children may have been minor or young adults where the parent commenced a relationship with the step-parent. They may be able to demonstrate that there were a member of the household and dependant if the step-parent was in loco parentis with the child. However, they may not be able to demonstrate that they were a member of the household and dependant if they were living with the parent's ex-partner, and only spending access visits, every second weekend and half the holidays, with the parent and the step-parent.[8]

The fact that a person is a member of a household is relatively objective. Generally speaking, the applicant needs to have lived in the same house as the testator, although it is possible to have one household and two properties. "Member of the household" connotes some element of permanence, frequency of contact, some degree of voluntary restraint upon personal freedom which each party undertakes, some element of mutual support and some element of community of resources.[9]

The concept of dependency may be more flexible, is a question of degree, an "evaluative judgment"[10], may involve subjective concepts such as "emotional support" and may be difficult to demonstrate.

In Re Estate of Hakim; Simons v Permanent Trustee Co Ltd , Palmer J said:[11]

> "Dependence …., is seen as the giving of financial or other material assistance by the deceased over a significant period of time in order to meet a need of the eligible person, with the result that the recipient has come ordinarily to rely upon that assistance."

The period of dependence may be relatively short – in *Page v Page*, Sackville AJA acknowledged that a person may be partially dependant, even if it is only for a period of 14 months.

Importantly, dependant includes both financial and emotional dependence. In *Petrolihos v Hunter*,[12] Hope JA said that the provision by a mother to her children, living with her, of the services essential for their well-being makes them partly dependent upon her, and the same considerations apply to a step-child or his or her step-mother when the child lives with the step-mother and is looked after by her.

In *Spata v Tumino*,[13] the testator's *husband* owned the two houses that the applicant lived in. However, Payne JA said that the court needs to determine the factual question of who, *in a practical sense,* determined who lived in the matrimonial home. The evidence demonstrated that the testator had a right to determine who lived in her and her husband's home, even if her husband was the person was the person who actually owned the home.

When a person moves in with the testator bringing their own children, the children may remain dependant *on their own parent*, and may not be directly dependent on the testator. For example, in *Siddle v Ellis*,[14] Macready J acknowledged that the testator had "affection and warmth" for her partner's son, they cared about each other's well-being, but he was dependent on the testator's

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[8] *Porthouse v Bridge* [2007] NSWSC 686, where the child was not a member of the household and dependant when he was growing up, but only a member of the household and dependant when he later moved in with the parent and step-parent as a young adult

[9] *Oakes v Oakes* [2014] NSWSC 1312 per Pembroke J at [3] to [6]

[10] *Page v Page* [2017] NSWCA 141 per Sackville AJA at [92]

[11] *Re Estate of Hakim; Simons v Permanent Trustee Co Ltd* [2005] NSWSC 223 at [42]

[12] *Petrohilos v Hunter* (1991) NSWLR 343 at 346 per Hope JA

[13] *Spata v Tumino* [2018] NSWCA 17

[14] *Siddle v Ellis* per Macready at [73]

partner, the father, not the testator. Macready J said that the testator's partner was the primary carer, the testator did not attempt to alter that situation, and she regarded her partner as having that role.

However, there is a suggestion in the recent case of *Spata v Tumino*, that indirect dependence may be enough provided that there was the actual fact of dependence. In particular, Payne JA referred to *Shaw v Lambert* and said

> "the fact that the grandchild was dependent upon her mother does not, of itself, preclude a finding that the grandchild was also dependent upon her grandfather for accommodation,"[15]

Step-child as beneficiary – plaintiff claims more than their parents' "share"

The testator and the step-parent may have carefully considered their estate planning and their wills, and properly made provision for their children and step-children. The split may be half each to each set of children, or split evenly between the number of children and step-children, or some other proportion based on the relative contribution to the matrimonial pool of assets.

However, this careful planning may collapse like a jenga tower if one of their children makes a claim. Quite apart from the amount of provision the applicant receives, the court needs to consider where the burden of the provision should fall.

Generally speaking, the burden of the provision should be borne proportionately between all of the beneficiaries. However, the court has jurisdiction to order the burden of the provision to fall disproportionately between the beneficiaries "to be just and equitable to all persons affected".[16] If one parent's child is making a claim, the other parent's children may reasonably consider that "their family's share" should be quarantined from bearing the burden of the provision, and the applicant's siblings bear the whole of the burden of the provision, so that the relative split between the families is preserved. It may be particularly galling if one of the parents has contributed most of the wealth, and not only do the spouse's children ultimately receive half of the wealth but then one or more of them makes a claim so that the spouse's family ultimately receives more than half.

Mutual wills

Parents involved in blended families may attempt to address the issue by making mutual wills, where both parents make a will, and they agree that if the deceased parent does not change the deceased's parent's mutual will before death, then the surviving parent will not revoke the surviving parent's will or change the relevant gifts in the surviving parent's will.[17] However, mutual wills may not be a panacea.

First, there may be some difficulties proving the mutual will agreement. It is not sufficient to demonstrate that the parents have mirror wills, and it is necessary to show an agreement that each of the parents have agreed that they will not revoke or change their wills before they pass away. Ideally, this is reflected in a written agreement. If it is not in a written agreement, the disappointed beneficiaries will need to rely on comments made by the parent. Ideally, the

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[15] *Spata v Tumino* per Payne JA at [76]

[16] Section 66(2) Succession Act – see *Hoobin v Hoobin* [2004] NSWSC 705, *Sackelariou, Edward v O'Donnell; Sackelariou, George v O'Donnell* [2018] NSWSC 1651

[17] *Birmingham v Renfrew* (1937) 57 CLR 666

solicitor who prepared the will may have a file note confirming this agreement, but it may be that the parents merely gave the solicitor the instructions, and did not expressly explain why they were giving instructions for mirror wills. (It may be that a solicitor presented with instructions for a mirror will should have a positive duty to ask the testators to clarify whether the testators intend a mutual will.)

Unfortunately, invariably, the only persons who can give evidence of the comments are the disappointed beneficiaries, and the only evidence is comments from their own parent and not from the other parent. In *Birmingham v Renfrew,* Latham J noted that there was a heavy burden of proof and the court would be careful in accepting the evidence of interested parties.[18]

Second, the fact that the parents have mutual wills merely imposes an equitable obligation on the survivor and their estate. If the survivor changes their will, the survivor's will is still valid.

Third, the surviving parent merely has to maintain their will, and there may be no obligation to preserve their estate. The surviving parent may die with the mutual will, but they may have dissipated their estate during their lifetime, so there is nothing to distribute pursuant to the will. The mutual will agreement may include an obligation that the surviving parent not enter into any relevant property transactions such as making gifts, donations or forgiving loans, but it would be very unlikely that a person would accept any further restrictions in the mutual will agreement – it is their money so they should be able to spend it on themselves.

Fourth, the parents may be bound by the mutual will agreement, but no-one else is bound by it. Therefore, the surviving parent's estate is still exposed to family provision claims from a second partner or from children and step-children.[19]

Fifth, a person may structure their affairs on the basis of a mutual will agreement, and then discover that the deceased parent in fact changed their will before they died. The surviving parent's only remedy is to change their will – the fact that the deceased parent changed their will only releases the surviving parent from the mutual will, but it does not claw back assets that the surviving parent thought was going to them from the deceased parent's estate.

Section 95 releases against step-parent's estate

Parents involved in blended families may attempt to address the issue by requiring each other and their children to release both parents' estates from any family provision claim.

Alternatively, if a child makes a claim against their deceased's parent's estate, thereby accelerating their inheritance from the matrimonial pool, then the step-parent (and the other children!) may require that the applicant release the step-parent's estate from any family provision claim, so that the child does not get a second bite of the cherry and round 2 when the step-parent passes away.

The releases are not binding unless the release has been approved by the court.[20] The court is to take into account all of the circumstances of the case including

(a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and

[18] Ibid at 674 per Latham
[19] *Barns v Barns* (2003) 214 CLR 169
[20] Section 95 Succession Ac 2006 (NSW)

(b) it is or was, at that time, prudent for the releasing party to make the release;[21] and

(c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and

(d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.

The parties should not assume that the court will rubber stamp the release or that it is a mere formality.[22] There is no presumptive right to an order, but there remains a general discretion, vested in the Court, to make an order approving the release. The approval does not follow just because all the parties have agreed that such an order should be made:[23]

In particular, the parents should not assume that they can wait until a child brings a claim and if a child brings a claim, then the estate can cross-claim seeking for the release to be approved. The court may not approve the release and proceed to order further provision. This may because the release was reasonable and prudent when it was first given, but the releasing party's circumstances have since changed so the release is no longer reasonable and prudent.[24]

However, there may be strategic reasons why the parents don't want to seek a release. Practically speaking, the court is only in a position to approve a release if the releasing party and the court is provided details of the nature and value of the assets and liabilities of the testator's estate.[25] This may disclose the testator is much wealthier than the releasing party anticipated. The releasing party may then refuse to give the release, or may then demand a greater share of the testator's estate before giving the release. This is even though the releasing party may not have even been eligible to make a claim against the testator's estate, or may not have otherwise even attempted to make a claim against the testator's estate.

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[21] In *Russell v Quinton [2000] NSWSC 322*, Bergin J at [70] said "prudent" was someone who acts with care and thought for the future, in particular in exercising care and good judgment in relation to their interests.
[22] *Oxley v Oxley* [2014] NSWSC 1606; *Kelly v Kelly* [2019] NSWSC 994 at [71] and [72] esp [72(f)] per Hallen J
[23] *Boyter v Lepre; Estate of Umberto Lepre* [2001] NSWSC 127.
[24] *Neil v Jacovou* [2011] NSWSC 87, Slattery J did not approve the release in the widow's pre-nuptial agreement and ordered significant provision
[25] *Kelly v Kelly* [2019] NSWSC 994 at [27]