FAMILY PROVISON CLAIMANTS WITH ADDICTION PROBLEMS

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Introduction

A claim on the estate by someone who suffers from addiction problems (either gambling or substance abuse), raises special questions in a family provision matter. For example, how does their addiction affect their ability to handle money, have they reformed their ways and if so how long is it since that change and are they likely to relapse? What weight should be given to the deceased's views? The deceased may have been so upset about the person's addiction problems that they were left out of the will entirely or the deceased may have been sympathetic to their predicament and left them money to be held in trust so that they could not squander the capital.

Caselaw

The issue was referred to by the Court of Appeal in *Hampson v Hampson* [2010] NSWCA 359. The statutory provisions pursuant to which the claim

was brought in that case were contained in the Family Provision Act 1982 but are now to be found in Chapter 3 of the Succession Act 2006 for estates where the deceased died on or after 1 March 2009. Campbell JA (with whom Giles JA and Handley AJA agreed) provided a useful summary of some of the relevant cases at [95] to [103] and [118] to [124]. *Hampson* was an appeal from a decision to not allow any provision from the estate for the appellant, one of the grounds of appeal being that the Judge below had erred in taking into account the appellant's use of marijuana. The appeal was dismissed.

His Honour referred to what is in reality the major issue in matters involving addictions: the tendency on the part of addicts to spend significant amounts of money in feeding their habit, saying at [96]:

> *"A tendency on the part of an applicant to waste money on items that are either of no use or are positively damaging to himself can enter into what is adequate provision for proper maintenance of that applicant. To the extent to which it is still of use to refer in Family Provision Act legislation to the provision that a wise and just husband or father fully aware of all the relevant circumstances would have made (cf Bosch v Perpetual Trustee Co [1938] AC 463 at 479; McCosker v McCosker [1957] HCA 82; (1957) 97 CLR 566 at 571-572; Singer v Berghouse (No 2) [1994] HCA 40; (1994) 181 CLR 201 at 209; Vigolo v Bostin [2005] HCA 11; (2005) 221 CLR 191 at [15]-[17] per Gleeson CJ, cf at [60]-[63] per Gummow and Hayne JJ, cf [113]–[121] per Callinan and Heydon JJ), in my view marijuana use is a matter that the wise and just parent would be likely to take into account in deciding to make provision for a child, or in fixing on the type and amount of provision to make for a child. Thus, it can be taken into account by the court in deciding whether provision made*

> *for a child is inadequate for proper maintenance, education and advancement in life, and also in deciding what would be adequate for proper maintenance, education and advancement in life."*

His Honour noted that the illegality of the conduct involved in drug use would not necessarily be a relevant consideration but that it would be relevant if the deceased felt shunned and embarrassed by the conduct.

He then referred at paragraphs ([97] to [99]) to decisions where the addict had been left a provision but with limited access to the funds:

> *"97 Ray v Moncrieff [1917] NZLR 234 concerned an applicant who was the only son of a deceased, who had been left the income of a sum of money, with the capital of that sum on his mother's death. The applicant was an able-bodied labourer, and "a chronic drunkard". Chapman J rejected the argument that the applicant should be treated as a man suffering from a chronic disorder, such as being maimed or insane. His Honour said, at 235:*
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> > *"[I]t would be a novel use of the powers of this Act to relieve the son of his burdens when the only result would be to set free his resources to be spent in drinking. The Court in these cases is asked to make good some failure on the part of the testator to perform his duty. It seems to me he has most thoroughly endeavoured to do his duty towards the applicant."*
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> *98 Similarly, in Bondy v Vavros (Supreme Court of NSW, Young J, 29 August 1988, unreported at 10) Young J (as his Honour then was) contemplated that:*

> *"… if one can see that a plaintiff is a spendthrift and the testator has arranged his will in such a way as to limit the funds flowing to the plaintiff, then one may very well come to the conclusion that the plaintiff has failed to establish that there has been any breach of moral duty."*

99 In such a situation, if a plaintiff had been left periodical income, then even if another plaintiff who was similarly situated but not at serious risk of frittering away capital could have obtained a capital sum in lieu of the income stream, it might be concluded that for that particular plaintiff the income stream was adequate and proper provision"

Campbell JA noted (at [100] and [101]) that another passage in *Bondy* which preceded that quoted above, ie

> *"if a person is entitled to an order, what they do with the money is their business and it is none of my affair if I very much fear that the money may be wasted on wine, women and song"*

has sometimes been treated as meaning that the Court should disregard the likely use the applicant will make of an award. However, in his view that involved a misreading of the statement in its context particularly since the sentence he quoted at [98] commenced with the words *"On the other hand, when one is considering what a wise and just testator would have done"*. The sense of the whole of the paragraph is (to the extent to which the wise and just testator would take it into account) the prospect of the applicant wasting the money is a legitimate matter to take into account in deciding whether the applicant has been left without adequate provision for proper maintenance, education and advancement in life.

His Honour referred to the fact that there was ample precedent, and justification in principle, for a tendency of an applicant to spend excessive amounts of money unwisely including through an addiction to drugs to enter into consideration of the formulation of an order under family provision legislation. He extracted examples in the appendix to his judgement at paragraphs [118] to [124] which is headed "Taking Account Of Financial Improvidence In Order Formulation."

In *In Re Fletcher (Deceased), Fletcher v Usher* [1921] NZLR 649 the applicant who was *"addicted to drink"*, had been left only a small piece of real estate. Adam J said, at 650, that the applicant should receive a weekly sum, *"but that he should be protected in some way against his propensity to waste the allowance. The court should, I think, take such precaution as a prudent testator would be expected to take in such a case"*. Apart from a condition in the order that the applicant abstain from drinking, Campbell JA thought that *"the order is in my view within the range of permissible discretionary orders."*

Green v Perpetual Trustee Company Limited (Supreme Court of NSW, Hodgson J, 10 July 1985, unreported) concerned two adult son applicants. One of them had once been a heroin user, but claimed to have given it up, though he occasionally still smoked marijuana. The judge held that it was appropriate that legacies of equal amounts be given to the two brothers. However, he had a concern about whether one of the brothers was *"entirely free of any drug problem"*. He wished to have further submissions:

> *"… as to whether or not there should be any terms attached to his gift to ensure that it is used for a purpose such as the acquisition of a business and*

> *not used in any way for the purchase of drugs. What I have in mind, in very general terms, is that he should not have absolute control of the money for some period of years and, in the meantime, there should be some provision made that the money be used for purposes such as the acquisition of a business and that if the business is sold any proceeds be used for similar purposes."*

Hoadley v Hoadley (Supreme Court of NSW, Young J, 17 February 1987, unreported) was a case in which a spendthrift plaintiff was given a legacy on terms that it be held on protective trust. Another applicant son, who was then in prison and had been in prison for about 14 years out of the previous 20 years, was given provision structured to be paid in stages as so long as he stayed out of prison to the end of each stage.

In *Carroll v Cowburn* [2003] NSWSC 248 Young CJ in Eq (as his Honour then was), made an order for provision for a plaintiff who had demonstrated that his ability to handle money was limited and who was in necessitous circumstances. The form of the order was that $8,000 be held on trust for the plaintiff for the payment of particular itemised expenses, that a legacy of $16,000 be paid to the plaintiff at the end of the month in which the orders were made, that a further legacy of $16,000 be paid to the plaintiff one year thereafter, and that a further legacy of $20,000 be paid to the plaintiff upon production to the trustees of an agreement for the purchase of a motor car for the plaintiff at a cost of at least $15,000, and evidence that the plaintiff or a member of his immediate family is duly licensed to drive a motor car.

Macready AsJ made an order in *Marshall v Public Trustee* [2006] NSWSC 402 in favour of a drug dependent applicant, on the basis that the award would be managed for the applicant's benefit in a protective trust, that included power to make capital advancements.

Campbell JA also referred in *Hampson* to the converse decision in *Grey v Harrison* [1997] 2 VR 359 where an applicant whose career had been ruined by alcoholism was given a substantial award of capital from his father's estate, with no conditions attached, but it is notable that this was in circumstances where the court accepted that he had recovered from his alcoholism.

In *Sangster v Sangster* [2009] NSWSC 695 Bergin CJ in Eq dealt with a case involving a plaintiff with drug and alcohol problems, but who had not been using since 2000. However, her Honour formed the view that the evidence demonstrated that the plaintiff had *"at least a cavalier attitude towards the incursion of expense that he was unable to repay, or perhaps a more serious flaw in relation to the incursion of such expense"* ([39]). She paid significant regard to the views of the deceased mother and the plaintiff's father and the siblings of the plaintiff that he should not have access to the provision that had been made for him in his mother's will other than through a trustee and other than for the purpose of accommodation and general living expenses. She determined that because of the size of the estate there was little room for an investment manager but that a trustee should be put in place to ensure that of the $370,000 legacy she was ordering for the plaintiff on the condition that it was to be used for the purchase of property within a range that would enable a fund of at least $20,000 to be set aside for general expenses and

maintenance of that property, would be observed. She required the plaintiff to prepare a trust deed and invited submissions from counsel as to the means for keeping costs to a minimum in ensuring that the condition was observed.

What the caselaw means

Each case of course turns on its own circumstances but the weight of the authorities extracted above tends, where the circumstances involve an addiction that results in an inability to manage money, to favour the primacy of some form of protection against the squandering of the gift either imposed by the deceased in the will, or by the Court. Questions of whether the claimant has reformed, such as in *Grey*, are relevant and may persuade the Court that protection is not necessary.

Some practical considerations

(i) In matters in which it seems that some form of protection is appropriate, the cases above lead to the conclusion that the form which that protection should take is really an open question. That means there is ample scope, when running a hearing or trying to settle one of these cases, for practitioners to try to devise and suggest a form of protection that balances the interests of the claimant and the estate as the defender of the will and thus the deceased's intentions.

(ii) Often a claimant in these cases alleges that they have reformed and will not consider settlement on any basis other than a cash legacy without any conditions. Where the will had imposed

conditions on a gift in their favour and the executor has doubts about the claimed reform, the executor may be concerned about the possibility of some personal risk if they proceed to settle the claim and the claimant squanders the legacy because of a relapse or because they had not really reformed at all. I would suggest that in those circumstances the executor should insist on a release and insist on having the proposed settlement and release approved by the Court pursuant to section 95 of the Succession Act. It may be that medical evidence and/or independent evidence corroborating the claimant's allegations would be needed on such an application.

(iii) If you are running one of these cases for the claimant and the claimant alleges that they have reformed you should think carefully of what evidence is available to substantiate that such as medical evidence, evidence from persons associated with narcotics/alcoholics anonymous or gamblers anonymous or any rehab program they have undertaken and evidence that shows a pattern of responsible handling of money over time. The weight and nature of such evidence could be the difference between losing the case or having a legacy subjected to Court imposed conditions or getting the sort of outcome that was obtained in *Grey*. If you are acting for the estate you would of course be looking to subpoena records from these sources to try to refute the claims.

(iv) When considering what evidence is appropriate do not forget the special way in which costs issues are handled in this jurisdiction: the size of the estate is very relevant to questions of how far evidence gathering should go.

(v) It is also clear from the caselaw above that addiction problems or a tendency to waste money on the part of a proposed beneficiary are relevant considerations when drawing a will. Practitioners should be alert to the issue if it arises when taking instructions and be mindful that in the right circumstances, provisions that impose trusts or the like in an attempt to guard against the squandering or misuse of capital may withstand challenge.

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