The Treatments of Claimants who have been estranged from the deceased for a substantial period

I have found that that from time to time I have to advise a potential claimant under the succession act who is an eligible person as to his/her prospects of making a successful claim, when they have had nothing to do or little to do with the testator for many years. I have one at present where the person left home at 17 years old, changed his surname and virtually had no contact with his parents for 30 years.

I am encouraged by 2 recent Court of Appeal cases:

Keep v Bourke [2012 NSWCA 64]
Andrew v Andrew [2012 NSW CA 308]

Keep v Bourke [2012 NSWCA 64]

In *Keeps* case decided on 5 April 2012 the circumstances were that the deceased made no provision in her will for her daughter the Respondent Marion Gay Bourke "*because of her complete lack of concern with me and other members of my family over a long period of time"*. The estrangement continued over 38 years to Mrs Keep's death. The Nett distributable estate was about $620,000.

The estate was left to the appellant's sister and brother, neither of whom had ever married or had children. Both lived in the family home at Hurstville the only asset and had lived there all their lives. Neither were employed with no prospects of either obtaining employment.

The Respondent was divorced; she had received $120,000 from a property settlement. She had 4 children all of whom were 20 years or older at the time of the testators death in 2009.

The Respondent had been in full time employment at the time of the trial, but a subsequent foot injury caused her to be unemployed, at the time of the appeal.

All 3 had significant health problems and were of modest means.

The estrangement began when the respondent married in 1971 against her parent's wishes. The husband was a Vietnam conscript and the parent wanted the appellant to wait until her elder sister married. The parents refused consent. The respondent initiated court proceedings for consent. The parents then relented and gave permission but refused to pay for the wedding nor did they attend. The invitation to the wedding was returned with a note to the effect that they wanted to have nothing further to do with the respondent.

The respondent and her parents had only 5 encounters from 1971 to 2009. The respondent sought out her mother only once when she was dying. The testator did not seek out the respondent at all.

"*22. On the primary judge's findings, Marion and Mrs Keep saw one another on only five occasions after Marion left the family home shortly before her marriage in November 1971. They encountered one another by chance while shopping shortly after the birth of Marion's first child in 1973 (Marion had not told her parents that she had had a child). Marion had the baby with her in a pram and, when she saw her mother, covered the child so that the mother could not see it. They did not speak. The second encounter occurred when Marion, together with husband and children visited Mr Keep in a nursing home shortly before his death in 1986. Mrs Keep was there, as was Gwendolene. Mr Keep asked Mrs Keep to buy sweets for the grandchildren but she said she did not have her purse with her. On this occasion Gwendolene spoke abusively to Marion and called her a "vulture". Marion and Mrs Keep next saw one another soon afterwards at Mr Keep's funeral. They did not speak and neither Marion nor her children were mentioned in the course of the funeral service. The further occasion was a meeting in passing at a relative's funeral at the crematorium when Marion asked Mrs Keep where Mr Keep's remains were and Mrs Keep answered with a gesture in the relevant diredction. The last meeting occurred when Marion, her daughter Joanne and Joanne's daughter, visited Mrs Keep in hospital a matter of hours before Mrs Keep's death and at a time when she was unconscious. Mrs Keep did not regain consciousness while Marion was there."*

The primary Judge McCready made provisions for the respondent by way of a legacy of $200,000.

The Estate appealed.

The first ground of appeal was a jurisdictional or "first stage" ground that is, the Court must first determine whether the deceased was left without adequate provision. The appellant's argument was that given the long period of estrangement and testator's stated reasons, the provision of nil was adequate in the circumstances. The Court of Appeal disagreed and found that McCready J had taken all the facts and circumstances into account in finding for the respondent on the jurisdictional ground.

The Court also made a finding that the testator "*must be seen"* as the instigator of the separation, although noting that the respondent did not attempt reconciliation "*taking her parents at their word"*.

> "*39. The proposition is not borne out by the judge's finding or by the evidence. I have quoted [81] of the judgment. The paragraph paints, in my view, a picture that is somewhat kinder to Mrs Keep than the finding and evidence indicate. Marion never did wrong to her parents. In her late teenage years, she formed a romantic attachment to a young man. They became engaged. At the age of 20, Marion wished to marry. That was the natural inclination of a young woman particularly in the early 1970's. It was something that, in most families, parents understand and accept unless some reason relevant to the daughter's welfare indicates otherwise. Mrs Keep did not, it seems have any objection to Marion's fiancé on ground going to Marion's welfare (the possibility that he might be sent to war and put into danger could not be viewed in that light). Nor were there any other articulated grounds of rational opposition to the match. The problem of paying for the wedding was solved by Marion's using her own savings, she having informed her mother that she*

would do so. Yet the parents boycotted the wedding, even to the extent of returning the invitation with a note which, in effect, expelled Marion from the family and later writing Marion a letter threatening to sue her unless she made financial provision for the cat.

40. Mrs Keep must be seen as the instigator of the separation. It is true that Marion did not attempt reconciliation. She apparently took at face value her parents' decision – conveyed in hurtful terms – that, by marrying as she wished, Marion had made herself unworthy of continuing as a member of the family.

41. The primary Judge was right when he referred to Mrs Keep's "stringent refusal to make any attempt at reconciliation" and to two occasions on which such reconciliation could have been attempted. His Honour's conclusion that, because of this, Marion should not be barred from making a claim reflected a finding that there was not, on Marion's part, a withholding of support and love "without justification" in the terms used by Bergin CJ in ***Ford v Simes.***

42. In summary, the primary Judge addressed all relevant matters going to jurisdiction. His assessment was made by way of appropriate "multi-faceted evaluative judgment" taking those matters into account (including the situations of Gwendolene and Graham). The estrangement and its circumstances were correctly viewed as not excluding Marion's claim on jurisdictional grounds and the conclusion that the jurisdictional condition was satisfied was one warranted by the evidence. His Honour's decision that adequate provision for the proper maintenance or advancement was not made by Mrs Keep's will is not one calling for appellate intervention in accordance with the principles explained by this Court in ***Hampson v Hampson*** *(above). The first two grounds of appeal ((1) and (2) above) are therefore not made out".*

The Court then determined the second stage test, an assessment of whether the provision (if any) was adequate and if not what was the proper level of maintenance and provision.

The order made was:

"*54. In the result, I am of the opinion that this court should not disturb the primary judge's decision under s 59(1)(c) of the Succession Act that there was jurisdiction to make an order under s 59(2). It is however, necessary to vary the order made in exercise of the discretion conferred by s59(2).* ***There must be a reduction recognising Marion's contribution to the estrangement.*** *But given the factors mentioned by the judge at [78] of the judgment and the hurtful way in which her parents expelled Marion from the family* ***the reduction should not be great.*** *The discretion ought to be re-exercised so that the legacy is $175,000 instead of $200,000.*

There was some contention in relation to the size of the reduction McFarlane would have reduced by more than $25,000 however Barrett JA and Tobias AJA were of the view that $25,000 was appropriate.

The sole rational for the $25,000 reduction seems to be due to the estrangement although as the respondent had to pay the appellants costs of the appeal this may have been in their Honour's minds.

Andrew v Andrew [2012 NSW CA 308]

In *Andrew* the Plaintiff had a legacy of $10,000 increased to $60,000 and costs. The Plaintiff a daughter of the deceased was 1 of 5 children. She received a small legacy of $10,000 from an estate of $800,000 Nett). The balance was to be divided between the remaining 4 siblings, in unequal shares. She was initially unsuccessful before Hallen As J [2011 NSWSC 115).

There was no issue that the appellant was in financially strained circumstances and was significantly less secure then her siblings.

The main asset was the family home. The son Michael was to receive 40% of value of the home in recognition of work he had done to improve its value. If the balance had been equally divided among all 5 then each would have received 12% or $96,000 however the balance was divided at 15% ($120,000) amongst the other 4, meaning Michael's total share was $440,000.

There was no doubt that the provision for the appellant was on its face inadequate. The question was whether the court should have been satisfied that it was "not adequate" having regard to the almost total absence of contact between the appellant and the deceased for some 35 years.

Appellants Explanation for the Estrangement

The reasons for the estrangement were unclear, there was a suggestion that it was because of the appellant's sexuality.

> "*113. Lynne's evidence about her understanding of possible causes of the breakdown in the relationship appears from this part of the primary judge's reasons:*
>
> *"83. In relation to what had caused the breakdown of their relationship, the Plaintiff said the she suspected that perhaps, her mother was angry because of the Plaintiff's sexuality. Her evidence was:*
>
> *'Q. What was it that caused you to be suspicious or suspect that it had to do with your sexuality?*
> *A. That's the only thing that I could think of. I'd never had intense disagreements with them in any way, shape or form. It just basically, the relationship, petered out sort of. It's the only way that I can describe it really.*
>
> ...

Q. You also were cross examined by Mr Ellison on the fact that as an adult you chose to have the level of contact or no contact, as it appears it was, with your mother? You were asked some questions about that, do you remember?
A. I do.

Q. You said that it was due to family dynamics?
A. That's correct.

Q. What did you mean by that?
A. When I went into nursing my father had these expectation of me following his ideals about what my working life should be., My parents, their dynamics between the both of them was very difficult, particularly as my father was medicated and was gradually increasing his consumption of alcohol and I just didn't want to be in that situation. I didn't like it, I was uncomfortable. There was no there was no rapport. It was two people that gave birth to me, brought me up and then I was on my own. That sounds a bit sort of black and white but I just pursued my own career from then on.

Q. Do you mean your own life from then on?
A. My life and my career."

84. As can be seen from this evidence, no specific conduct is attributed to the deceased that led to the breakdown of their relationship. Indeed, the Plaintiff stated in her first affidavit, that the deceased had expressed pride that she had become a nurse and had gone into a medical based career.

85. What had been asserted by the Plaintiff, in her first affidavit, as the cause of the breakdown of the relationship was that when she was going overseas, she asked one of her sisters to look after her house, which request 'seemed to upset my parents and caused a rift between myself and [them]'. Later, in the same affidavit, it is said that her parents did not like the way in which she was living her life and 'this may have influenced my mother in her attitude towards me, but we never spoke about any of these things'.

114. Lynne referred to her affidavit to a belief that her mother "suspected that I was not heterosexual" and that her parents "would disown me if I openly discussed these matters". After the birth of her son in 1991, Lynne took the view that her parents "would not approve of me having a child outside of a marriage relationship".

115. The primary judge referred to evidence given by Tracey and Lisa. Tracey said that she tried to find out from Lynne why she did not wish to see her parents. She knew how much the lack of contact was hurting them and that Mrs Andrew had said how sad and confused she was about Lynne's attitude. She said that Lynne became very angry. Tracey then hesitated to raise the matter further with her. Lisa corroborated this aspect of the evidence and confirmed that Lynne would say that she did not want to talk about her parents.

116. Tracey also gave evidence of conversations she had had with her mother about Lynne. Tracey said:

"The regular line of conversation was asking if I knew where Lynne was, how Lynne was, how [name] her son was and do I know why she will not talk to mum and dad anymore and she wished she knew why and how painful it was to talk about it with her husband, my father, any more that she decided she will not talk about it with him anymore because he could not cope with it. There was no it was just baseless for mum and dad. So over the years that was the constant line of conversation."

There was no evidence that the testator knew her daughter was a lesbian. The appellant's reasons for the estrangement were not convincing and vauge.

Deceased's Reasons for a Small Legacy

The deceased gave written reasons for the small legacy for the appellant "*...is that she has not acted as a daughter should in our lifetime, and should not be remembered as our other children have in the dispersal of our assets*."

In a split decision Barrett JA would not have interfered with Halle J's decision on the basis that "*...the decision of the primary judge on the first stage question was not affected by error of the kind that would justify the intervention of this court".*

Bastian JA found for the appellant.

"56. *The points of departure between the facts in these cases warrant caution in the transportation of a statement from one to another. In* ***Scales****, it was the father who had abandoned the son, but at the time of his death, there was no emotional anguish on either side. The present case is distinguishable in a number respects. First, there was a family relationship between parents and daughter throughout the early years of the appellant's life. Secondly, it was the daughter who left the family, rather than the reverse. Thirdly, the testator suffered as a result of her daughter's abandonment of their relationship. Fourthly, however, there was a continuation of the family relationship and the maintenance of other family ties, which might have given rise to a legitimate expectation that the appellant would receive some, if diminished, recognition in her mother's will. The failure to make adequate provision suggests an attempt to punish her daughter for her failure to provide love and affection to her ageing mother.*

57. Although the mother's reaction was entirely understandable and might have been shared by many parents, I am not persuaded that it justified the reduction of the daughter's share in the estate from that which might otherwise have been expected to a largely nominal sum. In these circumstances, the appeal should be allowed, and provision made for the appellant.

58. The amount of the available provision must be far less than that sought by the appellant. As noted, the appellant's brother received a 40% share of the estate, together with a further 15% of the residue, giving an amount of

$440,000, while each of the daughters received $120,000. Taking into account their respective circumstances, as set out by the primary judge at [114-115], it is clear that the respondent son is best able to meet the burden of any provision.

59. Although allowance may need to be made for the costs of the proceedings and thus a conservative approach adopted, on a modest net estate of $800,000, and given the long estrangement, in my view the appellant should receive an amount of $60,000 being an additional provision of $50,000. Of that additional amount, the share of the respondent son should bear the burden of $35,000 and the shares of the three sisters an amount of $5,000 each.

Alsop J also found for the appellant and said at:

"18. In [149]-[152] of his reasons, the learned primary judge appears to have approached the matter by recognising a species of legal right ("the entitlement") of the testator to make no provision if love and support are withheld "unjustifiably" over a period of many years. This is to concentrate or distil a complex life-long relationship into encapsulated rights of testamentary power and the need of the claimant to justify her conduct. To the extent that it is derived from ***Pontifical Society v Scales*** *it is the impermissible formation of principle or rule from a particular factual assessment of circumstances by reference to human and societal values. Even accepting it as an approach, like Basten JA, its fulfilment in this case is more than doubtful.*

19. That is not to say that in conducting the assessments in ss59(1) and (2) estrangement, the reasons therefore, an absence of love, hostility, resentment, and carelessness of the hopes and wishes of another are not all apposite matters for consideration. That enquiry should not, however, be structured or approached by reference to justification in order to displace a testamentary "entitlement" or right in respect of an adult child.

20. It is necessary in these circumstances that the Court makes its own evaluation for the purposes of section 59.

21. The circumstances of the appellant are set out in the reasons of Basten JA and Barrett JA. It can be inferred that the testator knew that the appellant was not well-off. It cannot be concluded, however, that she knew of her daughter's particular circumstances which reveal a chronic lack of funds, the undertaking of human and social responsibilities for the care of a child in need of family, the inability to see her son because of the lack of money and the lack of ability to fund her own medical and health needs. Her need for assistance was real, and able to be met to some degree from a modest estate otherwise shared by siblings in more secure circumstances in a way that would not cause hardship to them. Given the fact of estrangement ***and not hostility****, it is not to be supposed that if the testator had known and appreciated all of the circumstances of the appellant, including the detail of the appellant's lack of means, her responsibilities to a young foster child and her inability to see her own adult son through lack of funds, that she would have closed the bounty to*

her daughter, even if estranged. I would make the orders suggested by Basten JA."

The is a case where despite 35 years of self imposed exile without proper explanation the Court was prepared to overturn the deceased's written and specific wishes, as communicated in 3 documents.

Rationale

It seems that while the Plaintiff's responsibility for the estrangement may not be fatal it may reflect in the diminution of the proportion of the estate awarded after the usual factors of size of estate and the needs of the parties are taken into consideration. If the Plaintiff has displayed open hostility towards the testator this may have had an adverse affect, on her entitlement.

In the later case of *Andrew*, there was some discussion regarding whether the 2 stage approach in *Singer v Berhouse* is applicable under the *Succession Act* however it seems to have been implemented in both cases by the majority.

I have some difficulty understanding how the Court of Appeal in *Keep* could interfere with the Primary Judges discretion in altering the sum awarded, particularly in deducting $25,000 from $200,000. The reason given was that no allowance had been made for the estrangement. However was this not within McCready's discretion?

Conclusion

An estrangement from the deceased testator (even a long one) without adequate explanation is not necessarily fatal.

Paper Presented by:
Tom Sherley
Partner
HANSONS LAWYERS