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Grandchildren challenging a grandparent's estate a 'growth' area

by Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

Grandchildren challenging estates is becoming a growth area that shows no signs of slowing down, says a legal professional.

Matthew Burgess, director of View Legal, said tougher financial times will likely further stimulate the industry, with an area of particular expansion related to cases where aggrieved grandchildren have been granted greater entitlements out of a deceased estate than what they had been allocated by the willmaker.

"A key area that continues to evolve based on recent court decisions is challenges against estate plans by grandchildren who are 'wholly or partly dependent upon the deceased'," Burgess said.

"The decision in Veniou v Equity Trustees Limited [2018] VSC 832 provides clear guidance on how the courts determine 'dependency'."

He said the court confirmed in this case that dependency requires several criteria to be met including the actual receipt of material aid, not a promise of some undefined financial aid in the future.

Additionally, the court said it is required there is something more than solely emotional support such as financial or other form of material aid e.g. relying on the deceased for accommodation.

"Based on the above points, the claim made in this case by a grandchild against the estate of her maternal grandmother failed because there had been no actual material aid from the grandmother during her life," Burgess said.

"The same conclusion was reached in the case of Re Estate Bohar; Bockos v Bohar [2021] NSWSC 1177. In this decision, it was held that the relationship of the aggrieved with their grandparent did not extend beyond that of a grandchild, and at no time was the grandchild even partly 'dependent on' the deceased."

He continued that in a similar situation, step-grandchildren were held to be able to obtain rectification of a will where the evidence supported a conclusion that the willmaker had intended to benefit them but failed to do so due to the way the will had been drafted.

"This was even though historically the law assumed stepchildren did not fall within the generally accepted definition of children (see Estate of Grahame David Wright [2016] NSWSC 1779)," he said.

Burgess said the decision of Bowditch v NSW Trustee and Guardian [2012] NSWSC 275 summarises the general principles relevant in relation to any challenge against an estate by a grandchild. These include that generally a grandparent does not have a responsibility to make provision for a grandchild – that obligation rests on the parent of the grandchild – and that a grandchild, normally, should not be regarded as a natural object of the deceased's testamentary recognition.

"Where a grandchild has lost their parents at an early age or taken in by the grandparent in circumstances where the grandparent becomes in loco parentis, these factors would, generally, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent," he said.

“The fact that the grandchild resided with one or more grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare.”

The principles also stated that the mere fact of a family relationship between grandparent and grandchild does not establish any obligation to provide for the grandchild upon the death of the grandparent.

“Generosity by the grandparent to the grandchild, including contribution to the education of the child, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent,” Burgess said.

“The fact that the deceased occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the deceased and it is also relevant to consider what inheritance, or financial support, a grandchild might fairly expect from their parents.”

In a more recent decision in Curtis v Curtis [2023] NSWSC 1164 the court concluded that while every case will be decided on its own facts, dependency is a relatively low test and does not require “financial or other material assistance”.

“Even where the grandparent had not ever provided money or gifts, this did not necessarily prevent the court from concluding partial dependency existed,” Burgess said.

“This therefore justified a trial decision to allocate 20 per cent of the proceeds of the sale of a house, being the deceased estate’s only substantial asset, to each of the two children of a son that had predeceased his father.”

He added that on appeal in Curtis v Curtis [2024] NSWCA 136, the court concluded the grandchildren were entitled to no share of the estate stating that before making any order for grandchildren under a family provision application it first must be satisfied whether the grandchildren were at any particular time wholly or partly dependent upon the deceased.

Secondly, the court found having regard to all the circumstances of the case, whether there were factors warranting the making of the application, and finally, whether adequate provision for the proper maintenance, education or advancement in life of the grandchildren had not been made in the deceased’s will.

“Here, the 'central peculiarity' of the case was held to be why the deceased changed his will (and continued the approach in a later will) to exclude his grandchildren, when there was evidence suggesting the accepted (by the trial judge) quasi-parental relationship with the grandchildren was not present – evidence that were 'illogical' for the trial judge to have ignored, given the changes to the will,” Burgess said.

“An alleged statement by the willmaker that his other son (who was effectively denied 40 per cent of his father's estate by the trial decision) would 'take care of' the grandchildren when the willmaker was 'not around' did not mean the willmaker's son would provide money or assets.”

The court ruled that a more natural reading of the words was that of a grandfather to young men whose father had died a decade earlier, that after the grandfather died, their uncle would be an older male to whom they could talk and from whom they could seek advice and that 'take care of' does not necessarily mean 'give money to' and no testamentary intention should have been ascribed to the phrase.

“Even if the phrase and other debatable evidence supporting the claim by the grandchildren was accepted, it was insufficient to amount to something which would have converted the grandchildren to be regarded as natural objects of testamentary disposition that there was nothing to support a social, domestic or moral obligation upon the willmaker to leave any part of his estate to his grandchildren,” Burgess said.

“While it was accepted the trial judge had formed an unfavourable view of the willmaker's son, this was largely irrelevant to the key question of whether the grandchildren had made a case that there were factors warranting disturbing the testamentary wishes set out in the will.”

He concluded that the court confirmed that the question should have been answered in the negative and that it was difficult to avoid a conclusion that the trial judge’s adverse views of the willmaker's son contributed to being distracted from the real issues.

“Ultimately, the key point in considering dependency is that it should be considered 'a gateway for the court to consider whether there are factors that warrant the making of an application for provision by a grandchild' out of their grandparent’s estate,” Burgess said.

“While the degree of dependence will generally be relevant to the merits of the claim, it is inappropriate to conflate the questions (see Chisak v Presot [2022] NSWCA 100)