

When does grandparent support tip over into a claim on their estate?

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

A recent court decision illustrates the complexities involved when a grandchild challenges the estate of their deceased grandparents.

In this case a granddaughter was claiming to have been partially dependent on her grandmother during the first two years of her life, providing the foundation for the ability to challenge the grandmother's estate - over 50 years later.

Matthew Burgess, director of View Legal, said the intergenerational wealth transfer has seen an increase in work for the legal fraternity in a range of estate planning areas - particularly with the "on trend" strategy of grandchildren challenging the estates of deceased grandparents.

"In some situations, a close financial relationship between grandparents and grandchildren can be the foundation for positive outcomes for all concerned such as where superannuation death benefits would otherwise be subject to an effective 'death duty' if they were paid to adult children," Burgess said.

"In some circumstances, the payment of superannuation benefits to a financially dependant grandchild can be tax free - although such an outcome is the exception rather than the rule and also has material second order consequences, particularly from an asset protection perspective."

However, he said the situations which gain the most attention often involve aggrieved grandchildren seeking to force provision be made to them out of estates where their grandparents had otherwise decided not to provide for them under a valid last will.

He said the decision in *Laidlaw & Anor v Kellie; Laidlaw (bht NSW Trustee & Guardian) v Rusiti & Ors* [2011] NSWSC 740 is one which illustrates the situations as to whether a grandchild can challenge the estate of their grandparent.

In this case, the court held there were several key principles that applied including that generally, a grandparent does not have a responsibility to make provision for a grandchild, but rather the obligation rests on the parent of the grandchild.

It also stated that a grandchild is not normally regarded as a natural object of the deceased's testamentary recognition, unless there are additional factors to bring a grandchild into the category of persons for whom the deceased should have made provision.

"An example of special circumstances where a grandchild may have a claim is where they have lost their parents at an early age, and have been taken in by the grandparent," Burgess said.

“In contrast, the mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. This means that generosity by a grandparent to a 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.”

He continued that the court also stated that If there is an argument by the grandchild of dependence, whether whole or partial, on the grandparent, it must be direct and immediate.

“This means that it is not sufficient that the grandchild's dependence is the indirect result of the deceased grandparent providing support and maintenance for their own adult child, and, thereby, incidentally, benefiting the grandchild,” he said.

Burgess said these principles are further clarified in the later decision of *Howitt as Executor of the estate of the late Margaret Norma Howitt v Bosschieter* [2025] NSWCA 179.

In the *Laidlaw* case, the court confirmed that a finding of dependency for the purposes of challenges against an estate does not involve demonstrating that the deceased person stood in loco parentis (that is, acted as the parent) to the claimant at the relevant time (see for example *Curtis v Curtis* [2024] NSWCA 13).

“It also stated that dependency is not to be given a restrictive meaning, and simply involves being reliant on a person to meet one’s needs - this plainly includes being 'partly dependent' (see *Spata v Tumino* [2018] NSWCA 17),” Burgess added.

“The ruling also confirmed that in relation to the timing of such dependency, it is sufficient to demonstrate that the person in question was wholly or partly dependent on the deceased person 'at any particular time', although not a very brief period, such as when a child is left in the care of grandparents overnight (see *Alexander v Jansson* [2010] NSWCA 176).”

He said in this case, the grandchild was successful in a claim for further provision from the estate, but this decision was overturned on appeal due to a finding that she misappropriated her grandmother's life savings by “undue influence and unconscionable conduct” shortly before the death, which had a significant adverse impact on other beneficiaries (see *Andrew v Andrew* (2012) 81 NSWLR 656).

“Ultimately, reminiscent of other recent cases (see *Robinson v Glennon* [2025] NSWSC 770) the legal costs of the dispute appear to have been well in excess of \$500,000, despite the amount being attacked likely less than this,” Burgess said.

“That is, arguably, in addition to the dependency principles, the case is another reminder of the heuristic that it is possible to win every litigation, guaranteed: as long as you are the lawyer. Or a reinforcement of the George Bernard-Shaw observation, 'all professions are conspiracies against the laity'.”