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Why a $43m entitlement may be insufficient to prevent a successful estate challenge

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

A recent high-profile decision has illustrated how an adult child, who stood to receive more than $40 million from her parents, was still able to claim $1.15 million from her father's $6 million estate.

Matthew Burgess, director of View Legal, says the decision in Cotter v Tomassini [2025] VSC 518 is the latest in an ever-growing number of deceased estate challenges in the multi-trillion-dollar intergenerational wealth transfer from the Baby Boomer generation.

Burgess said one of the most widely publicised of these for many years was the Wright estate case, which followed the original decision in Mead v Lemon [2015] WASC 71.

"In that case, the claimant (a daughter born from a temporary relationship), made a claim for $20 million from an estate likely worth at least $1 billion, having initially been gifted $3 million, although this gift was subject to the terms of a highly restricted trust," he said.

"Initially, the court awarded $25 million to the claimant, which exceeded the previous largest successful application under the family provision rules in Australia. On appeal, the award was reduced to $6 million, which is still a high water mark in successful court applications, without any restrictive trust provisions."

Burgess said the Cotter case centred on the deceased, whose wealth – built through investments in hotels, pubs and commercial property – was largely allocated to his former wife in a property settlement, with around 81 per cent, or $43 million, transferred to her as the mother of the claimant.

The court heard the relationship between the deceased and his daughter had broken down, strained by multiple affairs and further damaged by revelations that he had fathered a child with another woman, who later raised the child with her same-sex partner.

"The deceased made no provision for his daughter in an estate valued at over $6 million, stating, 'as it is my understanding and belief that my said wife has made adequate provision for her in her will from the substantial assets that my wife has acquired from me during my lifetime'," Burgess noted.

The sole beneficiary of the estate was the spouse of the willmaker at the date of his death, who had not made any claims against the estate.

The other daughter raised by the same-sex couple had earlier settled a claim against the estate, receiving $300,000.

"Both daughters had also challenged the effectiveness of a binding death benefit nomination that purported to distribute 100 per cent of a $5 million benefit to the deceased's spouse. In settlement, the daughter from the previous marriage received almost $200,000 and the daughter raised by the same-sex couple received $104,000," Burgess said.

“The daughter, who was also involved in property settlement proceedings with her former husband, originally claimed 100 per cent of the $6 million estate, however, she adjusted the claim at trial to $3.3 million. Much of the $43 million in wealth was owned via trusts, although while the daughter was a beneficiary, the deceased's former wife was not a potential beneficiary, as the drafting of the trust deeds did not include former spouses.”

Burgess said that in allowing the challenge against the estate, the court confirmed that it is satisfied a moral duty is owed by the willmaker (which was held to be the case here), then it must determine the quantum of appropriate provision.

“A moral duty to provide for the daughter existed, despite it being reasonable to assume her mother would pass most (if not all) of the $43 million in wealth to her benefit, with a number of key factors mentioned.” “These factors included that despite around 50 per cent of the $43 million would not pass via the mother’s will because it was controlled via trusts, even a radical change by the mother to provide 75 per cent of her personal estate for her spouse (which the court believed was unlikely) would still see over $5 million pass to the daughter which was deemed to be 'a very substantial bequest by community standard'.”

“While a wise and just willmaker in the position of the father would have reasonably considered that the possibility that his daughter would not eventually receive a gift of at least substantial value from her mother’s estate to be so remote that it could safely be disregarded, consideration should have been given to the fact that it may be some years before her mother died.”

The court determined that the daughter was experiencing a degree of uncertainty and potential economic insecurity associated with her living and accommodation arrangements, which should have been considered by the willmaker.

“While the daughter's long-term financial situation could have been concluded to be secure, her short to medium-term financial position was characterised by a level of need that the willmaker should have made provision for,” Burgess said.

“The potential economic insecurity for the daughter in the immediate future, meant a wise and just willmaker with a substantial estate for which there was no competing need would feel obliged to address these weaknesses or vulnerabilities. That is, the daughter's likely inability to successfully meet needs from her own limited financial means should have been accounted for – particularly because of the 'foundational importance of ‘home’ to family stability and the capacity of individuals to thrive and develop in their lives‘.”

Burgess said ultimately, the court was comfortable that the above assessment accorded “with community expectations about the importance of secure housing and stable living arrangements,” justifying the allocation of $1.15 million to the daughter.

“However, the court also rejected claims that the willmaker owed any moral duty to make provision for payment of his grandson's school fees, for legal costs or for other ‘contingencies’; all being categories the willmaker was justified in assuming would be addressed by his former wife directly, or via trusts she controlled.”