Family Provision applicants don't always win: the sorry tale of the unsuccessful cross dressing widower

1. It used to be the conventional wisdom that applicants for Family Provision, particularly widows, widowers and children would usually receive some portion of the claim which they had made on an estate. No longer is this so. In recent years, the Supreme Court of NSW has become more willing to reject claims.

2. Practitioners should keep in mind that it is only if the Court is satisfied of the inadequacy of provision by a deceased, that consideration is given to whether to make a family provision order: *e.g.,* Andrew v Andrew (2012) 81 NSWLR 656 at 658[6] per Allsop P and at 662-63[26] per Basten JA; Nagy v Marton [2014] NSWSC 540 at [67].

3. Even a widow or widower, for whom the original testator's family maintenance provisions were enacted, has no guarantee of succeeding with a family provision claim. There must be persuasive evidence of a financial need for maintenance and it must be a need for which the deceased had a moral obligation to provide.

4. Ikonomou v Panagopoulos [2017] NSWSC 1805 was one of Justice Parker's earlier Family Provision decisions and concerned a widower who owned the matrimonial home in equal shares as tenants-in-common with his deceased wife.

5. Manuel, the husband, was 17 years younger than Helen.

6. They married in August 1977 and she passed away in June 2016.

7. It was Manuel's first marriage, but Helen's second. Helen had a daughter, Nancy, from her first marriage.

8. Helen made her last will in February 2014 and appointed Nancy as her Executrix. She left the whole of her estate to her granddaughter, Elena. The estate was worth approximately $700,000.

9. Manuel, through his Counsel, had submitted that a "*Crisp order*" would be appropriate.[1] A Crisp Order gives an applicant for family provision an interest for life in real property, or in an interest in real property, with the right to it (should the need arise) for the purposes of securing, for the applicant's benefit, more appropriate accommodation. That type of order is intended to provide flexibility, by way of a life estate, the terms of which could be changed to cover the situation of the applicant moving from his own home to a retirement village, to a nursing home, to a hospital: O'Leary v O'Leary and Eccles [2010] NSWSC 1347 at [80] per Hallen AsJ.

10. However, a Crisp order does involve some expense and it also involves some goodwill between the parties, and there was no such goodwill between Nancy and Manuel.

11. Indeed, Parker J elected not to even mention the submission in giving his reasons for judgment.

12. This was because all was not as it seemed.

13. Manuel and Helen had quarrelled frequently.

14. Helen spent half of each year, as she got older, in Greece with relatives. She did not take Manuel with her on all but one occasion.

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1 Crisp v Burns Phillp Trustee Co Ltd (Holland J, 18 December, 1979, unreported; Handler & Mason, Succession Law and Practice NSW [9433], p 13,580.

15. According to Nancy, Manuel slept in a separate bedroom since 1992 and it turned out that he was quite an active cross-dresser. His room was full of ladies' clothes, makeup and sex toys.

16. He was also a particularly proficient hoarder. The matrimonial home was in an appallingly cluttered state, except for the room where Helen had lived and some of the kitchen.

17. As evidence of the separate lives which Manuel and Helen lived, Helen's bank statements were sent to Nancy's home from about 2005.

18. In November 2012, when Helen's faculties began to decline, she wrote an enduring power of attorney in favour of Nancy, and not Manuel. She also began to suffer from macular degeneration.

19. In April 2015, Helen suffered a stroke. She suffered a second stroke in a few months later.

20. After the second stroke, both Nancy and Manuel applied to the NSW Civil and Administrative Tribunal to become Helen's guardian and financial manager.

21. The Tribunal left Nancy in charge of Helen's financial affairs but appointed the Public Guardian to be Helen's guardian.

22. Still, one would have expected that Manuel, now 66 years old and a pensioner, could continue to live in the matrimonial home as he had done since he and Helen had purchased it in 1979.

23. But that was not to be. It became quite apparent that Manuel's and Helen's marriage had become a marriage in name only. Succession Act 2006 (NSW), subsections 60(2)(a) & (m) render relevant an enquiry into

the nature of their relationship and the into Plaintiff's character and conduct before the Deceased passed away. That section relevantly provides as follows:

> *(1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:*
>
> *(a) whether the person in whose favour the order is sought to be made (the applicant) is an eligible person, and*
>
> *(b) whether to make a family provision order and the nature of any such order.*
>
> *(2) The following matters may be considered by the Court:*
>
> *(a) any family or other relationship between the applicant and the deceased person, including* ***the nature and duration of the relationship****,*
>
> *…*
>
> *(m)* ***the character and conduct of the applicant before and after the date of the death of the deceased person****,*

24. The documentary evidence in these regards which most impressed the Court was a Centrelink application made by Manuel in October 2015, some months after Helen's second stroke.

25. The form was entitled "*Relationship Details – Separated Under One Roof*". It purported to be signed by Helen at a time when she could no longer sign, after two strokes. On the form, Manuel acknowledged that there was no sexual relationship between Helen and himself. The form asserted that Helen was doing the cooking, when she could not do so. Manuel even pretended to be Helen and asserted on the form that as her vision decreased, she "*come back to Manuel*." All this in circumstances where, since 1992 for Helen and 2015 for Manuel, they were each receiving the pension on a single person basis.

26. Moreover, such application to change status from "*single*" to "*partnered*" or "*married*" was made until after the Deceased had had two strokes in 2015.

27. Reinforcing the point as to the lack of harmony in the marriage, it was not in contest that Helen's funeral expenses were paid for by Nancy, with Manuel refusing to contribute even half the cost.

28. Manuel was desperate to keep the house in which he had hoarded so many goods, but in the end the Court accepted that Helen had good reason in not making a bequest to benefit Manuel.

29. Furthermore, Manuel was unable to produce evidence of financial contributions to the house or indeed the home units which he and Helen had previously occupied together. Although on Nancy's evidence, Helen paid for each home, Helen was quite content for Manuel to have his half share of the house, but did not want him to have any part of her share.

30. Just as importantly, Manuel's needs could be met by purchasing a smaller home with his half of the net proceeds of sale albeit not in Cronulla. No doubt, concluding that he would have half the house, largely as a gift on Nancy's evidence, Helen left Manuel no ***further*** substantive provision in her will.

31. In clause 5 of the Will, Helen stated as follows:

> *I note that in making this my Will I have borne in mind the interests of my husband, and state that he is to take no part in my Estate, other than the right of occupancy mentioned in clause 3 hereof.*

32. Clause 3 of the Will gave Manuel 6 months after Helen's death to reside at the matrimonial home in Cronulla, before it was to be sold. This was

Helen's position not only set out in Will in respect of which probate has been granted, but also an earlier Will made 28 August 1999.

33. Whilst there were other details, some more and some less salacious, in the end it became obvious to everyone, except Manuel, that he could not succeed with his family provision claim.

34. This was not, however, a case determined solely on the strength of provisions made by one spouse to the other during their lifetime being considered sufficient.

35. Nor is it a case where separated partners had finalised their financial relationship at the time of a divorce or subsequently: Lodin v Lodin [2017] NSWCA 327.

36. To paraphrase the words of Ward J (as her Honour then was) in Scott v Scott [2009] NSWSC 567 at [136]-[137], the community would consider that a testator in the deceased's position had already done "*the right thing*" by effecting an amicable division of the principal asset; the House.

37. This case is as good an example as any of Lindsay J's comments in Verzar v Verzar [2012] NSWSC 1380 at [131]:

> *Whatever guidance one might draw from analogous cases all analogies, and any guidelines drawn from a pattern of similar cases, must yield to the text of the legislation, the duty of the Court to apply that text to the particular circumstances, and the totality of material circumstances, of each case. Preconceptions and predispositions, comforting though they may be, can be the source of inadequate consideration of the jurisdiction to be exercised: Bladwell v Davis at [12] and [18]–[19].*

38. Before concluding, may I draw your attention to another of Parker J's recent decisions. In Megerditcian v Khatadeurian [2019] NSWSC 1870, a daughter made a claim on her 91 year old father's estate. She had been left $10,000. Her brother was to inherit the residue. The estate property was valued at $900,000 to $950,000 and had already been transferred to the brother. The daughter wanted an equal share of the estate, but her evidence was found wanting. In the end, notional estate orders were made and a provision of $100,000 was ordered for the daughter. The decision is an instructive read on how ***not*** to prepare and run a family provision case.

39. With that observation I hand over the floor to my colleague and friend Adrian Maroya to address you on "*Aspects of evidence in FPA cases -the Evidence Act and facilitation of proof*".

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