

Succession Law

By John Fitzpatrick

Family Provisions and Maintenance

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- Vasey v Henry was decided by NSW Supreme Court on 8 August 2019.
- Facts – 3 plaintiffs were daughters of the deceased and defendant is a widow of the deceased.
- The plaintiffs sought orders pursuant to Section 59 Succession Act for extra maintenance out of the estate or notional estate of the deceased.
- Section 60 Succession Act provides a non-exhaustive list of factors that the court may take into account in applying Section 59.
- The plaintiffs have the burden to prove that they deserved an extra amount from the estate based on an evaluative judgment that adequate provision for the proper maintenance of the plaintiffs was not given.
- What does proper mean?
 - a) McCosker's case stated "It means 'proper' in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent."
 - b) Pontifical's case stated "The 'proper' maintenance and support of a son claiming a statutory provision must be relative to his age, sex, condition and mode of life and situation generally. What is 'adequate' must be relative not only to his needs but to his own capacity and resources for meeting them. There is then a relation to be considered between these matters on the one hand, and on the other, the nature, extent and character of the estate and the other demands upon it, and also what the testator regarded as superior

claims or preferable dispositions. The words 'proper maintenance and support', although they must be treated as elastic, cannot be pressed beyond their fair meaning."

- c) Vigolo's case stated "...the use of the word 'proper'...implies something beyond mere dollars and cents. Its use, it seems to us, invites consideration of all the relevant surrounding circumstances and would entitle a court to have regard to a promise of a kind which was made here...The use of the word 'proper' means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the 'station in life' of the parties and the expectations to which that has given rise, in other words, reciprocal claims and duties based upon how the parties lived and might reasonably expect to have lived in the future."
- In evaluating whether or not the deceased's will makes adequate provision for the proper maintenance, education and advancement in life of the applicant, the Court must give due weight to the considered view of the deceased as expressed in the deceased's will. As White J (as he then was) said in *Slack v Rogan* (2013) 85 NSWLR 253 at 284-285; [2013] NSWSC 522 (a view his Honour reiterated as White JA in *Sgro v Thompson* [2017] NSWCA 326 at [80]-[88]):
 - "...In my view, respect should be given to a capable testator's judgment as to who should benefit from the estate if it can be seen that the testator has duly considered the claims on the estate. That is not to deny that s 59 of the *Succession Act* interferes with the freedom of testamentary disposition. Plainly it does, and courts have a duty to interfere with the will if the provision made for an eligible applicant is less than adequate for his or her proper maintenance and advancement in life...The deceased will have been in a better position to determine what provision for a claimant's maintenance and advancement in life is proper than will be a court called on to determine that question months and years after the deceased's death when the person best able to give evidence on that question is no longer alive. Accordingly, if the deceased was capable of giving due consideration to that question and did so, considerable weight should be given to the testator's testamentary wishes in recognition of the better position in which the deceased was placed..."
- Freedom of testamentary disposition:
 - In connection with this, in *Goodsell v Wellington* [2011] NSWSC 1232, at [108], Hallen AsJ (as his Honour then was) observed that:
 - "...Freedom of testamentary disposition remains a prominent feature of the Australian legal system. Its significance is both practical and symbolic and should not be underestimated."
- Financial resources and needs of a beneficiary:
 - In this case, it is important that, although s 60(2)(d) makes "the financial resources (including earning capacity) and financial needs, both present and future, of the applicant..." one of the matters that may be considered by the Court, sub-par (d) also requires the Court to consider the financial resources and needs of any beneficiary of the deceased's estate; and furthermore, this matter is but one of all of the matters listed in the subsection that the Court may consider."
- NOT Court's function to achieve a fair distribution:

Further, the observation made by Bryson J in *Gorton v Parks* (1989) 17 NSWLR 1, at 6, that it is not appropriate to endeavour to achieve “an overall fair” division of the deceased’s estate, is important. It is not the Court’s function to try to achieve what it considers to be a fair distribution of the deceased’s estate between the

beneficiaries of the will and all eligible claimants who make an application for further provision.

- Claims by adult children – This was considered by Hallen J in McDonald’s case and stated a number of principles including ‘Generally, also, “the community does not expect a parent to look after her, or his, children for the rest of [the child’s life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. If an adult child remains a dependant of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute”: *Taylor v Farrugia*, at [58].’
- Conclusion in Vasey’s case:
 - a) In all of the circumstances of this case, the Court was not satisfied that any of the plaintiffs had established that adequate provision was not made by the deceased’s will for their proper maintenance, education and advancement in life, with the result that the condition for the making of family provision orders in their favour in s 59(1)(c) of the Succession Act had not been satisfied. The deceased had already made provision for his first wife, the plaintiff’s mother, by means of the marital property settlement. The Court’s view was that in accordance with reasonable community standards and expectations, a husband in the deceased’s position in the circumstances of this case, and with the limited remaining assets at his disposal, would leave all of those assets to his wife in his will. This is a very important point.
 - b) The evidence clearly established that the wife and the deceased had a loving relationship for a period of about 16 years, and she provided him with exemplary support and comfort during the course of his final illness.
 - c) The arrangement that he made with the wife for the couple to make ‘mirror wills’ for the purpose of the remaining assets of the couple at the time of the death of the survivor being shared equally between the couple’s six children was a proper arrangement that would, in the Court’s view, be regarded by the general community as a proper provision for the children, given the limited nature of the couple’s collective assets and the fact that, as the wife was retired, those assets would be needed to provide a secure home for the wife and a fund to provide an income and a buffer against contingencies.
 - d) While not conclusive, the fact that the daughters told the deceased during his lifetime that they accepted the testamentary arrangements that he had made is not an insignificant factor in deciding that the Court should not disturb the deceased’s will, as he would have believed in his lifetime that those daughters accepted that the terms of the will were proper. The daughters’ agreement that the terms of the will were proper would not by itself prevent the Court finding, in an appropriate case, that adequate

provision for the proper maintenance, education and advancement in life of the daughters
had not been made, but the Court did not find in this case that the evidence justified such a finding.

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