Article Information

Authors: Donna Benge, Rod Jones
Service: Estate & Succession Planning
Sector: Private Clients

The Club incident and community values

Recently, the Court of Appeal of the Supreme Court of New South Wales has given some firm guidance upon community values and expectations when an estranged adult son made an Inheritance Family Provision claim against his mother's estate

Recently, the Court of Appeal of the Supreme Court of New South Wales has given some firm guidance upon community values and expectations when an estranged adult son made an Inheritance Family Provision claim against his mother's estate. ***Rod Jones*** *and* ***Donna Benge*** *discuss the case of Burke v Burke [2015] NSWCA 195.*

Mrs Beryl Burke died a widow aged 93 years. She was survived by her three adult children, the appellant (Terry), the respondent (Alan, who was the executor of her Will) and Diana.

In her Will, the deceased left a legacy of $100,000 to her grandson, Stephen (the sole surviving son from Terry's first marriage) and the residuary of her estate was divided equally between Alan and Diana. She made no provision for Terry with whom she had no contact for about 20 years prior to her death. In a letter prepared before her death, Mrs Burke explained that she had not included Terry in her Will to reflect the fact that he, through his own choosing, was no longer a part of her life, having become totally estranged from the entire family, and that such estrangement had caused the family a great deal of pain and upset.

Terry commenced proceedings in the Supreme Court seeking a family provision order out of Mrs Burke's estate. It was not disputed that Terry was in financial need, he having been made bankrupt in July 2010 and only recently having received an automatic discharge from that bankruptcy in August 2013.

The trial judge found that Mrs Burke was entitled to regard Terry as a person undeserving of any benefit from her estate whatever his financial circumstances and dismissed Terry's application with costs. On appeal, Terry contended that the trial judge had wrongly attributed little significance to what was described as "the Club incident" at the Ashfield Bowling Club. It was the Club incident which Terry maintained:

- was the material cause of the estrangement
- that the estrangement was due to a misunderstanding to which Mrs Burke and Terry had contributed
- that he had attempted a reconciliation in 2009/2010 with Mrs Burke
- having regard to the size of the estate and his financial need, in the absence of callousness or hostility on his part, the deceased was under a duty to make provision for him.

Terry also contended that the trial judge's finding that no provision ought to have been made for him did not reflect current community attitudes and values which constituted an error.

The Full Court dismissed Terry's appeal finding that:

- The trial judge's assessment of the significance to be attributed to the Club incident as one forming part of a pattern of conduct was not shown to be in error.
- The trial judge's conclusion that telephone calls made by Terry to Mrs Burke's nursing home did not bespeak of an attempted reconciliation and that Terry's contact was motivated by desire to ascertain if he was going to receive an inheritance.
- There is no rule or principle that in cases of significant need there is an obligation to make provision for an adult child, irrespective of any estrangement, except in circumstances of hostility or callousness.

- The estrangement of an adult child is a factor to be taken into account in the making of provision for an adult child, in the absence of callousness or hostility by the Willmaker.
- The trial judge's assessment of Terry's position in all of the circumstances was not so out of kilter with community values and expectations as to bespeak an error.

Justice Emmett noted that Section 60 (2) of the *Succession Act* (NSW) lays down criteria in very broad terms and that it might have been preferable for the legislation to be more specific about these circumstances. However, the decision is a significant, and perhaps welcome one, in guiding Willmakers when reflecting on their estrangement from children where that estrangement is not motivated by the Willmaker's callousness or hostility towards their child.