Family Provision: Can Unpaid Carers Have a Beneficial Claim?

Introduction

Family Provision aims to provide individuals with protection and support by granting them provision out of the deceased's estate where the relevant will does not provide them with adequate provision for their proper maintenance, education or advancement of life.[1] The recognition of informal carers as eligible applicants falls under the 'Close Personal Relationship',[2] (CPR) introduced by the *Property Relationships Legislation (Amendment) Act 1999* (NSW) (Amendment Act).

This article explores how the scope of CPR has broadened significantly over the past decade through case law to encompass relationships previously excluded from family provision.

'Close Personal Relationships'

A family provision applicant who was not adequately provided for in the will must be an 'eligible person.'[3] The CPR was introduced in response to a discussion paper proposing greater recognition of non-spousal relationships, which became known as CPR.[4]' The definition is identical in the *Succession Act,* defining a CPR as a 'relationship between 2 adults other than marriage or de facto whether or not related by family, who are living together and one or each provides the other with domestic support and personal care for no fee or reward.'[5] The type of relationship contemplated by the definition is carers, such as a child caring for an elderly parent.[6] Case law has interpreted the informal carer within the context of CPR as applying to unpaid live-in carers.[7] The policy underlying the recognition of caregivers in family provision is their assistance and service of the vulnerable, the sick and the elderly.[8]

To be eligible as a CPR, an informal carer must satisfy 3 indicia:

1) living with the deceased;
2) provides domestic support; and
3) provides personal care.[9]

The first requirement has a low threshold and has been interpreted as being met even if it is intermittent rather than continuous, such as one party staying only 3 nights a week and maintaining a separate residence.[10] The seminal case on CPRs interpreted 'domestic support' as including shopping, cooking meals and washing clothes, a concept largely uncontested.[11] It is however the broadening definition of 'personal care' that has afforded informal carers the greatest protection and support. Initially narrow, personal care was regarded as purely 'assistance with mobility, personal hygiene and physical comfort' and excluding mere emotional support.[12] This reasoning enabled an applicant named Mr Ye to apply for family provision due to having assisted Ms Fung with her daily affairs such as cooking, helping her with mobility, accompanying her to doctor's appointments and administering her medication.[13]

Personal Care Redefined and Expanded

Personal care however was redefined by the majority in *Hayes v Marquis* to extend its ambit to include the provision of emotional support on its own.[14] McColl JA highlighted 'psyche is just as much a personal attribute requiring sustenance as one's physical self. The notion of 'personal care' should not be confined to matters relating to physicality.'[15] Consequently this new definition of personal care has expanded the eligibility of informal carers to apply for family provision and recognises the value of emotional support previously understated. This was evident in *Hughes v Charlton*,[16] when a housekeeper initially under a commercial

agreement to provide the deceased with care developed a non-romantic relationship with him, which involved 'a substantial amount of sharing' and so His Honour found there was a CPR based on McColl JA's reasoning.[17]

Issue with current definition of CPR – judicial uncertainty

Although the expanded definition of CPR has given informal carers increased support and protection through family provision, *Smith v Daniels* reveals a significant issue inherent in the statutory definition of CPR. The decision involved an interpretation inconsistent with previous judicial rulings, which points towards issues of judicial uncertainty.[18] Slattery J misstated the indicia of a CPR as involving 'companionship and mutual support'.[19] The difficulty lies in the conflicting indicia of commitment and mutual support, with domestic support and personal care.[20] One party need only supply the former, while the latter implies reciprocity, which could unjustly exclude unpaid live-in carers.[21] The indicia are so broad and vague that they allow for judicial inconsistency in determining whether an applicant is eligible under CPR to apply for family provision.[22]

Should the statutory definition of CPR be reformed?

Interestingly, while the 1982 legislation gave a person in a CPR the right to apply for family provision, subsequent legislation requires the Court to be satisfied that circumstances warrant the application,[23] thus demonstrating a clear statutory restriction. To ensure greater certainty the statutory indicia of CPR ought to be replaced with a 'focus on the relationship's functions (such as mutual care, emotional or economic interdependencies), rather than status.'[24] Consolidating a connection between CPR recognition and legislative objectives is more likely to place appropriate limitations on CPR eligibility and will ensure greater judicial consistency and certainty.[25]

[1] *Succession Act 2006* (NSW) s 59.
[2] New South Wales, *Parliamentary Debates*, Legislative Council, 25 May 1999, 296 (Ian Cohen).
[3]*Succession Act 2006* (NSW) s 57.
[4]Lesbian and Gay Rights Service, 'The Bride Wore Pink: Legal Recognition of Our Relationships, A Discussion Paper' (2nd ed, 1994); Amanda Head, The Legal Recognition of Close Personal Relationships in New South Wales - A Case for Reform' (2011) 13 *Flinders Law Journal* 53, 55.
[5] *Personal Relationships Act 1999* (NSW) s 5(1)(b), (2); *Succession Act 2006* (NSW) s 3(3)-(4).
[6] New South Wales, *Parliamentary Debates*, Legislative Council, 25 May 1999, 296 (Ian Cohen).
[7]Amanda Head, The Legal Recognition of Close Personal Relationships in New South Wales - A Case for Reform' (2011) 13 *Flinders Law Journal* 53, 80; *Ye v Fung* [2006] NSWSC 243.
[8]Ibid 59.
[9] Ibid 94.
[10] *Przewoznik v Scott* [2005] NSWSC 74 [22]; *Hayes v Marquis* [2008] NSWCA 10 [48]; Amanda Head, The Legal Recognition of Close Personal Relationships in New South Wales - A Case for Reform' (2011) 13 *Flinders Law Journal* 53, 82.
[11]*Dridi v Fillmore* [2001] NSWSC 319 [103]-[104].
[12] Ibid [108].
[13] *Ye v Fung* [2006] NSWSC 243 [53].
[14]*Hayes v Marquis* [2008] NSWCA 10 [87].
[15] Ibid.
[16] *Hughes v Charlton* [2008] NSWSC 467.
[17] Ibid [20], [53], [54], [56].
[18]Amanda Head, The Legal Recognition of Close Personal Relationships in New South Wales - A Case for Reform' (2011) 13 *Flinders Law Journal* 53, 78.
[19] *Smith v Daniels* [2010] NSWSC 604 [54].
[20]Amanda Head, The Legal Recognition of Close Personal Relationships in New South Wales - A Case for Reform' (2011) 13 *Flinders Law Journal* 53, 79.
[21] Ibid.
[22] Ibid, 83.
[23] Explanatory Note, Succession Amendment (Family Provision) Bill 2008 (NSW).
[24] Nancy Polikoff, 'Ending Marriage as We Know It' (2003-2004) 32 *Hofstra Law Review* 201, 223-224, [xxiv-xxv].
[25] Amanda Head, The Legal Recognition of Close Personal Relationships in New South Wales - A Case for Reform' (2011) 13 *Flinders Law Journal* 53, 91.