Stepchildren seeking further provision in Victoria

by Katerina Peiros, ATI, Hartwell Legal, and Christine Smyth, ATI, Robbins Watson Solicitors

New developments in the definition of "stepchild" in Victoria will affect other jurisdictions.

The Victorian *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* made changes to Pt IV of the *Administration and Probate Act 1958* (Vic) (the Act), which governs applications for further provision from deceased estates in Victoria.

These amendments commenced on 1 January 2015 and replaced the responsibility test with a category-based eligible applicant approach.

For willmakers dying prior to 1 January 2015, court could order provision for the proper maintenance and support of any person for whom the deceased had responsibility to make provision. The courts gave this threshold question a broad and liberal interpretation — housemates[1] were in, friends and friends' minor children[2] were in, unrelated minors whom deceased assisted[3] were in, step-grandchildren[4] were in, siblings,[5] foster children,[6] niece by marriage[7], carers,[8] daughters-in-law[9] and former daughters-in-law[10] were in.

The eligibility of applicants was open-ended and dependent on the quality or nature of the relationship with the deceased.

For willmakers dying from 1 January 2015, the list is closed, the eligibility is category-based. In order to be eligible to bring a claim, the applicant must be either:

- spouse or domestic partner (includes same-sex partners);
- former spouse or domestic partner (includes same-sex partner) who is not eligible to bring a family law proceeding;
- child, adopted child, stepchild;
- person who believed the deceased was their parent and was treated by the deceased as their child;
- a financially dependent grandchild;
- a financially dependent registered caring partner;
- a financially dependent spouse or domestic partner of the deceased's child who dies within 12 months of the deceased; or
- a financially dependent member of the deceased's household (present or future).

In order to succeed in a claim for further provision, the claimant must satisfy the court that:

- the person is an eligible person;
- the deceased owed that person a moral duty to provide for them; and
- the distribution of the deceased's estate fails to discharge the duty.

If the threshold eligibility cannot be shown, the claim cannot proceed, even if there is dire financial need (financial need being the cornerstone of family provision legislation).

Although it has been two years since the legislation commenced, there have only been eight trial judgments and one appeal. Stepchild as the "eligible applicant" has received the most "air time" with almost half the cases focusing on the definition of "stepchild",[11] which the Act did not define.

The developments in the definition of "stepchild" will have effect outside Victoria.

The second and third elements of the test have not changed under the new law, and will not be addressed in this column.

Who is a stepchild?

Traditionally, the courts have given the family provision legislation very wide and liberal interpretation.[12] However, the existing cases accepted that a step-relationship arises when the natural parent and the step-parent are married and remained alive and married. This appears to be behind the times and the modern community acceptance of the variety of step-relationships. These recent cases appear to be catching up.

Bail v Scott-Mackenzie[13]

The applicant's mother was the de facto partner of the deceased for almost 40 years. The deceased was only a few years older than the applicant. She had a good relationship with the deceased at all times, but never lived with him and was not ever financially dependent on him.

The mother died in 2001. After that, the deceased had another de facto relationship for 15 years and himself died in 2015. By his will, the deceased left his estate (approximately $960k) to his new partner.

The applicant argued that she was the deceased's stepchild, that the deceased had a duty to provide for her and failed to do so.

The estate applied for summary dismissal of the claim under the *Civil Procedure Act 2010* (Vic) on the basis that the applicant had no real prospects of success for the following reasons:

- the applicant was not a stepchild as the step-relationship only arises on marriage, and there had not been a marriage between the applicant's mother and the deceased;
- in the alternative, if the step-relationship did exist in de facto relationships, the step-relationship ended on:
  - the death of the mother; or
  - when the deceased re-partnered.

Derham AsJ refused the summary dismissal and gave a detailed analysis of why the applicant was a stepchild:

- the Act treats de facto and married couples in exactly the same way;

- the Act gives identical rights to children and stepchildren;
- the *Macquarie dictionary* and the *New Oxford dictionary* define "step-relationship" as deriving from marriage or a de facto relationship;
- the *Status of Children Act 1974* (Vic) removed any difference between the treatment of children born out of wedlock and children of married couples; and
- relying on Deane J's judgment in the High Court decision of *Re Cook*,[14] if the relationship between the couple is ongoing at date of death (ie they have not separated), the step-relationship continues after death. Death does not dissolve a de facto relationship, only a break-up would.

In arriving at this conclusion, his Honour considered the approach taken in Pt 4 of the *Succession Act 1981* (Qld) which provides that the relationship of stepchild/parent in the context of married couples stops on the divorce of the deceased and the stepchild's parent, but subsists if the stepchild's parent dies first while in an ongoing marriage, even if the step-parent remarries afterwards.

His Honour rejected a number of old authorities, including the 1934 decision of *Brotherhood of Locomotive Firemen and Enginemen v Hogan*,[15] the Victorian Court of Appeal decision of *Popple v Rowe*,[16] the Full Court decision of the Supreme Court of Queensland in *Re Burt*,[17] which was substantially followed in *Re Marstella,*[18] *Re Taylor,*[19] *Re Danes,*[20] *Re Monckton*,[21] *Re John*,[22] *Connors v Tasmanian Trustees Ltd*,[23] and *Basterfield v Gay.*[24] *Re Burt* said that the step-relationship depended for its continued existence on the continuity of the marriage and marriage is terminated by divorce and usually also by death.

Derham AsJ preferred Deane J's reasoning, and concluded that by analogy with the common law position of a stepchild of a marriage, the relationship of step-parent and stepchild of a domestic partnership for the purposes of the Act ends if, before the death of the deceased, the domestic partnership ends otherwise than by the death of the parent.

If the domestic partnership remains undissolved at the time of death of the natural parent, again by analogy with the position at common law, the relationship of affinity between step-parent and stepchild continues.

Accordingly, Derham AsJ found that the applicant was an eligible applicant even though her mother had died first and the step-father re-partnered.

This decision was appealed to the Full Court,[25] and Beach, Ferguson and McMillan JJ approved Derham AsJ's reasons. This expands the legal definition of "stepchild" and brings it in line with the modern community understanding of the concept.

After the appeal was handed down, two judgments were delivered in quick succession.

Re Williams; Smith v Thwaites[26]

In this case, the applicant's (Elizabeth's) step-mother (Margaret) had been married to Elizabeth's natural father for 40 years. The father died first and Margaret inherited his estate of $190k.

Margaret's estate was valued at $1.4m, the main asset being her home in Mount Waverley which she had purchased and built with her first husband, who died young. Margaret's prior wills had consistently left the Mount Waverley property to the three children of her first marriage, and the residue equally between them and Elizabeth.

There was evidence that when Elizabeth's father and Margaret married, Elizabeth's father sold his own home and the proceeds were spent over the years on the family, ie Margaret, himself and Margaret's dependent children who lived with them in the Mount Waverley property. Elizabeth never lived with them as she was older. Elizabeth's father was the sole breadwinner and the couple lived on his superannuation when he retired.

Elizabeth demonstrated financial need. She was 62 years old, had just been made redundant from her job as a receptionist in a country town in Queensland and had virtually no chance of finding another job. Her husband was a retired carpenter in receipt of the age pension.

Margaret's children were all financially better off than Elizabeth.

Following the appeal in *Scott-Mackenzie v Bail*, it was conceded on behalf of the estate that Elizabeth was a stepchild, however, McMillan J went through the family relationship and satisfied herself that the concession was appropriate. Her Honour endorsed Derham AsJ's reasoning and was bound by the Court of Appeal (of which she was a presiding judge).

McMillan J then went through the other elements. Did Margaret owe a moral duty to Elizabeth to make provision for her? What was the extent of the moral duty? What is the right and proper provision according to community standards in this situation? What would a wise and just testator, not a fond and foolish one, do in such circumstances? She said it was a question of fact and degree taking into account discretionary and mandatory factors contained in the Act.

Her Honour referred to *Bosch v Perpetual Trustees Co Ltd*[27] and that proper maintenance and support is not simply alleviating poverty, but to take the vicissitudes of life into account. The court's role is not to adjust the distribution so it is fair between the beneficiaries, but to determine adequate provision for the claimant.

Her Honour found that Margaret owed a moral duty to her own three children and to Elizabeth. She took the support that Elizabeth's father provided to Margaret and her children into account in determining the quantum.

Elizabeth was to receive a $38k quarter share of the residue under the will. Her Honour gave Elizabeth an additional $100k, her reasoning for it was that this was the funds required to tide Elizabeth over until she was eligible for the age pension at the age of 65 and to leave her with a small amount for the vicissitudes of life. Elizabeth was also given her costs of the proceeding from the estate.

Trembath v Trembath[28]

In this case, Scott's father married Olga in 1962, and they had a child together. Scott's father's died first. Olga left her entire estate to her own son, bar a modest pecuniary legacy to Scott. Olga and Scott had a good relationship, Scott was living with her when she died. Scott had significant financial need and health problems, he was 58.

His half-brother, the defendant, argued on behalf of the estate that Scott was not a stepchild as that relationship ended on the death of Scott's biological parent, and applied for a summary dismissal.

Scott argued that because the marriage was undissolved at the time of his father's death, the step-relationship continued. Not only that, the "step" ties between him and Olga were strengthened because of the existence of the half-brother.

Lansdowne AsJ heavily relied on *Bail v Scott-Mackenzie.* She agreed with Derham

AsJ and the appeal and followed the reasoning.

Her Honour said the legislation should have defined what "stepchild" was intended to mean, but as it did not, ordinary meaning should be given to the word and the meaning is capable of changing over time.

Her Honour said that a deliberate act is required to end the step-relationship, ie divorce, death not being sufficient.

Her Honour also thought that the presence of the half-sibling can cause the step-relationship to continue, despite dissolution of the marriage or termination of the de facto relationship between the natural parent and the step-parent.

She refused summary dismissal as there were real issues to be tried. There is no information on the final outcome for Scott.

These new cases provided an interesting (but fair) expansion of the concept of stepchild.

Recent Queensland developments

In 2017, Queensland amended its *Succession Act 1981* to clarify when a stepchild relationship ends in relation to family provision applications. The amendments extend step-relationship to civil partnerships and de facto partners (including same-sex). Section 40A(2) of the *Succession Act 1981* provides that the step-relationship ceases on the termination of the marriage (by divorce), civil partnership or de facto relationship between the natural parent and the step-parent.

Section 40A(3) provides that the step-relationship does not stop if the step-parent dies before the natural parent when the spousal relationship is ongoing or when the natural parent died and the deceased had another relationship.

This is consistent with the recent Victorian cases.

Conclusion

The Victorian cases have considered various permutations of step-relationships and we now have pretty clear guidance of how step-relationships will be treated in Victoria. Queensland has achieved it legislatively.

It is beyond the scope of this article to examine the current position in other Australian jurisdictions, but these Victorian and Queensland developments should be kept in mind by practitioners in other jurisdictions as they will influence the courts in other states.

Katerina Peiros, ATI
Incapacity, Wills and Estates Lawyer
Accredited Specialist – Wills & Estates (Vic)
Hartwell Legal

Christine Smyth, ATI
Partner
Accredited Specialist – Succession Law (Qld)
Robbins Watson Solicitors

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3 *Major v Dendakos* [2010] VCC 1029.
4 *Subasa v State Trustees Ltd* [2007] VSC 399.
5 *Marshall v Spillane* [2001] VSC 371; *Tucci v Tucci* [2009] VCC 300.
6 *Sellers v Hyde* [2005] VSC 382.
7 *Iwasivka v State Trustees Ltd* [2005] VSC 323.
8 *Unger v Sanchez* [2009] VSC 541.
9 *Petrucci v Fields* [2004] VSC 425.
10 *Thompson v MacDonald* [2013] VSC 150.
11 S 90(f) of the *Administration and Probate Act 1958* (Vic).
12 For example, *Coates v National Trustees Executors and Agency Co Ltd* [1956] HCA 23.
13 [2016] VSC 563.
14 *Re Cook & Maxwell; Ex parte C* (1985) 156 CLR 249.
15 5 Fed Supp 598 (1934).
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