
Family provision claims in the context of a claimant's need for aged care

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Introduction

Family provision claims are trending. This means more legal practitioners are becoming more creative in their strategies for maximising their client's position in litigation. A claimant seeking provision from an estate to go into a residential aged care facility is a breeding ground for "differences in opinion". There are many ways to skin the proverbial cat after taking into consideration the level of care required, fee structures and life expectancy of a claimant going into aged care.

A broad overview of family provision claims

The greatest qualifier to the phrase "testamentary freedom" is a family provision claim. Whilst a willmaker is free to express his or her resolve in his or her Will, the court retains the power to override that willmaker's "Will" to ensure that the willmaker's family and other dependants are adequately and properly provided for out of the willmaker's estate. The court's power equally applies to an intestate estate. It is here that Australian law upholds society's expectations that a willmaker/deceased person has a moral obligation to provide for the proper maintenance, education and advancement of their family and other dependants (noting eligibility to bring a claim varies from State to State). For example, in Victoria, there is a narrow class of people who the court considers can receive provision and dependency alone is insufficient.

One of the key factors weighed by the court in determining a successful claim is the "need" of a claimant. This area of law is characterised by the court's broad discretion and the various types of orders that can be made to "adequately provide" for a successful claimant.

Acting for a claimant going into residential aged care

Presenting evidence of a claimant's "financial needs" in order to enter into a residential aged care facility requires careful consideration of the various fee structures.

Daily standard care fee — this is also called a "standard resident contribution" and a provider may

request up to 85% of a resident's single person age pension be paid. This amount can change every six months.

Means tested care fee — a provider may request an additional fee be paid based on a resident's asset and income assessment by Services Australia (reviewed quarterly by Services Australia). This fee has an annual cap and a further lifetime cap.

Extra/additional service fees — a provider may provide an option for extra services to improve the comfort and wellbeing of the resident. For example, Foxtel. A provider may also charge additional service fees where they are providing a higher level of care than required. For example, mobility aids. These fees are set by the provider and are not impacted by any means test.

Accommodation bond — a provider may request an accommodation bond be paid before a resident enters into care. The bond amount is set by the provider based on the room size, location, features, etc. Whether the provider can make this request depends on the resident's means test. The resident may be eligible for full or partial financial assistance from the Federal Government. If the resident is ineligible for financial assistance, then he or she will be required to either pay the full accommodation bond or a daily accommodation amount or a combination of the two. Any accommodation bond is fully refundable on the death of the resident (or earlier departure).

Therefore, legal practitioners should:

- Consider the maximum amount that may be subsidised by the Federal Government and contextualise it against both the claimant's "ideal aged care provider" and affordable aged care providers, if the claimant was not *as successful* or unsuccessful. As expected, premium aged care providers may request additional service fees for premium creature comforts. Comparably, the entry point is a fully-funded Government aged care provider with no additional service fees. Adding to this, an ideal aged care provider may be close to family or other external services that may improve the claimant's quality of life.

- Give evidence for the ideal/optimum scenario but work through fee combinations, particularly if this is compromised on in settlement negotiations. For example:
 - Whether any fees can accrue and be deducted from the refundable accommodation bond upon death or earlier departure rather than paid up front. Whether the costs of a daily accommodation bond are cheaper than the fully paid refundable accommodation bond, noting that the average life expectancy of a person going into aged care is around two years.¹
 - Ensure fee projections account for an increase in fees.
- Consider whether the claimant would consider it desirable and agree to a contract to make a Will gifting any refundable accommodation bond to other beneficiaries of the deceased's estate on the claimant's death (**Contractual Will**). This would act like a "life interest" in the provision.
- Consider the effect of any other order being made in favour of the claimant on any means tests, including the age pension means tests.

Acting for the defendant/estate in relation to a claim brought by someone going into residential aged care

The estate will seek to minimise its obligation to pay the claimant a large sum, particularly if that sum is advanced towards an accommodation bond that will ultimately end up in the claimant's estate when the provider refunds it to the claimant's estate, unless a Contractual Will is entered into.

Accordingly, the executors of the estate should seek to reduce the quantum of the claim on the basis of the life expectancy of the claimant, their needs and what other support they receive, such as DVA benefits or other income streams.

For example, if the claimant presented evidence of a need to go into a premium aged care facility with all the trimmings, then the estate may request that the claimant provide an independent report demonstrating their need. The argument would be that the evidence includes "wants" as well as "needs".

If the claimant presented evidence that sum was calculated on a life expectancy greater than, say, two years, then the estate may seek that an actuary provide a life expectancy report.

Based on the actuary's report, the executors should then engage an accountant to calculate the minimum sum required to meet the claimant's needs. As stated above, different fee combinations can yield entirely

different results. For example, if the refundable accommodation bond set by a provider is \$400,000 and the accountant strategises that \$100,000 is paid upfront, the balance could be represented as a daily accommodation fee of say, \$60 (including interest). If the claimant is expected to live for two years, then $365 \text{ days} \times 2 \times 50 = \$43,800$. Therefore, \$143,800 is significantly cheaper than \$400,000, even with an additional contingency sum put in place.

You can see this would be further nuanced by the different providers that could be chosen from, the amount paid up front and the breadth of contingency. Added to this, a person can negotiate with a provider on the price of the accommodation bond, which should be encouraged.

Other arguments raised by the defendant/estate

At home care or retirement village

A claimant may put forward alternatives to an aged care provider.

Naturally, at home care is a service generally offered to persons with lower needs than what an aged care provider could provide. The various levels of lower care can be subsidised by the Federal Government and means tested.

A retirement village can offer no care or lower care options. Retirement villages are regulated by State legislation (as opposed to the aged care sector which is regulated by the Federal Government) and therefore, have more liberal fee and/or buy in structures.

A claimant may put forward a low care option and a high care aged care provider option if they reasonably foresee a transition taking place. Otherwise, the estate should question the disparity in levels of care and whether low care options or high care options are truly reflective of "need".

De facto claimant

In the context of a claim made by a de facto, it is not uncommon for the estate to contend that the deceased and claimant were not, in fact, in a de facto relationship and were either merely friends, or in a relationship/dating, but not to the degree of satisfying the elements of a de facto relationship.

De facto relationships are not defined at law. Rather, they often involve the relevant court weighing up a number of factors and this is becoming increasingly difficult as relationships become more fluid and less traditional. Because of this, both parties have a breadth of circumstances and precedent to ally their case and equally, the other party have a breadth of circumstances to tear down the other's case. Another breeding ground for differences in opinion.

Retirement & Estate Planning

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Taking the concept of social security entitlements further, the estate can request proof from the claimant of Centrelink entitlements such as age care pensions. Assessment of the age care pension requires a declaration of whether the claimant is single or in a relationship. This has seen many family provision claims unravel because for one reason or the other the claimant was claiming a single person's pension for many years. This is evidence they were not in a de facto relationship. Added to this, the claimant has significantly weakened their negotiating position as they are faced with the prospect of being reported by the court or the estate to Centrelink for fraud. Therefore, the parties are more likely to settle out of court.

Summary

In summary, a prudent practitioner will always know the range of arguments an opponent can deploy. A blind spot in strategy will be attacked by an opponent. Therefore, it is imperative that when formulating your client's best position and understanding your client's minimum position, an in depth analysis of "need" juxtaposed against all the different financial ways that need can result in a court order be undertaken.

It is also useful to remember that Government social security records can ally or undo your case and to be mindful to obtain this information from your client early.



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Footnotes

1. Parliament of Australia, "Caring for the Elderly' — an Overview of Aged Care Support and Services in Australia' (Web Page) <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/agedcare>.