

CASE NOTE: *Lemon v Mead*

Buss P, Mitchell and Beech JJA, 22 November 2017

Case note prepared by: Kate Varcoe TEP, Special Counsel, and Katie Worsnop TEP,
Senior Associate, de Groot's wills and estate lawyers, Brisbane

Succession – Wills – Inheritance – Appeal against a decision granting an application made by the respondent under s6(1) of the *Family Provision Act 1972* (WA) for further and better provision from the testator's estate – Appeal allowed

The date 26 February 2015 marked an extraordinary date in family provision history in Australia. On that day, the largest ever award (\$25 million) was made in favour of Olivia Mead, daughter of mining tycoon Michael Wright. Of particular note from the judgment at first instance was the seeming resurgence of the 'moral duty test' and the notion that a judiciary faced with a 'colossal estate' enjoyed an almost unbridled discretion. In allowing a recent appeal, however, the Full Court of the Supreme Court of Western Australia found that Master Sanderson had overreached.

BACKGROUND

The deceased was survived by his wife, three ex-wives and three adult children. The plaintiff, Olivia Mead, was the youngest child of the deceased at 19 years of age.

The deceased's last will, as it related to Ms Mead, essentially provided Ms Mead with benefits from a trust created by the deceased during his lifetime ('the trust'). The executor was directed, by the terms of the will, to fund the trust in the amount of \$3 million. Pursuant to the terms of the trust, the trustee had an absolute discretion to distribute the income and capital to the trust beneficiaries, of whom Ms Mead was one. The trust was to vest upon Ms Mead turning 30 years of age.

Ms Mead sought \$12 million by way of further provision.

At first instance, in applying the well-established *Singer v Berghouse* two-stage test, Master Sanderson found the deceased had failed to make adequate provision for Ms Mead and awarded her the sum of \$25 million. In so doing, he had regard to the following:

- The estate was 'colossal' and no other person would be materially prejudiced by the award to Ms Mead.
- The trust structure was unwieldy and there was no guarantee Ms Mead would receive anything from it.
- When considering the testator's moral duty, in terms of 'community expectations', the deceased should have made 'more than adequate provision' and even 'spoiled' Ms Mead.

THE APPEAL

The defendant executor appealed the decision. On 22 November 2017, the appeal was allowed, and Ms Mead's provision was reduced from \$25 million to \$6.142 million.

Principally, the court found that Master Sanderson had correctly applied the first stage of the test (i.e. in determining that adequate provision had not been made for Ms Mead). As to the second stage, Master Sanderson had erred in considering his discretion to be unfettered because, fundamentally, he failed to have due regard to the limiting nature of the statutory text and purpose that conferred the discretion (i.e. that there be no more than adequate provision made).

In 're-exercising' its discretion at the second stage of the test, the Court preferred to adopt what might be described as the 'reasonably substantial test' in terms of the quantum of the award.

The Court relied on actuarial evidence as to the present value of the sum required by Ms Mead when awarding her a capital sum 'likely to ensure her financial security for the remainder of her life'. The sum of \$6.142 million was said to enable Ms Mead:

- (a) to purchase a 'reasonably substantial house' (\$1.5 million); and
- (b) to receive a 'reasonably substantial' annuity for the rest of her life from the balance invested.

Ms Mead has since sought leave to appeal the decision to the High Court of Australia.

IN MEMORIAM

The STEP Victoria Committee regrets to advise that Richard Phillips Barrister died on Tuesday 2 January 2018. He was aged 60. Richard had been a member of STEP for over 15 years. He served as a member of the STEP Victoria Branch Committee for a number of years, and on the *STEP Directory* Editorial Committee for Australia. Richard was also a speaker at a number of our meetings and at our 2012 annual conference.

He had practised as a barrister at the Victorian bar since 1983, having previously practised at the English bar as a member of Lincoln's Inn. He was also a co-author of the *LexisNexis Wills, Probate and Administration Service Victoria*. Richard's services were always in demand both as a barrister and as an accredited mediator.

He will be sadly missed.