

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



RE MEULEMAN; QUMINAKELO V AMIDZIC [2020] VSC 376

Supreme Court of Victoria, Judicial Registrar Englefield, 26 June 2020

Whether a person not resident with, or dependent upon, a deceased person at the time of death is eligible for family provision in Victoria.

Key words: Family provision, Victoria, Eligible Person, Member of the Household, Meaning of Household, Dependency, Quantum of Dependency, Relevant Time of Membership and Dependency

1. This was a claim for provision under Part IV of the [Administration and Probate Act 1958](#) (Vic) (the Act) from the estate of Olive Meuleman (the deceased). The plaintiff relied on section 90(k) of the Act which provides that an 'eligible person' for provision includes:

(k) a person **who, at the time of the deceased's death**, is (or had been in the past and would have been likely in the near future, had the deceased not died, to again become) a member of the household of which the deceased was also a member (emphasis added)

2. The plaintiff had befriended the deceased in 2007, and acted in a caring capacity to the deceased. The plaintiff lived nearby in rented accommodation, but often spent a large part of the week staying with the deceased and attending to her needs. The deceased paid 50% of the plaintiff's rent and contributed to her personal expenses such as petrol, utilities, phone, clothes and other necessities. On one occasion, the deceased cleared the plaintiff's credit card debt and on another occasion paid for her flights to Fiji. Additionally, the deceased paid for some of the plaintiff's son's school and sports expenses, and in 2008, when the plaintiff was treated for cancer, the deceased paid the excess on her medical bills after the Medicare rebate.
3. No provision was made for the plaintiff in the deceased's will, which left her estate to five Melbourne charities, despite some alleged promises to the plaintiff and evidence from a neighbour and her son of her care of the deceased. The plaintiff's concern continued after 2013 when the deceased moved into aged care, with the plaintiff visiting daily, bringing food and providing personal care. This level of care was attested to by the facility's chaplain.
4. On 22 July 2013, the Victorian Civil and Administrative Tribunal appointed the plaintiff administrator of the deceased's financial affairs under the then [Guardianship and Administration Act 1986](#) (Vic). In this role, the plaintiff undertook the tasks of dealing with the aged care service provider, paying all bills, selling the deceased's home (so to reduce aged care daily fees and improve the deceased's financial position) and generally managing her money.

5. There was no doubt of the warm mutual regard which existed between the parties. But was the plaintiff a member of the deceased's household? The court found that the plaintiff was a member of the deceased's household from 2008 until 2013 when the deceased went into aged care. After that, the court, though finding no direct case on point, made an analogy with separated partners in a marriage or de facto relationship, to hold that there was still a 'household' situation pertaining (at [49]):

I am not satisfied that Inise has no prospect of successfully establishing that she remained a 'member of the household' after Olive's involuntary departure for residential aged care on 2 June 2013. An involuntary separation does not end a domestic or de facto relationship which depends on 'living together' and mutual commitment for its existence. Neither does an involuntary or forced separation mean that parties to a legal marriage have formally separated. It may be that the involuntary nature of Olive's removal from her home and the continued family-like commitment given to Olive's welfare by Inise preserves their 'household' as such things preserved the marriage of the husband with his wife in *Stanford*. Like spouses, the relationship of 'member of the household' depends on a legal definition, not a biological relationship. An involuntary separation can occur in many households. For example, a dependent parent who had been living with an adult child until the adult child is admitted to palliative care for the final months of a terminal illness. I decline to grant summary judgment on the basis that an involuntary physical separation of a deceased and a plaintiff for health reasons terminates a 'household' notwithstanding continuing care, contact and involvement in each other lives.

6. In addition to being a member of a household, a person relying on paragraph (k) of the definition of eligible person must satisfy the court that they were wholly or partly dependent on the deceased for their proper maintenance and support before a family provision order may be made in their favour under [s 91\(2\)\(b\)](#) of the Act. The court held that a threshold of dependency had been met by the plaintiff during the time the deceased had been in her own home, but had there been a sufficient quantum of dependency **at the time of death**?
7. The court found that this test could not be met because the plaintiff was not in receipt of financial or material assistance from the deceased at the time of the deceased's death and therefore was not dependent on her. Therefore, although the plaintiff was a member of the same household as the deceased from after October 2008 to 2 June 2013, when the deceased was placed into residential aged care, and dependent on the deceased within the meaning of s 91(2)(b) of the Act for a period, summary judgement was given for the defendant because neither of these factors was present at the time of the deceased's death.
8. Thus, the estate's proceeds went to the named charities in the will.

IMPLICATIONS



In Victoria, for family provision applications where the deceased died on or after 1 January 2015, eligibility is restricted to certain categories of persons defined in section 90 of the Act. This is a major shift from the previous Victorian family provision scheme, where any person was eligible to apply if they could establish that the deceased had a responsibility to provide for them from the estate.

One of the section 90 categories of person is 'member of the household.' However, the term 'member of the household' is not defined in the Act, nor discussed in the explanatory memorandum the amending legislation. The recommendation of the Victorian Law Reform Commission was that the 'member of the household' category should be based on the similar New South Wales category. Nonetheless, there are significant differences between the two, and the Victorian provision had been untested before this case. The court considered the relevant New South Wales cases in its search for guidance, but concluded that dependency and membership of a household do not have to coincide in New South Wales, nor be present at the time of death. Thus, the Victorian provision is narrower in scope. Even though family provision legislation in each state and territory is remedial in nature, the court in this case could not go beyond the actual wording of the Act.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/vic/VSC/2020/376.html>

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