**EQUITABLE CLAIMS AND FAMILY PROVISION**

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I INTRODUCTION

The purpose of this paper is to examine the interaction between equitable claims in the context of estate disputes and family provision legislation.

I propose to concentrate on claims involving:

1. Equitable estoppel and in particular estoppel arising from representations which are relied upon to the detriment of a party to whom they were made; and
2. Constructive trusts which arise from contracts to make wills.

II COMMON SCENARIOS

A represents to B that A will make a will in B’s favour. In reliance on that representation B acts to his detriment. A fails to make a will in the form represented.

A agrees with B to make and not revoke a will. A fails to make that will or alternatively makes the will but revokes it before death.

A and B agree to make and not revoke mutual wills. One of the following occurs. A dies having adhered to the agreement and B takes the benefit of the relevant interest in A’s estate. Alternatively, A dies having adhered to the agreement. B takes the benefit of the relevant interest in A’s estate and then subsequently makes a will the terms of which are inconsistent with the agreement with A.

III ANALYSIS OF RELEVANT CASE LAW

A *Vukic v Luca Grbin and ors; Estate of Zvonko Grbin[[2]](#footnote-2)*

In Vukic, the plaintiff was the daughter of the deceased. The deceased represented to the plaintiff that if she lived in the deceased’s house at Lane Cove and paid the rates and maintenance he would leave her three quarters of the house. In reliance on those representations the plaintiff lived in the house, paid the outgoings and did not pursue the opportunity of finding a house for herself in Sydney. The plaintiff also expended money and labour on improving the property. The deceased died leaving a will which gave the plaintiff a one sixth as opposed to a three quarters interest in the property.

Brereton J summarised the relevant principles relating to equitable estoppel and said the following at paragraphs 27-32 of the judgment:

27 Equity comes to the relief of a plaintiff who has acted to his or her detriment on the basis of a fundamental assumption in the adoption of which the defendant has played such a part that it would be unfair or unjust if he or she were left free to ignore it, on the footing that it would be unconscionable for the defendant to deny the assumption [Grundt v Great Boulder Pty Gold Mines Limited [[1937] HCA 58](http://www.austlii.edu.au/au/cases/cth/HCA/1937/58.html); [(1937) 59 CLR 641](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281937%29%2059%20CLR%20641?query=), 675; Thompson v Palmer [[1933] HCA 61](http://www.austlii.edu.au/au/cases/cth/HCA/1933/61.html);[(1933) 49 CLR 507](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281933%29%2049%20CLR%20507?query=), 547; Waltons Stores (Interstate) Limited v Maher [[1988] HCA 7](http://www.austlii.edu.au/au/cases/cth/HCA/1988/7.html); [(1988) 164 CLR 387](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281988%29%20164%20CLR%20387?query=), 404 (Mason CJ and Wilson J)]. It is essential to an equitable estoppel that the defendant knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation [Crabb v Arun District Council [[1976] Ch 179](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b1976%5d%20Ch%20179), 188;Waltons v Maher, 423 (Brennan J)]. Such knowledge or intention may easily be inferred where the adoption of the assumption or expectation is induced by the making of a promise, but may also be found where the defendant encourages a plaintiff to adhere to an assumption or expectation already formed, or acquiesces in an assumption or expectation when in conscience objection ought to be stated [Waltons v Maher, 423 (Brennan J)]. The unconscionability which attracts the intervention of equity is the defendant’s failure, having induced or acquiesced in the adoption of the assumption or expectation with knowledge that it would be relied on, to fulfil the assumption or expectation or otherwise avoid the detriment which that failure would occasion [Waltons v Maher, 423 (Brennan J)].

28 Although numerous attempts have been made to identify the various components of equitable estoppel, for present purposes, the matters which a plaintiff must establish to found an equitable estoppel may conveniently be summarised, in the present context, as follows:

· First, in relation to the plaintiff’s conduct: that the plaintiff acted (or abstained from acting) in reliance upon an assumption or expectation that a particular legal relationship existed or would exist between the plaintiff and the defendant, or that the plaintiff had or would acquire some interest in the defendant’s property

· Secondly, in relation to the defendant’s conduct: that the defendant induced the plaintiff to adopt the assumption or expectation and encouraged the reliant activities of the plaintiff, or at least failed to deny the assumption or expectation with knowledge that the plaintiff was relying on it to the plaintiff’s potential detriment and that it could be fulfilled only by transfer of the defendant’s property, a diminution of the defendant’s rights or an increase in the defendant’s obligations;

· Thirdly, in relation to the interest or property: that the assumption or expectation was one which the defendant could lawfully satisfy.

[See generally, Waltons v Maher, 428-429 (Brennan J); Meagher, Gummow & Lehane,Equity: Doctrines & Remedies, (4th ed., 2002), [17-105]].

29 As to the Plaintiff’s conduct, I am satisfied that the Plaintiff believed and expected that she would inherit a three-quarter interest in the House, and upon the faith of that belief or expectation acted to her detriment by remaining in the property rather than finding a home for herself, retaining her flat in Zagreb rather than selling it and using the proceeds to assist the purchase of alternate accommodation for herself in or around Lane Cove at a time when the property market there was much more affordable, and conforming with the Deceased’s wishes by expending moneys (to the extent of at least $127,252 since the first representation was made in 1986) and labour (to the value of at least $26,022 since 1986) on the upkeep maintenance and improvement of the Mowbray Road property; in short, she arranged and conducted her affairs and her life on the basis of that expectation.

30 As to the Deceased’s conduct, I am satisfied that the Deceased made representations to the Plaintiff to the effect that if, during his lifetime, she lived in the Mowbray Road property and maintained it in good order and paid the outgoings, he would upon his death devise to her a three-quarter interest in it. I am also satisfied that the Deceased intended her to act as she did in respect of the Mowbray Road property, and that it was for his benefit that she do so, in that it enabled him to retain receipt of an Australian aged pension.

31 And as to the property, the expectation was one which the Deceased could have lawfully satisfied by leaving three-quarters, rather than a one-sixth, interest in the Mowbray Road property to the Plaintiff under his will.

32 In those circumstances it is unconscionable for the Deceased (and his estate) to depart from the expected state of affairs, as the Plaintiff will have incurred detriment – namely the expenditure of the moneys and labour and the loss of the opportunity to acquire a property for herself – if the expectation is not satisfied. In this case the unconscionability is accentuated by the circumstance that the Deceased (and his estate) have benefited from the Plaintiff’s reliant conduct

His Honour would have been prepared to make a declaration that the deceased’s estate held a three quarter interest in the property on a constructive trust for the plaintiff. However it was urged upon him that it was preferable to grant relief under the *Family Provision Act 1982* because of the flexibility of the statutory remedies that existed under that legislation.

The plaintiff as a daughter of the deceased was eligible to make an application for provision. In considering whether the plaintiff had been left without adequate for her proper maintenance, education and advancement in life His Honour sad that it was relevant to take into account the promises made by the deceased to the plaintiff.

At paragraphs 38-39 of his judgment, Brereton J said:

38 Promises made and expectations raised by testators have always been regarded as relevant to the ascertainment of what is proper provision for a claimant [Re Anderson (deceased)[(1975) 11 SASR 276](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281975%29%2011%20SASR%20276?query=), 284; Hughes v National Trustees Executors & Agency Co of Australasia Ltd [[1979] HCA 2](http://www.austlii.edu.au/au/cases/cth/HCA/1979/2.html); [(1979) 143 CLR 134](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281979%29%20143%20CLR%20134), 148]. This is particularly so where a claimant has relied to his or her detriment on any such promise or expectation. The requirements of conscionable behaviour which inform the doctrine of equitable estoppel are philosophically closely analogous to the concept of “moral duty” which has traditionally informed the exercise of jurisdiction under the [Family Provision Act](http://www.austlii.edu.au/au/legis/nsw/repealed_act/fpa1982209/) and its predecessors and, some of the observations in Singer v Berghouse (No 2) notwithstanding, continues to do so [Vigolo v Bostin; Palmer v Dolman [[2005] NSWCA 361](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2005/361.html), [74]]. Thus, although a claim under the [Family Provision Act](http://www.austlii.edu.au/au/legis/nsw/repealed_act/fpa1982209/) is to be distinguished from one for a constructive trust or equitable estoppel and some different considerations apply (including in particular the interests of beneficiaries under the Will, and other eligible persons) [Vigolo v Bostin, [76]-[78]], nonetheless the conclusions expressed above as to the requirements in the circumstances of conscionable behaviour are highly relevant also to what is proper provision for the Plaintiff [cf Lewis v Lewis [2001] nswsc 321, [76]].

39 The Plaintiff’s present income of $52,000 per annum supports her day-to-day expenses but little more. At her age, with that income, with her assets (including the one-sixth share in the House to which she would be entitled under the Will) amounting to about $190,000, and having expended her superannuation benefit on the House, she would have great difficulty in borrowing sufficient to enable her to purchase accommodation in the locality in which she has lived since the early 1960s (except for the period she spent in Zagreb) and to which she is accustomed. While the three-quarter interest claimed by the Plaintiff is a very large share of the Estate, it is to be born in mind that the Deceased had provided for Ante many years earlier by the transfer of substantial real property in Croatia, and for Luca by a lifetime right of residence in the family home on Korcula. The Plaintiff has lived in the Mowbray Road house since she was a child, except for the period between December 1969 and August 1980 when she lived in Zagreb, Croatia. Since 1981 she has done so at the request of the Deceased, and since 1986 on the basis that she could do so rent free provided that she pay all expenses and outgoings and be responsible for its maintenance and upkeep, in order to maintain his eligibility for an Australian aged pension. In that way she has made substantial contributions to his estate – and in particular to the House - and his welfare. In those circumstances I am satisfied that the Plaintiff has been left with inadequate provision for her proper maintenance and advancement in life.

His Honour was of the view that the plaintiff should receive six 1/8s of the property and two other beneficiaries a 1/8 share each of the property. The difficulty of this result was that it would expose the plaintiff at the mercy of the other two beneficiaries to an application pursuant to section 66G *Conveyancing Act 1919* for a sale of the property. In order to avoid this Brereton J used the legislation to convert their interests in the property into legacies of $100,000 each which were charged on the property.

The decision is illustrative of the overlap between the general equitable jurisdiction of the Court and its statutory jurisdiction under Family Provision legislation. The same facts gave rise to equitable relief in the form of an equitable estoppel that could be satisfied by the imposition of a constructive trust and also statutory relief under the *Family Provision Act 1982.* On the facts of the case it was to the plaintiff’s advantage to elect to take the more flexible remedy that the statute provided.

B *Lewis v Lewis[[3]](#footnote-3)*

In Lewis the plaintiff was the son of the deceased. He brought proceedings against his father’s estate alleging that it held a rural property called “Rugby” which was located at Braidwood in New South Wales on a constructive trust for him. The constructive trust was alleged to arise as a result of representations made in 1968 and 1969 by the deceased that the plaintiff would receive Rugby after the deceased’s death on the basis that the plaintiff was expected to work on it without wages, do what his father required and pay expenses out of his own pocket. In the alternative the plaintiff sought an order for provision pursuant to the *Family Provision Act 1982.*

Hodgson J was satisfied that the deceased did say to the plaintiff in 1968 something to the effect that he would leave Rugby to him. However, the Judge was not satisfied that the statement was one which could reasonably have been understood to mean that no matter what the circumstances were the deceased would leave the land to the plaintiff to the extent that he would entirely disinherit the plaintiff’s sister.

The Judge was satisfied that the plaintiff did act on the basis of what the deceased had said to him. He made a finding that the plaintiff did work on parts of the property and whilst it was not possible to quantify the work or the amounts that the plaintiff had paid the Judge was satisfied that it substantially affected the plaintiff’s life.

At paragraphs 74-76 of the judgment His Honour said:

74 It is clear in my opinion that the deceased did intend the plaintiff to act on the basis of the deceased's representations and requirements. However, I have noted the lack of clarity as to precisely what the plaintiff had to do to satisfy the deceased's requirements, and I accept evidence given by the defendants' witnesses to the effect that the deceased expressed dissatisfaction in relation to the plaintiff's activities.

75 In those circumstances, there is a real question as to whether what the deceased left the plaintiff fell so far short of what the deceased should in conscience have left him, having regard to the plaintiff's expectations, reliance, detriment, and benefit to the deceased, that the Court should impose a constructive trust. When one adds to this the circumstance that the deceased did, over the last 20 years of his life, incur very substantial new moral obligations by reason of his marriage and further child, I find myself unable to say that what the deceased did was unconscionable.

76 Many of the considerations relevant to the plaintiff's constructive trust claim are also relevant to the [Family Provision Act](http://www.austlii.edu.au/au/legis/nt/consol_act/fpa209/) claim. However, the constructive trust claim might have succeeded without the plaintiff proving that he needed the benefit which he claimed, whereas the [Family Provision Act](http://www.austlii.edu.au/au/legis/nt/consol_act/fpa209/) requires that the plaintiff establish that he was left without adequate provision for his proper maintenance. On the other hand, the constructive trust claim could have succeeded only if I had been satisfied that what the deceased did was unconscionable; while the requirement for the purposes of the [Family Provision Act](http://www.austlii.edu.au/au/legis/nt/consol_act/fpa209/) that the plaintiff be left without adequate provision for proper maintenance does not require any finding that the deceased acted unconscionably. In that latter respect, the requirements of the [Family Provision Act](http://www.austlii.edu.au/au/legis/nt/consol_act/fpa209/) are easier to satisfy.

Ultimately the Judge dismissed the constructive trust claim for the reasons stated above, namely his inability to say that what the deceased did was unconscionable. However, His Honour found for the plaintiff on the alternative claim under the *Family Provision Act 1982*. The case is an illustration of the same facts potentially being available to support a claim based on estoppel and a claim for provision. However unlike *Vukic* the claim based in estoppel failed. The Judge made the point that the estoppel claim would succeed if the plaintiff could establish with sufficient certainty the alleged representation, detrimental reliance and what the deceased did was unconscionable. On the other hand the family provision claim was dependant on the plaintiff establishing that he was left without adequate provision for his proper maintenance. It follows that it may well be worthwhile to bring both claims in the same proceedings and rely on them in the alternative.

C *Simpson-Cook v Delaforce[[4]](#footnote-4)*

The plaintiff was the former wife of the deceased. She brought proceedings against the defendant in his capacity as executor of her late former husband’s estate alleging that the defendant held a property at Arncliffe on a constructive trust for her and in the alternative she sought relief pursuant to the *Family Provision Act 1982*.

The constructive trust was alleged to arise from the former husband’s conduct in negotiations that led to a property settlement between them. The parties had combined assets of about $3.5 million between them. Initially the parties agreed that the deceased would pay the plaintiff $100,000 in order to make the division of their combined matrimonial assets an “even split”. Later this amount was reduced to $70,000 and subsequently further reduced to $50,000.

The negotiations led to a draft set of property settlement orders being prepared which provided that the deceased would become the sole beneficial owner of the property and required him to pay the plaintiff $50,000.

The deceased then said to the plaintiff that he did not want to pay her the $50,000. Ultimately, the plaintiff agreed that she would forego the $50,000 if the deceased spent the money on a granny flat on the property and if the deceased left the property to her in his will.

In the final Family Court Order the following notation appeared:

“The parties have entered into this agreement on the basis that the husband:

Will retain the wife as a beneficiary in his will and will bequeath unencumbered to her;

Will use his best endeavours to have a granny flat/combined garage erected on the said property…

Pursuant to section 81 of the *Family Law 1975* the husband and the wife intend that these Orders shall as far as practical finally determined the financial relationship between them and avoid any further proceedings between them.

The parties consent to making the Orders herein and to those Orders being of the same force and validity as if they had been made after a hearing by the Court.”

The deceased died and left a will which after some legacies gave the rest of his estate to a relation.

Bergin CJ in Eq held that plaintiff had relied on the representation made by the deceased that he would use the $50,000 to improve the property and leave it to her in his Will. Her Honour held that the plaintiff had acted to her detriment by giving up the opportunity to receive the $50,000. She held that the appropriate relief was to impose a constructive trust that gave effect to the plaintiff’s expectation that she would receive the property unencumbered.

The Judge also upheld the plaintiff’s family provision claim. The evidence was that the plaintiff had a net worth of $2,500,000, but the balance between her income and expenditure was tight.

The Judge held that she could take into account the promises made by the deceased to determine what was proper provision for the plaintiff. In the circumstances she held the proper order under the Family Provision Act 1982 was that the plaintiff should receive the property unencumbered.

D *The Appeal – Delaforce v Simpson-Cook[[5]](#footnote-5)*

On appeal the Court of Appeal unanimously upheld the trial judge’s finding based on proprietary estoppel which led to the imposition of a constructive trust pursuant to which the defendant held the property for the plaintiff. The Court held that the detriment which the plaintiff had suffered was not limited to giving up her claim to the $50,000 but extended to giving up her right to have the Family Court determine her entitlement. This had the effect of giving up the chance of obtaining an enforceable order whereby the deceased was obliged to leave the property to her after his death. The Court agreed with the trial judge that the appropriate relief was the imposition of a constructive trust that enforced the expectation that she receive the property unencumbered. The Court also made the point that there was jurisdiction to mould the remedy to whatever was appropriate. In other words it did not automatically follow that the remedy that would be given would be the enforcement of the expectation. In other cases it might be appropriate to give a lesser remedy such as compensation or a charge.

The Court disagreed with the trial judge’s decision to make an order under the *Family Provision Act 1982*. It held that having regard to the fact that the plaintiff had net assets of $2,500,000 she had no need for provision and the Order could not be justified.

This case is in a way the reverse of the decision in *Lewis.* The plaintiff could not establish need so the family provision claim failed. However (unlike the plaintiff in *Lewis)*, she could establish the representation, detrimental conduct and a finding that the deceased’s conduct was unconscionable with the consequence that the Court imposed a constructive trust.

E *Saliba v Tarmo[[6]](#footnote-6)*

The plaintiffs claimed that the defendant as executor of the deceased held half of the deceased’s estate on a constructive trust or based on equitable estoppel. The facts were that the deceased had made representations to the plaintiffs that they would receive half of her estate when she died. She made a will to this effect but subsequently revoked it.

Nicholas J upheld both claims. The Judge held that the deceased engendered in the plaintiffs the belief that they were duty bound to continue to provide unpaid care to meet the deceased’s needs for the rest of her life. Put another way, in reality they denied themselves the freedom to cease providing such services, a situation which must have been intended by the parties at the time the expectation of inheritance was established.

Alternatively, His Honour held that there was an actual common intention that the plaintiffs were to have a beneficial interest in one half of the deceased’s estate upon which the plaintiffs acted to their detriment.

His Honour also held that in all the circumstances it was unconscionable for the deceased and the defendant to depart from the representations that the plaintiffs would inherit a one half share of the estate in return for benefits provided by and, in fact, obtained for the plaintiffs.

The result was that the Court made a declaration that the defendant held half of the deceased’s estate on a constructive trust for the plaintiffs.

F *Dable v Peisley[[7]](#footnote-7)*

The decision in *Saliba* is to be contrasted with the decision in *Dable.* In *Dable* the plaintiffs alleged a contract between themselves and the deceased whereby the deceased agreed to make and not revoke a will. In the alterative they alleged that the defendant was estopped from denying that the deceased had contracted to leave them her estate.

Ward J held that the contract claim failed because the parties did not intend to enter into a legally binding contract. Her Honour held that the estoppel claim failed on the basis that the services provided were not done in reliance on the representations made by the deceased, or alternatively, if they were she was not satisfied that they had suffered financial or other detrimental reliance of such a nature to make it unconscionable for the deceased later to have resiled form the assurances he made to them.

G *Barns v Barns[[8]](#footnote-8)*

The appellant was a daughter of the deceased. She made an application for family provision relief against his estate in the Supreme Court of South Australia pursuant to the *Inheritance (Family Provision) Act 1972*. The deceased, the deceased’s wife and son had entered into a Deed which stated that the deceased had agreed to make a will in a particular form and the deceased’s wife had also agreed to make a will in a particular form. The Deed recited agreements whereby the parties agreed to act in a manner which would result in the estates of the deceased and his wife devolving in the manner set out in the respective wills unless the other parties consented in writing to the relevant testator acting in a contrary manner.

The deceased executed a Will in the form required by the deed and did not revoke it prior to his death. The Will appointed his son as executor and left his entire estate to his wife. The Will executed by the deceased’s wife left her estate to her husband and in the event that her husband did not survive her for 30 days, to her son. The appellant received no provision under either will.

The appellant instituted proceedings in the Supreme Court of South Australia which sought an order for provision out of the deceased’s estate and a declaration that the Deed was void as being against public policy.

A Master of the Supreme Court held that the Deed was void as being against public policy. An appeal against that decision to the Full Court was successful. The proceedings for provision were remitted to a judge who dismissed them.

The issues in the High Court were twofold. First, was the Deed void as being against public policy? Secondly, did the Deed have the effect that the deceased did not hold the assets in his estate beneficially but rather on trust for his wife? Assuming that that was so, did that have the effect that the Court could not make a family provision order out of those assets?

The High Court held that the Deed was not void as being against public policy.

The majority of the Court, Callinan J dissenting, held that the assets of the deceased’s estate at the time of his death were available to make an order for provision. In doing so they rejected a submission based on the decision of the Privy Council in *Schaefer v Schuhmann* [1972] AC 572, which had held that the Court had no jurisdiction to make an order for provision because the deceased was not the beneficial owner of the assets, with the consequence that here was nothing in the estate from which an order could be satisfied.

IV CONCLUSION

A person who is a party to a contract to make a will or a beneficiary under a will which is the subject of such a contract may enforce the contract. If the relevant deceased has died and not left a will that conforms with the contract they may bring proceedings for a declaration that the executor or administrator of the relevant deceased’s estate holds the estate on a constructive trust that will give effect to the terms of the agreement. Alternatively there may be an action available in damages or if the promise was to leave a legacy, an order that the legacy be paid (*Birmingham v* *Renfrew [1937] HCA 52; Schaefer*).

The fact that there is a valid contract which might give rise to relief of the type mentioned in the foregoing paragraph does not preclude the Court from making an order for provision out of the deceased’s estate in favour of an eligible person pursuant to family provision legislation (*Barns).*

A person who cannot establish a contract to make and not revoke a will may be able to rely upon principles relating to equitable estoppel. The Court has flexibility to fashion the remedy which may range from giving effect to the expectation (*Vukic, Lewis, Delaforce*) to some lesser relief.

The same facts may give rise to a claim based on the constructive trust, estoppel or family provision relief. It may be advantageous to claim each of these in the alternative. The equitable claims will succeed if the constituent elements of the cause of action are established and are not dependent on need. An application for a family provision order on the other hand is dependant on the applicant establishing that they were left without adequate provision. Family provision relief will sometimes provide a more flexible remedy *(Vukic).*

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2. [2006] NSWSC 41 (9 February 2006). [↑](#footnote-ref-2)
3. [2001] NSWSC 321 (1 May 2001). [↑](#footnote-ref-3)
4. [2009] NSWSC 357 (1 May 2001). [↑](#footnote-ref-4)
5. [2010] NSWCA 84 (25 March 2004). [↑](#footnote-ref-5)
6. [2009] NSWSC 581 (23 June 2009). [↑](#footnote-ref-6)
7. [2009] NSWSC 772 (7 August 2009). [↑](#footnote-ref-7)
8. [2003] HCA 9; 214 CLR 169; 196 ALR 65; 77 ALJR 734 (7 March 2003). [↑](#footnote-ref-8)