



New South Wales Supreme Court

CITATION :	Ye v Fung (No 3) [2006] NSWSC 635 This decision has been amended. Please see the end of the judgment for a list of the amendments.
HEARING DATE(S) :	06/06/06
JUDGMENT DATE :	26 June 2006
JUDGMENT OF :	Gzell J
DECISION :	Legacy of \$425,000.00 and forgiveness of debt of \$22,000.00.

CATCHWORDS :	SUCCESSION - Family Provision and Maintenance - Failure of testatrix to make provision - Able bodied adult in close personal relationship with her for 10 years left nothing and debt not forgiven - Relationship like that of aunt and nephew - Lived together non-sexually - He financially dependent upon her and he providing domestic support and personal care - Estate left to siblings - Estate in excess of \$1.5 million - No evidence of needs of siblings - Provision made to buy and furnish a house and a buffer against exigencies
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LEGISLATION CITED : Family Provision Act 1982
Wills, Probate and Administration Act 1898
Uniform Civil Procedure Rules 2005
Property (Relationships) Act 1984

CASES CITED : Ye v Fung; Ye v Fung [2006] NSWSC 243
Singer v Berghouse (1994) 181 CLR 201
Vigolo v Bostin (2005) 221 CLR 191
McGrath & Anor v Eves & Anor [2005] NSWSC 1006
Barbara Mayfield v Suzy Carolyn Lloyd-Williams [2004] NSWSC 419
Lloyd-Williams v Mayfield (2005) 63 NSWLR 1
McKenzie v Topp [2004] VSC 90
Taylor v Lewis [2004] NSWSC 375
Golosky v Golosky, NSWCA, unreported, 5 October 1993
In Re Allen; Allen v Manchester [1922] NZLR 218

PARTIES : Michael Ye - Plaintiff
Keith Yuk Kee Fung - Defendant

FILE NUMBER(S) : **SC 6032/02**

COUNSEL : Mr A Gidaro - Plaintiff
Mr L Ellison SC - Defendant

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**IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION**

GZELL J

MONDAY 26 JUNE 2006

6032/02 MICHAEL YE v KEITH YUK KEE FUNG (NO 3)

JUDGMENT

Background

1 Two lots of proceedings were commenced by Michael Ye: the first for an order under the *Family Provision Act* 1982 for provision for his maintenance and advancement in life out of the estate of the late Lan Fong Fung; the second that the grant of probate to Keith Yuk Kee Fung be revoked, the deceased be declared to have died intestate, and Mr Ye be appointed administrator of her intestate estate.

2 In order to sustain his challenge in the second proceedings, Mr Ye had to satisfy the *Wills, Probate and Administration Act* 1898, s 61B(3A)(a) that he was the de facto spouse of the deceased within the meaning of s 32G and he was such for a continuous period of not less than two years prior to the death of the deceased.

3 Pursuant to the *Uniform Civil Procedure Rules* 2005, r 28.2, I ordered that a decision on those questions be made before any decision on any other part of the proceedings. In *Ye v Fung; Ye v Fung* [2006] NSWSC 243, I concluded that Mr Ye was not the de facto spouse of the deceased.

The evidence

4 What is now before the Court is Mr Ye's claim under the *Family Provision Act* 1982. The evidence in *Ye v Fung* is evidence in this claim. In addition, some further evidence was called.

5 Keith Yuk Kee Fung was cross-examined. But this evidence did not add significantly to the evidence he gave in the other proceedings. He confirmed his view that Mr Ye did not provide much help to the deceased in the last couple of years. But he accepted that the household work was done by Mrs Lam and his complaints about a lack of cleanliness in the unit should be attributed to her. He said that the deceased was obese and had difficulty in getting around. While he said the deceased complained to him about Mr Ye, he took no steps to get Mr Ye out of the unit. He merely told the deceased to get rid of Mr Ye. While a community nurse visited the deceased, Mr Fung

conceded that it would not be necessary for her to administer insulin. It was Mr Ye's evidence that he gave the insulin to the deceased when asked by her to do so.

6 In the earlier proceedings, an affidavit of James Yuk Chee Fung was read, but he was not cross-examined. In the affidavit he said the deceased told him that Mr Ye had borrowed \$20,000.00 from her for school fees and immigration agent fees and that Mr Ye was going to pay her back when he obtained suitable employment. Mr Fung stated that in about 2000 the deceased complained that she had fallen over and Mr Ye refused to help her unless she showed him her will. Mr Fung said that the deceased asked him to help her "kick my useless border out". Mr Fung was cross-examined about this in the current proceedings. He said he did nothing as there was nothing within his power to do. He did not advise her to see a solicitor.

7 In *Ye v Fung* I set out the evidence of the relationship between the deceased and Mr Ye. I do not repeat it here, except to say that at [15] I found that the deceased had contributed approximately \$22,000.00 towards Mr Ye's tuition fees and that Mr Ye estimated that her financial contribution to him was about \$70,000.00. And at [63] I summarised their relationship thus:

"It is clear that a number of the matters specified in the *Property (Relationships) Act* 1984, s 4(2) apply to the relationship between Mr Ye and the deceased. Their relationship lasted for 10 years. They lived in a common residence, but Mr Ye had his own bedroom and the deceased had hers. The relationship was non-sexual. Mr Ye was partially financially dependent upon the deceased, but there was no financial interdependence and the financial support extended to Mr Ye was ad hoc. There was no joint ownership or acquisition of property and the only property used by both was the unit and its contents. There was mutual commitment to sharing the unit, but not to a shared life. The relationship between the pair was affectionate but not what would generally be regarded as a shared life. There were no children. Household duties were shared. Apart from visits together to functions, restaurants and outings, there was no evidence that either promoted the notion that they were living together as a couple and no evidence of any public perception to that effect."

8 At [44] I found that the relationship between the deceased and Mr Ye was

like that of an aunt and a nephew. While I concluded in [53] that Mr Ye was not in a de facto relationship with the deceased, I said he was in a close personal relationship with her:

“He lived with her and for no fee or reward, he provided the deceased with domestic support and personal care. That support and care was of a high order, at least until his visit to China. And whether or not the criticisms of the quality of his performance after his return are accepted, he continued to live with the deceased and provide domestic support and personal care to her.”

I see no reason to depart from these findings.

Eligible person status

9 It follows that Mr Ye was an eligible person in relation to the deceased in terms of par (a)(ii) of the definition in the *Family Provision Act 1982*, s 6(1). It refers to a person with whom the deceased person was living in a domestic relationship at the time of the deceased person’s death. A domestic relationship is defined in the same provision to have the same meaning as in the *Property (Relationships) Act 1984* which, in s 5(1) defines a domestic relationship to be a de facto relationship or a close personal relationship, other than a marriage or a de facto relationship, between two adult persons whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

Legal requirements

10 This means that the *Family Provision Act 1982*, s 9(1) does not apply to Mr Ye, and the Court does not have to first determine whether, having regard to all the circumstances of the case, there are factors that warrant the making of the application, the Court refusing to proceed with the determination of the application and to make the order unless so satisfied.

11 Section 7 of the *Family Provision Act 1982* applies to Mr Ye. The Court may order that such provision be made out of the estate of the deceased, or out of the notional estate or both, as in the Court’s opinion ought, having regard to the circumstances at the time the order is made, be made for the maintenance, education or advancement in life of Mr Ye.

12 The *Family Provision Act 1982*, s 9(2) provides that the Court shall not make such an order unless satisfied that the provision (if any) made in favour of Mr Ye by the deceased either during her lifetime or out of her estate is, at the time of determining whether or not to make an order, inadequate for the proper maintenance, education and advancement in life of Mr Ye.

13 Section 9(3) of the *Family Provision Act 1982* provides that in

determining what provision (if any) ought to be made, the Court may take into consideration any contribution made by Mr Ye, whether of a financial nature or not, and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to the acquisition, conservation or improvement of property of the deceased, or the welfare of the deceased, including contribution as a homemaker; the character and conduct of Mr Ye before and after the death of the deceased; circumstances existing before and after the death of the deceased; and any other matter that is considered relevant in the circumstances.

14 Under the testamentary instrument the subject of the earlier proceedings, the deceased made no provision for Mr Ye and left her entire estate to her siblings.

Additional evidence

15 Mr Ye swore a further affidavit for the purpose of these proceedings. He said that the deceased had told him she wanted him to visit her grave frequently and that she was buried in Macquarie Park Cemetery. He wished to acquire a two bedroom home unit in the Chatswood area because it was only 10 to 15 minutes by bus to the cemetery. If unable to afford a home unit in the Chatswood area, Mr Ye made inquiries of the cost of purchasing a two bedroom home unit in the Campsie area.

16 Taking into account advice to him about stamp duty and an amount of \$15,000.00 to furnish the home unit, his evidence of the cost range in Chatswood was \$490,145.00 to \$512,090.00 and in the Campsie area \$386,690.00 to \$396,050.00.

17 Mr Ye said he completed a medical degree at Shanghai Medical University but did not practise. He said it was his desire to study medicine in Australia to be able to practise as a doctor here. A four-year course at Sydney University would cost \$38,352.00 per annum with an additional \$2,000.00 per annum for text books. Mr Ye presently has a HECS debt of \$14,301.00 and he may have to pay \$70,000.00 in costs of the earlier proceedings.

18 Because of his previous and current studies, Mr Ye has been advised that he is ineligible to receive Austudy benefits and he estimates he would need about \$20,000.00 per annum for reasonable living expenses while he studies.

19 Mr Ye was cross-examined. Since arriving in Australia in 1990, he has obtained a number of tertiary qualifications and has for much of that time been a full-time student.

20 When he arrived in Australia, he embarked upon two six months courses studying the English language. In 1991, he started a two-year course in computer engineering at North Sydney TAFE College and in 1994 he commenced a further course of study at the University of Technology, Sydney, again in computer engineering.

21 He only completed one year of that course, and from 1993 to 1996 he was one of a group of Chinese students lobbying the government to change its policy and to allow Chinese students to stay in Australia. During that time he worked as a packer in a warehouse earning \$400.00 per week after tax. The work continued until 1997 when he lost his job. From then until 1999 he searched for work unsuccessfully. He said he became depressed and stayed home on some occasions.

22 In 1999, Mr Ye visited China. On his return in 2000, he did no work until December 2003 when he became a research assistant at an institute attached to several universities where he earned about \$300.00 per week before tax.

23 In 2002, he commenced a course in information technology at the University of Technology, Sydney which he completed at the end of 2005. At the time of the current hearing, he was studying accounting at TAFE, Ultimo. It is a two-year course.

24 His research work ended in February 2004, since which time he has not undertaken any work.

25 Mr Ye says he wishes to commence medical studies after he has completed the accountancy course. He has not sought work in any allied field to medicine. He said he would not do nursing. He has not applied to work for the ambulance, as a paramedic, or a first aid officer.

26 He has about \$200.00 in a bank account and a superannuation entitlement of about \$6,000.00.

The estate

27 Paul Sharah, the solicitor for the estate, swore an affidavit. The undistributed estate comprises the property at Lindfield. It has an estimated value of \$850,000.00. It brings in \$1,521.00 net per month. The estate debts are essentially legal costs and disbursements expected to be approximately \$20,000.00.

28 Cash distributions have been made from the estate and shares have been transferred *in specie*. Together, those distributions have been as follows:

Keith Fung	\$122,054.93
Ester Poon	\$140,398.45
James Fung	\$140,106.30
David Chow	\$192,272.69
Legal costs	\$100,000.00
Total	\$694,832.37

Legal principles

29 The principles to be adopted in applying the relevant provisions of the *Family Provision Act* 1982 are well known. In *Singer v Berghouse* (1994) 181 CLR 201 at 208 the High Court stated the provisions required the Court to carry out a two-stage process. First, the Court must determine whether the applicant has been left without adequate provision for proper maintenance, education and advancement in life. Secondly, if that determination is made in favour of the applicant, the Court has to decide what provision ought to be made out of the estate. At 209 the High Court said that concepts of moral duty or moral obligation were not of useful assistance in elucidating the statutory provisions and might well amount to a gloss on the statutory language.

30 That approach was questioned by three members of the High Court in *Vigolo v Bostin* (2005) 221 CLR 191 at [15], [115]-[117] where their Honours expressed the view that considerations of moral claims and moral duty are useful as a guide to the meaning of the statute. There was no suggestion by the Court that the two-stage process enunciated in *Singer* should be abandoned.

31 Reference was made to my decision in *McGrath & Anor v Eves & Anor* [2005] NSWSC 1006. But that was a case of the failure by a testator to make sufficient provision for his able-bodied adult son and daughter. I concluded, following what White J had said in *Barbara Mayfield v Suzy Carolyn Lloyd-Williams* [2004] NSWSC 419 at [109]-[110], and the absence of criticism of the point in the Court of Appeal in *Lloyd-Williams v Mayfield* (2005) 63 NSWLR 1, that there is no rule to the effect that proper provision for an adult and presently able-bodied child does not extend to providing him or her with a house or money to buy one.

32 *Mayfield* should be approached with some caution, however, for as Bryson JA observed at [31] there were features to the case that were rarely encountered in claims under the *Family Provision Act* 1982 and rarely encountered together. First, the value of the shares designated as notional estate was very large in comparison with the estates ordinarily encountered. Secondly, because the appellant was otherwise amply provided for, the further provision ordered by White J could have no adverse effect on her wellbeing. Thirdly, the applicant did not have any needs in terms of lack of present provision for necessities and amenities of life on an ordinary scale of needs as understood in the community generally.

33 Reference was also made to *McKenzie v Topp* [2004] VSC 90. But that was a case of a stepson who had lived with the testatrix from the age of 10. He continued to live with his stepmother after his father's death until he was 32, when he married and moved away to a house that he bought. When his business failed, he and his wife were forced to sell the house to meet debts. His marriage broke up and he returned to live with the deceased for interrupted periods of time. At [22] Nettle J said that whatever differences there might be between the relationship of a parent and child and the

relationship of a stepparent and stepchild, in the case before him the relationship was tantamount to that of mother and child. His Honour went on at [23] to say that the sort of obligation and responsibility that a mother owed a son was likely to exceed any obligation or responsibility she might owe to a nephew. His Honour ordered provision out of the estate to acquire and furnish a modest house.

34 Reference was also made to *Taylor v Lewis* [2004] NSWSC 375. That was a case in which an adult grandson moved from England to Australia to care for the deceased, which he did for twelve months. Master McLaughlin gave him a lump sum to supplement his income and give him a buffer against the contingencies of life.

35 As Kirby P said in *Golosky v Golosky*, NSWCA, unreported, 5 October 1993, consideration of other cases must be conducted with circumspection because of the inescapable detail of the factual circumstances of each case. It is in the detail that the answer to the proper application of the *Family Provision Act* 1982 is to be discovered.

Application of the principles

36 In this case, I am of the view that the deceased owed a high degree of obligation to Mr Ye and, certainly, a higher obligation than she owed to her siblings.

37 In my view, by leaving Mr Ye nothing, not even the forgiveness of the debt of \$22,000 that he owed her, the deceased failed to provide him with adequate provision for his proper maintenance, education and advancement in life. The first stage in *Singer* has been made out.

38 In an oft quoted passage, Salmond J said in *In Re Allen; Allen v Manchester* [1922] NZLR 218 at 220-221:

“The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.”

39 During her life, the deceased made considerable provision for Mr Ye. In my view she should have had him in mind as an object of her testamentary bounty, and she failed to do so.

40 There is no evidence of competing needs of the siblings whom the deceased favoured. The estate had a value in excess of \$1.5 million.

41 It was submitted on behalf of Mr Ye that he should be provided with a legacy of \$600,000.00 to purchase a house at \$480,000.00 and to make provision for the payment of debts of \$100,000.00.

42 I do not accept the proposition that the deceased was errant in her responsibilities to Mr Ye by failing to provide funds from which he could

discharge his liability for costs in the earlier proceedings.

43 Nor do I see that he should expect a provision enabling him to acquire a two bedroom unit close to the grave of the deceased. A more modest approach by the provision of money to buy a house in the Campsie area is, in my view, more realistic.

44 There is much to be said for the submission that Mr Ye is a perennial student who has not sought to exercise his talents in an appropriate way. He is able-bodied and well qualified to earn his living.

45 Nor am I convinced that Mr Ye has a burning desire to practise medicine. If he did, he would, in my view, have applied for admission to medical school by this stage and, in particular, rather than undertaking a course in accountancy.

46 Under the second stage in *Singer*, I am of the view that the provision that ought to be made out of the estate in his favour is \$425,000.00 plus the forgiveness of the debt of \$22,000.00. This will enable him to purchase and furnish a two bedroom unit in the Campsie area and provide him with a modest buffer against the prospect that he does not immediately obtain gainful employment.

Proposed orders

47 I will hear the parties on the appropriate terms of orders, including the question whether interest should be payable on the \$425,000.00 if not paid by a specified date. As to costs, I will hear the parties on whether it is appropriate to order that the costs of Mr Ye on a party and party basis and the costs of Mr Fung on an indemnity basis be paid out of the estate.

48 I direct the parties to bring in short minutes of orders reflecting these reasons.

26/06/2006 - Files numbers did not coincide and date of judgment wrong - Paragraph(s) Coversheet and dobdy of judgment

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