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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : KENNEDY -v- KENNEDY [2016] WASC 210

**CORAM** : MASTER SANDERSON

**HEARD** : 21 & 22 JUNE 2016

**DELIVERED** : 19 JULY 2016

**FILE NO/S** : CIV 2931 of 2013

**MATTER** : Section 6(1) of the *Family Provision Act 1972* (WA)

The Estate of Margaret Catherine Kennedy late of  
50 Elphin Street, Floreat, Western Australia, Deceased

**BETWEEN** : BARBARA LORRAINE KENNEDY  
Plaintiff

AND

BRUCE CHRISTIAN KENNEDY as Executor of the  
Estate of MARGARET CATHERINE KENNEDY  
First Defendant

BRUCE CHRISTIAN KENNEDY as a Beneficiary  
under the Will of the Estate of MARGARET  
CATHERINE KENNEDY  
Second Defendant

CAROLINE ELIZABETH KENNEDY as a  
Beneficiary under the Will of the Estate of  
MARGARET CATHERINE KENNEDY  
Third Defendant

CRAIG RONAL KENNEDY as a Beneficiary under  
the Will of the Estate of MARGARET CATHERINE  
KENNEDY  
Fourth Defendant

IAN TORRINGTON BLATCHFORD as a Beneficiary  
under the Will of the Estate of MARGARET  
CATHERINE KENNEDY  
Fifth Defendant

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*Catchwords:*

*Family Provision Act 1972 (WA)* - Claim by adult daughter - Whether further provision ought be made - Turns on own facts

*Legislation:*

*Family Provision Act 1972 (WA)*

*Result:*

Claim dismissed

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	Dr P R MacMillan & Mr D Singh
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	No appearance
Fourth Defendant	:	Mr M A Tedeschi & Mr E W Nielsen
Fifth Defendant	:	No appearance

*Solicitors:*

Plaintiff	:	Friedman Lurie Singh & D'Angelo
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	No appearance
Fourth Defendant	:	Nielsen & Co
Fifth Defendant	:	No appearance

**Case(s) referred to in judgment(s):**

Braun v Australian Executor Trustees Ltd [2014] WASC 210

Butcher v Craig [2010] WASC 92

Singer v Berghouse (No 2) [1994] HCA 40; (1994) 181 CLR 201

Vigolo v Bostin [2005] HCA 11; (2005) 221 CLR 191

- 1     **MASTER SANDERSON:** This is the plaintiff's claim brought pursuant to the *Family Provision Act 1972* (WA). It raises again the question of in what circumstances an adult child is entitled to claim a greater proportion of a deceased parent's estate. The matter was complicated by the fact neither the second nor third defendants participated in the action subsequent to the mediation. The Supreme Court's Practice Direction 9.2.2 deals with matters brought under the *Family Provision Act*. Paragraphs 6 - 7 of the Practice Direction deal with the originating summons and they are in the following form:

**The Originating Summons**

6.     The originating summons must set out the nature of the relief sought and the persons or classes of persons affected. This requires an identification of the parts of the estate from which the applicant seeks provision.
7.     The originating summons should be drafted so as to include all relevant parties. Relevant parties will be the executor or administrator who will be the first defendant and such other beneficiaries as will be affected by the proceedings who will be the second and subsequent defendants. The plaintiff should not join as parties to the proceedings beneficiaries whose entitlements they do not seek to have varied.

- 2     The originating summons issued by the plaintiff in this matter did not comply with that Practice Direction. It was in the following form:

This summons is issued upon the application of the Plaintiff who claims to have been left without adequate provision for her proper maintenance, support, education, or advancement out of the Estate of the late Margaret Catherine Kennedy (deceased) and as the Daughter of the said deceased who died on 7 June 2013, being then domiciled in the State of Western Australia and who claims that such provision as this Court thinks fit should be made for the Plaintiff out of the estate and that orders be made:

1.     specifying the amount and nature of such provision;
2.     specifying the manner in which the provision shall be raised or paid out of the same and from what part or parts of the Estate of the deceased;
3.     stating any conditions, restrictions or limitations imposed by the Court; and
4.     stating the manner in which the costs of and incidental to this application shall be paid.

3           At the commencement of the hearing counsel for the fourth defendant drew my attention to par 58 of the plaintiff's written submissions. That paragraph is in the following terms:

It is open to the Court to both preserve the Fourth Defendant's testamentary entitlement and make further provision for the Plaintiff. This may be done by providing that some part of the Second and/or the Third Defendants' testamentary entitlement be the Plaintiff's.

4           Counsel indicated it was not until these submissions were filed on 17 June 2016, a week or so before the hearing, he was aware the plaintiff was seeking at least as an alternative any provision made for her be paid from the bequests to the second and third defendants. The second defendant had filed an appearance and as I understand he had participated in a mediation. He had not filed any evidence. The third defendant had not filed an appearance nor had she filed any evidence. As I understand it the second defendant was present in court throughout the hearing. Apart from some gratuitous abuse directed at the plaintiff while they were both sitting at the back of the court he did not take part in the hearing. It is by no means clear that either the second or third defendant was advised by the plaintiff's solicitors any award to the plaintiff might come out of their entitlement under the will. Certainly it was not suggested by counsel for the plaintiff they had been given any notice.

5           At that point I gave careful consideration to adjourning the matter and allowing the plaintiff to notify the second and third defendants of the prospect their entitlement under the will might be affected even though the entitlement of the fourth defendant remained intact. In the end I determined that such a course was not warranted. The second and third defendants had ample opportunity to participate in the case and they had chosen not to do so. Of course they cannot be forced to take part in the hearing. It is a matter for them. They must have been aware if greater provision from the estate was made to the plaintiff their entitlement might be affected. While accepting the second and third defendants may not have been aware it was particularly their entitlement which would be affected, rather than the entitlement of each of the second, third and fourth defendants, it was a question of degree. To adjourn the trial at that point would have meant considerable costs which would likely have been paid out of the estate. In my view the interests of justice required the matter should proceed.

6           The deceased made her will on 28 January 2011. The deceased died on 7 June 2013 aged 92. A grant of probate issued on 5 July 2013 appointing her son, the first defendant, the executor under the will.

Subsequently the fifth defendant was appointed administrator by orders made 24 September 2015.

7           In her will the deceased gave all her jewellery to her daughter, the third defendant, absolutely, and all of her furniture, furnishings and articles of domestic use or ornament, including all of her antique furniture, all of her books, firearms, swords, clothing, photographs, stamp collection, assorted bric-a-brac, memorabilia and ephemera to her son, the second defendant, and her daughter, the third defendant, jointly, to sell and pay the net proceeds of such sale to her residuary estate. She left the sum of \$100,000 to her son Gregory James Kennedy. Subject to the payment of her just debts, funeral and testamentary expenses she gave the residue of her estate to be divided equally between such of her four children who survived her and if more than one as tenants in common in equal shares.

8           The plaintiff's brother, Gregory James Kennedy, challenged the provisions of the will with respect to him. These proceedings were resolved in terms of consent orders dated 1 September 2014. The bequest to him of \$100,000 was deleted and he was to be paid \$70,000 with a block of land in Donnybrook valued at \$85,000 to be transferred to him. An adjustment was made in favour of the plaintiff in the sum of \$18,333.

9           It was agreed between the parties that as of the date of death the value of the estate was \$1,729,550.40. If the terms of the will had applied the plaintiff and each of her three siblings would have received \$432,387.60.

10          There was no dispute between the parties as to the applicable principles. What follows is largely taken from the submissions of the plaintiff. Section 6(1) of the *Family Provision Act* sets out the circumstances in which the court will change the disposition of a deceased's will. Section 6(1) requires the court to carry out a two stage process. The first stage involves determining whether the disposition of the deceased's estate by will is not such as to make adequate provision from the estate for the proper maintenance, support, education or advancement in life of the plaintiff. The first stage raises a jurisdictional question which means that the court's power to make an order in favour of the plaintiff is conditional upon first being satisfied the state of affairs referred to in the opening part of s 6(1) ending with the words 'made under this Act'.

11       The first stage involves a question which is strictly one of fact although it involves the exercise of value judgment. The evaluative character of the decision arises because the court must determine whether the plaintiff has been left without 'adequate' provision for his or her 'proper' maintenance. When doing so the court puts itself in the position of the deceased and considers what ought have been done in the particular circumstances treating the deceased as a wise and just testator rather than fond and foolish.

12       In answering the first question the court should not proceed upon the assumption freedom of testamentary disposition allows the court to re-write the will of a testator or so encroach upon the testator's decisions expressed in the will have only prima facie effect the real dispositive power being vested in the court. There must have been a breach of the testator's moral duty (as used by the majority in *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191) in not making adequate provision for the proper maintenance, support, education or advancement of life of the plaintiff such that the deceased failed to make a testamentary provision that a just and wise testator would have thought it her moral duty to make in favour of the plaintiff had she been fully aware of their relevant circumstances.

13       The jurisdictional question which arises at the first stage is formulated and determined as at the date of the death of the deceased, having regard to all material facts that existed at the date of death whether the deceased knew of them or not, and all material eventualities that might at that date reasonably have been foreseen by the deceased who knew the facts.

14       Section 6(1) of the *Family Provision Act* speaks of 'adequate' provision for the 'proper maintenance [etc]' of the plaintiff. Considering whether 'adequate' provision has been made the court is required to consider:

[W]hat, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty (210).

See *Singer v Berghouse (No 2)* [1994] HCA 40; (1994) 181 CLR 201, 210 (Mason CJ, Deane & McHugh JJ).

15 No distinct test is to be applied involving special need or special claim simply because the plaintiff is an adult. Such a factor is merely to be weighed in making the determination as to whether adequate provision has been made. Further there is no doubt the existence of a moral (or special) claim is relevant in determining the jurisdictional question whether adequate provision has been made.

16 At par 32 of his written submissions counsel for the plaintiff summarised the principles applicable to claims by adult children. He did so by reference to the decision in *Braun v Australian Executor Trustees Ltd* [2014] WASC 210 [11]. In my view the principles set out by counsel are a fair and accurate summary of the position and I can do no better than quote them in full:

- (a) the relationship between parent and child changes when the child leaves home; the child does not cease, however, to be the natural recipient of affection or support;
- (b) the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education where that is feasible; where funds allow, to provide them with a start in life such as a deposit on a home or assistance in some form or other;
- (c) generally the community expects a parent where a child falls on hard times, and there are assets available, to provide a buffer against contingencies or to assist with retirement;
- (d) if the applicant has an obligation to support others, that will be a relevant factor in determining appropriate provision;
- (e) there is no need for an applicant child to show special need or some special claim;
- (f) an adult child's lack of reserves to meet demands, particularly of ill health, is a relevant consideration as is the applicants inability to earn a living or to earn anything more than a limited living;
- (g) the applicant has the onus of satisfying the Court of the justification of the claim;
- (h) equality between children does not necessarily provide an appropriate guide as to appropriate provision in respect to a particular clam;
- (i) there is no obligation on a parent to equalise distributions made to her or her children.



17 In support of her application the plaintiff relied on two affidavits. The first was sworn 22 August 2014. The second was sworn 15 June 2016. There were a number of other affidavits filed in support of the application but these two affidavits set out the plaintiff's circumstances and the grounds upon which she says she was not adequately provided for in the will of the deceased.

18 The plaintiff was born on 9 October 1946. At the date of death of the deceased, the plaintiff was 66 years of age and was not married or in any de facto relationship. She has a grown up daughter who has her own family and who does not assist her financially in any way. She did not own any land and lived in rented premises. She says she has 'various illnesses' which means she is unable to work. It must also be acknowledged that her age is against her joining the workforce.

19 As to her assets the plaintiff says she had assets of between \$114,500 and \$115,000. These comprised a car of \$2,500 - \$3,000 value; furniture and household effects of \$12,000; and \$100,000 cash at the bank. She had no liabilities apart from costs she had incurred with her solicitors in relation to this matter.

20 Her total income was \$25,199.20 made up of a pension of \$21,912.80 and rent assistance of \$3,286.40. She puts her expenses at \$40,372 per annum. By far the biggest component of these expenses was rent at \$25,220. Otherwise her main expenses are medical - \$2,500 for chemist; \$1,000 for dental; and so on. There is nothing in those expenses which suggests an extravagant lifestyle.

21 The plaintiff says her relationship with her mother 'was always good'. That issue was not seriously in dispute. It may have been that from time to time mother and daughter were estranged or there was some tension in the relationship. That is evident from extracts from the deceased's diary which are annexed to the affidavit sworn by the fourth defendant. But it was not suggested, nor could it have been, that there was any ill feeling which could be characterised as 'disentitling conduct'. While the relationship may not have been particularly close it was clear there was a strong mother/daughter bond between the plaintiff and the deceased.

22 In her first affidavit the plaintiff seems to indicate she felt adequate provision in the deceased's will would have been for the deceased to have provided enough capital to allow the plaintiff to buy a house in which she could live. Indeed submissions made on behalf of the plaintiff support that view. As I understand the plaintiff's case it was submitted an amount

sufficient to allow the plaintiff to purchase a property in which she could live, together with a further amount to allow for contingencies, was what she was seeking from the estate.

23        There is no doubt that from time to time over many years the deceased and her husband had been generous in financial terms to not only the plaintiff but all of their children. This was neatly summarised in the affidavit of the fourth defendant sworn 11 May 2016. At par 7 of that affidavit he said:

My late parents provided considerable financial assistance to [the plaintiff], over a lengthy period of time - some 40 or more years. They also provided considerable assistance to their other children, namely Bruce, Gregory, Caroline and myself.

24        That is borne out by the evidence. Quite how much financial assistance the deceased and her husband provided to the plaintiff is difficult to ascertain. Counsel for the fourth defendant estimated the amount to be in the region of \$267,904. That is probably about right. It was not really disputed by counsel for the plaintiff.

25        The fourth defendant provided details of his current financial position. He estimated his assets at \$1,273,000; the main asset being a house in Floreat Park valued at \$1,250,000. He had liabilities of \$238,500 largely made up of a mortgage of \$155,000 and an overdraft of \$44,000. As at the date of death of the deceased he was receiving unemployment benefits and renting out a room in his house. That gave him a total income of \$27,560. He puts his current expenses at \$34,945. Of that the largest component is mortgage repayments totalling \$15,600.

26        He describes his financial circumstances as 'very difficult'. In the past he has worked as a salesman selling motorcycles. This career appears now to be closed to him and again given his age it seems unlikely he would re-enter the workforce. He was married but the relationship broke down. He remains single but, as he said in cross-examination, 'optimistic'. He has a number of health issues which he detailed in his evidence and during cross-examination. He has a number of specific complaints which I think would characterise his health as poor.

27        Turning to the principles as outlined in *Braun* the deceased did over a long period provide real financial assistance to the plaintiff. It could not really be said the plaintiff has fallen on hard times. The evidence shows she has not worked since 1985. As I understand her evidence that was really because of ill health. I will have more to say about this issue below

but for the present it is enough to acknowledge there has been no particular event or events which in and of themselves would generate a moral duty on the deceased to assist the plaintiff.

28       The plaintiff does not have an obligation to support anyone else. It is to be acknowledged that the mere fact the deceased divided her estate between four of her children is not in and of itself sufficient to allow a finding adequate provision has been made in the will.

29       In relation to her medical condition the plaintiff relied on an affidavit of Dr Tsung-Che Huang sworn 14 June 2016. That affidavit annexes a report which was prepared on 14 April 2014. Dr Huang details the plaintiff's medical conditions. Essentially the plaintiff suffers from local and general pain. She suffers headaches which can be severe at times. These appear to be related to her cervical spine musculature. She suffers burning mouth syndrome which is treated by 'over the counter' medication. She has general back pain which is treated with physiotherapy and chiropractic treatment. In 2012 she fell fracturing her left shoulder and she still suffers pain from time to time. She also suffers from fibromyalgia. Dr Huang describes this condition as being 'responsible for pain involving multiple regions of the body'.

30       It is clear while the plaintiff suffers from numerous medical complaints they are very general in nature. Under cross-examination she mentioned a number of times that she wanted to get her health 'right'. Quite how she might do this she did not say and there was nothing in Dr Huang's evidence that suggested there would be any improvement in her condition. In fact, Dr Huang said:

Patient's pain can partly be explained by those medical conditions described in question one, mainly degenerative facet joint spinal changes. However, I do believe that there is a significant psychological component contributing to the patient's pain perception which various specialists have commented on in their reviews of the patient. The experience of significant pain involving multiple body regions can also negatively impact on her psychological wellbeing [4].

31       Watching the plaintiff give evidence she struck me as fit and spritely and certainly of sound mind. Although she appeared to tire under what was a lengthy cross-examination she answered questions cogently suggesting no difficulties with her memory. While I accept the plaintiff has medical problems I would characterise her health as reasonable. She certainly has no specific disability which requires ongoing medical treatment and which will involve significant cost.

32 When it comes to looking at competing claims on the deceased's estate there is no doubt, in my view, the claim of the fourth defendant is at least as strong as the claim of the plaintiff. He appears to be worse off financially and his health is perhaps worse than the plaintiff's health. In my view there could be no justification for depriving the fourth defendant of part of his inheritance.

33 There is a difficulty due to the lack of information provided by the second and third defendants. In *Butcher v Craig* [2010] WASC 92 the second defendant did not provide any information about her situation. The court noted she did not challenge the distribution from the estate but did not give any indication as to how that lack of information was to feed into the determination of the jurisdiction question. There appears to be no direct authority on the point. Perhaps all that can be said is there is no evidence of need on the part of the second and third defendants but nor is there a concession their entitlement under the will ought be adversely affected by any decision.

34 In the end I am not satisfied the jurisdictional question should be answered in the plaintiff's favour. As at the date of death of the deceased, allowing for her entitlement to quarter share of the deceased's residuary estate, she would have had available to her cash reserves of \$532,387.60. Given that on her present lifestyle she has a yearly deficit of \$15,000 that would more than adequately cover her position assuming she did not purchase a residential property. But of course it is the purchase of a residential property which formed the basis of her claim.

35 In this respect the plaintiff relied on evidence of Maxwell John Nevermann. Mr Nevermann swore an affidavit dated 15 June 2016. Paragraph 3 of his affidavit is in the following form:

Based on the current statistics obtained by the Real Estate Institute of Western Australia ('REIWA'), I provide the following information which I believe to be true:

- 3.1 The current median price of a house in the suburb of Bedford, Western Australia is \$631,250.00;
- 3.2 The current median price of a unit in the suburb of Bedford, Western Australia is \$461,000.00;
- 3.3 The current median price of a house in the suburb of Dianella, Western Australia is \$635,000.00;
- 3.4 The current median price of a unit in the suburb of Dianella, Western Australia is \$403,750.00;

3.5 The current median price of a house in the suburb of Inglewood, Western Australia is \$765,000.00;

3.6 The current median price of a unit in the suburb of Inglewood, Western Australia is \$442,500.00.

36 The plaintiff presently resides in Bedford. She indicated during cross-examination she would prefer to continue to live in that suburb. At present she occupies a three bedroom detached house. As she lives alone and as there is no evidence she has visitors at any time it is somewhat difficult to see why a three bedroom house or indeed a three bedroom unit would be necessary to satisfy the plaintiff's needs. That was put to her during cross-examination and she really did not provide any entirely satisfactory answer. Accordingly, while the evidence of Mr Nevermann gave some guide as to what house prices and unit prices might be it did not really provide evidence which fully supported the plaintiff's position.

37 Once again it comes down to the question of why it is necessary for the plaintiff to buy a property. She has rented for many years and at least at present is in satisfactory accommodation. If she were to continue to rent she would, as I have indicated, have sufficient capital to meet her needs. So really the case comes down to this. Was there a moral duty on the deceased to provide sufficient in her estate to allow the plaintiff to purchase a property in which she could reside. I am not satisfied such a moral duty existed.

38 The application will be dismissed. I will hear the parties as to costs.