

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

**CITATION** : SMITH -v- RADONICH [2017] WASC 290

**CORAM** : MASTER SANDERSON

**HEARD** : 5 & 6 AUGUST 2017

**DELIVERED** : 10 OCTOBER 2017

**FILE NO/S** : CIV 1791 of 2016

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

The Will of Boris Anthony Radonich, late of  
623 Rockingham Road, Munster in the State of  
Western Australia

**BETWEEN** : NOELENE ELIZABETH SMITH  
Plaintiff

AND

JASON PAUL RADONICH as Executor of the Estate  
of the late BORIS ANTHONY RADONICH  
First Defendant

JASON PAUL RADONICH  
Second Defendant

PETER JOSEPH RADONICH  
Third Defendant

SHARON LOUISE MCAULIFFE (nee RADONICH)  
Fourth Defendant

*Catchwords:*

*Family Provision Act 1972 (WA)* - Claim plaintiff de facto widow of deceased -  
Turns on own facts

*Legislation:*

*Family Provision Act 1972 (WA)*  
*Interpretation Act 1984 (WA)*

*Result:*

Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	Mr A P Hershowitz
First Defendant	:	Mr M Curwood
Second Defendant	:	Mr M Curwood
Third Defendant	:	Ms M A Kershaw
Fourth Defendant	:	Ms M A Kershaw

*Solicitors:*

Plaintiff	:	Greenstone Legal
First Defendant	:	Frichot & Frichot
Second Defendant	:	Frichot & Frichot
Third Defendant	:	Kershaw Legal
Fourth Defendant	:	Kershaw Legal

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

Devenish v Devenish [2011] WASC 129  
Graham v Graham [2011] NSWSC 504  
Hertzberg v Hertzberg [2003] NSWCA 311  
Sinclair v Forsyth [2008] VSC 250

1     **MASTER SANDERSON:** Boris Anthony Radonich (the deceased) died by his own hand on 25 August 2015. Probate of the will of the deceased was granted to the first defendant on 12 November 2015. The plaintiff and each of the second, third and fourth defendants were beneficiaries of the deceased's estate. The plaintiff claims to be the de facto widow of the deceased. She seeks further provision from the estate pursuant to s 6 of the *Family Provision Act 1972* (WA).

2             The plaintiff's claim gives rise to three questions. First, was she in fact the de facto widow of the deceased. Second, if she was, as at the date of death did the will of the deceased make adequate provision for her under the terms of the Act. Third, if adequate provision was not made what further provision should be made for her from the estate of the deceased. For reasons which follow I am not satisfied the plaintiff was in a de facto relationship with the deceased. If that conclusion be wrong I am not satisfied that the will of the deceased failed to make adequate provision for the plaintiff. In the event that conclusion is wrong I have expressed my views as to what further provision should be made from the estate of the deceased.

3             As at the date of his death the deceased was 61 years of age. He was unmarried and had never been married. He had no children. The second and third defendants are the nephews of the deceased and the fourth defendant is his niece. All are the children of the deceased's brother George. After the death of the deceased's parents George, who was somewhat older than the deceased, took the deceased into his family. It was common ground there developed a very close relationship between the deceased and the second, third and fourth defendants.

4             The plaintiff details her relationship with the deceased in pars 14 - 50 of her affidavit affirmed 11 May 2016. What follows is a summary of that evidence. The plaintiff met the deceased in 2001 through a dating service. At the time they met the deceased was 48 years of age and the plaintiff was 46. The plaintiff was divorced having been married for 23 years before the relationship ended in 1998. She had three children from the marriage - a son born in 1978 and twin daughters born in 1980. At the time the plaintiff met the deceased only one of her daughters resided with her, the other two children having moved out of home.

5             As at the date when she met the deceased the plaintiff was residing in a property in Noranda. She had acquired this property as part of the property settlement with her former husband. She maintained that property as her principal place of residence throughout the course of her

relationship with the deceased. Indeed she still lives in the property. For his part the deceased was at the date the plaintiff and the deceased met resident at a property at 623 Rockingham Road, Munster. That remained the deceased's principal place of residence up until the time of his death. It is nowhere suggested in the evidence that at any stage either the plaintiff or the deceased abandoned their principal place of residence.

6       The plaintiff says that after she and the deceased met in 2001 up until the date of his death they had an exclusive relationship in the sense that they did not date anyone else. They began by seeing one another alternate weekends. The deceased would generally drive up to the plaintiff's home in Noranda either on Friday evening or Saturday morning and stay for the weekend before leaving on Monday morning. For the first two or three years of the relationship the plaintiff would occasionally travel down to Munster to spend the weekends at the deceased's property. Eventually that stopped as the Munster property was in very poor condition. Occasionally the deceased would stay with the plaintiff mid-week but this was dependent upon whether or not the deceased's work brought him to the city. Such mid-week overnight stays appear to have been an exception rather than the rule.

7       The plaintiff says that on a number of occasions she and the deceased discussed the possibility of his moving in to the Noranda property. However, the deceased worked in Munster and there would have been considerable travel time involved if such an arrangement had been implemented. Further, the plaintiff wished to stay in Noranda. She was close to her mother who was in a retirement village in Dianella. The deceased was, according to the plaintiff, fond of the Noranda property because of its size.

8       It is clear the plaintiff and the deceased socialised on a regular basis. They went out on weekends and they spent time with the plaintiff's children. From time to time they also socialised with the second defendant. The plaintiff regularly attended Christmas functions with the deceased. Although it is not stated it would seem that the socialising largely took place on the weekends but that is only to be expected.

9       From time to time the deceased and the plaintiff travelled together. In August 2008 the plaintiff and the deceased travelled to Canada for the wedding of one of the plaintiff's daughters. They were away for four weeks. In 2011 they went together to Bali for a holiday. In 2013 they went to Melbourne to see the Fremantle Dockers play Hawthorn in the

Grand Final. They were both enthusiastic Dockers supporters. They had other travel planned.

10        It would seem that the deceased paid for all of the travel costs. He also appears to have paid the expenses when the plaintiff and the deceased socialised. Some 10 years ago the plaintiff and the deceased took out a lease of a shack at Navel Base. This was the one occasion on which they intermingled their finances. Other than that they kept separate bank accounts and paid expenses individually. However, from about October 2009 the deceased did provide the plaintiff with \$1,800 a month. The plaintiff used these funds to pay part of her living expenses. Effectively the payment made up for the shortfall between the plaintiff's expenses and what she obtained from part-time employment.

11        Although it is not mentioned in her affidavit the plaintiff said in oral evidence she and the deceased enjoyed a sexual relationship. There is no reason to doubt that was the case.

12        Counsel for the defendants did not cross-examine the plaintiff at all in relation to her claim she was a de facto of the deceased. That was a bold forensic decision. At the time I was surprised; in retrospect it was a wise decision. As counsel for the first and second defendants said in his closing submissions the evidence of the plaintiff spoke for itself. Nothing would have been gained by counsel cross-examining the plaintiff when he had no conflicting evidence to advance. An acrimonious exchange would have been in no one's interests. In the brief time she was in the witness box it did not appear as though the plaintiff was the type of person who would have crumbled under cross-examination.

13        There is one matter which should be mentioned. There are other proceedings on foot between the plaintiff and the first defendant in his capacity as executor of the estate of the deceased. In those proceedings the plaintiff has pleaded she was the de facto widow of the deceased. In his defence the first defendant admits that fact. In my view that plea and the admission is irrelevant. It is not a material fact in that proceeding as to whether or not the plaintiff in this action was the de facto partner of the deceased. The admission made by the first defendant is neither here nor there in the other action let alone in these proceedings. Moreover, in these proceedings the question of whether or not the plaintiff was the de facto partner of the deceased goes to jurisdiction. If she was not the deceased's de facto partner then there is no jurisdiction to make an award. An admission by the first defendant cannot serve to enliven a jurisdiction which does not exist. It is for the court to determine in these proceedings

whether or not the plaintiff is in the class of eligible persons to bring an application.

14 Section 13A of the *Interpretation Act 1984* (WA) sets out a number of factors relevant to determining whether or not a de facto relationship exists. Relevantly it is in the following terms:

- (1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage like relationship.
- (2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential -
  - (a) the length of the relationship between them;
  - (b) whether the 2 persons have resided together;
  - (c) the nature and extent of common residence;
  - (d) whether there is, or has been, a sexual relationship between them;
  - (e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  - (f) the ownership, use and acquisition of their property (including property they own individually);
  - (g) the degree of mutual commitment by them to a shared life;
  - (h) whether they care for and support children;
  - (i) the reputation, and public aspects, of the relationship between them.

15 Dealing with these factors in turn the relationship was one of long-standing - just on 14 years. The plaintiff and the deceased resided together intermittently but it cannot be said they resided together as a couple. That is to say they did not live together in the conventional sense that they shared a common home. To the extent they had a common residence it was the Noranda property. But it can hardly be said that it was a 'common residence'. The plaintiff had the Noranda property and the deceased had his property in Munster. Each doubtless regarded their property as their principal place of residence and in fact that was the case.

16           The deceased and the plaintiff had limited financial inter-dependence. The plaintiff says she had no idea of the deceased's financial position. There is no evidence the deceased had any idea of the plaintiff's financial position. The deceased must have been aware the plaintiff was of limited financial means because he provided her with \$1,800 per month and he paid the expenses both for social occasions and for travel. They shared ownership of the shack at Navel Base. They did not have joint bank accounts and they did not pool their funds. It is clear there was a considerable degree of financial independence between the parties.

17           Apart from the shack at Navel Base the plaintiff and the deceased do not appear to have owned any property jointly. That extends to personal property. There is no suggestion in the plaintiff's evidence they jointly owned a caravan or even household furniture. It appears each had their own possessions.

18           Perhaps the most difficult of the criteria to judge is that found in s 13A(2)(g). The plaintiff says she and the deceased did from time to time discuss the possibility of marrying and living together. She says this was particularly so as the deceased got older and looked at disentangling his business affairs from those of the second defendant. The plaintiff says the reason they did not marry is that they did not see the point. Nonetheless it remains the fact they did not make the public commitment involved in marriage. They do appear to have maintained an exclusive relationship one with the other. To that extent they were committed. They socialised together and no doubt many of their friends and family regarded them as a couple. That feeds in to s 13A(2)(i).

19           The plaintiff and the deceased did not have children together. However when they began to reside together on weekends the plaintiff had living with her a daughter. No doubt to an extent the deceased cared for and supported the plaintiff's daughter. Further, he appears to have assisted the plaintiff's children from time to time in practical ways. There was certainly no suggestion of any animosity or ill-feeling between the plaintiff's children and the deceased.

20           In determining whether or not a de facto relationship exists the decided cases are really of little assistance. Reference was made to the decision of Harper J in *Sinclair v Forsyth* [2008] VSC 250. In that case the plaintiff and the deceased did not live together and appear not have intermingled their finances. Yet his Honour found they did live in a

de facto relationship. But the case was significantly different to this one. The relationship was far closer and far more consistent.

21 In this case although I would accept there was a degree of mutual love and affection between the parties their relationship does not seem to me to have been 'marriage like'. They did not live together, they did not intermingle their finances (save with respect to the Navel Base shack), and they appear to have had a significant degree of independence. There is no evidence, for instance, of how often they spoke to one another. The evidence suggests the deceased arrived at the plaintiff's house on Friday afternoon or Saturday morning and left on Monday morning. The extent of their contact in the interim is not covered by the evidence. There was some mid-week contact but it appears to have been irregular and then very much a matter of convenience - the deceased happened to be in Perth on business. In the end my overall impression that while the parties were close the relationship just did not meet the criteria of a marriage.

22 Accordingly I am not satisfied the plaintiff was the de facto widow of the deceased and accordingly she does not have standing to maintain a claim. However, in the event I am wrong in that conclusion I will deal with the issues which arise assuming the plaintiff has standing.

23 As at the date of his death the deceased owned four properties and held the lease of the shack at Naval Base jointly with the plaintiff. He also had a self-managed superannuation fund. Prior to his death he had sold his interest in a business Radonich Earth Moving to the second defendant. That business was actually conducted by a company known as RET CO. It is the defendants' position the deceased owed money to RET CO for a director's loan. For the purpose of the hearing the parties agreed the net value of the deceased's estate as at the date of his death was \$2,392,150.01. As at the date of the hearing the parties agreed the value of the estate was between \$2,046,307.57 and \$2,111,302.50. Of course all of these values anticipate a sale of the properties and as at the date of trial none of the four properties had been sold.

24 It is also clear that the figures need to be otherwise adjusted. The estimate of the value of the deceased's property as at the date of death includes an amount of \$76,235 for the shack at Naval Base. Not only is it open to question whether the value of the shack would be anything like the nominated value but it seems likely it would pass to the plaintiff by survivorship. Further, the liabilities listed include the alleged loan owing by the deceased to RET CO. As I understand it there is a dispute between the plaintiff and the defendants as to whether or not such a loan was



owing. In the end that dispute does not make a serious difference to the way in which this matter is to be approached. But it does suggest the value of the estate, although agreed, may not actually be accurate.

25       The deceased made his will on 6 June 2008. It was a hand written will on a 'home made will kit' form. In his will the deceased made a number of specific gifts. He left the shack at Naval Base to the plaintiff. As I have said it is doubtful this provision is operative. He left 'Radonich Earth Moving' and a property at 30 Churchill Avenue, Beeliar to the second defendant. This reference to Radonich Earth Moving would also appear to fail. Prior to his death the deceased had disposed of his interest in the business to the second defendant. He left a property at 26 Churchill Avenue, Beeliar to the third defendant and he left a property at 623 Rockingham Road, Munster to the fourth defendant.

26       The residue of his estate was to be divided between the plaintiff and the second, third and fourth defendants equally. The main asset of the residuary estate was the superannuation fund which for probate purposes was valued at \$494,794.15. The primary asset of that superannuation fund was a property at 18 Collis Road, Wattleup. It now seems the Wattleup property may be valued at less than what is owed on the property to Westpac Bank. The first defendant has also used cash in the superannuation fund to pay out what he says is the loan amount the deceased owed to RET CO. Accordingly, and depending on what the Wattleup property realises on sale, the value of the superannuation fund is put at between negative-\$24,400 and positive-\$40,595. That being so I have proceeded on the basis that the plaintiff and the second, third and fourth defendants will receive nothing from distribution of the residuary estate.

27       The personal circumstances of the plaintiff, largely taken from her first affidavit, can be summarised as follows. She was born on 13 April 1955 and as the date of the death of the deceased was aged 60. As at the date of trial she is aged 62. She was the sole owner of the property in Noranda which was valued at around \$700,000. As at the date of death of the deceased she was working in a permanent part-time position three days a week. She had held that position for some 17 years. As at the date of death of the deceased she was earning a net amount of \$2,400 per month from her employment. She had superannuation in an amount of \$72,000 and owned parcels of Telstra and Bank of Queensland shares valued at \$4,500. She owned a motor vehicle valued at \$13,000. The Noranda property was mortgaged in an amount of \$80,000.

28        It seems that the value of the Noranda property has declined since the date of the death of the deceased. The value according to the plaintiff is now \$600,000. The property is 1,012 m<sup>2</sup> and is zoned R20/40 so it has the potential to accommodate group dwellings. Be that as it may for the purposes of this application it can be assumed the present value of the property is \$600,000. As at the date of trial the plaintiff's liability under the mortgage had declined slightly to \$63,000. However she has a liability for legal fees and other debts which mean her current liabilities stand at \$116,000.

29        In summary then as at the date of the death of the deceased the plaintiff had net assets of approximately \$714,500. As at the date of trial her net assets were approximately \$506,500.

30        Turning then to the position of the defendants. In his affidavit sworn 16 June 2017 the second defendant deposes that he and his wife's assets total \$196,620. He puts his total assets at \$2,347,354 and his liabilities at \$2,150,734. To reach this figure he assigns a value of \$642,445.34 to the RET CO business. Attached to the second defendant's affidavit are certain company accounts prepared by an accountant. They are very difficult to follow. In the end it is difficult to know what they establish. In par 57 of his affidavit the second defendant expresses some doubts as to the value of RET CO. It is an earth moving business and it has clearly suffered as a consequence of the economic downturn. The second defendant says its future is uncertain. With that in mind he and his wife have placed their family home on the market. It is reasonable to assume the second defendant is of limited means.

31        The third and fourth defendants are somewhat more advantageously placed. The third defendant puts his net worth at \$450,000. He owns a house worth approximately \$900,000 which is encumbered by a mortgage of approximately \$534,000. He has superannuation of approximately \$130,000. He says his business assets - and he too is in the earth moving business - are valued at \$330,000. Against that he has a debt of \$386,000.

32        The fourth defendant is a teacher. She is married and she owns a property estimated to be worth \$900,000. She has a mortgage of \$190,000. Between them she and her husband have superannuation of just over \$600,000. She has four children only one of whom is under the age of 18.

33 The question which falls for determination is whether at the time of his death the deceased made adequate provision for the proper maintenance, support, education or advancement in life of the plaintiff. The principles to be applied in determining the application have been considered in numerous cases and do not bear repeating. It is enough if I refer to the decision of Pritchard J in *Devenish v Devenish* [2011] WASC 129. With respect her Honour there sets out the principles as clearly as can be done.

34 There was a significant difference in approach between counsel for the plaintiff and counsel for the first and second defendants in relation to the proper approach to be adopted when the claimant is the widow of the deceased. In par 17 of the plaintiff's written submissions counsel for the plaintiff put the position as follows:

17. The Courts approach to a claimant who was the wife/ de facto of the deceased has been summarised by the New South Wales Supreme Court and includes the following principles:

17.1 As a broad general rule, and in the absence of special circumstances, the duty of the deceased to the widow, to the extent to which his assets permit him to do so, is to ensure that she is secure in the matrimonial home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies and the amount should be sufficient to free her mind from any reasonable fear of any insufficiency as she grows older and her health and strength fail;

17.2 The broad general rule should not be regarded as one of immutable application;

17.3 Concern as to the capacity of the plaintiff to maintain herself, independently and autonomously, may also bear upon the notion of what is proper provision. (footnotes omitted)

35 In support of that statement of principle counsel relied upon the New South Wales decisions of *Graham v Graham* [2011] NSWSC 504 and *Hertzberg v Hertzberg* [2003] NSWCA 311.

36 For this part counsel for the first and second defendants put the position as follows (counsel did not refer to any case law to support his proposition):

The present case has to be considered in the context of contemporary community standards of modern Australia. That must involve an analysis of the relationship. Whilst a person can be a spouse within the meaning of the enabling legislation, there are different characteristics of relationships. A couple who have lived together for many years, pooled their resources and, in effect, carried on a joint endeavour for their mutual benefit would fall at one end of the spectrum. It is submitted that the relationship between Boris and Noelene falls at or near the opposite end of that spectrum. They never lived together. They appear to have never pooled resources. Noelene had her house. Boris had his house (par 44).

37 With respect to counsel I am not sure either of the two formulations of principle accords with the law in this State. It would appear the New South Wales approach to claims by a widow have not been reduced to the formulations suggested by counsel for the plaintiff in this jurisdiction. That said there is really nothing in that formulation which is at odds with general principles. But each case must depend upon its own circumstances. Those comments apply equally to the statement of principle advanced by counsel for the first and second defendants. It has always been the case the nature of the relationship between the parties is one of the factors to be considered in determining whether or not the jurisdiction question is answered in favour of a plaintiff. Whether there is some 'moral obligation' on a deceased to provide for a plaintiff or whether the proper view is an assessment must be made in light of 'community standards' is the subject of debate.

38 In the end it is a matter of fact as to whether adequate provision has been made for a plaintiff. But in determining that fact certain value judgments must be made. That really means nothing more than looking at all the surrounding circumstances to determine whether or not the jurisdiction question is answered in the plaintiff's favour.

39 In this case I am not satisfied the plaintiff has met the jurisdictional test. As the will is presently structured she will receive an amount of \$400,000. That would allow her to discharge her mortgage, pay off other debts and she would still have liquid assets of around \$300,000. Even assuming her monthly liabilities exceed her income by an amount of \$3,000 properly invested the amount she has been left should provide adequately for her for the remainder of her life. While she would not be comfortably placed I am satisfied that the amount left to her by the deceased was in all the circumstances adequate.

40 (During the course of the hearing, there was a suggestion the plaintiff would be obliged to pay capital gains on the property she inherited from the deceased. There was no direct evidence as to what the amount of the

tax might be or indeed how it would be calculated. Even assuming tax was payable in an amount of around \$50,000, it would still seem to me adequate provision has been made for the plaintiff.)

41       The plaintiff's case suffered from a further difficulty. There was no evidence as to any need she may have for funds in the future. She clearly has a shortfall of income over expenditure. But there was no evidence of what she might do with the property in Noranda as she ages, what return she would need to get on a fund invested to support her lifestyle, what the return might be if she were to subdivide the Noranda property and so on. That being the case, I have assumed she will sell the property left to her by the deceased, invest the proceeds and use a combination of the capital and the income to support her lifestyle. No other assumption was available.

42       In reaching that conclusion I have taken into account the competing claims of the second, third and fourth defendants. So far as the second defendant is concerned he is clearly under some financial pressure. The deceased was involved in the RET CO business with the second defendant and to some extent that can be said to give rise to a legitimate claim on the deceased's bounty. Furthermore, the second, third and fourth defendants seem to have enjoyed a very close relationship with the deceased. He doubtless wished to enhance their position. That is a legitimate reason for preserving their entitlement.

43       Accordingly I would dismiss the plaintiff's application on the basis she has not satisfied the jurisdictional question. I will hear the parties as to the form of orders and as to costs.