



Supreme Court
New South Wales

Case Name: Bryan v Beveridge

Medium Neutral Citation: [2021] NSWSC 1406

Hearing Date(s): 26 & 29 October 2021, 1 November 2021

Date of Orders: 8 November 2021

Decision Date: 8 November 2021

Jurisdiction: Equity - Duty List

Before: Slattery J

Decision: Order for interim provision made. Issues of enforcement of that order reserved for further consideration.

Catchwords: FAMILY PROVISION – interim family provision orders – Succession Act 2006, s 62 – no contest that an interim family provision order should be made – issue concerning the timing of the interim family provision order – whether any interim provision should be paid on 30 December 2021 or in late January 2022 – capacity of the estate to pay interim provision in the short term – whether interim family provision order can be made against notional estate.

Legislation Cited: Civil Procedure Act 2005, s 56(3)
Family Provision Act 1982, s 9(5)
Probate and Administration Act 1898, s 84
Succession Act 2006, ss 3, 62
Uniform Civil Procedure Rules 2005, r 54.3(3)

Cases Cited: Roberts v Moses [2015] NSWSC 1504
Steiner v Strang [2017] NSWSC 132
Young v Salkeld (1985) 4 NSWLR 375

Category: Procedural rulings

Parties: Plaintiff: Sharron Bryan
First defendant: Patricia Ellen Beveridge
Second defendant: Reysson Pty Ltd

Representation: Counsel:
Plaintiff: K. Morrissey
First and second defendants: C. Wilson

Solicitors:
Plaintiff: T. Goldberg, Turner Freeman Lawyers
First and second defendants: S. Dunn, Dunn Legal

File Number(s): 2019/333391

Publication Restriction: No

JUDGMENT

- 1 The plaintiff, Ms Sharron Bryan brings an application for an order for interim provision out of the estate of her late father, Keith Alexander Beveridge (“the deceased”) under *Succession Act 2006*, s 62. The first defendant, the deceased’s executor, Ms Patricia Ellen Beveridge, who is the plaintiff’s mother, resists aspects of her daughter’s application.
- 2 The deceased’s last will gave the whole of his estate to the first defendant. It is not in issue that the market value of the deceased’s estate is presently of the order of \$8 to \$12 million and that property to the value of about \$50 million, some of which is held by the second defendant, a corporate trustee of a discretionary trust controlled by the first defendant, is potentially available for designation as notional estate.
- 3 The evidence supports the conclusion that the plaintiff has limited financial resources, has been living in a state of financial uncertainty for some years since the deceased’s death, and is being treated by medical specialists for multiple myeloma.
- 4 By her Amended Notice of Motion dated 26 October 2021 (“the Motion”), the plaintiff seeks an order for interim provision from the deceased’s estate in the amount of \$220,206.62 by 1 December 2021. The plaintiff says she proposes to apply this interim provision to meet medical expenses for treatment

associated with her multiple myeloma which is due to commence in January 2022.

- 5 The Motion was heard on 1 November 2021 in the Equity Duty List. The defendants concede that some interim provision should be provided and they accept that the estate can provide \$20,000 of that interim provision on or before 22 November 2021. The narrow dispute that remains between these parties is as to the timing of payment of the balance of the interim provision.
- 6 The plaintiff says she needs the bulk of the funding requested by 1 December 2021 to pay for her cancer treatment. The defendant says that the estate cannot pay the balance until 31 January 2022. In effect the contest is about whether the sum of \$200,000 will be paid to the plaintiff at the beginning or at the end of the period of two months between 1 December 2021 and 31 January 2022. This point has occupied a disproportionate portion of the energy of these parties and their legal advisors in the last few days.
- 7 Mr K. Morrissey of counsel, instructed by Mr Goldberg of Turner Freeman Lawyers, appeared for the plaintiff. Mr C. Wilson of counsel instructed by Mr Dunn of Dunn Legal appeared for the defendant.
- 8 These reasons order the payment of the interim provision by 1 December 2021, and in default of that order grant to the plaintiff liberty to apply to seek orders to enforce the order for the payment of the balance against the estate.

Applicable Legal Principles

- 9 The applicable legal principles may be shortly stated. *Succession Act*, s 62 provides that the Court may make an interim family provision order before it has fully considered an application for a final family provision order, “if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order”. That wording in substance appeared in the predecessor legislation, the *Family Provision Act 1982*, s 9(5) (“the *FPA*”). The current statutory jurisdiction to make interim orders was not available before the enactment of the *FPA*.
- 10 The decision of *Young v Salkeld* (1985) 4 NSWLR 375 (“*Salkeld*”) considered *FPA*, s 9(5). In *Salkeld*, the duties of the Court on such an application were

summarised by Young J as described in this paragraph. The Court is to examine what evidentiary material is placed before it to assess from that material the probable outcome of the proceedings at final hearing. The Court is also required to consider, as at the date when the Court makes its final consideration of the matter, what the applicant's and the estate's circumstances are likely to be. When exercising this jurisdiction, the Court may make an interim order that it considers proper to make and it is not restricted to making provision for immediate maintenance. And it would ordinarily be proper to make an order that would give the eligible person only such a sum as would deal with the real needs of the applicant pending the hearing and then usually only on terms that the monies could be recovered if the applicant were to be unsuccessful.

- 11 Kunc J applied these principles when exercising *Succession Act*, s 62 jurisdiction in *Roberts v Moses* [2015] NSWSC 1504 ("*Roberts*") and in *Steiner v Strang* [2017] NSWSC 132 ("*Steiner*"). In *Roberts* (at [13]) and *Steiner* (at [28]) Kunc J dealt with the scope of interim family provision orders. His Honour pointed out that a "family provision order" as the term is used in s 62 is no less a "family provision order", than that term is defined in *Succession Act*, s 3. The definition of "the family provision order" in s 3 is "an order made by the Court under Chapter 3 in relation to the estate or the notional estate of the deceased person to provide from that estate for the maintenance education or advancement in life of an eligible person". Kunc J observed in *Roberts* and *Steiner* that in the text of s 62, "family provision order" is only qualified by the word "interim". Importantly for this case, Kunc J's reasons in *Roberts* and *Steiner* would justify interim orders being made against notional estate. This issue has not been contested before me on this application as yet and at present orders will only be made against the first defendant.
- 12 Another important consequence of Kunc J's reasons in *Roberts* and *Steiner* in this case is that, if required, the Court may be able to look to the statutory power conferred by *Succession Act*, s 66 to make consequential and ancillary orders "in addition to or as part of a family provision order". Those consequential orders under *Succession Act*, s 66 include the securing of the due performance of an order under Part 3 of the *Succession Act*. s 66(1)(i).

- 13 The Court does not need to look to other sources of jurisdiction here. The Court has power to increase an existing legacy to make an interim distribution, such as in exercise of the jurisdiction conferred by *Probate and Administration Act 1898*, s 84 or *Uniform Civil Procedure Rules 2005*, r 54.3(3). Here, the plaintiff received nothing under the deceased's will and only *Succession Act*, s 62 jurisdiction is engaged.

Additional Background and the Parties' Submissions

- 14 Other background facts based in the evidence are relevant. The plaintiff's claim at final hearing is for a family provision order of over \$8 million. Its major components include medical treatment of over \$1.5 million, superannuation of \$2 million and school fees for the plaintiff's children of \$250,000. In addition, the plaintiff claims many incidental medical and other expenses.
- 15 The evidence of Mr Goldberg, the solicitor for the plaintiff, estimates that the real property in the estate may be valued between about \$8 to \$12 million and that the notional estate comprised largely of real property may have a value of at least \$50 million. Mr Goldberg says that there are other unknown assets in the estate, including proceeds of loan accounts and cash at the bank. His affidavit of 1 November 2021 exhibits appraisals of five properties, including a commercial property in Parramatta said to have a market value of \$35 million and a property in Dundas ("the Dundas property"), said to have a market value of \$14.5 million. The commercial property in Parramatta is a 42-room motel with a liquor license, swimming pool and conference facility, which, according to the plaintiff, is enjoying high rates of occupancy. A substantial residential property in Chatswood is the major real property in the estate.
- 16 The order for interim provision the plaintiff seeks from the estate or the notional estate is the aggregate of various sums to the total of \$220,206.62. These are made up as follows.
- 17 The plaintiff has personal liabilities in the sum of just over \$15,000. She currently pays health insurance premiums of \$565.85 per month. Part of her claim for interim family provision is to cover six months' of health insurance premiums in the total sum of \$3,394.10. Moreover, the plaintiff's evidence is that she is without funds to pay her daughter, Jessika's school fees for the next

two terms and needs \$6,500 to pay those. The plaintiff does not have a motor vehicle and says that she needs one and seeks \$30,000 for a used Hyundai motor vehicle. Neither the plaintiff nor her husband have any spare cash and they seek an amount of \$5,000 to assist her until the final hearing of the proceedings in order to cope with her ongoing general medical needs.

- 18 In addition to those needs, the plaintiff's evidence is that she needs treatment with the anti-cancer drug, Daratumumab. The plaintiff's evidence is that Daratumumab is now available in Australia but it requires private funding, although the other drugs used in combination with it are available via the Pharmaceutical Benefits Scheme ("PBS"). The defendants' evidence is that Daratumumab is now available in the PBS. But the plaintiff's personal eligibility for PBS benefits for Daratumumab is not established, so the proper inference from the plaintiff's evidence is that she is still likely to have to pay for it.
- 19 The plaintiff's evidence is that she needs this Daratumumab treatment now, and that the treatment plan would include eight doses received weekly, then eight doses given fortnightly for four months and which would then continue monthly. Her treatment needs to start in January 2022 and the total cost of her treatments would be \$157,278. The plaintiff's evidence is that she would be asked to pay for this sum for this treatment upfront in early December in 2021. In addition to these treatments, the plaintiff's evidence is that she is likely to incur additional costs not covered by ordinary health insurance in the order of \$2,780. The plaintiff's claim for \$220,206.62 is the sum of all those various amounts.
- 20 Title searches show that the Dundas property is unencumbered. Title searches also show that some of the defendants' properties are mortgaged to the National Australia Bank, with whom it can be inferred the defendants have a banking relationship.
- 21 In the evidence filed in the proceedings to date, the first defendant has not put on evidence as to her assets or her need for capital, so as to indicate her competing need for the deceased's testamentary bounty.
- 22 The first defendant's evidence establishes that she is very unwell at present. She is undergoing intensive investigations for suspected cancer. The fact of

those investigations and the probability of her needing to undergo surgery and for her to be placed under a general anaesthetic were reasons why the four-day hearing due to commence today, 8 November 2021 was vacated.

- 23 The first defendant gave instructions to solicitors that she would agree to provide the plaintiff with interim family provision of \$220,000, but she expressed her concern that she did not have the capacity to pay that sum immediately. She expressed the view that she may need to sell a property, or to refinance, and that either way “that will take some time”. She said that if a property is to be sold, “I expect that the earliest that funds would be available from settlement would be in mid-January 2022”. Another issue in the proceedings was whether or not the plaintiff could remain at her present residence, a property owned by one of the defendants. The first defendant eliminated that issue by undertaking not to sell that property to raise the \$220,000.
- 24 It is reasonably clear from this evidence, and from submissions made on behalf of the defendants, that counsel has only been able to obtain limited clear instructions from the first defendant. This is due both to her present medical condition and her concerns about the medical treatment that she may soon have to undertake.
- 25 The medical evidence conflicts as to whether the plaintiff needs the cancer treatment that underpins her claim for interim family provision. This rather unusual contest emerges in the following way. After conflicting medical evidence and uncertainty about the range of treatments available to the plaintiff both locally and internationally, the Court decided to appoint Professor Simon Harrison, an Honorary Clinical Professor at the Peter MacCallum Cancer Centre, Department of Oncology at Melbourne University as a Court expert to answer questions about a wide range of options both in Australia and overseas for the plaintiff’s future treatment.
- 26 Professor Harrison provided a comprehensive report answering some 77 detailed questions which has been the subject of submissions in these interlocutory proceedings. Mr Wilson, on behalf of the estate, submits with support from Professor Harrison’s report that it does not recommend therapies

for the plaintiff, such as Car-T therapy as being any better than the treatment she has presently been receiving. It can be accepted Professor Harrison does not see any clear benefit of Car-T therapy for the plaintiff.

- 27 But in answer to several questions, Professor Harrison gives the opinion that Daratumumab is an available second line therapy for the plaintiff and that its cost is much the same as the plaintiff claims it to be. Whatever be the outcome of the medical evidence about Car-T therapy, Professor Harrison's report does appear to support Daratumumab as a "second line" therapy for the plaintiff.
- 28 The defendants' submissions focus on the lack of need for the plaintiff receiving Car-T treatment. But it seems clear from the evidence of Mr Goldberg and Professor Harrison that the interim provision is being sought, not for Car-T treatment, but for Daratumumab and Professor Harrison does not rule it out for the plaintiff.
- 29 The plaintiff's treating oncologist, Dr Jane Freeman, has strongly and continuously recommended the commencement of Daratumumab-based therapy for the plaintiff in several medical reports that she has provided to the Court.
- 30 This medical evidence does not appear to be in as much conflict as the defendants sought to submit. But even if it were, context is important. This is an interlocutory hearing, not a final hearing. This is not the time for the Court to make a final determination of any conflicts between Professor Harrison's evidence and Dr Freeman's evidence, or that of any other medical specialist. The Court is very cautious about preferring the evidence of any expert over another before a full final hearing takes place.
- 31 The Court must make this decision based on the available evidence, which includes a recommendation by the plaintiff's treating oncologist for the treatment for which the interim provision is required. The Court would be loath to deny the plaintiff interim provision against the recommendation of her treating oncologist, on the basis that it might be in conflict with the evidence of a Court-appointed expert, albeit an eminent expert. In the Court's view, there is strong evidence that the plaintiff has near-term financial need for interim provision for medical treatment with Daratumumab, which she needs.

- 32 Some options to facilitate the payment of an interim family provision order have been canvassed in argument. The Court raised the possibility of charging estate property with the payment of interim provision, perhaps using *Succession Act*, s 66. The existence of the Court's charge could potentially be used to raise the funds with a financier organised, if not by the defendants, then by the plaintiff. Mr Goldberg, the solicitor for the plaintiff, rejected this idea on the basis that his firm did not raise money for clients, and the defendant should already have the resources to raise the funds required. The example the Court gave would not necessarily mean that the plaintiff's firm would need to raise the money: that is a task that could perhaps be outsourced.
- 33 Mr Goldberg points to the fact that the defendants have at least one significant piece of land that is unencumbered at Dundas, and that they could easily raise the funds on that land should they wish to do so. Mr Goldberg says that raising the funds is the responsibility of the defendants, whose property is only very lightly geared. But this unencumbered land at Dundas is owned by the second defendant, and is not part of the estate. The plaintiff says it is potentially able to be designated as notional estate. But if it comes to a contest the parties may be at issue, as to whether an interim family provision order can be made against notional estate.

Consideration

- 34 The plaintiff is an eligible person. Her evidence establishes to the level required for an interim order, that she is a person of demonstrable financial need. She has received nothing from the substantial estate of her father, the deceased. The general quality of her relationship with the deceased seems not to be significantly in issue. The Court concludes on the evidence that it is likely that given her overall demonstrated need she will be likely to receive no less provision than \$220,206.62 at final hearing. There is jurisdiction to make an interim family provision order for the plaintiff in these proceedings.
- 35 The contest about the timing of the interim provision came down to two issues. First, the defendant submitted that the plaintiff did not need the medical treatment for which the interim provision was claimed. And second, the defendant submitted that the estate was unable to raise the funds to pay the

interim provision before 31 January 2022. These reasons consider both these issues.

- 36 As to the plaintiff's need for medical treatment, the Court has reasoned above that it regards the medical evidence as sufficient to justify the plaintiff's claim for interim provision to cover her medical expenses. But even if the plaintiff's case linking her claim for interim provision with an immediate need to cover medical expenses was weaker than it in fact is authorities such as *Salkeld* make clear that orders for interim provision can be made for purposes other than making provision for immediate maintenance. Even if the defendants' case, put at its highest and contrary to what the Court has inferred, were made out and the Court found that the plaintiff's need for the Daratumumab treatment is doubtful, interim provision could still be justified on the basis that it would enable her to keep her medical options open in the medical uncertainty in which she finds herself.
- 37 As to the defendants' capacity to raise the funds, the Court will order the provision of the \$180,000 of requested interim provision by 1 December 2021. This is \$160,000 for the Daratumumab and \$20,000 for other general expenses.
- 38 The defendant has just under a month to raise \$180,000 on existing property. Despite her illness, with the assistance of her solicitor, it does not seem objectively to be an unusually demanding task for the first defendant to approach her existing bankers to raise funds on estate properties by 1 December 2021 for the interim provision being requested. The Court does not readily accept that the funds cannot be raised through the estate's existing bankers or other financiers by that time, given the amount of the interim provision being sought, and the size of the estate and the time available to the estate to raise the funds. The defendants do not advance evidence of approaches to their bankers for short term finance having already been rejected.
- 39 The Court has decided to adjourn this application to the week commencing Monday, 6 December 2021 with a listing of no more than one hour at a time to be arranged between the parties and with my Chambers. The Court will review

whether the defendant has complied with these orders. If the defendant has complied with the orders, then the Motion for interim provision can be finalised by consent.

- 40 If by the week commencing 6 December 2021, the defendant has not complied with the orders, the Court will address the question of what supplementary orders, if any, should be made to enable the plaintiff to have the benefit of the interim provision ordered today. If there is default in relation to order for payment for provision by 1 December 2021, the Court expects the plaintiff to come to the Court with a concrete thought-out proposal and a precise prayer for relief, as to how the funds can be raised by the estate, or the plaintiff with the assistance of the estate, to meet the plaintiff's needs to pay for her medical treatment.

Conclusion and Orders

- 41 For these reasons, the Court makes the following orders, notations and directions:
- (1) Subject to Order (3), order the first defendant to pay the sum of \$220,206.62 to the plaintiff by way of an interim family provision order pursuant to *Succession Act 2006*, s 62 (“the interim provision”);
 - (2) Order that the first defendant pay the interim provision as follows:
 - (a) As to the sum of \$20,000, on or before 22 November 2021;
 - (b) As to the sum of \$160,000 by 1 December 2021;
 - (c) As to the sum of \$40,206.26, on or before 31 January 2022;
 - (3) Orders (1) and (2) are subject to the proviso that if the plaintiff is unsuccessful in the proceedings against the first defendant then the plaintiff will repay to the first defendant the sums paid pursuant to Orders (1) and (2);
 - (4) Note the undertaking of the defendants to the Court not to take any action to evict or remove the plaintiff from her residence at [residential address redacted from publication] during the pendency of these proceedings, including the pendency of any appeal that might be lodged from any award or judgment in respect of them;
 - (5) Order the defendants to pay the plaintiff's costs of and incidental to the plaintiff's application for interim provision;
 - (6) Order the defendants to pay the plaintiff's costs thrown away by reason of the orders made by the Court on 26 October 2021 vacating the

hearing date commencing on 8 November 2021, as agreed or assessed;

- (7) Adjourn these proceedings to a date to be fixed by arrangement with the Associate to Slattery J and reserve for further consideration on that date issues of the enforcement of Orders (1) and (2) if the first defendant defaults on those orders; and
- (8) Liberty to apply.

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