[2009] WASC 115

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	MILLER -v- DUNCAN ROBERT WARREN AS EXECUTOR OF THE ESTATE OF MURIEL JOSEPHINE COSTIGAN [2009] WASC 115
CORAM	**:**	LE MIERE J
HEARD	**:**	12 & 13 FEBRUARY 2009
DELIVERED	**:**	5 MAY 2009
FILE NO/S	**:**	CIV 2263 of 2007
MATTER	**:**	The *Inheritance (Family & Dependants Provision) Act 1972* The Will of Muriel Josephine Costigan, late of 59 Kirwan Street, Floreat in the State of Western Australia, Widow, deceased, Probate Number 3633/07
BETWEEN	**:**	MERIDITH ANNE MILLER Plaintiff AND DUNCAN ROBERT WARREN AS EXECUTOR OF THE ESTATE OF MURIEL JOSEPHINE COSTIGAN First Defendant SUZANNE ELIZABETH ALBANUS Second Defendant ROBYNNE PATRICIA HALL Third Defendant

Catchwords:

Inheritance (Family and Dependants Provision) Act 1972 - Whether adequate provision made for the plaintiff's proper maintenance, support or advancement in life - Whether deceased had a moral duty to make further provision for the plaintiff after 30 years of estrangement - Turns on own facts

Legislation:

Inheritance (Family and Dependants Provision) Act 1972 (WA), s 6, s 7

Result:

Will varied to make further provision for plaintiff

Category: B

Representation:

Counsel:

Plaintiff	:	Mr M J C Bateman
First Defendant	:	No appearance
Second Defendant	:	Mr M D Cuerden
Third Defendant	:	Mr M D Cuerden

Solicitors:

Plaintiff	:	Batemans
First Defendant	:	No appearance
Second Defendant	:	David Rawlinson
Third Defendant	:	David Rawlinson

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

Kleinig v Neal [No 2] [1981] 2 NSWLR 532
Singer v Burghouse (1994) 181 CLR 201
The Pontifical Society for the Propagation of the Faith v Scales (1961) 107 CLR 9
Vigolo v Bostin (2005) 221 CLR 191
Walker v Walker (Unreported, NSWSC, 17 May 1996)
Wheatley v Wheatley [2006] NSWCA 262

1 **LE MIERE J**: John Costigan and Muriel Josephine Costigan were married for 62 years before Mr Costigan died on 9 July 2004. There were four children of the marriage: the second defendant (Suzanne) born 6 March 1948, the plaintiff born 29 December 1950, the third defendant (Robynne) born 15 February 1952 and Leigh born 29 November 1957. Leigh died in 1985 aged 28. Muriel Costigan (the deceased) died on 20 May 2007 and left a will. Under her will she appointed the first defendant as her executor. She left some specific chattels to family and friends. The deceased left to the plaintiff all her shares in Investa Property Trust, which at the date of her death had a value of $50,437.50. The deceased left the house and land, on which the family had lived, other shares and money in various bank accounts to Suzanne and Robynne in equal shares. The statement of the assets and liabilities of the deceased filed in the court by the executor stated that the estate had a net value of $1,780,538.96. The plaintiff claims that she has been left without adequate provision for her proper maintenance, support or advancement in life and applies under s 6 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) (the Act) for an order that such provision as the court thinks fit be made out of the estate for that purpose.

The executor and the estate

2 The executor has sworn three affidavits concerning the assets and liabilities of the estate but otherwise has taken no active part in the proceedings and will abide the decision of the court. For convenience I will refer to Suzanne and Robynne as the defendants.

3 The Investa Property Trust shares were sold and the proceeds invested with ANZ. On 17 January 2008 the balance in that account was $57,184.14. The estate included a sum of $25,000 described as the Department of Veterans Affairs one off payment. That money was not covered by the terms of the will and the plaintiff, Suzanne and Robynne were entitled to that money in equal shares under s 14 of the *Administration Act 1903* (WA). On 23 January 2008 the executor distributed the sum of $8,360.49 to each of the plaintiff, Suzanne and Robynne. That was their entitlement to the Department of Veterans Affairs one off payment. On 16 May 2008 the executor distributed $58,458.62 to each of the plaintiff, Suzanne and Robynne as an interim distribution.

4 Counsel for the defendants submits, and I accept, that the present value of the estate is approximately $1,554,043.85. That sum is calculated as follows. The value of the assets presently held by the

executor is $1,581,129.65 after adding back the interim distributions made on 16 May 2008 and adding back the Department of Veterans Affairs payment of $25,000 plus accrued interest. From that sum of $1,581,129.65 has been deducted estimated income tax to 30 June 2009 and executor's additional legal costs and anticipated further costs.

Legal principles

5 Section 7 of the Act sets out the persons who are entitled to make a claim under the Act for provision out of the estate of the deceased. The plaintiff, as a child of the deceased, is entitled to make a claim.

6 Under s 6 of the Act the court is required to carry out a two stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for her proper maintenance, support, education or advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question'. That description means no more than that the court's power to make an order in favour of an applicant under s 6 is conditioned upon the court being satisfied that the disposition of the deceased's estate is not such as to make adequate provision from her estate for the proper maintenance, support, education or advancement in life of the applicant: ***Singer v Burghouse*** (1994) 181 CLR 201, Mason CJ, Deane and McHugh JJ (208) - (209).

7 Whether, in the disposition of the estate, adequate provision was made for the proper maintenance, support, education or advancement in life of the applicant is to be determined at the date of death of the deceased. If it is found that adequate provision has not been made the court has a discretion to make such provision as it thinks fit. It must take into account the relevant facts as they exist at the time of the making of the order.

8 In ***Vigolo v Bostin*** (2005) 221 CLR 191 Gleeson CJ in discussing the Act said:

> It is evident that, depending upon the stage of consideration involved, the following judgments are required by the terms of s 6. What kind of provision for the matters referred to in that section should be regarded as adequate? What should be regarded as proper maintenance, support, education or advancement in life in the case of a particular applicant? If the court comes to exercise its discretion to make an order in favour of an

> applicant, what should it regard as fit provision for the purposes referred to in the section? Upon whom should the burden of such an order fall?
>
> Each of those judgments is to be made by reference to criteria that are expressed in the most general terms. Two of the key words are 'proper' and 'fit'. Fitness and propriety are value-laden concepts. Those values must have a source external to the decision-maker. Morality is the source of many of the values that are expressed in the common law, in statutes, and in discretionary judicial decision-making [5], [6].

9 Gleeson CJ said that 'from the earliest days courts in expounding the legislative purpose have invoked moral values' [11]. The Chief Justice said that the concept of 'familial obligation, not unnaturally or inappropriately described as moral', was employed 'not only to account for the power of curial intervention, but also to illuminate the legislative purpose bearing upon the nature and extent of appropriate intervention' [11]. The Chief Justice said:

> The legislation was not merely, or even primarily, concerned with relieving the state of the financial burden of supporting indigent widows and children. The courts were not empowered merely to make such provision for an applicant as would rescue the applicant from destitution. The legislative power was to make 'proper' provision. Judicial explanation of what was meant by proper provision was based upon the idea of a moral obligation arising from a familial relationship. That is one of the fundamental ideas upon which the structure of our society is based [12].

10 All members of the court in ***Vigolo v Bostin*** accepted that, in applying the Act, the court must make a value judgment whether appropriate provision has been made, and the content of the value judgment must be determined by prevailing community standards.

11 The plaintiff had a poor relationship with the deceased. At the time of the deceased's death the plaintiff had been estranged from the deceased for about 30 years. Prior to that the plaintiff had engaged in conduct and had experiences that had upset the deceased. Section 6(3) of the Act provides that the court may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the court to disentitle him to the benefit of an order. However, the defendants do not submit that the court should refuse to make an order in favour of the plaintiff on the ground that her character or conduct is such as to disentitle her to the benefit of an order. The defendants submit that the fact of the estrangement, regardless of its cause, is relevant to the existence (and, if relevant, extent) of any moral duty. Before considering the effect of the plaintiff's estrangement from the deceased on her claim it

is convenient to refer to the plaintiff's relationship with the deceased, her personal and financial circumstances and those of Suzanne and Robynne.

The plaintiff's relationship with the deceased in her early years

12 There is little evidence concerning the relationship between the plaintiff and the deceased in the plaintiff's early years. In her affidavit sworn 11 October 2007 the plaintiff said:

> I loved my mother but did not have a good relationship with her [12].

13 In cross-examination the plaintiff agreed that there had always been a lot of problems between her and her parents. The plaintiff denied that she was a teenager that caused trouble to her parents. The plaintiff agreed that she had not had a happy childhood.

14 Counsel for the defendants asked the plaintiff a number of questions about the details and causes of her unhappy childhood. The plaintiff declined to answer those questions. Counsel for the defendants submitted that I should draw the inference that any answer the plaintiff would have given would have been adverse to her case. There are at least two things to be said about that submission. First, the plaintiff's refusal to answer counsel's questions must be seen in the context of the trial as a whole. The plaintiff's refusal to answer questions occurred shortly before lunch on the first day of the trial. Immediately before lunch I informed the plaintiff that counsel for the defendants had informed her that if she declined to answer some of his questions he may not press them but would ask the court to draw an inference adverse to the plaintiff because of her failure to answer counsel's questions. Later that day, counsel returned to the issue of the plaintiff's childhood in the following exchange:

> And you say, 'in my view I had not had a happy childhood'?
>
> ---That's correct.
>
> And I think you have agreed that wasn't because of the way you were brought up?
>
> ---In some ways, yes, it was (ts 117 - 118).

15 Counsel did not then pursue that issue further. At the commencement of the second day of the trial counsel for the plaintiff said that he would re-examine the plaintiff in relation to some matters in respect of which she had not answered questions on the previous day. I raised with both counsel whether counsel for the defendants should be

permitted to put his questions again to the plaintiff before she was re-examined. The plaintiff herself informed me that she was willing to answer questions in relation to Saudi Arabia and in relation to her name change. Counsel for the defendants said that he had no other questions for the plaintiff on those subjects and was unable to remember what the other questions were. I informed counsel for the defendants that if any matters were dealt with in re-examination which he did not have an opportunity to deal with in cross-examination because the plaintiff had declined to answer his question then I would give him an opportunity to take up those matters again with the plaintiff.

16 In re-examination the following exchange took place:

> Now, apart from the telephone communications you made, can you enlighten the court as to why you physically did not come back to pay a visit to your parents?
>
> ---Because I believed that I would have been tolerated but rejected.
>
> Thank you. You were also asked or it was put to you that you were a difficult teenager?
>
> ---That's correct.
>
> Apart from the incident of the forging of the cheque, did you do anything after that period which could be described as perhaps reprehensible?
>
> ---No (ts 148).

17 At the completion of re-examination I invited counsel for the defendants to further question the plaintiff in relation to any matters arising out of her re-examination. Counsel did not put any questions to the plaintiff about her life or relationship with her parents before the age of 17.

18 Second, the nature and causes of the plaintiff's relationship with her parents before the age of 17 are not very important in this case.

19 The defendants expressly do not rely upon disentitling conduct by the plaintiff and hence no occasion arises for drawing any inference as to any misconduct by the plaintiff during those years.

20 The defendants' case is based upon the estrangement of the plaintiff from her parents which the defendants say commenced when the plaintiff left Perth for the eastern states in about 1977. Counsel for the defendants put to the plaintiff that 'you moving to the eastern states was the event that

triggered the breakdown in the relationship between you and your parents'.

21 The plaintiff denied that her move to the eastern states caused the breakdown in the relationship between herself and her parents. However, the plaintiff did not seek to attribute the breakdown in the relationship between her and her parents to any specific events or conduct that had occurred in her childhood. The plaintiff said that 'basically … my mother didn't like me'.

Plaintiff's relationship with deceased 1967 - 1977

22 In 1967 the plaintiff became pregnant at 17. At her mother's instigation the plaintiff gave birth to a child at Ngala, a nursing home for unmarried mothers, and gave the child up for adoption. Some time after that the plaintiff took a motor vehicle belonging to the father of her child and crashed the car. The plaintiff initially admitted that as a result of that conduct she was convicted of the offence of unauthorised use of a motor vehicle. Later she said that the police were called but she did not recall the conviction she received. She said she did not recall anything about going to court. The plaintiff said that in hindsight she thought her action was a payback (ts 161).

23 In about 1968 the plaintiff was employed at Princess Margaret Hospital as a nurse for six months. She ceased that employment when she failed her theory exams and had to leave the course.

24 Some time after those experiences the plaintiff left Western Australia and lived in Sydney. The plaintiff worked in Western Australia for Mayne Nickles and then left Western Australia when she was about 19 or 20. She worked in New South Wales and then went to the United Kingdom in about 1973 or 1974.

25 In London the plaintiff met an American serviceman called James Miller and moved to Saudi Arabia to be with him. The plaintiff says that in 1975 she married Mr Miller according to Sharia law. In about 1975 the plaintiff became homesick. Mr Miller bought her a return ticket to Australia so that she could see her parents. At that time the plaintiff was pregnant. Mr Miller was the father of her child. While the plaintiff was in Australia she lived with her parents. One day the deceased had a telephone conversation with Mr Miller. The deceased subsequently told the plaintiff that she had spoken to Mr Miller and that 'he now knows all about you and does not want you to come near him and he does not want you back'. The plaintiff attempted to contact Mr Miller but was unable to

do so. Her return ticket to Saudi Arabia was cancelled. The plaintiff says that she was desperate to get back to Saudi Arabia to contact Mr Miller and attempt to work things out with him. She took money from her father without his knowledge to pay for her airfare. She did so by forging a cheque.

26 When the plaintiff got back to Saudi Arabia, Mr Miller would have nothing to do with her. He caused her to be charged with adultery. The alleged adultery was with her driver. The plaintiff gave evidence of a very humiliating experience when she was called before a Sharia court. She was then released into the care of American authorities for whom she had been working. Her son, Jamie, was born. She was then ordered to report to the Saudi Arabian authorities to answer the charge of adultery, the penalty for which was death by stoning. Eventually the Australian Embassy officers contacted the plaintiff's parents. The plaintiff was assisted to flee from Saudi Arabia. Suzanne and Robynne both gave evidence that their parents had told them that their father had paid the cost of bringing the plaintiff and Jamie back to Perth. The plaintiff's evidence is that she was not aware that her parents paid for her airfare. She was led to believe that the Australian Government had paid it. I am unable to make any finding as to who paid the costs of the plaintiff and Jamie returning to Perth.

27 After the plaintiff returned to Australia she lived with her parents for 10 weeks. She then put Jamie into day care, got a job at Garrick Agnew Mining and moved into a flat in Wembley. One day her mother visited her and suggested that she move to a house so that there was more room for Jamie. The plaintiff rented a house in Wembley. Soon after that the plaintiff's mother brought Suzanne to come and live with the plaintiff. Suzanne was then pregnant with her second child, Nasain, and moved out shortly after she gave birth. At some stage in 1978 the deceased asked the plaintiff and Jamie to come over to her house. The deceased told the plaintiff that she would assist her if the plaintiff promised to bring Jamie up 'her way'. The plaintiff says that she had not had a happy childhood and was not prepared to make that promise.

28 Shortly after that the plaintiff was contacted by her first child's father. The plaintiff left Western Australia so as to avoid him. The plaintiff did not return to Western Australia before the death of the deceased on 20 May 2007. The plaintiff initially moved to Victoria. Whilst she was living there Leigh came to stay with her. They moved together to New South Wales. The plaintiff and Leigh ran out of money. The deceased sent Leigh some money to return to Western Australia. The

plaintiff did not request that the deceased send her any money for that purpose. The plaintiff has lived in New South Wales ever since.

29 In her affidavit sworn on 11 October 2007 the plaintiff gave the following evidence of her attempts to make contact with her mother after she had moved to New South Wales:

> Since I moved to New South Wales I called my mother to try and stay in contact. I called her at least twice a year. Often, she hung up when she heard my voice. Sometimes, she would ask me what I wanted and if I tried to talk, would just say that she had nothing to talk about. Once when I told her who I was, she told me that she didn't have a daughter called Meredith and hung up.
>
> I kept calling about two times a year until she died. I wanted to restore our relationship, and was hoping that one time there would be a breakthrough. It used to take months to nerve myself to call, and then I'd be depressed for ages afterwards because she still didn't want to know me or Jamie.
>
> The last contact I had with the Deceased was in January this year when I called to ask for her if it was possible to have a copy of her birth certificate so Jamie could obtain an Ancestory Visa for the United Kingdom. The deceased was very upset that I asked for it and stated words to the effect '*Oh, I do not think so'*. I replied words to the effect of '*Well we will just have to obtain it another way*'. She had hung up by the end of my words [29] - [31].

30 The defendants challenge the veracity and accuracy of the plaintiff's evidence concerning her contacts, or attempted contacts, with her mother. The plaintiff's evidence is supported to some extent by the evidence of her former de facto husband, John Dempster, with whom she lived between 1980 and 2004 except for a year or so from 1995.

31 In cross-examination the plaintiff agreed with counsel for the defendants that her attempts to contact her mother were more about an attempt to let Jamie have a relationship with her mother rather than herself. However, the plaintiff denied that she was not interested in a relationship with her mother for her own sake.

32 I accept the thrust of the plaintiff's evidence concerning her contacts, or attempted contacts, with her mother, although she may have somewhat overstated the extent of those contacts, or attempted contacts. I accept that the plaintiff sent her mother Christmas and Mothers Day cards and photos of Jamie when Jamie was young. That must have been within a few years, at the most, of the plaintiff moving to New South Wales. I accept that the plaintiff telephoned the deceased in January 2008.

However, that call was for the purpose of obtaining a copy of the deceased's birth certificate so that Jamie could obtain an ancestry visa for the United Kingdom rather than for the purpose of attempting to establish a relationship with the deceased. I find that the plaintiff continued to telephone her mother occasionally at least until towards the end of the plaintiff's relationship with Mr Dempster in 2004 and possibly later. I find that the plaintiff did so for the purpose of attempting to establish a relationship with her mother.

The plaintiff's financial situation

33 The plaintiff worked as a paralegal or legal secretary from about 1980 to 2005. She gave evidence that she suffered RSI and found that working as a paralegal was exacerbating her injuries. That evidence was not objected to but counsel for the defendants submitted that it was not supported by any medical evidence. Counsel for the defendants asked the plaintiff when she was diagnosed with RSI. The plaintiff said it would have been in 2004 or 2005. The plaintiff did 10 weeks paralegal work in mid to late 2008. The work ceased and the plaintiff started to get RSI again. The plaintiff is not qualified to give evidence that she suffered from the medical condition known as RSI. However, I accept her evidence that she ceased work as a paralegal in about 2004 or 2005 because she was suffering pain or discomfort in both her wrists. I also accept her evidence that after undertaking paralegal work for about 10 weeks in 2008 she again suffered pain and discomfort in her wrists. I find that the plaintiff is not likely to return to work as a paralegal or legal secretary.

34 The plaintiff says that when she ceased working as a paralegal she decided to train as a landscape designer and constructor. She has finished the construction part of the course and has a further six months study to complete the designer part of the course. The plaintiff presently earns about $350 net for working Saturday and Sunday each week for Saint Vincent de Paul Society.

35 Jamie is a qualified landscaper and is currently working in the United Kingdom. Jamie has previously worked as a landscaper in the northern beaches area of New South Wales. The plaintiff intends to complete her landscape designer and constructor course. When she does so Jamie intends to return to Australia and the plaintiff and Jamie intend to start a landscape business in the northern beaches area of New South Wales.

36 The plaintiff owns no substantial assets. She lives in rented accommodation. Her rent is $450 per week of which Jamie pays $250.

Jamie pays for the plaintiff's home phone bill. In her affidavit of 11 October 2007 the plaintiff swore:

> I wear second hand clothes and Jamie's castoffs, so rarely buy new clothes. I do not drink or smoke and my TAFE books are Jamie's old ones. If I go out, it is usually to girlfriend's places, so I don't incur any costs in that way.

37 Counsel for the defendants challenged the plaintiff's evidence concerning her bank accounts and superannuation. The plaintiff has not produced all of her records relating to her bank accounts and superannuation. On the other hand, it appears that she was not challenged in relation to those matters or requested to provide any further supporting documents until she was cross-examined at the hearing of this application. Having assessed the plaintiff's evidence, the documents produced by her and her evidence in cross-examination, I accept her evidence that, in effect, she has no significant savings, other money in bank accounts or superannuation entitlement.

The plaintiff's claim

38 The plaintiff filed a document entitled 'Particulars of the Quantum of the Plaintiff's Claim' pursuant to an order of the Registrar of 8 April 2008. In that document the plaintiff put forward the following claim:

> **1. Accommodation**
>
> The Plaintiff claims that, at the date of her death, the Deceased should have made provision for her accommodation.
>
> The cost of accommodation in the area in which the Plaintiff has resided for 30 years is between $650,000 to $700,000.
>
> **2. Self employment**
>
> The Plaintiff claims that, at the date of her death, the Deceased should have made provision for her to commence a business. The cost of commencing that business is $136,665.00
>
> **3. Superannuation**
>
> The Plaintiff claims that, at the date of her death, the Deceased should have made provision for her superannuation.
>
> Pursuant to the Westpac ASFA Retirement Standard (September 2007), an income of $359.00 per week is required to maintain a modest lifestyle.

Pursuant to the 'High Life Expectancies' table issued by Cumpston Sarjeant Pty Ltd in 2007, the Plaintiff has a life expectancy of 35.92 years, that is, until she is 91 years of age.

Based upon receipt of superannuation from age 65 onwards (and using the 6% table of multipliers) the lump sum for 36 years less 9 years to age 65 being the expected retirement date is 785.6 - 365.5 = 420.1 x $359 = $150,815.90.

4. Effect of other claims

The Plaintiff acknowledges that, pursuant to *Roberts v Roberts* (1992) 9 WAR 549 where the Estate does not have the capacity to meet all competing claims then the role of the Court is not to disregard the weaker claims at the expense of the stronger but to effect a proportionate reduction in each.

The Plaintiff cannot identify any claims made by the Defendant and therefore cannot estimate the effect that their claims (if any) would have on her entitlement.

5. Summary

The Plaintiff claims:

Accommodation	$650,000 to $700,000
Business	$136,665.00
Superannuation	$150,815.90
TOTAL	**$937,480.90 to $987,480.90**

39 In cross-examination the plaintiff said that she does not claim an amount between $650,000 to $700,000 for accommodation. The plaintiff said that she seeks $150,000 to $200,000 which, together with a mortgage loan, would enable her to purchase suitable accommodation.

40 The plaintiff accepted that $136,665 is the whole of the cost of establishing a business and makes no allowance for any contribution to be made by Jamie.

41 The defendants accept that the Westpac ASFA Retirement Standard is that an income of $359 per week is required to maintain a modest lifestyle.

The second defendant's situation

42 Counsel for the defendants accepted that Suzanne and Robynne are in a financially better position than the plaintiff but submitted that there was not a big difference in their situations.

43 Suzanne was 60 years of age at the time of the hearing. She has a doctor of anthropology and art history degree conferred by James Cook University in 2000. She was a university lecturer at James Cook University in Townsville for approximately 20 years from 1986 to 2006. Her most recent employments were teaching contracts in England. These were relatively short term contracts, the last of which was with a technology college in Kent for two months finishing in October 2007. At the time of the hearing Suzanne was engaged by the Catholic Education Office in Queensland to teach on a casual basis on Palm Island. She earns $250 per day.

44 Suzanne has been married and divorced twice. From her second marriage she has two children, Stephanie now aged 36 and Nasain now aged 31.

45 Suzanne lives in shared rental accommodation in Townsville for which she pays $180 each week. Suzanne's principal assets are:

Bank savings account $5,203

Superannuation approximately $125,000

Shares approximately $5,000.

46 Suzanne wishes to continue to live in the Townsville area. An expert valuer, Mark Baxter, gave evidence that the second defendant would need to pay in the range of $350,000 to $400,000 to secure a suitable two bedroom unit in the Townsville inner city area.

The third defendant's situation

47 Robynne turned 57 shortly after the hearing. She is currently employed as an administrative officer with the Department of Child Safety in Queensland. That is a permanent position she has held since August 2006. Her net weekly salary is $550 after deduction of income tax and union fees.

48 Robynne works in Brisbane and lives in Alexandra Headland on the Sunshine Coast, approximately 120 kms from Brisbane. She pays $205 per week rent. She spends about $80 to $90 per week on petrol.

49 Robynne was previously married and divorced. She has two children of her marriage, namely Sam, born 4 November 1982, and Jack, born 23 July 1985. Sam lives with Robynne. Apart from a motor vehicle of no great value, Robynne's principal asset is superannuation valued at $19,040.28 on 1 January 2008.

50 Robynne wishes to continue to live in the Alexandra Headland area. An expert valuer, Paul Caspers, says that Robynne would need to pay in the range of $350,000 to $430,000 to secure a property to meet her stated requirements in the Alexandra Headland area. Those requirements are for a three bedroom unit.

The 'jurisdictional question'

51 The deceased left a moderately large estate. At the time of the deceased's death the plaintiff's financial situation and her immediate prospects were poor. She was studying landscape and design. Her only sources of income were Austudy and earnings from Woolworths during the term holidays. During term time she received $114 per week from Austudy. During holidays she received approximately $246 per week from Woolworths and about $70 per week from Austudy. The plaintiff lived in rental accommodation. Part of the rent was paid by her son, Jamie. Jamie also paid her home phone bill. The plaintiff had no substantial assets which she could realise to meet her living expenses or any unforeseen adverse contingencies.

52 If regard is had only to the plaintiff's age, capacity and financial circumstances at the time of the deceased's death I must conclude that she was left without adequate provision for her proper maintenance and support. However, the defendants' case is that the deceased had no moral duty to make provision for the plaintiff beyond the Investa Property Trust shares and her share of the Department of Veterans Affairs one off payment, which at the date of the death of deceased had a value of $50,437.50 and $8,333.33 respectively, a total of $58,870.83. The net value of the estate was $1,261,477.64. The defendants say that the deceased had no moral duty to make provision for the plaintiff beyond what was left to her from the estate because after 30 years of estrangement, the deceased owed the plaintiff no moral duty to make further provision.

Estrangement between a parent and child

53 In many cases there will have been a period of estrangement between the deceased and the claimant. In ***Kleinig v Neal [No 2]*** [1981] 2 NSWLR 532 Holland J said:

> If it is a case of a parent and child, another circumstance is that the parent was responsible for bringing the child into the world and having done so assumed a duty to be concerned for the child's welfare. A wise parent will recognize that perfect harmony between parent and child is in the nature of things not to be looked for and that, coming to adulthood, a child will want to make his own life just as the parent had done before him. Differences of outlook between different generations is not exceptional, it is the general rule, so some friction between parent and child or disappointment in a parent's hopes and expectations concerning his child will be accepted by the wise parent as almost inevitable. If it occurs, the parent who is just as well as wise will not allow such disharmony or disappointment to blind him to the needs of his child for maintenance, education or advancement in life. The duty of a parent towards his child to provide for those needs on his death, if he can, continues in spite of such disharmony or disappointment and the statute obliges the court to consider whether it has been performed. The court must take in the whole scene and make the judgment that it considers that a wise and just parent would have made in the circumstances. Of course, as the statute provides, if the court considers that the character or conduct of the child has been such as to disentitle the child to any or any further benefit from the parent, it may refuse the child's claim (540).

54 In ***The Pontifical Society for the Propagation of the Faith v Scales*** (1961) 107 CLR 9 a testator died at 86 leaving a wife aged 81 and a son aged 50 and an estate with a gross value of £50,000, by will bequeathed to his wife £21 per month for her life and subject thereto the whole of his estate to charities. He made no bequest to his son. The testator had permanently left his wife and son some 46 years before his death, when the son was 4, and had not communicated with either of them thereafter except by sending his wife a small monthly allowance. The applicant was a middle ranking public servant. He 'had made no great savings but an uncle on his father's side had left him a legacy and they had been able to purchase a home, subject to a mortgage, and a motor car' (18). The High Court held that an order should not be made in favour of the son. Dixon CJ said at 20:

> 'Duty' no doubt does not afford an exclusive test, indeed it is not right to treat it strictly as a test at all. It is but an element, however important an element, that is to be taken into account in weighing all the considerations. One consideration here is that the son has made his way in life and though, like most people, he would find more money an advantage, he is not in

> need. If one really considers the situation of this old man in the closing stages of a long life in which his son has played no part at all, a son to whom his father has meant nothing and who did not even know him, it is hard to see why the testator, in the interest of his son, should be deprived of his complete freedom of testamentary disposition.

55 In ***Walker v Walker*** (Unreported, NSWSC, 17 May 1996) Young J in the Supreme Court of New South Wales held that the testator ought to have made provision for the advancement in life of his adult son who was aged 46 at the time of the hearing. The testator left the matrimonial home and family about 1964 when the plaintiff was aged 14. The plaintiff did not see his father very much after that. He recalled seeing his father in the street about 1968 and speaking to him then but his father did not recognise him until he spoke and his father could not even recall his son's name. About six or seven years before his death the testator, not knowing who the plaintiff was, approached him in relation to obtaining permission to take certain photographs at a site. The testator did not recognise the plaintiff until the plaintiff introduced himself. Thereafter the plaintiff used to ring the testator on odd occasions to keep in contact. The plaintiff would have spoken to the testator on about three occasions. There was no other contact between them. Young J held that in all the circumstances the testator ought to have made provision for the advancement in life of the plaintiff. Young J said:

> I do not consider that there is any purpose in analysing whose fault it was that the state of non-communication came into place. In family relationships, hurts are inflicted or suffered sometimes consciously, sometimes unconsciously … It is often impossible to work out whether the degree of separation between parent and child at the date of the parent's death is solely the fault of either or whether it has come about by factors too strong for either to control or somewhere in between. The important matter is not fault, but, whether in all the circumstances it would be expected by the community that the testator would have to make a greater benefaction than he in fact did to constitute proper or adequate provision for the plaintiff.
>
> Accordingly, I reject the approach that all an applicant under this Act has to do is to prove that he or she is an eligible person and that he or she reasonably needs more financial assistance. The cases show that there must be a full investigation into all the facts and circumstances of the matter to see whether the community would expect that a person in the plight of this testator ought to have made provision or further provision for the applicant. Although it is not much mentioned in recent decisions, the older authorities often mention the fact that the Act did not intend to affect freedom of testation except insofar as that freedom had to be abridged in order to ensure that people made proper provision for those who were dependant on them financially or morally …[30] - [31].

The circumstances of this case

56 In her will the deceased stated that she gave 'only' the Investa Property Trust shares to the plaintiff because the deceased had not seen the plaintiff for the last 30 years. There is some evidence that the plaintiff had disappointed the deceased and her father and had caused them distress in her teens and twenties. Some time during late 2003, or early 2004, the deceased and Mr Costigan said to a neighbour, Ms Pyne, that:

(1) the plaintiff had taken off to Saudi Arabia and whilst in Saudi Arabia she had gotten into difficulties;

(2) the plaintiff had rung Mr Costigan from Saudi Arabia to say that she was in trouble. He then had to assist her in returning to Australia;

(3) since then they had been estranged for about 30 years.

That is not evidence of the truth of the statements made by the deceased but it is evidence of why the deceased made her will the way she did.

57 In their affidavit evidence Suzanne and Robynne sought to put the fault for the estrangement on the plaintiff. Suzanne said that when the plaintiff became pregnant at 17 years both of her parents were deeply upset by the pregnancy and observed that the plaintiff was under the legal age of consent and was living at home with no money and no means of supporting a child. In her affidavit of 24 April 2008 Suzanne swore that, after the plaintiff had returned to Perth from Saudi Arabia with Jamie, the deceased told Suzanne that the Department of Foreign Affairs had rung in the middle of the night and said:

> Your daughter Meredith is being sought by the Saudi police for having a baby out of wedlock. If caught and tried the penalty would be stoning. You have 24 hours in which to assist her to leave the country [37].

Suzanne said that both her parents felt grief at how the plaintiff had 'turned out'. She said that her mother asked: 'What has gone wrong' and 'How did I fail here'. She also said 'I am frightened that every time she contacts me it is for something else and it will never end'.

58 Robynne, in her affidavit sworn 28 April 2008, gave evidence that her mother said to her in relation to the plaintiff:

> What have we done to deserve this treatment? We treated all of you the same and gave all of you the same opportunities [37].

Robynne gave evidence that after the plaintiff returned from Saudi Arabia her mother said to her. 'We always seem to be paying for Meredith's irresponsible behaviour'.

59 It is inconsistent with the evidence, and it is not the defendants' case, that the deceased ceased to have contact with the plaintiff after the plaintiff returned to Perth from Saudi Arabia. As I have set out earlier in these reasons, after the plaintiff returned to Australia she lived with her parents for 10 weeks and then moved into a flat at Wembley. Her mother visited there and suggested she move into a house which the plaintiff did. The plaintiff's mother then brought Suzanne to live with the plaintiff when Suzanne was pregnant with her second child.

60 The deceased and the plaintiff ceased to have contact when the plaintiff left Western Australia and moved to Victoria and then New South Wales. It is not unusual for an adult child to move to a different state. Indeed, both Suzanne and Robynne have done so. Robynne did not return to Western Australia to visit her mother for many years.

61 Counsel for the defendants submits in effect that I should infer that something occurred between the plaintiff and the deceased at the time, or after, the plaintiff left Western Australia for Victoria which caused the deceased to want no further contact with the plaintiff. There is no evidence of any such happening. The evidence is that the plaintiff left Western Australia. At some indefinite time after she had left Western Australia, but no more than a few years, she tried to contact her mother and maintain or re-establish a relationship with her. The deceased rejected the plaintiff's approach. Periodically thereafter the plaintiff attempted to contact her mother and on each occasion the deceased rejected the approach. There was opportunity for the deceased to renew her relationship with her daughter. She chose not to do so.

62 The court is required to form an opinion whether on the disposition of the deceased's estate affected by her will and the law relating to intestacy makes adequate provision for the proper maintenance, support or advancement in life of the plaintiff. In forming that opinion the court must be guided by prevailing community standards of what is right and appropriate in the circumstances as I have found them to be.

63 The deceased and her late husband incurred some expense in supporting the plaintiff at the time of, and in relation to, the plaintiff's first pregnancy and her return from Saudi Arabia. However, there is no

evidence that the deceased conferred significant benefits on the plaintiff during her lifetime.

64 The defendants do not submit that the court should refuse to make an order in favour of the plaintiff on the ground that her character or conduct is such as to disentitle her to the benefit of an order and I do not form such an opinion.

65 The evidence establishes that at the date of death of the deceased the plaintiff was in need. Her only income was Austudy and $246 per week from Woolworths during the holidays. She did not own a house and had no significant realisable assets. She was aged 56 and no significant funds or means to meet any adverse contingencies. In those circumstances, notwithstanding the estrangement of the plaintiff from the deceased, the deceased ought to have made greater provision for the deceased than she did in her will. I am of the opinion that the disposition of the deceased's estate effected by her will and the law relating to intestacy is not such as to make adequate provision from her estate for the proper maintenance, support or advancement in life of the plaintiff.

Effect of poor relationship

66 The poor state of the relationship between the deceased and the plaintiff is relevant to the second stage of the inquiry as well as the first. The poor state of that relationship operates to restrain amplitude in the provision to be ordered: ***Wheatley v Wheatley*** [2006] NSWCA 262 (Bryson JA) [37].

Adequate provision

67 In her cross-examination the plaintiff said that her claim was to be treated equally with her sisters. The court is required in the first instance to determine, not whether the plaintiff should be treated equally with her sisters, but to determine what provision should be made so as to make adequate provision for the proper maintenance, support or advancement in life of the plaintiff.

68 The plaintiff filed a document entitled 'Particulars of the Quantum of the Plaintiff's Claim' to which I have referred. The document was drawn by the plaintiff's solicitors on her instructions. In effect, the plaintiff says that adequate provision requires allowance to be made for her future accommodation, provision for her to commence a business to earn future income and provision for superannuation or income after the plaintiff

ceased earning income from her own exertions. I will consider each in turn.

69 Some provision should be made to enable the plaintiff to provide for her own accommodation. The plaintiff suggested in cross-examination an amount of $150,000 to $200,000. That was on the basis that the plaintiff would receive $136,000 to establish a business from which she would earn income.

70 Thomas Webster is an expert valuer. Mr Webster was instructed by the plaintiff's solicitors to consider the cost of purchasing a suitable residence for the plaintiff based on her requirements that she wishes to purchase a home in the northern beaches suburbs of Sydney and that she would prefer to live in a townhouse, duplex or freestanding house with a courtyard or garden to accommodate her two dogs. Mr Webster's opinion is that a suitable residence that will accommodate the plaintiff's requirements would cost in the vicinity of $650,000 to $700,000. Mr Webster also said that the entry starting price to purchase a property on the northern beaches would be around $250,000 for a modest one bedroom unit. Counsel for the defendants cross-examined the plaintiff to the effect that she should seek more modest accommodation in a less expensive area than the northern beaches of Sydney. The plaintiff has lived for many years in that area. She intends to set up a landscaping business in that area with her son who has business experience in the area. It was not demonstrated that the cost of residences in surrounding areas was any less expensive. Having regard to the size of the estate, and the reasonable demands and requirements of Suzanne and Robynne, it would not be proper to allow the plaintiff $650,000 to $700,000 to acquire a residence. A sum in the vicinity of $150,000 to $200,000 is a more reasonable approach.

71 The plaintiff intends to establish a landscaping business with her son. The cost of establishing the business is approximately $136,000. If the business is to be jointly owned by the plaintiff and her son then it is reasonable that he should contribute half of the cost of establishing the business. Thus a sum in the order of $68,000 is a reasonable allowance to assist the plaintiff in establishing a landscaping business.

72 The plaintiff claims that approximately $150,000 should be allowed for her superannuation, or income after she has ceased working. The defendants say that if the plaintiff establishes a landscaping business then she will have a capital asset to sell on her retirement. A number of things may be said about that submission. The assets to be acquired to establish

the business are depreciating assets. The assets of the business may have little resale value on the plaintiff ceasing the business. There is no evidence that the business would have any goodwill value. There is no certainty that if the plaintiff does establish her business that it will be successful and continue until the time she chooses to retire.

73 The defendants say that pension entitlements should be taken into account in making an order. The issue is discussed in de Groot J and Nickel B, *Family Provision in Australia* (3rd ed, 2007) where the authors after discussing relevant authorities conclude that the better view seems to be that pension entitlements should be taken into account in making an order, as this accords with the principle that facts or circumstances existing at the date of the order should be taken into account and is generally supported by authority [2.15]. It is appropriate to have regard to the plaintiff's future likely pension entitlements. At the same time the court must also have regard to the following matters. The pension is a modest amount and may be insufficient to meet unforeseen adverse circumstances. Further, the pension is subject to both an asset test and an income test.

74 In determining the proper provision for the plaintiff the court must have regard to the size of the estate and the needs and rights of Suzanne and Robynne. Taking those matters into account I consider that the proper provision is the sum of $260,000 in addition to the plaintiff's entitlement to the proceeds from the sale of the Investa Property Trust shares and her share of the Department of Veterans Affairs one off payment. That means the plaintiff will receive an amount of approximately $326,000 by way of provision from the estate of the deceased. That is sufficient for the plaintiff to apply $150,000 to $200,000 towards the purchase of accommodation, $66,000 towards establishing a landscaping business and have a modest fund left over for her retirement and to act as a buffer against the vicissitudes of life. Provision for the plaintiff in that sum enables the reasonable requirements of Suzanne and Robynne to be met in relation to future accommodation and other provision for their future.

Order

75 The will of the deceased should be varied by providing that the sum of $260,000 be paid to the plaintiff from the estate after the distribution, in accordance with the will, of the furniture, paintings, jewellery and other household goods and the proceeds of the sale of the Investa Property Trust shares, as well as the Department of Veterans Affairs one off payment.

The sum is to bear interest from 8 January 2009, that is the date on which the executor calculated the value of the estate which I have adopted in these reasons.