SUPREME COURT OF QUEENSLAND

CITATION:	*Grimsley v Paul* [2021] QSC 78
PARTIES:	**BARBARA MERLE GRIMSLEY** (applicant) **v** **CHRISTOPHER LANCE PAUL AS EXECUTOR OF THE WILL OF EDGAR LEWIS WOOD (DECEASED)** (respondent)
FILE NO/S:	BS No 1019 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	2 and 3 December 2020
JUDGE:	Martin J
ORDER:	**1. That, in lieu of $215,000, adequate provision for the proper maintenance and support of Barbara Merle Grimsley be made out of the estate of Edgar Lewis Wood by payment of the sum of $750,000.** **2. I will hear the parties as to costs.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY CHILDREN – where the testator died leaving an estate worth approximately $4,400,000 – where a five percent provision was made for a stepchild of the testator – where the stepchild's net worth was approximately $418,200 at trial – where the estate of the stepchild's biological mother was almost entirely left to the testator – whether the provision made for the stepchild was inadequate in all the circumstances, and if so, what provision ought to be made *Succession Act* 1981, s 40, s 41 *Anasson v Phillips* (Unreported, Supreme Court of New South Wales Equity Division, Young J, Eq 1125 of 1986, 4 March 1988) *Blore v Lang* (1960) 104 CLR 124

Currey v Gault [2010] QSC 27

Daverniza v Darveniza and Drakos [2014] QSC 37

Freeman v Jaques [2006] 1 Qd R 318

Goodman v Windeyer (1980) 144 CLR 490

Graziani v Graziani (Unreported, Supreme Court of New South Wales Equity Division, Cohen J, Eq 2678 of 1985, 20 February 1987)

Hunter v Hunter (1987) 8 NSWLR 573

Permanent Trustee Co Ltd v Fraser (1995) 36 NSWLR 25

Singer v Berghouse (1994) 181 CLR 201

Vigolo v Bostin (2005) 221 CLR 191

White v Barron (1980) 144 CLR 431

COUNSEL:	AB Fraser for the applicant DM Flaherty for the respondent S Bhati (Solicitor) for Cameron Weston
SOLICITORS:	de Groots for the applicant Caldwell Martin Cox for the respondent Brander Smith McKnight Lawyers for Cameron Weston

[1] Barbara Grimsley seeks an order for further provision from the estate of her deceased step-father, Edgar Wood.

[2] Edgar Wood died on 14 May 2019. He was survived by the applicant and:

(a) his son, Cameron Weston, and

(b) his daughter, Stephanie Kennedy.

[3] The net distributable estate is, depending upon a minor tax matter, either $4,430,937 or $4,348, 937. There is also superannuation of approximately $645,000 which is the subject of review by a Commonwealth body as to who is to benefit.

[4] In his last will, Edgar Wood split his estate in the following way:

(a) to Cameron Weston – 45 per cent,

(b) to Stephanie Kennedy – 15 per cent,

(c) to the applicant – five per cent, and

(d) to identified friends and relatives – the balance.

[5] The effect of that distribution is the applicant would receive approximately $215,000. She seeks an order which would result in her receiving a total sum of $900,000.

The estate of Edgar Wood

[6] The way in which the estate came to be the size that it is was the subject of submissions. It is convenient to describe a brief history of the family of the deceased in order to understand how the estate was created.

[7] Edgar Wood married Merlene Grimsley in 1975. Each of them had children from earlier relationships:

(a) Merlene had three children from her prior marriage to Jack Grimsley – Barbara, William and Alan, and

(b) Edgar had two children, namely Cameron Weston and Stephanie Kennedy.

[8] Soon after they were married, Edgar and Merlene purchased Heathcote Cellars and, then, Tahmoor Cellars. They conducted three wine stores and, in 1981, incorporated the company which they called Nanefo Pty Ltd. They were the original directors and shareholders and each held one of the two ordinary shares in that company. It was a very successful enterprise. They also bought and sold real estate, in particular, an estate called Rosslyn.

[9] Merlene died in 2007 and her estate passed to Edgar with the exception of some jewellery, which Barbara received, and the proceeds of a loan account which was distributed equally to her three children. Under her will, these assets passed to Edgar:

(a) her share in Nanefo,

(b) her share in the property at Rosslyn which had been jointly held by them, and

(c) her interest in superannuation.

[10] The interest in the company and the real estate constituted a large part of the deceased's estate.

The legislation

[11] This claim is brought under s 41 of the *Succession Act* 1981. So far as it is relevant, it provides:

> "(1) If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.

(1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.

(2) The court may—

(a) attach such conditions to the order as it thinks fit; or

(b) if it thinks fit—by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or

(c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable."

[12] Section 40 of the *Succession Act* provides that "child" includes "stepchild" for the purposes of a family provision application.

The two stage test

[13] An application under s 41 is to be considered in two stages:

(a) Was the provision made inadequate in all the circumstances?

If yes, then

(b) What provision ought to be made?

[14] The process was considered in *Singer v Berghouse*[1] where the majority said:

> "The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
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> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process,

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1 (1994) 181 CLR 201.

that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance."[2]

[15] A summary of the relevant principles was set out in *Daverniza v Darveniza and Drakos*:[3]

> "[16] From those, and other, decisions the following may be drawn:
>
> (a) The court must determine whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life.
>
> (b) When considering the proper level of maintenance, the following, at least, should be taken into account:
>
> (i) the applicant's financial position,
>
> (ii) the size and nature of the deceased's estate,
>
> (iii) the totality of the relationship between the applicant and the deceased,
>
> (iv) the relationship between the deceased and other persons who have legitimate claims upon his or her bounty,
>
> (v) present and future needs including the need to guard against unforeseen contingencies.
>
> (c) The use of the word 'proper' means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the 'station in life' of the parties and the expectations to which that has given rise, in other words reciprocal claims and duties based upon how the parties lived and might reasonably have expected to live in the future.[4]
>
> (d) 'Maintenance' may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live.[5]
>
> (e) 'Support', similarly, may imply provision that exceeds a person's bare needs. The use of the two terms serves to amplify the powers conferred upon the court. And, furthermore, provision to secure or promote "advancement" would ordinarily be provision beyond that for the mere necessities of life. It is not difficult to conceive of a case in which it might appear that

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2 Ibid at 209-210.
3 [2014] QSC 37.
4 *Vigolo v Bostin* (2005) 221 CLR 191 at [114] per Callinan and Heydon JJ.
5 Ibid at [115].

sufficient provision for support and maintenance had been made, but that in the circumstances, further provision would be proper to enable a potential beneficiary to improve his or her prospects in life, or to undertake further education. This might be the case where, for example, a promise had been made, or where a claimant reasonably held an expectation that such provision would be made.[6]

(f) The totality of the relevant relationship would include:

(i) any sacrifices made or services given by the claimant to or for the benefit of the deceased;

(ii) any contributions by the claimant to building up the deceased's estate; and

(iii) the conduct of the claimant towards the deceased and of the deceased towards the claimant.[7]

(g) Any such sacrifices, services or contributions (whether described as giving rise to a moral duty/moral claim or not) are a relevant consideration (as part of the totality of the relationship between the claimant and the deceased), but are neither a necessary nor a sufficient condition for the making of an order under the Act.[8]

(h) A claimant may fail to establish that the disposition of the deceased's estate was not such as to make adequate provision for his or her proper maintenance, etc, even though no provision was made for him or her in the will.[9]

(i) The determination of whether the disposition of the deceased's estate was not such as to make adequate provision for the proper maintenance, etc, of the claimant will always, as a practical matter, involve an evaluation of the provision, if any, made for the claimant on the one hand, and the claimant's 'needs' that cannot be met from his or her own resources on the other.[10]

(j) The adequacy of the disposition is assessed as at the time of the testator's death. Any order that might be made is considered in the light of the applicant's circumstances at the time of the trial."[11]

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6 Ibid.
7 *Goodman v Windeyer* (1980) 144 CLR 490.
8 *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 25.
9 *Singer v Berghouse* (1994) 181 CLR 201.
10 *Hunter v Hunter* (1987) 8 NSWLR 573.
11 *White v Barron* (1980) 144 CLR 431 at 441 per Mason J.

[16] Mr Flaherty, who appeared for the respondent, reminded me of the statement by Windeyer J in *Blore v Lang*:[12]

> "The jurisdiction under the *Testator's Family Maintenance Act* is to provide for deserving persons according to their requirements, **not to reward past services**. This is sometimes overlooked and evidence concerning the present and probable future requirements of the applicant is subordinated to or submerged in evidence of past services to the testator. Allegations and denials concerning episodes in the past are then likely to become emphasized at the expense of evidence directed to the central issues in the case."[13]

[17] To similar effect is the statement in the joint reasons of Fullagar and Menzies JJ:

> "The jurisdiction conferred by the Act is to interfere with the testator's dispositions when he has left a member of his family without adequate provision for his or her proper maintenance, etc., and the extent of the interference authorized is to order such provision as the court thinks fit for that persons's proper maintenance. **Bad conduct or character may disentitle a member of the family to needed assistance, but good conduct and honest worth are not to be rewarded by a generous but second-hand legacy at the hands of the court**."[14]

[18] Mr Fraser, who appeared for the applicant, referred me to decisions which consider matters peculiar to claims made by stepchildren. From them it may be concluded that, where a stepchild receives nothing from the estate of a biological parent, and that parent's estate passes to the step-parent, then one may more readily conclude that a wise and just step-parent would recognise a moral claim in a stepchild to maintenance or support.

[19] In *Freeman v Jaques*,[15] Keane JA (with whom de Jersey CJ and McPherson JA agreed) said:

> "[29] It is clear from the authorities that the resolution of the jurisdictional issue necessarily involves an evaluative balancing of relevant considerations. The more exiguous and distant the familial relationship between the deceased and a claimant, the greater must be the need of the claimant for maintenance or support if it is to give rise to the obligation, postulated of a wise and just stepmother, to make adequate provision for the proper maintenance or support of the claimant. Similarly, the greater the extent to which a step-parent's estate reflects her own contributions and efforts, the greater must be the need in the claimant for maintenance or support if a stepmother is to be regarded as subject to a moral claim to make adequate provision for proper maintenance and support.

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12 (1960) 104 CLR 124.
13 At 137.
14 At 134.
15 [2006] 1 Qd R 318.

…

> [40] The appellants urge that this case is directly analogous with the decisions of the Victorian Supreme Court in *McKenzie v. Topp* and *James v. Day*. But both these decisions concerned claims made against the estate of a deceased step-parent where the whole of the estate of the natural parent had earlier been left to the step-parent. **They were cases where the stepchild had received nothing from the estate of the natural parent. In those circumstances, one may more readily conclude that a wise and just step-parent would recognise a moral claim in a stepchild to maintenance or support from an estate which was derived, in whole or in part, from the stepchild's natural parent**."

[20] That reasoning was applied by Wilson J in *Currey v Gault*.[16] Her Honour also referred to *Graziani v Graziani*[17] in which Cohen J said that in the case of an applicant who was a stepchild of the deceased "then there would be a number of relevant matters in my opinion which the Court should consider in deciding whether factors exist. These include the closeness of the relationship, that is whether it was one which might be properly described as parent and child, whether the plaintiff was brought up as a permanent member of the family, what was the age of the plaintiff when he or she became a member of that family, and the extent to which the plaintiff was supported by the deceased, whether it be financially, educationally or emotionally."

The applicant's personal circumstances

[21] Barbara Grimsley met Laura Tricker in December 1995. In the following month they commenced a relationship which only lasted for about seven months but they remained close friends after that time. In 1998 they purchased a home in Annandale and they lived there until 2004 when they purchased a property in Perth where they have lived since 2005. That property is held by both of them as joint tenants.

[22] Ms Grimsley contributed her share of the proceeds from the sale of the Annandale property towards the purchase of the Perth property but was unable to contribute a full half share.

[23] Ms Tricker's evidence was uncontested. She was not cross-examined on her affidavit. She said that in May 2017 Ms Grimsley paid her the sum of $162,960 from her superannuation fund and that this repaid more than half the debt arising from the purchase of the Perth property and subsequent home improvements. Her evidence was that the balance of the debt was the subject of a statutory declaration by Ms Grimsley which was an exhibit to her affidavit of January 2020.

[24] The statutory declaration is dated 10 May 2017. It records that:

(a) she owes Ms Tricker the total sum of $262,960 being her share of the Perth property,

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16 [2010] QSC 27.

17 Unreported, Supreme Court of New South Wales Equity Division, Cohen J, Eq 2678 of 1985, 20 February 1987.

(b) she has agreed to pay Ms Tricker the sum of $162,960 from her superannuation fund immediately, and

(c) the balance of $100,000 plus any additional accrued funds will be finalised when they sell the Perth house.

First question: Was the provision made inadequate in all the circumstances?

[25] The estate in this case is relatively large – some $4.4 million. In the words of Young J:

> "If the estate is a large one the Court has a slightly different approach. The basic principles are the same, that is, the will can only be affected to the extent that it is necessary to discharge the moral duty by making adequate provision for the plaintiffs, but **where there is a large estate competition between claimant and claimant, and claimant and beneficiary under the will is much reduced or eliminated. Further, there may be a more liberal assessment of the moral duty owed, to be reflected in what is proper provision for the plaintiffs**."[18]

[26] What, then, are the relevant circumstances of the applicant? She is 67 years old. She is single. She has been unable to work since 1999 and has received a disability support pension.

[27] She has a number of medical and mental issues which have affected her for many years. I will set out the major conditions in a summary form. The applicant:

(a) has suffered from depression since she was in her late 30s – she will require medication for the rest of her life and sees a psychologist on an intermittent basis,

(b) has lower back pain,

(c) has a disorder which results in hearing loss and tinnitus – she requires a hearing aid which has to be replaced every four years,

(d) suffers from rheumatoid and psoriatic arthritis,

(e) has, in the last few years, undergone shoulder surgery and has had two knee replacements for which she continues to receive physiotherapy,

(f) has a chronic autoimmune disease that causes her considerable pain and disability and for which she takes several types of medication.

[28] Soon after she turned 65 years of age the applicant was transferred to an aged pension of $1810 a month including supplements. She has monthly expenses of $2241. She says that her assets and liabilities can be represented in the following way:

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18 *Anasson v Phillips* Unreported, Supreme Court of New South Wales Equity Division, Young J, Eq 1125 of 1986, 4 March 1988.

Assets	**Value**
1/2 share 11 Barrington Street, West Leederville, Western Australia	$475,000.00
Motor vehicle - Hyundai Tuscan - 2005	$4,200.00
Household contents (including clothing)	$15,000.00
Jewellery (a ring from my mother)	E$20,000.00
Motorbike - 250 Yamaha V Star - 2014	$4,000.00
Total	**$518,200.00**
Liabilities	
Loan to Laura Tricker for the purchase of 11 Barrington Street, West Leederville, Western Australia	**$100,000.00**
Net Total	**$418,200.00**

[29] At 30 June 2019 she had $177,833 in her superannuation account. Of that some $70,000 has been used to pay the legal costs she has incurred in these proceedings. Thus, it is submitted, her net assets are approximately $500,000.

[30] Following the death of her biological father she received, in 2015 and 2016, shares worth $333,298 and cash in the sum of $437,264.

[31] Mr Flaherty submitted that her evidence with respect to her financial position should be discounted because of the general vagueness that surrounded it and because, in her first affidavit, she made no mention of receiving the sum of about $437,000 from her father's estate. He submitted that the applicant and her friend, Ms Tricker, "had deliberately not disclosed to the court … the financial position of the applicant and her financial history". That is a troubling submission given that Ms Tricker was not required for cross-examination and, so, was not challenged.

[32] I accept that there is a degree of uncertainty about Ms Grimsley's financial position. Ms Grimsley was unimpressive when it came to recalling, recounting and explaining her financial history. Part of her explanation for both having spent a lot of money and not being able to satisfactorily account for that was her addiction to cocaine in the period from late 1998 to early 2001. She said (in cross-examination):

> "Mr FLAHERTY: … Ma'am, for what period of time were you addicted to cocaine?---Two, two and a half years.
>
> When was that?---That was in the – that was in that period – this all started in late '98 to early 2001, I think.
>
> Right. Thank you. And you – are you saying that in that period of time, you racked up a debt to Laura of that 354,000-odd dollars in addition to the moneys used by the property at Western Australia? Is that what you're saying?---I'm saying that that debt that was

> racked up to Laura, that I had paid directly from my file that covered it. I owed money for cocaine; I owed a lot. I maxed out my credit cards buying it; that was a lot. I had a car accident; that was a lot. The money to buy the house came from the sale of the house – largely the sale of the house in – and I always said to Laura that I would repay her for my father's inheritance. I said that at that time.
>
> You're saying the debts regarding your drug use were in the late nineties, is that right?---That's correct.
>
> The purchase of the property in WA was in 2005, is that right?---That's correct. That's right."

[33] Why the car accident she referred to cost her a lot of money was not explained.

[34] A document exhibited to Ms Grimsley's first affidavit purported to set out the amount Ms Grimsley owed to Ms Tricker in May 2017 (the May 2017 calculation). It was prepared by Ms Tricker. It was created at about the same time as the statutory declaration referred to above was made. Mr Flaherty criticised it obliquely because the figures set out have all been rounded off. That is so, but I accept that this was a document created for two friends which was designed to capture their financial position rather than, for example, to be a document suitable for auditing or submission to taxation authorities.

[35] The result of the calculations does not appear to be consistent with the evidence of Ms Tricker that she received a total of $437,982 from the solicitors acting for Ms Grimsley's father's estate. That sum was transferred in to her bank account in 2016. The May 2017 calculation takes into account funds which came into existence in 2004 when the Annandale property was sold. But there is no accounting for the payment from the estate of Mr Grimsley. There was no evidence which explained the apparent and substantial discrepancy between the receipt of that sum and its omission from the May 2017 calculation.

[36] There is not enough evidence for me to conclude, as Mr Flaherty would have me do, that Ms Grimsley has set out to deceive the court with respect to her financial position. It was submitted that she has deliberately misrepresented her position so as to preserve any social security benefits she might be receiving.

[37] As I have observed above, Ms Tricker was not cross-examined. Many of the matters put forward against Ms Grimsley would require that Ms Tricker have been involved in the deception. Her evidence was unchallenged. Although the evidence concerning the applicant's financial position is vague, I am satisfied that, at the time of her stepfather's death, she had net assets in the order of $500,000. There is not enough evidence to support a finding that the amount paid by her late stepfather's estate to Ms Tricker is, in some way, held by her for the benefit of Ms Grimsley. Those amounts were, in any case, transferred some three years before the death of Mr Wood. The time for assessment of the financial circumstances of an applicant is at the time of the death of the person whose estate is the subject of the application.

[38] I am satisfied that the provision made for Ms Grimsley was inadequate in the circumstances of this case. I reach the conclusion on the following bases:

(a) the estate is a large one,

(b) the applicant suffers from a number of substantially disabling medical conditions all of which existed at the time of the testator's death,

(c) the estate of her mother, which she might have expected to share in, was left almost entirely to the testator,

(d) she has an ordinary life expectancy of a further 21 years with little by way of income and substantial medical expenses which she will continue to accrue,

(e) while she has, as part of her assets, a half share in the Perth property, should Ms Tricker wish to dispose of the property then she would be left without a place to live and would find it very difficult – if not impossible – to purchase an equivalent property.

[39] There was some considerable evidence about the efforts made by Ms Grimsley to see Mr Wood on a regular basis and provide him with some care. But while that was indicative of a good relationship I have not regarded that as an aspect upon which much weight should be placed.

[40] This is a case in which, in the words of Keane JA in *Freeman v Jacques*, one may more readily conclude that a wise and just step-parent would recognise a moral claim in a stepchild to maintenance or support from an estate which was derived, in whole or in part, from the stepchild's biological parent.

What provision ought to be made?

[41] The circumstances of the other beneficiaries were not the subject of dispute. The testator's son Cameron, who has an entitlement under the will to 45 per cent of the residuary estate, did not play an active part in these proceedings. He is 53 years old. He did not provide any particulars of his financial position and I am content to conclude that his circumstances are not such that they would have the effect of reducing or extinguishing Ms Grimsley's claim on the estate. The same may be said of Stephanie who, on the available material, is in a comfortable financial position.

[42] The applicant seeks an order that she receive the sum of $900,000 in lieu of her existing entitlement. That was advanced on the basis that it would constitute a fund that will give her financial independence and a contingency against which she can set off anything that may arise over the next two decades. The matter which might place Ms Grimsley in a situation of serious financial trauma is the possible sale of the Perth property. As a joint tenant, she could not resist an application for the appointment of statutory trustees for sale should Ms Tricker wish to sell the property in the face of an objection by Ms Grimsley. She would then be in the position where she would find it extremely difficult to obtain similar permanent accommodation.

[43] A sum should be awarded which recognises the personal and medical difficulties which the applicant will continue to face and which ensures that she will be in a position where she can obtain accommodation of the same quality and have reasonable security. Taking into account all the submissions made with respect to the circumstances of the applicant and those of the other beneficiaries, I conclude

that adequate provision for the proper maintenance and support of the applicant requires that an order be made that, in lieu of $215,000, she receive the sum of $750,000.

Order

[44] That, in lieu of $215,000, adequate provision for the proper maintenance and support of Barbara Merle Grimsley be made out of the estate of Edgar Lewis Wood by payment of the sum of $750,000.

[45] Mr Flaherty asked to be heard on the question of costs. I will hear any submissions on that matter which the parties wish to make.