Edgar v Public Trustee for the Northern Territory & Anor [2011] NTSC 05

PARTIES:	Edgar, John Young v Public Trustee for the Northern Territory and Edgar, Florita
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	KELLY J

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Anderson v Treboneras [1990] VR 527; *Hughes v National Trustees* (1979) 143 CLR 134; *In re the will of Gilbert* [1946] 46 SR (NSW) 318; *Menaker v Kutalyou* [2006] NSWSC 374;
Permanent Trustee Co v Fraser (1995) 36 NSWLR 24; *Singer v Berghouse* (1994) 181 CLR 201, referred to

Blore v Lang [1960] 104 CLR 124; *In re Allen; Allen v Manchester* [1922] NZLR 218; *In re Bradbury* [1947] St R Qd 171; *In re Sinnott* (1948) VLR 279; *Pontifical Society v Scales* (1962) 107 CLR 9; *Vigolo v Bostin* (2005) 221 CLR, considered

REPRESENTATION:

Counsel:

Plaintiff:	A. Young
First Defendant:	G. Martin
Second Defendant:	J. Stewart

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	Solicitor for the Northern Territory
Second Defendant:	Davison Legal

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Edgar v Public Trustee for the Northern Territory & Anor [2011] NTSC 05
No. 104 of 2008 (20822793)

BETWEEN:

JOHN YOUNG EDGAR
Plaintiff

AND:

PUBLIC TRUSTEE FOR THE NORTHERN TERRITORY
First Defendant

AND:

FLORITA EDGAR
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 14 January 2011)

[1] The plaintiff John Edgar is one of three children of Lawrence Edgar now deceased. John is now 64 years of age. His parents divorced in about 1964 or 1965. The other two children had little or no contact with their father for 20 years or more before he died. They make no claim against the estate.

[2] In 1993 Lawrence Edgar married the second defendant Florita Edgar. They had met in Kupang where Florita lived. The wedding took place at

Lawrence Edgar's property at Bees Creek in September 1993. They also had a wedding ceremony in Kupang.

[3] Lawrence arranged for a permanent residence application to be made on Florita's behalf but this was withdrawn in November 1993. Florita spent only 2 months living with Lawrence at Bees Creek following the wedding. During the course of their marriage she visited Darwin for a month or so at a time on two other occasions.

[4] Lawrence made many visits to Kupang where he stayed with Florita. These visits lasted from 2 to 6 weeks.

[5] In 1994 Florita made another spouse migration application but this was rejected as the delegate of the Minister stated he was not satisfied that there was a genuine and continuing relationship between Lawrence and Florita. He appears to have been proved wrong. The marriage continued for 15 years until Lawrence's death in 2008.

[6] The couple must have had a great deal of difficulty in communicating verbally since Lawrence spoke very little Bahasa Indonesia and very little of Florita's language which is a Kupang dialect of Bahasa Indonesia and Florita speaks only the Kupang dialect. Moreover Florita is deaf and has difficulty communicating orally even in her own dialect. When they were apart Lawrence telephoned Florita frequently but these telephone conversations had to be mediated through a third party. They also wrote frequently but again Florita had to have the assistance of a third party to

read Lawrence's letters and to write in return. Nevertheless it is clear both from the letters and from an affidavit sworn by Lawrence Edgar in connection with proceedings against his god-daughter that the relationship not only continued for 15 years but was characterised by love and affection on both sides.

[7] Another application for a spouse visa was made by Florita in 2003 but was again withdrawn. A fourth application was made in 2005. It took a long time to process. In 2007 the spouse visa application was again refused on the basis that there was no evidence of a "genuine and continuing relationship". As I have said, this appears to be at odds with the facts.

[8] In 1997 as a result of what Lawrence Edgar subsequently described as "church gossip", Lawrence became suspicious of Florita's intentions and feared that she was plotting against him and that he would lose his Bees Creek property. To prevent that he transferred that property into the name of his god-daughter, Esther Manson. Unfortunately Esther then mortgaged the property and used the proceeds to buy a property of her own. Litigation followed in which Lawrence succeeded in obtaining a declaration that the property was held in trust for him. However, at the end of that litigation there remained a debt owing to Westpac secured over the Bees Creek property which Lawrence had no means of repaying.

[9] Lawrence was unable to fund the litigation against Esther Manson to recover the Bees Creek property and his son John helped him out. John estimates

that he provided his father with approximately $20,000.00 to fund that litigation. A file note from the solicitor who conducted the litigation on Lawrence Edgar's behalf suggests that the amount was approximately $15,000.00.

[10] John's evidence is that he also helped his father out from time to time paying outstanding bills for rates and electricity, telephone, insurance premiums and repairs to his ride on mower. No documentary evidence of any such payments was adduced and, due to the vagueness of the evidence, I am unable to say how much money may have been advanced to Lawrence by John for these purposes.

[11] John says that he and his father had an understanding that Lawrence would repay him from his estate for the financial support John had given him over the years and John was confident that he would keep his word. However, it was not put on John's behalf that any such understanding amounted to an enforceable agreement by Lawrence to provide for John in his will.

[12] Immediately after the Manson court case, Lawrence Edgar made a will appointing John as his executor and leaving half of his estate to Florita and half to John.

[13] During the court case there had been some suggestion that John might pay out the Westpac mortgage over the Bees Creek property to enable his father to retain the property. However, there was no firm arrangement made to that effect and in the event the property was sold and the mortgage repaid from

the proceeds. Lawrence bought another property down at Acacia Hills and lived in a fairly basic ramshackle house on that property for the rest of his life.

[14] When John came to Darwin for his mother's funeral in 2007 he visited his father at the Acacia Hills property and found him living in extremely poor conditions. John got in an electrician to make the electrical wiring safe, mowed the block, and established a fire break. He also stocked the fridge with food and left his father a stock of beer and cigarettes. All of this cost him approximately $2,500.00.

[15] By 2007 Lawrence's health was quite poor. He was hospitalised in November 2007 and he died in hospital in 2008. John visited him in hospital just before he died.

[16] Lawrence Edgar made two further wills after the 2003 will which had appointed John as executor and left half the estate to John and half to Florita.

[17] The second last will provided that John was to be repaid amounts advanced by him to his father together with interest and for the balance of the estate to go to Florita.

[18] The last will was made on 29 May 2007. That will appointed the Public Trustee for the Northern Territory as executor and trustee. It contained a

legacy of $15,000.00 to John and bequeathed the Acacia Hills property to Florita. It also made Florita the residuary beneficiary.

[19] Lawrence Edgar died on 9 February 2008. The Public Trustee obtained probate of the last will and John Edgar has brought the present proceeding under the *Family Provision Act* seeking an order that adequate provision be made out of the estate for his proper maintenance, education and advancement in life.

John's personal circumstances

[20] John is 64 years of age. He has no dependent children. He is married and his wife had a serious accident in 2001 in which she badly injured her back when she fell out of a tree. Since the accident she has not been able to walk, wash or care for herself, or do any housework. She receives a full disability pension from the Government of $365.00 a fortnight and is totally dependant on John to look after her. He receives a carer's allowance of $100.00 per fortnight.

[21] John works for Optus on a casual basis four days a week. He receives approximately $1,000.00 per fortnight from his employment.

[22] As at the date of swearing his affidavit in 2008 he and his wife had a little under $20,000.00 in the bank.

[23] John owns his own home (worth approximately $295,000.00). He is paying off a Mercedes van which he uses for work and to transport his wife in her wheelchair. He also has approximately $73,000.00 in superannuation.

Florita's personal circumstances

[24] Florita likewise has no dependent children.

[25] Florita works as a cleaner at Teddy's Bar in Kupang. She receives minimal wages. The owner of Teddy's Bar, Mr Teddy Tanonef, gave evidence that she is indebted to him for, among other things, the cost of meals, money advanced to her, and "pocket money" all of which indicates that her wages from cleaning at Teddy's Bar are insufficient to support her.

[26] Florita does not own a house or any other property. She lives in a room at Teddy's Bar and Mr Tanonef claims that she is indebted to Teddy's Bar for rent for that room over the last 2 ½ years.

[27] Florita has a little bit of jewellery given to her by her husband.

[28] Lawrence also gave her a refrigerator, a freezer, a washing machine, a television set and satellite dish, an electric fan, two beds, and a cupboard, table and chairs much of which was taken away by her brother.

[29] Florita is deaf, has limited communication ability, and an extremely limited education. It is also clear that she has a very limited understanding of financial matters and virtually no prospect of obtaining well paid or even adequately paid employment. During the hearing of this matter I made a

protection order under the *Aged and Infirm Persons' Property Act*, appointing the Public Trustee to be the manager of Florita's estate in the Northern Territory.

Assets of the estate

[30] The total value of the estate is $583,535.64**.** Of that, $356,888.66 came from the estate of Lawrence's sister who died shortly before Lawrence and most of the balance from the sale of the Acacia Hills property. It is highly likely that Lawrence never became aware of the fact that his estate had been increased by the amount received from his sister's estate. The affidavit of the Public Trustee reveals that as at 19 November 2010, the liabilities of the estate to be deducted from that total were $81,779.53. That does not take into account the cost of these proceedings. The net value of the estate will therefore be less than $500,000 – perhaps quite a bit less.

Principles

[31] The plaintiff John, as Lawrence's son, is a person entitled to apply to the Court under s 7 of the *Family Provision Act* for an order under s 8 that provision be made for him out of Lawrence's estate.

[32] In determining whether provision should be made for him out of the estate, the Court undertakes a two stage process. The Court must first enquire into whether or not adequate provision is available under the terms of the will for the proper maintenance, education and advancement of the plaintiff. If satisfied that adequate provision is not available the Court proceeds to

consider what provision ought to be made for the plaintiff out of the estate.[1] Having said that, similar considerations apply to both stages of the process.

[33] The proper approach to applications of this nature was set out by Dixon CJ in *Pontifical Society v Scales*.[2]

> "It has often been pointed out that very important words in the statute are "adequate provision for the proper maintenance and support" and that each of these words must be given its value. "Adequate" and "proper" in particular must be considered as words which must always be relative. The "proper" maintenance and support of a son claiming a statutory provision must be relative to his age, sex, condition and mode of life and situation generally. What is "adequate" must be relative not only to his needs but to his own capacity and resources for meeting them. There is then a relation to be considered between these matters on the one hand, and on the other, the nature, extent and character of the estate and the other demands upon it, and also what the testator regarded as superior claims or preferable dispositions. The words "proper maintenance and support", although they must be treated as elastic, cannot be pressed beyond their fair meaning. The Court is given not only a discretion as to the nature and amount of the provision it directs but, what is even more important, a discretion as to making a provision at all. All authorities agree that it was never meant that the Court should re-write the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court. ….."
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> "In the present case the application for a provision for maintenance and support is by an adult son. In *In re Sinnott*[3] in the course of what is perhaps the soundest and most illuminating of all the discussions of the statutory provisions, Fullagar J. remarked: "No special principle is to be applied in the case of an adult son. But the approach of the Court must be different. In the case of a widow or an infant child, the Court is dealing with one who is prima facie dependant on the testator and prima facie has a claim to be

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1 *Singer v Berghouse* (1994) 181 CLR 201 at 209

2 (1962) 107 CLR 9 per Dixon CJ at 19-20

3 (1948) VLR 279

> maintained and supported. But an adult son is, I think, prima facie able to 'maintain and support' himself, and some special need or some special claim must, generally speaking, be shown to justify intervention by the Court under the Act" (1948) VLR, at p 280."

[34] More recently, in *Vigolo v Bostin*,[4] Callinan and Heydon JJ expressed the process to be undertaken by the court in these terms:

> "Adequacy or otherwise will depend upon all of the relevant circumstances, … the age, capacities, means, and competing claims, of all the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

[35] If an applicant establishes that proper provision has not been made for him or her, in the often cited words of Salmond J in *In re Allen; Allen v Manchester*:[5]

> "The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

[36] Different considerations apply in the case of a small estate than apply in the case of a larger estate. In *Blore v Lang*,[6] the High Court considered a claim against a relatively large estate[7] by an adult daughter said to be "a married woman with a healthy husband in satisfactory employment who supports her in reasonable comfort." Fullagar and Menzies JJ said, "[H]er need is not for the bread and butter of life but for a little of the cheese or jam that a wise

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4 (2005) 221 CLR 191 at 122

5 [1922] NZLR 218 at 220-221

6 [1960] 104 CLR 124 at 135.

7 The net value of the estate was £22,793 which included a house at Broken Hill worth £2,005 – so the estate was worth the value of about 10 houses. By contrast, the present estate is worth about 1 house.

and just parent would appreciate should be provided if circumstances permit."

[37] The present estate is a comparatively small one. It consists solely of the proceeds of sale of land and what has been described as a shack at Acacia Hills in which the testator lived until shortly before his death, and money received from the deceased's sister's estate which essentially consisted of the proceeds of sale of her family home.

[38] Particularly in the case of smaller estates, Courts have long taken the view of Dixon CJ in *Scales* that adult sons are *prima facie* able to maintain and support themselves and that some special need or special claim must generally speaking be shown in order to justify an order that provision be made for them under the Act. A special claim may exist where the son has contributed to the building up of the estate or has helped the deceased in other ways, or may be based on a special need.[8]

[39] It has become obligatory in cases of this nature to query whether in modern conditions adult sons should be treated differently from adult daughters. Presumably they should not. However this is of relevance where the competing claimant is an adult daughter: the chief beneficiary under this will is the widow of the deceased.

[40] I accept that John can show a special claim on the deceased as a result of having advanced $15,000.00 to the deceased for legal fees for the action

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8 *Hughes v National Trustees* (1979) 143 CLR 134

against Ms Manson over the Bees Creek property. If the deceased had made no provision in his will for John at all, I think it would have been appropriate to have made some small provision from the estate in recognition of this contribution. However, the deceased did recognise this contribution and left John $15,000.00 in his will. I do not consider the other contributions made by John (several visits, doing some mowing and repairs to the Acacia Hills property, buying grocery items to stock the fridge, and, perhaps, paying some bills) give rise to any special claim, as these are normal things done by a loving son. More weight might have been placed on these matters by way of contrast if the rival claimants had been John's siblings who had not seen the deceased for 20 years. However, they make no claim against the estate.

[41] To a certain extent John also has a special need given his wife's circumstances which give him extra responsibilities for her care and also limit his capacity to earn income. However, his age and general circumstances must also be borne in mind. He is almost at retirement age and is well settled in life with his own home and no dependant children.

[42] In these circumstances, a wise and just testator may have made some additional provision for John "if circumstances permitted". The question is whether the size of the estate is sufficient to allow "some of the cheese or jam" to John, taking into account the widow's need for "the bread and butter of life".

[43] The plaintiff has submitted that in light of the circumstances of Florita's marriage to Lawrence outlined above, Florita should not be seen as a "classic or archetypal widow" whose claim should be treated as paramount. For this reason, says the plaintiff, sufficient provision for Florita would be some form of an annuity or income from a capital sum representing something like 34% of the estate. This figure is based on the fact that the proceeds of sale of the Acacia Hills property (which was the only property the deceased knew about when making his will) amounted to about $170,000.00 or approximately 34% of the estate. Counsel for the plaintiff submitted that the appropriate order for this Court to make would be that the balance of the estate over and above this should go to John.

[44] I reject this submission. I accept that the claim of a widow does not always have "paramountcy" and each case must depend on its own facts. The court must take into account the whole of the circumstances. In *In re Bradbury*[9], Stanley J said at p 173:

> "The claim of a second wife is legally just as strong as that of a first wife, but in determining whether the testator omitted to make adequate provision for her proper maintenance and support the court must determine the existence and extent of the husband's moral obligation to the second wife in the light of the whole of the surrounding circumstance of the case."

[9] [1947] St R Qd 171

[45] Remarks to similar effect were made in *In re the will of Gilbert*.[10] In each of these cases the widow was making a claim for provision under the Act and bore the onus of proving that adequate provision had not been made for her proper maintenance and support. That is not the case here. Here the plaintiff is the applicant for provision under the Act. The widow is the primary beneficiary under the will.

[46] There is no onus on the widow as residuary beneficiary under the will to show that she is entitled to be treated as such – or to prove what may be necessary for her proper maintenance and support. Rather the onus is on the plaintiff to show that proper provision is not available for him under the terms of the will. In determining whether this is the case the Court must have regard to all relevant circumstances including the size of the estate and the nature of the competing claim by the widow. In performing this task the Court must have due regard to the will of the testator and should interfere only to the minimum extent necessary to make adequate provision for the proper maintenance, education and advancement in life of an applicant who has passed the first jurisdictional hurdle.[11] As Dixon CJ said in the passage from *Scales* quoted above, due regard must be had to "what the testator regarded as superior claims or preferable dispositions" as demonstrated by his will.

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10 [1946] 46 SR (NSW) 318 at p 322

11 *Permanent Trustee Co v Fraser* (1995) 36 NSWLR 24

[47] I do not think that the plaintiff is able to overcome that jurisdictional hurdle. In the circumstances I do not think he is able to establish that proper provision is not available for him under the will. The estate is a relatively small one. Florita was the wife of the deceased for 15 years. The fact that in the early years of their marriage the couple withdrew Florita's application for permanent residency and apparently chose to live in different countries visiting each other from time to time is neither here nor there. Their domestic arrangements are their own business and it is not for this Court to say she is somehow less of a widow as a result. The deceased recognised a responsibility towards her. He left her his Acacia Hills property and also made her the residuary beneficiary under his will. Moreover the evidence shows that towards the end of his life he very much wanted his wife to come and live with him but they were prevented from doing this by an official from the Australian Department of Immigration who took the view that there was no evidence of a "genuine and continuing relationship" - after the couple had been married for some 14 years.

[48] It was also said by the plaintiff that Lawrence provided only modest amounts of money to support Florita during their marriage. Again, in my view this is neither here nor there. While he was alive Lawrence could and did send her money as needed. The big change in Florita's circumstances is that she no longer has a husband who can do that. Lawrence recognised a moral duty to provide for Florita after his death and he did so by making her the major beneficiary under his will.

[49] Florita has no significant assets and no ability to earn an adequate living.

[50] I do not have sufficient evidence before me to enable me to be satisfied that there would be any money left in the estate from which any provision could be made for the plaintiff after Florita is provided with a house and a modest income.

[51] While I accept that the plaintiff can show that he has some special needs as a result of his wife's illness, it is also clear that he is adequately meeting those needs from his own resources. He owns his own home, he has a part time job which earns him approximately $1,000.00 per fortnight and he has $73,000.00 in superannuation. He and his wife are also in receipt of Australian Social Security benefits.

[52] The onus is on the plaintiff to establish that proper provision has not been made for him in light of all of the circumstances including the size of the estate and the nature of the competing claim. There is, as I say, no evidence upon which I can conclude that there is any surplus from which "some cheese or jam" may be provided to the plaintiff. This is partly as a result of no evidence having been called as to the cost of a house in Kupang or the size of a capital sum which would be necessary to produce an income stream sufficient to provide Florita with an adequate income.

[53] It was suggested by counsel for the plaintiff that the onus was on the second defendant to adduce this evidence. In fact the second defendant sought to lead hearsay evidence in an affidavit about the cost of a house in Kupang

and this was objected to by the plaintiff. Had it not been objected to, I would have found it of very little assistance in any event. The estimate was given by Mr Teddy Tanonef and I did not find him to be a credible witness. In my view, however, it is not correct to suggest that the second defendant bore any onus of establishing these matters.

[54] The onus was on the plaintiff to establish his entitlement to an order that provision be made for him from the estate. Certainly there was an evidentiary onus on the second defendant to provide details of her own personal circumstances which are within her sole knowledge. In the absence of any evidence of those matters the Court would have been entitled to assume that the beneficiary, Florita, had adequate resources on which to live and no special needs.[12] In this case, Florita did adduce evidence about her own personal circumstances. This evidence shows that she has no property and no means of earning an adequate income. However the cost of housing and the cost of living in Kupang are objective facts about which the plaintiff could have called evidence as easily as the second defendant and the plaintiff bore the onus of proof.

[55] Having said all that, given the relatively small size of the estate, it seems to me unlikely such evidence would, in any event, have assisted the plaintiff. It seems to me to be simply one of those cases where even though the applicant can show some special need, the estate is only sufficient to support

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12 See *Anderson v Treboneras* [1990] VR 527 at p 535 and De Groot and Nickel, *Family Provision in Australia* (3rd Edition) Lexis Nexus Butterworths, 2007 p 20.

the sole beneficiary who has a stronger claim on the estate than the applicant[13]. Had Lawrence been a wealthy man it may have been proper for some additional provision to have been made for John to make his life more comfortable in the circumstances in which he finds himself; however Lawrence was not a wealthy man, notwithstanding the late addition to his estate from his sister. John is comfortably off: he and his wife own their own home and are not in need. I am not convinced that it is proper in order to make proper and adequate provision for John to deprive the widow of any part of this modest estate.

[56] John has not been left totally unprovided for. He has received a legacy of $15,000.00 under the will which is the amount which, on the evidence of Mr Tony Crane's file notes, the applicant expended on his father's legal fees in 1997. Whether the sum advanced (and any other bills paid by John for his father) were gift or loans repayable by the estate, and whether that legacy was intended to be a way of repayment of the amount advanced by John to his father I am not called upon to determine. That will be a matter between the plaintiff and the Public Trustee. I note that counsel for the plaintiff said that he had no instructions to undertake not to make a claim against the estate for repayment of the sum advanced. The presence or absence of an additional asset in the nature of a small claim by John to be a creditor of the estate would not make a difference to my opinion that, in the whole of the

[13] See for example *Menaker v Kutalyov* [2006] NSWSC 374.

circumstances, John cannot show that adequate provision is not available under the will for his proper maintenance and support.

[57] The plaintiff's claim is dismissed and judgment is entered for the first and second defendants.