

Not Restricted

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
TESTATORS FAMILY MAINTENANCE LIST

S CI 2018 02081

IN THE MATTER of the Estate of MILAN JANSON, deceased

and

IN THE MATTER of Part IV of the *Administration and Probate Act 1958*

ELLEN GASH

Plaintiff

v

EVA RUZICKA (who is sued as the Executor of the Estate of the late MILAN JANSON, deceased)

Defendant

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JUDGE: McMillan J  
WHERE HELD: Melbourne  
DATE OF HEARING: 21 April 2020  
DATE OF JUDGMENT: 23 July 2020  
CASE MAY BE CITED AS: Re Janson; Gash v Ruzicka  
MEDIUM NEUTRAL CITATION: [2020] VSC 449

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FAMILY PROVISION – Where deceased bequeathed a one-hundredth share of estate to his adult daughter – No dispute by defendant that provision for adult daughter fails to satisfy deceased’s moral duty to plaintiff – Where quantum in dispute – Plaintiff’s need – Insufficient evidence to determine plaintiff’s financial circumstances – *Administration and Probate Act 1958* (Vic) ss 90, 91.

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APPEARANCES:

|                   | <u>Counsel</u> | <u>Solicitors</u>              |
|-------------------|----------------|--------------------------------|
| For the Plaintiff | Mr JD Catlin   | Marshalls+Dent+Wilmoth Lawyers |
| For the Defendant | Ms M Rozner    | Lake Street Lawyers            |

HER HONOUR:

- 1 Milan Janson ('the deceased') died on 7 August 2017. He is survived by his adult daughters, Ellen Gash ('the plaintiff') and Vaclava Klempt ('Wendy'), and his partner Eva Ruzicka ('the defendant').
- 2 Probate of the deceased's will dated 20 March 2015 was granted to the defendant on 7 December 2017. The will directs the defendant to divide the funds in the estate into 100 equal parts and, relevantly, to distribute the estate as follows:
  - (a) 30 parts to the deceased's brother, Josef Jandovsky ('Josef');
  - (b) 30 parts to Wendy;
  - (c) 14 parts to the defendant;
  - (d) 12 parts to the deceased's niece, Klara Jandovska ('Klara'); and
  - (e) one part to the plaintiff.

The remaining 13 parts are to be distributed in varying proportions to seven other beneficiaries.

- 3 The plaintiff seeks further provision from the estate pursuant to pt IV of the *Administration and Probate Act 1958* ('the Act'). The plaintiff is unemployed and is a full-time carer for her husband, David Gash, who has been diagnosed with multiple sclerosis.
- 4 As at 6 March 2020, the funds in the estate were \$3,179,462.54. These funds will be reduced by an amount of two per cent for executor's commission payable to the defendant, by agreement of all beneficiaries, as well as legal costs of this proceeding.

**Part IV of the Act**

- 5 Section 91(1) of the Act provides the Court with the power to order 'that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person.' Pursuant to s 91(2), the Court must not make an order

under s 91(1) unless it is satisfied that:

- (a) that the person is an eligible person; and
- (b) in the case of a person referred to in paragraphs (h) to (k) of the definition of *eligible person*, that the person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support; and
- (c) that, at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support; and
- (d) that the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person, whether by –
  - (i) the deceased's will (if any); or
  - (ii) the operation of Part IA; or
  - (iii) both the will and the operation of Part IA.

6 'Eligible person' is defined in s 90 of the Act. It is not disputed that the plaintiff in this proceeding is an eligible person under paragraph (f) of the definition, being a child of the deceased who is not under the age of 18 years, not a student aged between 18 and 25 years, and not having a disability.<sup>1</sup> Therefore, s 91(2)(b) has no application in this proceeding.

7 Once it is satisfied of the pre-requisites in s 91(2), the Court is entitled to order further provision from the deceased's estate in the exercise of its discretion.<sup>2</sup>

8 In making an order for family provision, s 91(4) of the Act relevantly directs the Court as follows:

In determining the amount of provision to be made by a family provision order, if any, the Court must take into account –

- (a) the degree to which, at the time of death, the deceased had a moral duty to provide for the eligible person; and
- (b) the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person; and
- (c) in the case of an eligible person referred to in paragraph (f) or (g) of

<sup>1</sup> See *Administration and Probate Act 1958* (Vic) s 90.

<sup>2</sup> *Re Dodson; Dodson v Dodson* [2019] VSC 833, [13] (McMillan J).

the definition of *eligible person*, the degree to which the eligible person is not capable, by reasonable means, of providing adequately for the eligible person's proper maintenance and support; ...

9 As the plaintiff is an adult child, s 91(4)(c) requires the Court to take into account the degree to which she is not capable, by reasonable means, of providing adequately for her own proper maintenance and support. This provision, introduced by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014*, addresses concerns regarding claims by adult children who are not otherwise suffering financial hardship.<sup>3</sup> However, the financial need of an adult child still needs to be considered in the context of proper maintenance and support.<sup>4</sup>

10 Pursuant to s 91(5)(a), a family provision order must not provide for an amount greater than is necessary for the eligible person's proper maintenance and support.

11 In determining whether the deceased has fulfilled his or her moral duty, and the extent of any provision, the Court must have regard to the relative concepts of 'adequate' and 'proper' maintenance and support. As stated in *Re Schlink; Keane v Corns*:

Adequacy is assessed by reference to the Court's inherent knowledge and inquiry into current social conditions and standards.<sup>5</sup> In this context, it is necessary that an applicant demonstrate need in order to be successful in his or her claim; mere proof of a moral duty is not in itself adequate.<sup>6</sup> However, an applicant is not required to show that his or her circumstances are destitute and, as such, the need is 'not restricted to the requirements of basic necessity or sustenance.'<sup>7</sup>

The nature and content of what is adequate provision is a flexible concept, and involves a broad evaluative judgment not constrained by preconceptions and predispositions.<sup>8</sup> Relevant constraints or limiting factors may be that further provision should be made only if, and to the extent that, it is necessary to alter the will to make adequate provision for an applicant's

<sup>3</sup> *Firth v Reeves* [2019] VSC 357, [59] (John Dixon J); *Re McKenzie* [2017] VSC 792, [53] (McMillan J); *Brimelow v Alampi* [2016] VSC 135, [18] (McMillan J).

<sup>4</sup> *Ibid.*

<sup>5</sup> See, eg, *Goodman v Windeyer* (1980) 144 CLR 490, 501–2 (Gibbs J); *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ). See generally, GE Dal Pont and KF Mackie, *Law of Succession*, (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2017) 607 [17.86].

<sup>6</sup> *MacEwan Shaw v Shaw* (2003) 11 VR 95, 104 [50] (Dodds-Streton J).

<sup>7</sup> *Ball v Newey* (1988) 13 NSWLR 489, 492 (Samuels JA).

<sup>8</sup> See, eg, *Camernik v Reholc* [2012] NSWSC 1537, [154] (Hallen J); *Slack v Rogan* (2013) 85 NSWLR 253, 284 [125]–[126] (White J), interpreting the similar legislative regime in New South Wales under s 59 of the *Succession Act 2006* (NSW).



proper maintenance and support,<sup>9</sup> or that any further provision must be limited by balancing the needs of an applicant against the proper claims that a testator recognised needed to be satisfied out of his or her estate.<sup>10</sup>

12 The assessment of whether the testator failed to make adequate provision for an applicant's maintenance and support is determined by reference to matters that were known, ought to have been known, or were reasonably foreseeable to the deceased at the time of his or her death.<sup>11</sup> The assessment as to what provision the Court should order, if any, is to be made with regard to the plaintiff's circumstances at the time of the trial.<sup>12</sup> The plaintiff bears the onus of proving the extent of any provision that should be granted.<sup>13</sup>

13 Section 91A also contains certain mandatory and discretionary factors, which the Court must and/or may have regard to in making a family provision order. These are relevant both to the jurisdictional question of whether the Court may make an order under s 91(1) and the exercise of the Court's discretion to make an order.<sup>14</sup>

### Submissions

14 The plaintiff submits that, by providing the plaintiff with only one share of the estate, the deceased abused his testamentary rights or duties. The plaintiff seeks further provision such that she would receive at least one third of the estate. Such further provision is sought to enable the plaintiff to purchase a home of her own as well as a nest egg to take her into the future. The plaintiff also submits that she requires provision to purchase a new motor vehicle and new furniture.

15 The defendant agrees that the deceased had a moral duty to provide for the plaintiff's proper maintenance and support, and that the deceased's will does not provide adequate provision for her proper maintenance and support given the plaintiff's current financial circumstances. However, the defendant submits that the deceased's moral duty did not extend to buying a house for the plaintiff.

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<sup>9</sup> *Grey v Harrison* [1997] 2 VR 359, 366 (Callaway JA, Tadgell and Charles JJA agreeing).

<sup>10</sup> *Re Schlink; Keane v Corns* [2020] VSC 180, [37]-[38] (McMillan J).

<sup>11</sup> See, eg, *Re Marsella; Marsella v Wareham* [2018] VSC 312, [85] (McMillan J).

<sup>12</sup> *Ibid.*

<sup>13</sup> See, eg, *Re Schlink; Keane v Corns* (n 10) [31] (McMillan J).

<sup>14</sup> See *Ross v Ross* [2019] VSC 820, [36] (Moore J).

16 The defendant submits that the deceased's moral duty to the plaintiff would be discharged by the plaintiff receiving 11 shares out of the estate. She submits that the additional 10 shares should be contributed by reducing two shares from Wendy, five shares from Josef and three shares from Klara. The defendant informed the Court that Wendy, Josef and Klara have agreed to this proposal in principle.

**Evidence**

17 The plaintiff was the only witness to give evidence.

18 The plaintiff deposed that she is the full-time carer of her husband and is otherwise unemployed. The plaintiff and her husband reside in rented premises in Brighton East and have lived there for many years.

19 In relation to her husband's condition, the plaintiff deposed that her husband walks with a cane, tires easily and sometimes falls. The plaintiff also deposed that her husband suffers from cognition issues, making him frustrated. The plaintiff deposed that her caring duties for her husband do not leave room for other employment. The defendant accepts that the plaintiff's husband had multiple scoliosis, an altered gait and cognition problems.

20 Certain paragraphs of the plaintiff's affidavits sworn 16 August 2018 ('the plaintiff's first affidavit') and 13 November 2019 ('the plaintiff's second affidavit') were admitted into evidence.

21 The plaintiff's first affidavit sets out her financial circumstances at that time. It states that the plaintiff and her husband each receive \$874.70 per fortnight from their disability service pensions, as well as \$127.10 in rent assistance, and received \$13,440.00 in homestay payments in the 2018 financial year. The plaintiff's first affidavit also details the assets and liabilities of the plaintiff and her husband, which can be summarised as follows:

**Assets**

|                    |                |            |
|--------------------|----------------|------------|
| Plaintiff's assets | Superannuation | \$7,748.00 |
|--------------------|----------------|------------|

|                       |                               |              |
|-----------------------|-------------------------------|--------------|
| Husband's assets      | Motor vehicle                 | \$2,500.00   |
| Joint assets          | Savings                       | \$2,212.00   |
|                       | Household contents            | \$4,000.00   |
| <b>Liabilities</b>    |                               |              |
| Husband's liabilities | Personal loan from Naomi Gash | \$156,647.00 |

- 22 The plaintiff's first affidavit also contains a summary of the plaintiff and her husband's annual expenditure totalling \$58,807.00.
- 23 The relevant paragraphs of the plaintiff's second affidavit merely refer back to the relevant paragraphs of her first affidavit and add that on 23 October 2018 she received confirmation from Centrelink that she qualified for the release of some of her superannuation on the grounds of severe financial hardship. A copy of that letter was exhibited to the plaintiff's second affidavit.
- 24 In her oral evidence, the plaintiff deposed that her disability pension was no longer the amount in her first affidavit but did not know how much it had gone up.
- 25 The plaintiff also deposed that she and her husband currently have two Vietnamese homestay students living with them, through a program run by the Department of Education. The plaintiff and her husband have been a part of that program, on and off, for four or five years. The students pay the plaintiff and her husband a weekly amount in exchange for which they are required to provide the homestay students with food, power, electricity, internet services and other support, such as occasional transport. Each student is currently paying \$330 per week.
- 26 The plaintiff deposed that she and her husband cannot rely on the income from homestay students, as the amount they receive changes every year depending on how many homestay students they have staying with them. She stated that students stay for varying periods, ranging from two weeks to a full year. There was no documentary evidence to support the plaintiff's oral evidence in relation to the income received from homestay students. In response to questions from the Court,

the plaintiff deposed that the Department did not produce paperwork for the homestay students, but that the school has records of the homestays and that her husband gives the students' parents invoices and a payment schedule. The plaintiff deposed that those documents were not in evidence as no one had asked for them.

27 In relation to her and her husband's assets, the plaintiff deposed that she no longer had the \$7,748 in superannuation listed in her first affidavit as she had received permission from Centrelink and the ATO to withdraw it. The plaintiff deposed that they still had their car, which is a 22 year-old Mercedes Benz. Asked about her current savings, the plaintiff deposed that the amount in her first affidavit was no longer accurate but that she did not know what savings she had now, stating 'I don't do money' and 'I would have to look in my account'.

28 In relation to the loan from her daughter, Naomi Gash, listed as a liability of her husband in the plaintiff's first affidavit, the plaintiff stated that the loan is really a loan to both her and her husband. That loan was said to have been paid in increments over a long period, such as when their car has broken down or they have extra expenses. The plaintiff stated that she thinks both her husband and Naomi have paperwork in relation to the loan, but that it was not produced to the Court. The plaintiff deposed that Naomi has told them that now that she is married and saving up for a house she can no longer help them, although she thinks that Naomi would assist if they 'really, really' need to borrow money from her.

29 In relation to their annual expenditure, the plaintiff deposed that utilities costs would have gone up since her first affidavit but that their rent had remained the same. The plaintiff did not provide any documents in relation to their rental arrangements.

30 A transaction history for 1 July 2019 to 16 March 2020 from the plaintiff's NAB bank account was also admitted into evidence ('the transaction history'). During cross-examination, the plaintiff deposed that her husband also had his own bank account, which was only used for his expenses. There was no documentary evidence in



relation to this account before the Court.

31 During her evidence, the plaintiff was taken to the following transactions in the transaction history:

- (a) A credit of \$131.90 dated 6 March 2020 and described as 'CTRLINK CARERS' was identified as a rental assistance payment;
- (b) A credit of \$768.50 dated 6 March 2020 and described as 'CTRLINKCARERS ELLEN GASH' was identified as her carer's pension.
- (c) A credit of \$768.50 dated 6 March 2020 and described as 'CTRLINK PENSION MR D AND MRS E G', was identified as her husband's pension payment.
- (d) A debit of \$3,550.00 dated 18 February 2020 and described as 'INTERNET BPAY DEFT RENT 13362330', was identified as her and her husband's monthly rental payment.
- (e) A debit of \$1,000 dated 3 January 2020 and described as 'INTERNET TRANSFER MORE FLOAT to 2K DAVID NAB', regarding which the plaintiff stated 'what happened was that David opened up an account there and we took out the 2,000 and put it into – it transferred into David's account'.
- (f) A debit of \$500.00 dated 6 December 2019 and described as 'INTERNET TRANSFER N 1000 FLOAT EG N 1000'. The plaintiff stated that she did not know to what this transaction related.
- (g) A debit of \$100.00 dated 11 November 2019 and described as 'INTERNET TRANSFER for open bal E Gash acct'. The plaintiff also stated that she did not know to what this transaction related.
- (h) A debit of \$400.00 dated 18 November 2019 and described as 'INTERNET TRANSFER MORE FLOAT DAVID NAB' was identified as an amount transferred to her husband's account. The plaintiff thought this was for his rehabilitation but stated that she would have to double-check.

(i) A debit of \$100.00 dated 21 October 2019 and described as 'INTERNET BPAY MASTER BLDS ASS VIC 41289406' was identified as her husband's retired Master Builders Association licence renewal.

32 The plaintiff acknowledged that the transaction history did not show amounts for utilities bills, groceries and motor vehicle insurance and registration. The plaintiff said that these expenses were paid from income received in cash from homestay students which is kept separate from her bank account.

33 The plaintiff deposed that her husband does all of the family's finances. She deposed that she helps him occasionally, but that she does not really know what their income or expenditure is and that she relies on her husband for that information. The plaintiff deposed that their expenses varied every year and acknowledged that she could not really help with their income and expenditure each year.

34 The plaintiff also deposed that the amounts of \$192.00 for 'Medical, dental and optical (not covered on private health insurance' and of \$250.00 for 'Chemist/pharmaceutical' listed as expenses in her first affidavit were the totality of her husband's medical expenses for the 2018 year. She stated that she did not have private health insurance.

35 During cross-examination, it was also revealed that her husband has just started receiving NDIS benefits. There was no documentation regarding these benefits before the Court.

### **Consideration**

36 The defendant agrees that the deceased had a moral duty to provide for the plaintiff's proper maintenance and support and that the will does not provide adequate provision for the plaintiff. Given the defendant's concessions, it was submitted that the only remaining issue for determination is the quantum of any further provision to the plaintiff.

37 Under ss 91(4)(b) and 91(5) of the Act, the concepts of the plaintiff's 'adequate' and 'proper' maintenance and support are central to the question of the quantum of any order for family provision. This inquiry necessitates the Court having an understanding of the plaintiff's need through evidence of her financial circumstances. This is reflected in the requirement that an applicant's 'need' be demonstrated before the Court has jurisdiction to make an order for family provision.<sup>15</sup> While 'need' is a relative concept and does not solely mean material need, the Court must have adequate evidence of an applicant's financial circumstances before an order for family provision can be made.

38 In the case of adult children not suffering from a disability, the importance of a plaintiff providing adequate evidence of their financial situation has been extenuated by the requirement in s 91(4)(c) that the Court consider the degree to which the eligible person is not capable, by reasonable means, of providing adequately for their own proper maintenance and support.

39 On the evidence before the Court it is impossible to draw any clear conclusion concerning the plaintiff's need as at the date of the trial. The plaintiff's first affidavit was made in 2018 and can only be seen as providing information of her financial circumstances at that time, albeit unsupported by documentary evidence. The plaintiff's oral evidence of her financial circumstances at the time of trial was equivocal. It was clear that the plaintiff had little knowledge of her financial situation, for example, she was unable to state what savings, if any, she had, stating 'I don't do money'.

40 Furthermore, aside from the transaction history, there was a noticeable lack of documentary evidence before the Court as to the plaintiff's financial circumstances and need. There was no documentary evidence before the Court supporting the oral

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<sup>15</sup> See *Hallam v Maxwell* [1998] VSC 131, [17] (Hansen J); *Collicot v McMillan* [1999] 3 VR 803, 820 [47], 825 [58] (Ormiston J); *De Angelis v De Angelis* [2003] VSC 432, [45] (Dodds-Streeton J); *MacEwan Shaw v Shaw* (n 6) 104 [50], 117 [185], 120 [212]-[213] (Dodds-Streeton J); *Warriner v McManus* [2015] VSC 314, [63]-[64] (Zammit J, as Incerti J then was); *Davison v Kempson* [2018] VSCA 51, [36] (Tate, Santamaria and Beach JJA); *Re Schlink*; *Keane v Corns* (n 10), [37] (McMillan J). See also *Re Anderson* (1975) 11 SASR 276, 283 (Zelling J); *Goodman v Windeyer* (1980) 144 CLR 490, 497 (Gibbs J, Stephen and Mason JJ agreeing); *Evans v Levy* [2011] NSWCA 125.

evidence of income received from homestay students, the plaintiff's savings (particularly her superannuation and present savings), the plaintiff's liabilities (notably the loan from her daughter), and little evidence of the plaintiff's expenditure. Nor was there evidence of her husband's medical expenses or NDIS benefits to assist in determining any future financial burden on the plaintiff due to his condition.

41 In relation to criticism from the defendant of a lack of evidence about the plaintiff's need, the plaintiff submitted:

[I]n the absence of special needs requiring particular proof and in the absence of any assets or income the plaintiff does not have to prove a negative. For example, it is not normal practice for a plaintiff to tender a title search that shows no property or a Personal Property Securities Register search that shows no mortgageable personal property. The plaintiff is unemployed and owns no real estate and drives a 22 year old car.

42 On the basis of the plaintiff's oral evidence, it can be accepted that the plaintiff is her husband's full-time carer and will remain so, such that she has no prospects of gaining other paid employment. It may also be accepted that the plaintiff lives in rented premises and drives a 22 year-old car, however, these matters would usually be supported by documentary evidence. This is particularly so when it seems that the landlord has not increased the rent for a substantial period of time, as stated by the plaintiff. In relation to the plaintiff's evidence of her assets, liabilities and expenditure, the following statement of Hallen AsJ in *Graham v Graham* is apposite:

When a Plaintiff acknowledges that she 'does not have any idea' about her current income, states that she does 'not take that much notice' and that she has not checked, or even looked at, the current rental income she receives, and provides no reasonable basis for failing to provide precise details thereof, the Court cannot be satisfied that the whole picture has been presented.<sup>16</sup>

43 The importance of an applicant for family provision providing adequate evidence of their financial circumstances is emphasised in *Collings v Vakas*, where, in dismissing the plaintiff's claim, Campbell J said:

[B]efore a court can be satisfied that a plaintiff has been left without adequate provision, the court needs to be persuaded that it has been presented, at least

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<sup>16</sup> [2011] NSWSC 504, [109].



in broad outline, with the whole picture concerning the plaintiff's financial situation. In the present case, even though there are two elements of the plaintiff's financial situation about which I am satisfied (that she owns no real estate, and has family responsibilities), when another crucial element of the plaintiff's financial situation (namely, her income and expenditure) is not satisfactorily proved, it is not possible to conclude that she has been left without adequate provision.<sup>17</sup>

44 A moral claim alone is not sufficient to warrant an order for further provision.<sup>18</sup> Despite the concessions of the defendant, the onus nonetheless remains on the plaintiff to lead sufficient evidence of her financial situation. To make an order for family provision without appropriate evidence of the plaintiff's need would be 'to do no more than act on speculation'.<sup>19</sup> It would also be contrary to the requirements of pt IV of the Act.

### Conclusions

45 On the evidence before the Court, an order for further provision cannot be made in the plaintiff's favour.

46 However, in the circumstances, and particularly given that the defendant has conceded that further provision in the form of an additional 10 shares of the estate should be granted to the plaintiff, the plaintiff will be provided with a further opportunity to file and serve documentary evidence of her financial circumstances at the time of trial within 28 days. Otherwise, the proceeding will be dismissed.

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<sup>17</sup> [2006] NSWSC 393, [67].

<sup>18</sup> See, eg, *Hallam v Maxwell* (n 15) [17] (Hansen J); *MacEwan Shaw v Shaw* (n 6) 104 [50] (Dodds-Streeton J).

<sup>19</sup> *Singer v Berghouse* [1992] NSWCA 230, 16 (Sheller JA, Cripps JA agreeing). See also *Collicot v McMillan* (n 15) 820 [47] (Ormiston J).