SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Buckman v Lindbeck**
Citation:	**[2018] ACTSC 313**
Hearing Date:	5 November 2018
Decision Date:	9 November 2018
Before:	McWilliam AsJ
Decision:	See [36]
Catchwords:	**FAMILY PROVISION** – application to extend the time in which to commence proceedings seeking family provision – where plaintiff unaware of terms of will – where claim for family provision previously made by another beneficiary without plaintiff's knowledge – where estate not fully distributed and no substantial prejudice to other beneficiaries – application granted
Legislation Cited:	*Family Provisions Act 1969* (ACT) ss 7(1), 8(2), 8(3), 9(2)
Cases Cited:	*Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494 *Hills v Chalk* [2009] 1 Qd R 409 *Re Guskett* [1947] VLR 212 *Re Marland* [1957] VR 338 *Re Nassim* [1984] VR 51 *Roberts v Stern* [2017] ACTSC 182 *Smith v Public Trustee of the Australian Capital Territory* [2012] ACTSC 4; 6 ACTLR 126 *Warren v McKnight* (1996) 40 NSWLR 390 *Young v Kestel* [2003] WASCA 190
Texts Cited:	Leonie Englefield, *Australian Family Provision Law* (Thomson Reuters, 2011)
Parties:	Paul Robert Buckman (Plaintiff) Ruth Louise Lindbeck, Timothy Michael Buckman and Rachael Anne Buckman as executors of the Estate of the late Peter Edward Buckman (Defendants)
Representation:	**Counsel** Mr W Sharwood (Plaintiff) Mr J Raine (Defendants) **Solicitors** Maliganis Edwards Johnson (Plaintiff) Griffin Legal (Defendants)
File Number(s):	SC 392 of 2018

1. Before the Court is an originating application filed 28 August 2018 seeking to extend the time in which to apply for family provision out of the estate of the late Peter Edward Buckman (**deceased**) who died on 15 June 2016.

2. Mr Paul Buckman will become the plaintiff if leave is granted to extend the time for bringing the application. He is one of five children of the deceased.

3. Ms Ruth Lindbeck, Mr Timothy Buckman and Ms Rachael Buckman are opposing the application. They are the three executors named in the deceased's will, executed on 17 December 2015 (**Will**). Probate was granted to the defendants in respect of the Will on 7 December 2016.

4. The other child of the deceased, Mr Anthony Buckman, is not presently a party to the proceedings.

5. For convenience, and without any intending any lack of respect, I will refer to the parties by their first names.

6. The evidence led on the application was through affidavits of the parties and the legal representative for the plaintiff, read without objection and admitted as unchallenged evidence.

The Court's power to extend time

7. Section 9 of the *Family Provision Act 1969* (ACT) (**the Act**) governs the time limits for the making of an application for family provision, and the circumstances in which the time may be extended. It is in the following terms:

> **Time for making application under s 8 (1)**
>
> (1) Subject to subsection (2), an application for an order under section 8 shall be made within a period of 6 months after the date when administration in respect of the estate of the deceased person has been granted.
>
> (2) The Supreme Court may, after hearing such of the persons affected as the court thinks necessary, extend the time within which an application may be made under section 8.
>
> (3) An extension of time under this section may be granted—
>
> (a) on any conditions that the Supreme Court thinks fit; and
>
> (b) whether or not the time for making an application has ended.
>
> (4) An application for the extension, under this section, of the time within which an application for provision out of the estate of the deceased person may be made under section 8 shall not be made after the estate of a deceased person has been lawfully and fully distributed.
>
> (5) An application for provision out of the estate of a deceased person shall, for this section, be deemed to have been made on the day when the notice of motion or other document instituting the application is filed.

8. It is conceded by the executors that the deceased's estate was not fully distributed as at 28 August 2018, when the application was filed.

9. The power under s 9(2) of the Act is discretionary. The applicant bears the onus of showing sufficient cause for an extension of time to be granted: *Roberts v Stern* [2017] ACTSC 182 at [12]. It is necessary to satisfy the Court that the circumstances are such as to make it unjust for him to be penalised for being out of time. Moreover, as he is

seeking an indulgence, the application for an extension of time should be made promptly: *Re Guskett* [1947] VLR 212; at 214 per Herring CJ.

10. While the discretion is unfettered, it is to be exercised judicially. Considerations for the Court to weigh in the balance are likely to include the sufficiency of the explanation for the delay, the strength of the case if an extension of time were granted, and any prejudice to other beneficiaries which might arise from the delay: *Smith v Public Trustee of the Australian Capital Territory* [2012] ACTSC 4; 6 ACTLR 126 at [16].

11. In *Warren v McKnight* (1996) 40 NSWLR 390, Hodgson J (as his Honour then was) referred to these same considerations (at 394) and added a fourth, namely whether there has been any unconscionable conduct by the applicant. The four considerations were also adopted in *Hills v Chalk* [2009] 1 Qd R 409 at [75], per Muir JA.

12. These are the principles to be applied to the facts of this case.

The explanation for the delay

13. As probate of the Will was granted on 7 December 2016, the 6 month limit for an application under the Act expired on 6 June 2017. The present application was filed on 28 August 2018. The application is therefore 1 year, 2 months and 3 weeks out of time. It is a substantial delay.

14. The explanation for the delay is that Paul was never given a copy of the Will by the executors. They were reluctant to talk to him about the contents of the Will or what arrangements were being made for the disposal of the assets of the deceased throughout the latter half of 2016 and all of 2017. He appears to have been unaware even of when probate of the Will was granted. He eventually sought to obtain a copy of the Will through approaching the ACT Law Society, and only obtained a copy of it on 12 March 2018.

15. In April 2018, Paul sought advice from his present solicitors. In mid-April 2018, the substantial asset of the estate, being the home of the deceased, was sold for approximately $780,000. Paul's solicitors only received a copy of the grant of probate after close of business on 30 April 2018. Thereafter, Paul appears to have delayed taking prompt action, only formally engaging his solicitors on 24 July 2018. Some further time passed until 28 August 2018 when the application was ultimately filed.

16. The application was thus not made promptly once Paul was aware of the terms of the Will. In particular, Paul gives no explanation as to what was occurring between May and August 2018. In the meantime, the solicitors for the executors were taking steps to partially distribute the estate. Having said this, there was no evidence of any published notice of intention to distribute the estate before the Court.

17. For the present application however, I consider that the more substantive reason for most of the delay in the year after probate was granted was the passive, if not active, obstruction of the executors in providing information to Paul that would enable him to determine his legal rights in a timely manner and act accordingly.

18. Extensions of time have been granted in cases where the applicant was unaware of the right to make a family provision application: *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494, 505; where the applicant was unaware of the true size of the deceased's estate: *Re Nassim* [1984] VR 51 at 56 and 57; and where the applicant was unaware of the extent of her interests under the deceased's will: *Re*

Marland [1957] VR 338; *Young v Kestel* [2003] WASCA 190 at [80]. All of these decisions have been helpfully collected, among others, in Leonie Englefield, *Australian Family Provision Law* (Thomson Reuters, 2011) at [535.370], an extract upon which Paul relies.

The strength of the case for family provision

19. Paul is a son of the deceased. There is no doubt that he is entitled to make the application for provision: s 7(1)(c) of the Act.

20. An order for family provision may be made if, as at the date of the order, adequate provision for the proper maintenance, education or advancement in life of the applicant is not available under the relevant will: s 8(2) of the Act. Whether such provision under the will is adequate will require an evaluative judgment taking into account all the circumstances, including those criteria listed in s 8(3) of the Act.

21. Relevant to the evidence on the present application, those criteria include the income, property and financial resources of the applicant, the physical and mental capacity of the applicant, the financial needs and obligations of the applicant and the responsibilities the applicant has to support any other person.

22. The Will reveals that the deceased intended to favour three of his children, namely the executors, more than the other two, being Paul and Anthony. Gifts of $25,000 each were given to Paul and Anthony. The remainder of the estate was then to be distributed equally between the executors as beneficiaries. Following the sale of the deceased's house, the evidence was that each of the executors distributed to themselves approximately $220,000 on 28 August 2018. This was in circumstances where the executors were on notice of Paul's intention to make a family provision claim on the estate, and indeed, such application had been filed with the Court that same day.

23. The reason for such inequality among siblings is expressly stated in the Will, as follows:

> I acknowledge that the specific bequests of $25,000 to my sons [Paul] and [Anthony] are a relatively small portion of my estate however this reflects the lack of support I have received from, and contact I have had with, either son over a significant period of time.

24. While that evidence clearly speaks to testamentary intention, which is a relevant consideration as part of the circumstances that the Court takes into account when determining whether adequate provision has been made under the Will, it is not the only consideration and the weight given to it will be a question for any trial judge.

25. Further relevant evidence before the Court is Paul's occupation as a truck driver, with no real property to his name. He shares a car and rental property with his partner and her adult child. His partner has been unemployed for years and has some health issues. The adult child works part time at Hungry Jacks. Paul also has just under $10,000 of debt, including bills and a personal loan to a company described as 'GE Financial'.

26. Given the terms of the Will and Paul's current personal financial circumstances and obligations, I am satisfied that there are at least reasonable prospects of success of a claim. The Court does not of course have the benefit of all the material evidence on the merits, and in particular, of anything other than hearsay evidence as to competing claims on the deceased's estate.

27. The executors place some reliance on the evident lack of any relationship between Paul and the deceased in contending that the claim is weak. However, it is important to

understand that a claim for family provision in the Territory is to be judged by reference to the circumstances of the plaintiff as at the date of hearing, not at the date of the testator's death: s 8(2) of the Act. There may be matters that were not known to the testator at the time he made his Will, when he expressed his testamentary intention referred to above. On applications for family provision, the discretionary task of the Court is to take into account not just the circumstances of the past, but also present and future needs.

28. The executors submitted that the estrangement from the balance of the family weighs against the prospects of the claim. If it is relevant at all, Paul's estrangement from his family is but one consideration and will be part of the factual matrix for substantive hearing.

29. The executors further submitted that the plaintiff has been far from candid with the Court. As none of the deponents to the affidavits were cross-examined on the evidence each gave, I do not consider it is open to the executors to make such a submission.

30. On such as the evidence as has been recited above, I am satisfied that the merit of the claim is sufficient to make it unjust for Paul to be penalised for being out of time.

Prejudice to other beneficiaries in allowing the claim to be brought now

31. The prejudice claimed by the executors is that the estate, save as to the $25,000 gift to the plaintiff, has been distributed. That is a prejudice of their own making, having transferred the funds to themselves on 28 August 2018 with clear notice of Paul's intended claim through correspondence of Paul's solicitor on 16 August 2018, and where a request had been requested that the executors take no steps detrimental to Paul's interests in the meantime.

32. As to any prejudice to Anthony, the other beneficiary, the evidence discloses that not only was Anthony given a copy of the Will, but he made a claim for family provision, and that he settled his claim with the executors, reputedly receiving $90,000 instead of the $25,000 gift under the Will. Yet no one notified Paul of the claim or its resolution. Again, if Anthony's interests are in any way affected, it appears that such prejudice arises from his and the executors' failure to include all the beneficiaries when family provision out of the Will was being addressed a year ago. How it came to pass that a claim for family provision could be made on the deceased's estate without the totality of the beneficiaries being notified is far from clear and I will leave that question for resolution at any hearing.

Unconscionable Conduct

33. There is no unconscionable conduct on the part of Paul relevant to this application. I have some disquiet about the conduct of the executors, but, in the absence of the totality of the evidence as to the history of their dealings with the estate, it is appropriate to refrain from forming any view. In light of my findings on the other three issues, a finding either way would not be determinative of the application here.

Conclusion

34. As will be apparent from the above reasons, this is a clear case where an extension of time ought to be granted, notwithstanding the lengthy delay and the lack of prompt attention to filing the application once solicitors became involved. The plaintiff has been successful, and costs should follow the event. I have given consideration to the fact that the plaintiff was seeking an indulgence of the Court, but the issue was fully contested and

the executors expressly sought that this aspect of the proceedings be determined separately. I therefore consider it appropriate that the executors pay the plaintiff's costs.

35. There was also an application in proceeding filed 18 September 2018 seeking to amend the relief in the Originating Application. From the bar table, counsel for the plaintiff indicated that this was because the Originating Application had not in fact sought any family provision. It had merely sought to extend the time to claim such relief as the first step. As the precise wording of the amendments sought was not stated and no amended document was in evidence before the Court, I will stand that application over for further directions.

36. Accordingly, the orders of the Court are as follows:

    (1) Pursuant to s 9(2) of the *Family Provision Act 1969* (ACT), the time for the plaintiff to apply for provision out of the estate of the late Peter Edward Buckman is extended to 16 November 2018.

    (2) The defendants are to pay the plaintiff's costs of the application to extend time, such costs not to be recoverable until the resolution of these proceedings.

    (3) The application in proceedings filed 18 September 2018 is stood over for further directions to 19 November 2018.

I certify that the preceding 36 [thirty six] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam.

Associate:

Date: