

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : DRAKE -v- BRADSHAW [2017] WASC 228

**CORAM** : MASTER SANDERSON

**HEARD** : 4 AUGUST 2017

**DELIVERED** : 4 AUGUST 2017

**PUBLISHED** : 9 AUGUST 2017

**FILE NO/S** : CIV 1261 of 2017

**MATTER** : *Family Provision Act 1972 (WA)*

The Estate of Margaret Rose Drake late of  
187 Knutsford Avenue, Kewdale in the State of  
Western Australia (dec)

**BETWEEN** : ANDREW DRAKE  
Plaintiff

AND

DEBORAH BRADSHAW as Executor and Trustee of  
the Will of the late MARGARET ROSE DRAKE  
First Defendant

DEBORAH BRADSHAW  
Second Defendant

LORAINÉ ELIZABETH DODD  
Third Defendant

*Catchwords:*

Family provision - Application for leave to file out of time - Turns on own facts

*Legislation:*

*Family Provision Act 1972 (WA)*

*Trustees Act 1962 (WA)*

*Result:*

Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	Mr T M Retallack
First Defendant	:	Mr M Curwood
Second Defendant	:	Mr M Curwood
Third Defendant	:	Mr M Curwood

*Solicitors:*

Plaintiff	:	Culshaw Miller
First Defendant	:	McVay Bates & Associates
Second Defendant	:	McVay Bates & Associates
Third Defendant	:	McVay Bates & Associates

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

Clayton v Aust (1993) 9 WAR 364

1     **MASTER SANDERSON:** This was the plaintiff's application for leave to commence proceedings out of time under the *Family Provision Act 1972* (WA). At the conclusion of the argument, I indicated I would dismiss the application. I said I would provide reasons for my decision. These are those reasons.

2             The plaintiff is the only son of Margaret Rose Drake (the deceased). The second and third defendants are the daughters of the deceased and the sisters of the plaintiff. Probate of the will of the deceased was granted on 3 November 2014. The applicable time limit expired on 2 May 2015. This present application was filed on 16 February 2017. It was therefore filed just over one year and nine months after the expiry of the time limit.

3             The principles applicable to applications for extensions of time under the *Family Provision Act* were set out by the Full Court in *Clayton v Aust* (1993) 9 WAR 364. The court said the relevant factors include:

- (1) the discretion of the court is unfettered but must be exercised judicially and in accordance with what is just and proper;
- (2) the onus is on the plaintiff to establish sufficient grounds for taking the matter out of the general rule and depriving those who are protected by it of its benefits;
- (3) the time limit in the Act is a substantive provision and not a mere procedural time limit;
- (4) it is material when considering the application to consider how promptly and in what circumstances the plaintiff has brought the application for an extension of time;
- (5) it is relevant to consider whether there have been any negotiations with the defendant;
- (6) it is relevant to consider whether or not the estate has been distributed before the claim was made;
- (7) it is relevant to consider whether a refusal to extend time would leave the plaintiff without redress against anybody; and
- (8) it is relevant to consider whether the plaintiff has an arguable case on the merits but no detailed examination of the plaintiff's claim is warranted.

4           The application was supported by two affidavits of the plaintiff, one sworn 14 December 2016 and the other sworn 26 May 2017. In opposition to the application, the defendants relied on three affidavits. The affidavit of the second defendant is undated but was filed 4 May 2017. The affidavit of the third defendant was sworn 8 May 2017. There was a further affidavit of Victor Dodd, also undated, but filed 11 May 2017.

5           The affidavit evidence of the plaintiff is in the form that might be expected if leave was granted and an application under the Act was on foot. In other words, it goes into considerable detail about the plaintiff's relationship with the deceased, his progression since he left school, his circumstances at the date of death of the deceased and his present circumstances. In his written submissions, counsel for the defendants accepted that the plaintiff had an arguable case and that criteria was satisfied. That being so, it is unnecessary for me to detail or even summarise most of the evidence in the plaintiff's affidavits.

6           During the course of his submissions, counsel for the plaintiff maintained that his client had a 'strong case'. At first instance in *Clayton v Aust* the master had determined that the plaintiff's case was 'weak' or 'barely arguable'. The Full Court said the master was in error in attempting to evaluate the strength of the plaintiff's case. The question was whether or not the case was arguable. If it was, that was sufficient to satisfy the test.

7           Counsel for the plaintiff maintained that the position was not the same if it could be shown the plaintiff had a strong case. He submitted, in those circumstances, the strength of the case was a factor in favour of granting leave. With respect to counsel, I cannot see that is a correct statement of principle. What must be determined is whether the plaintiff's case is arguable. Once it is, that is a factor to be weighed in the balance in determining whether or not leave ought be granted. Of course, if the case was hopeless so that on the most favourable version of the facts to the plaintiff there was no prospect of the action succeeding, then leave might be refused. But in other cases, there is no warrant for evaluating the strength or otherwise of the plaintiff's claim.

8           As at the date of the death of the deceased, the primary asset of the estate was the deceased's property in Kewdale. It was eventually sold for \$638,133 on 14 July 2015. Following the death of the deceased, the second and third defendants held a meeting with the plaintiff. The deceased's will left the Kewdale property to the second defendant. The

residuary estate of the deceased was divided equally between the plaintiff and the second and third defendants. That meant the plaintiff eventually received just over \$18,000. The plaintiff was aware of his entitlement under the will, although not perhaps to the precise amount of his entitlement, from Friday, 26 September 2014 - just under two weeks after his mother's death. When told by the second defendant what his entitlement would be, the plaintiff raised no concerns. He certainly did not suggest he intended to seek further provision from the deceased's estate.

9           On 2 October 2014, the second and third defendants sought legal advice mainly concerning the grant of probate. The solicitor who was consulted pointed out there was a six-month time limit within which certain persons could seek further provision from the estate. The solicitor advised the second and third defendants that after the grant of probate they should wait at least six months before they sold the Kewdale property.

10           After receiving that advice, there was a discussion between the plaintiff and the second and third defendants. By par 9.4 of her affidavit, the second defendant says that she told the plaintiff the Kewdale property would not be sold for at least six months 'in case anyone contested mum's will'. The third defendant in par 8 of her affidavit confirms this discussion. It was the defendants' position the plaintiff was aware as at October 2014 that he had six months from the date of grant of probate of the deceased's will to seek further provision from the estate.

11           The plaintiff directly addresses this issue in his affidavit of 26 May 2017. He acknowledges a discussion took place with the second and third defendants but he says he did not understand from these discussions that a six-month time limit applied to him.

12           There is clearly a conflict on the evidence between the parties. As there was no cross-examination of any of the deponents on their affidavit, it is a conflict that I am unable to resolve. It should be noted that what must be determined is the reason for the delay. It is part of the plaintiff's case that he was not aware of the time limit and that was, in part, the reason he did not bring proceedings within time. In dealing with the application I accepted the plaintiff did not know of the existence of the relevant time limit.

13           Dealing more generally with the reasons for the delay, the plaintiff says, in essence, he has fallen on hard times and the exigencies of his

day-to-day existence were such that he was not in a position to turn his mind to the question of any greater provision from the estate of the deceased. There is no doubt the plaintiff is in an unfortunate position. He is homeless and living in a rough shanty in the bush. Even prior to that, he was living out of his car until the car was stolen. In those circumstances, the seeking of legal advice was perhaps the furthest thing from his mind. On the other hand, given his financial position, the prospect of further provision from the deceased's estate might have been one avenue to advance his position. Either way, the difficulty experienced by the plaintiff was a factor in explaining the delay and it was a factor in favour of the grant of leave.

14 The estate of the deceased had been fully distributed. If leave were granted, and the plaintiff brought a successful application for further provision, he would presumably rely on s 8 of the Act and through that section on s 65 of the *Trustees Act 1962* (WA). In determining whether an order under s 65 of the *Trustees Act* is to be made, the court is to have regard to s 65(8) of the *Trustees Act*: see s 9 of the Act. Section 65 of the *Trustees Act* applies where a trustee has distributed any assets forming part of the estate of a deceased person. Section 65(3) provides, subject to s 65(8), in effect, that the court may order that a person to whom any assets were distributed (or any person who has received the assets from that person other than in good faith and for valuable consideration) pay to the person making the claim a sum not exceeding the value of the assets received.

15 Section 65(8) of the *Trustees Act* is in the following terms:

Where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust, relief (whether under this section or in equity or otherwise) against any person other than the trustee or in respect of any interest of any such person in any assets so distributed and in any money or property into which they have been converted, shall be denied, wholly or in part, if the person from whom relief is sought received the assets or interest in good faith and has so altered his position in reliance on his having an indefeasible interest in the assets or interest, that, in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full.

16 In par 11 of her affidavit, the second defendant details what was done with the proceeds of the sale of the Kewdale property. She says she renovated her home at a cost of \$300,000. She then gave to the third defendant an amount of \$110,000. Appearing as attachment DB3 to the second defendant's affidavit is a statement of how her inheritance was

spent. It shows she retained \$100,000 after paying the expenses of the estate, the cost of the renovations of her property and allowing for the gift to the third defendant. It was the plaintiff's submission this \$100,000 was the 'undistributed' portion of the estate. Alternatively, it was said that if reliance needed to be placed on s 65 of the *Trustees Act*, the second defendant would not be disadvantaged if the plaintiff were awarded an additional \$100,000 from the estate of the deceased. Funds up to that point could be traced to the hands of the second defendant.

17 In my view, that submission misunderstands what has occurred. Properly considered, the estate of the deceased has been fully distributed. The \$100,000 presently held by the second defendant is not in any way part of the deceased's estate. She says she spent money on house renovations and made a gift to her sister based upon her belief as to her entitlement from the estate. That evidence must be accepted. Had she been aware of the prospect of a further claim by the plaintiff, she may not have spent the full \$300,000 on renovations. In other words, she has altered her position based upon the plaintiff's failure to act within the allotted time period.

18 In my view, the fact of the distribution of the estate was decisive and was largely the reason why I refused the grant of leave. Weighing all factors in the balance, I accept the plaintiff has an arguable case and I accept that there is some explanation for the delay. But it is important to bear in mind, as was said in *Clayton v Aust*, the time limit is a substantive provision and not a mere procedural time limit. This was not a case where there was some factor which precluded the plaintiff from finding out when he had to issue proceedings. Really what was said was that ignorance of the law combined with the plaintiff's difficult circumstances was a factor in proceedings not being commenced. I accept that proposition.

19 Weighing all matters in the balance, it seemed to me the fact of the distribution of the estate is decisive. This case provided no better example of beneficiaries who took a cautious approach by waiting six months from the grant of probate before taking any steps to distribute the estate. They acted prudently and with the benefit of sound legal advice. They then acted as they were entitled to do and it would not be in the interests of justice if the plaintiff were now granted leave to issue proceedings.

20 Accordingly, I dismissed the plaintiff's application. The parties should provide short submissions as to the proper order for costs.