

**Re Duncan v Gibson (BS5172 of 2019) –Supreme Court of  
Queensland 9 July 2020**

**By John Fitzpatrick**

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- In this case, the plaintiff sought declaratory relief in relation to what was regarded as the last Will of Fay Duncan.
- The Will left the rest and residue of her estate to her carer who was the first defendant.
- The first defendant was granted letters of administration.
- The issue at the hearing was whether the deceased affixed her signature to the document and whether the deceased had testamentary capacity.
- Two further issues, in the event the document was found to be the last Will of the deceased, were whether the deceased and the first defendant were in a de facto relationship and whether the deceased had made adequate provision for the plaintiff.
- A further issue in the event, the document was found not to be the last Will of the deceased was a claim by the first defendant for unpaid wages and other sums.
- The legal principles concerning testamentary capacity included the following:
  - The testator must:
    - a) Understand the nature of the act and its effect, that is be aware of and appreciate the significance of the making of a Will;
    - b) Understand the extent of the property of which she is disposing, that is, be aware, at least in general terms, of the nature, extent and value of the estate;
    - c) Comprehend and appreciate the claims to which she ought to give effect, that is, be aware of those who may be reasonably thought to have a claim upon the estate and the basis for and nature of the claims of such persons;
    - d) Have no disorder of the mind which influences the disposition of his estate, that is, have an ability to evaluate and discriminate between the respective strengths of the claims on his estate;

**Testamentary capacity**

- The deceased had a number of medical conditions. This included alcohol and drug abuse. Her memory score for a test conducted in 2015 is consistent with poor cognition.
- A consideration of needs must take place in circumstances where the concept is relative. The plaintiff has substantial assets and reasonable income. However, she is not well off. The plaintiff has significant commitments, is a single mother with health

concerns and has primary custody of a child with medical and other needs, all of which place a demand on her available resources. Her overall financial position could probably be described as modest. The estate comprised real estate. There was no relevant contribution, financial or otherwise, by the plaintiff to that property or, indeed to the welfare of the deceased.

- The fact that the estate is modest does not of itself prevent a family provision claim. Even small estates are capable of accommodating the just demands of potential beneficiaries.
- The relationship between the plaintiff and the deceased was described as estranged. They had not spoken for many years. Even the death of the deceased's son, the plaintiff's brother, in 2014 had not resulted in contact between them.
- Estrangement will not necessarily be conduct disentitling a claimant to the benefit of proper provision, although it may reduce the moral claim a child might have to maintenance or support or advancement.
- In this case, the court found that the estrangement did not constitute disentitling conduct. It was an explanation for the lack of contact, namely, the dysfunctional nature of the parenting relationship in the plaintiff's childhood and the impact it had upon her emotionally and physically.
- The deceased clearly intended to provide a benefit to the plaintiff. She left the plaintiff her jewellery, motor vehicles and proceeds of her bank account. In truth, that benefit was of little value. The bank accounts held little funds and the valuable items of jewellery were unable to be located after the deceased's death.
- The court found that the plaintiff had been left without adequate provision for her proper maintenance, education and advancement of life.
- The provision of the residue of the deceased's estate, as to 75% to the first defendant and 25% to the plaintiff, provides proper recognition for the significant contribution provided by the first defendant to the deceased's welfare over more than 20 years, including during the difficult time when she had responsibility for her mentally unwell son, whilst providing adequately for the plaintiff's maintenance, education and advancement.

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