McIntyre v O'Regan [2015] NSWSC 1985

A recent decision of the Supreme Court in McIntyre v O'Regan concerned two adult children arguing they were not left with an adequate provision from the deceased's estate which totalled $1.1 million and that they should be entitled to further provision.

Judith McIntyre ("the deceased") died in June 2014, aged 66 and was survived by her two children – Seth, 41 and Sarah, 34. The deceased made a will in May 2014. In her will she left:

1. Half of her personal effects and $250,000 to Sarah;
2. Half of her personal effects and $190,000 to Seth (she had previously given Seth $60,000 to assist him with court expenses regarding custody of his children);
3. Household contents and right to use car for one year following her death to Ms Ingrid Langenbruch (she had also paid over $300,000 towards the purchase and improvement of a property registered in Ms Langenbruch's name in which the deceased and Ms Langenbruch lived); and
4. The balance to Mr Serge Benhayon (she had also paid $800,000 to Mr Benhayon to make improvements to a teaching hall on a property he owns).

The deceased was diagnosed with breast cancer in 2011. Sarah claimed she took a leave of absence from her PhD course, changed her enrolment from full-time to part-time and visited regularly until the deceased's death, provided emotional and practical support, took the deceased to medical appointments, did groceries and provided some domestic care until paid support was arranged.

Sarah and the deceased discussed her will – the deceased said her intention was to leave a large portion of her estate to the College of Universal Medicine started by Serge Benhayon. She told Sarah she would leave a sizeable amount to her and Seth to be used for deposits for a home but did not specify amounts. The week before she died, the deceased said to Sarah "I want you to promise that you will not challenge my will". Sarah said she would not.

Sarah's partner has a "debilitating chronic psychiatric disorder" and is dependent on Sarah.

Seth has a varied employment history. He commenced a counselling course in 2002 but did not finish and has had largely construction and maintenance jobs since. He currently earns $35,000 per annum. He has two children aged 10 and 4 who live with their mother. He has regular access to the children, contributes to their maintenance and rents an apartment in Petersham. Seth has a self described "chronic back condition" which will eventually prevent him from doing physically demanding jobs. He intends to finish his counselling degree.

Although Seth did not see the deceased a great deal in her final years, he said he spoke to her daily on the phone. He knew of her decision to give the majority of her money to Universal Medicine and had told her he thought she should deal with her money how she had come into it herself – by inheritance. Nonetheless, in their last conversation, Seth nodded when the deceased asked he respect her decision about her will.

Sarah and Seth put to the Court that their financial needs amounted to $600,000 and $715,000 respectively. This included a $400,000 deposit for property for each of them, $60,000 for Mr Williams' treatment and $35,000 for vacations in Sarah's case, and $30,000 for a car and $130,000 for two years of fulltime retraining and income support in Seth's case,

among other things. They stated a provision of $550,000 each from the estate would be adequate.

The deceased had a longstanding interest in spiritualism and a history of providing financial support and gifts to spiritual gurus.

Mr Benhayon owns a business known as Universal Medicine, a complementary healing and training organisation. He first met the deceased in 2011 at the Byron Bay Writers Festival. Mr Benhayon provided complementary care to the deceased, alongside traditional medical treatments provided by her medical specialist, over a period of three years. In May 2014, the deceased gave Mr Benhayon $800,000 for the renovation of a warehouse to a teaching hall. She told Mr Benhayon she will also give him further money in her will, and that she had discussed it with her children who respected her wishes and will not challenge them.

The deceased met Ms Langebruch towards the end of 2011. At the time, Ms Langenbruch owned a property near Brunswick Heads, and the deceased owned a property near Byron Bay. They became close friends, with Ms Langenbruch driving the deceased to appointments and generally helping her. In 2012, Ms Langenbruch moved into the deceased's home and in 2013, the deceased and Ms Langenbruch decided to sell their respective homes and buy a house together, which was put in Ms Langenbruch's name.

Law

Section 59 of the *Succession Act*[1] states that the Court may make an order in relation to the estate of a deceased person if "adequate provision for the proper maintenance, education or advancement in life… has not been made by the will of the deceased person…".

Singer v Berghouse (No 2)[2] states a two-stage test should be applied to decide if adequate provisions have been made by:

1. Asking a question of fact, in this case, has the deceased made adequate provision for Sarah's and Seth's proper maintenance, education and advancement in life? If the Court finds the answer to this question is that an adequate provision was not made, the Court can make an order for provision.
2. Undertaking an exercise in discretion, in this case, whether the provision ought to be in Sarah's and Seth's favour? This second stage assesses whether the Court should make an order.

The Court's role is not to achieve a fair disposition of the deceased's estate, achieve equity between the various claimants, reward an applicant or distribute the estate according to notions of fairness or equity. Rather, the Court's role is simply to ensure adequate provision for the proper maintenance, education and advancement in life of an applicant which should not intentionally infringe on the deceased's freedom of testation.

Decision

Justice Stevenson detemined that while the deceased carefully considered how to divide her estate, and was generous to Mr Benhayon and Ms Langebruch she left both her children with a "sizeable" deposit for property as she promised them, and although some may argue it was in the lower range of adequate provision, it was adequate nonetheless. Justice Stevenson was not prepared to act against the deceased's decision to give gifts and provide in her will for Mr Benhayon and Ms Langebruch by providing a further provision to Sarah and Seth from the deceased's estate.

The claims were unsuccessful.

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[1] *Succession Act 2006 (NSW).*
[2] [1994] HCA 40.