

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## Bushby v Gayle Kristin Bushby as Executor of the Estate of Florence Born [2024] WASC 54

Supreme Court of Western Australia, Seaward J, 1 March 2024

Whether a stepchild had standing to bring a family provision application.

**Key words:** Estate, Western Australia, Residuary, Gifts to Charity, Family Provision, Stepchild, Standing, Meaning of Estate of a Parent

1. This application concerned the estate of the late Florence Born (the deceased), who died on 11 April 2021, leaving a will dated 20 February 2018. The residuary of the estate, an amount of \$720,000, was left to six charities.
2. The plaintiff was the stepdaughter of the deceased. The second to seventh defendants were the charities left the residuary of the estate.
3. The plaintiff's natural father had died in 2014. His estate passed by survivorship to the deceased, the plaintiff's stepmother. There had also been inter vivos gifts to the deceased during his lifetime.
4. The deceased left her stepdaughter a specific gift of \$100,000.
5. The case was heard on the papers.
6. The question before the Court was whether the plaintiff had standing to bring an action for further provision from Florence's estate pursuant to [s 6](#) of the [Family Provision Act 1972](#) (WA) (the Act).
7. The second to seventh defendants (the charities) disputed the standing of the plaintiff to bring a claim under [s 6](#) of the Act. The charities' position was that the plaintiff did not fall into any of the categories of person eligible to bring a claim under [s 6](#) of the Act, as specified in [s 7](#) (1)(eb) of the Act.
8. Section 7(1)(eb) which provides:
  - (1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons —
    - ...
    - (eb) a stepchild of the deceased, if —
      - (i) the deceased received or was entitled to receive property from the estate of a parent of the

stepchild, otherwise than as a creditor of that estate; and

(ii) the value of that property, at the time of the parent's death, is greater than the prescribed amount;

...

9. The amount prescribed for the purposes of section 7(1)(eb) in the [Family Provision Regulations 2013](#) (WA) is \$517,000: see Regulation 3.

10. 'Stepchild' is defined in s 4 of the Act as:

a person who was alive on the date on which the deceased married or entered into a de facto relationship with a parent of the person but who is not a child of the deceased;

11. The question was one of statutory construction. An issue regarding the construction of s 7(1)(eb) of the Act had not before been the subject of any judicial authority in Western Australia.

12. Moreover, there is no equivalent provision to s 7(1)(eb) in the relevant family provision legislation of the other states and territories. Therefore, no assistance was to be gained from a consideration of those Acts.

13. The Court noted that there was no definition of 'estate of a parent' in the Act. Therefore, this term needed to be investigated.

14. The plaintiff submitted that the definition of 'estate of a parent' in s 7(1)(eb), should be taken to mean 'a living person's assets' and therefore include inter vivos gifts or transfers made by the parent to the stepparent, and property the stepparent became the sole owner of by right of survivorship.

15. The charities submitted that as a matter of statutory construction, the reference to 'estate of a parent' in s 7(1)(eb) of the Act was a reference to the 'deceased estate' of the parent.

16. The charities therefore submitted that neither property the subject of a joint tenancy (which the surviving stepparent owns absolutely upon the death of the parent by virtue of survivorship), or property received by the stepparent from the parent during their lifetime, formed part of the estate of the parent for the purposes of s 7(1)(eb) of the Act.

17. The Court found, upon a close analysis of the text of the statute and of the relevant extrinsic materials, that 'estate of a parent' in this context meant 'deceased estate of the parent' (at [66]):

The above extracts confirm that the purpose of the amendments was to introduce the ability of stepchildren to be eligible applicants for the purposes of an application under s 6(1) of the Act. The extracts confirm that the purpose of the amendments was not to grant stepchildren the unconditional ability to make an application under s 6(1) of the Act. The extracts are also consistent with a construction of the term 'estate of the parent' as meaning the 'deceased estate of the parent', as revealed by an analysis of the text and context of s 7(1)(eb) of the Act.

18. The plaintiff could not succeed because the deceased did not receive, or was not entitled to receive, property from the estate of the plaintiff's father Eric Born (otherwise than as a creditor of that estate) which had a value at the time of Eric Born's death greater than the prescribed amount.

19. Therefore, the plaintiff did not have standing to apply for further provision, and the gift of the residuary to the charities was undisturbed.

## COMMENT



The plaintiff submitted that there was a moral issue to which s 7(1)(eb) was directed, There was a perceived unfairness that arose where a deceased person failed to make adequate provision for a stepchild in circumstances where the deceased's estate was substantially enhanced by contributions made to it by the parent of the stepchild.

The plaintiff further submitted that this unfairness is the same whether the property was received by the deceased inter vivos, or on the death of the parent.

On this point, the Court observed (at [69]):

I observe that the task of statutory construction is to determine the objective meaning of the provisions in question. Section 7(1)(eb) of the Act does not grant stepchildren an unconditional right to bring an action for provision under s 6(1) of the Act. The questions of the fairness (or otherwise) of the eligibility criteria are matters for Parliament to consider.

## VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2024/54.html>

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