

SUPREME COURT OF QUEENSLAND

CITATION: *Kay & another v Kreis* [2017] QSC 151

PARTIES: **YVONNE MARIE KAY**
(applicant)
ALBERT DE VIVO
(applicant)
v
GINA MARY KREIS
(respondent)

FILE NO/S: SC No 11998 of 2016

DIVISION: Trial Division

PROCEEDING: Application for an extension of time within which to commence a family provision

DELIVERED ON: 14 July 2017

DELIVERED AT: Brisbane

HEARING DATE: 26 April 2017

JUDGE: Holmes CJ

ORDER: **Application for extension of time within which to commence a family provision application dismissed.**

CATCHWORDS: WILLS AND ESTATES – TIME LIMITATIONS - where the testator died in December 2006 –where s 41(8) of the *Succession Act 1981* (Qld) requires a claim for family provision to be commenced within nine months of the testator’s death, unless the Court otherwise directs – where the applicants commenced proceedings almost ten years after the testator’s death – whether the applicants have demonstrated an arguable case – whether the applicants have sufficiently explained their delay – whether the respondent has suffered prejudice by reason of the delay – whether justice requires an extension of time

COUNSEL: C A Brewer for the applicant
J A Sheean for the respondent

SOLICITORS: De Groot’s Wills & Estates Lawyers for the applicant
Blake Topping Solicitors for the respondent

[1] **HOLMES CJ:** The applicants, Mrs Kay and Mr Devivo, who are brother and sister, seek the exercise of the Court’s discretion to permit them to commence a family

provision application in respect of the estate of their father, Mario De Vivo (to whom I shall refer as “the testator”). He died on 4 December 2006. They filed their application for provision on 17 November 2016. Section 41(8) of the *Succession Act* 1981 requires proceedings to be instituted within nine months after the death of the person against whose estate the claim is made, unless the court “otherwise directs”.

- [2] Among considerations relevant to the exercise of discretion under s 41(8) are: the sufficiency of the explanation of delay in making a claim; any prejudice to the beneficiaries; any unconscionable conduct by the applicant; and the strength of the applicant’s case.¹

The will and the estate assets

- [3] The respondent, Mrs Kreis, is the daughter of a later relationship of the testator and is the applicants’ half-sister, their junior by more than two decades. By the last in a series of wills, made in April 2001, the testator appointed Mrs Kreis as his executor and made her the sole beneficiary of his estate. In an addendum to the will he explained his decision, making some assertions about the conduct of his wife (the applicants’ mother), saying that he had assisted his children by employing them in his motel business, noting the particular needs of Mrs Kreis, and observing that her half-siblings had treated her with distance and contempt. Mr Devivo received a copy of the will in the same year it was made, and was aware that Mrs Kreis was the sole beneficiary.
- [4] In 2001, the testator suffered a severe stroke which left him with aphasia and right side hemiplegia. He was admitted to an aged care home at the Gold Coast. Mr Devivo says that he attempted to arrange for his father to be moved to Canossa, a Brisbane facility where there were Italian language speakers and he would be closer to his family, but Mrs Kreis opposed that step.
- [5] According to Mr Devivo, at the time of his death, his father held about \$43,000 in an Australian bank account, with a further \$4,200 in a solicitor’s trust account. Apart from those funds, the testator owned a half share in an apartment in Trestina in Italy (the other half having belonged to his wife, the applicants’ mother), two motor vehicles of uncertain value and funds in a Italian bank of about \$643,000.00. Those funds were the proceeds of the sale of his property at Bardonia. Mr Devivo, who had been appointed administrator of his father’s financial affairs, had transferred the funds to Italy not long before his father died, retaining an Italian lawyer to advise on their investment. He gave evidence that he had done so in order to meet the costs of obtaining a place in a nursing home in Italy for his father; the latter had said he wanted to die in that country. The account was frozen on the testator’s death, no steps having yet been taken to invest the money.

The parties’ actions in the year following the testator’s death

- [6] In February 2007, Mrs Kreis filed an application for a grant of probate, only to have it requisitioned because Mr Devivo had filed a caveat opposing any grant. Mr Devivo deposes that he had been advised by a registry officer to file the caveat (which he did on 15 February 2007) and to seek legal advice. On 19 February 2007, Mr Devivo and Mrs Kay went to their current solicitors to seek advice firstly, about the validity of their

¹ *Warren v McKnight* (1996) 40 NSWLR 390 at 394; *Hills v Chalk* [2009] 1 Qd R 409 at [75].

father's will, questioning his testamentary capacity (about which Mr Devivo had for some time had doubts, because he regarded statements in the addendum as untrue) and secondly, about the status of the testator's Italian assets.

- [7] Mr Devivo deposes that he was informed at that consultation that there would be difficulties in challenging testamentary capacity, but he and Mrs Kay could file family provision claims. They were given an estimate of its costing \$81,000 if the matter were to go to trial, and were warned of the risk of an adverse costs order. He then spoke to an officer at the Italian consulate who informed him (in Mr Devivo's words) that "Foreign assets in the estate might not be transferrable to Australia". The solicitors estimated costs of up to \$3,200 to advise on that issue.
- [8] Mr Devivo deposes that he had no other income than a pension and was suffering from poor health. He and Mrs Kay decided that they would not engage the solicitors to take matters any further, because they could not afford the fees estimated. The solicitors advised by letters in February, April and May 2007 that it was necessary within six months of death to give notice of an intention to commence a family provision application, a period which would expire on 3 June 2007, while the nine month limitation period within which to commence proceedings would expire on 3 September 2007.
- [9] Mr Devivo filed a "Notice in Support of Caveat" on 26 February 2007, after he had seen the solicitors. It purported to identify the claimed interest in the estate as arising under "the *Family Provision Act*" by virtue of Mr Devivo's position as a son of the testator. It went on to say that he required the will to be proved in solemn form, on the ground that he was one of the testator's next of kin.
- [10] Mrs Kreis' then solicitors, obtaining a copy of the notice from the registry, wrote to Mr Devivo in March 2007, saying that they inferred that he wished to make an application under s 41 of the *Succession Act* 1981 and advising him that if that were so, he would need to commence separate proceedings under that Act and should consult a solicitor. They also suggested that he consider withdrawing the caveat to allow probate of the will to be obtained, undertaking in that event not to distribute the estate until the claim for family provision was resolved, and expressing their preparedness to take the notice supporting the caveat as notice of his intention to make a claim. The letter also advised the necessity to file such a claim within nine months of the date of the testator's death.
- [11] Mr Devivo consulted another firm of solicitors in July 2007 and was given similar fee estimates to those already received. Those solicitors suggested an attempt at informal resolution, and wrote on his behalf to Mrs Kreis' solicitors, advising of his intention to make a family provision application and asking whether Mrs Kreis would be prepared to negotiate a settlement. Having suggested negotiation, the letter proceeded, in a most unconciliatory way, to advise Mr Devivo's intention to apply to remove Mrs Kreis as executor of the estate on the grounds of alleged fraud, and to propose that she renounce her position in his favour or that of another member of the family. (Nothing ever came of the removal threat.) Mr Devivo says that he cannot recall if there was a response from Mrs Kreis' solicitors to his solicitors' letter. He says, however, that he was not prepared to agree to Mrs Kreis' obtaining probate, because he regarded her as having carried out unauthorised transactions on his father's bank accounts after the latter suffered his stroke.

- [12] Mrs Kay wrote to Mrs Kreis' solicitors on 3 April 2007, advising that she intended to challenge the will and requesting a copy of it. On 16 August 2007, Mrs Kay lodged a caveat supported by a notice expressed in very similar terms to Mr Devivo's, asserting an interest under "the *Family Provision Act*" as a daughter of the testator and requiring that the will be proved in solemn form. Mrs Kreis' solicitors wrote to Mrs Kay on 24 August 2007, indicating that they inferred that she wished provision to be made under the *Succession Act*. They proposed that the assets of the estate be held pending resolution of her and Mr Devivo's claims for family provision, providing she agreed to proceed expeditiously with the claim and withdraw her caveat, while both parties agreed to negotiate the claims in due course.
- [13] Mr Devivo also wrote again to Mrs Kreis' solicitors in August 2007, advising that the firm which had previously written on his behalf no longer acted for him but he would advise when he had replaced them. It appears that Mrs Kreis' solicitors had made some enquiry of him about assets of the estate. Mr Devivo responded that there was an asset (presumably the Trestina apartment) in Italy, the whereabouts of which Mrs Kreis knew, and that there were other Italian assets controlled by a bank, which had nothing, he asserted, to do with Queensland law. Mrs Kreis would need to contact him or his Italian lawyer in regard to the foreign assets, but the will was, according to Mr Devivo, void according to Italian law, which mandated equal shares for all children of the testator. The letter ended by saying that he and Mrs Kay were prepared to enter into "a fair contract".
- [14] Mrs Kay has supported her brother's account of what occurred, other than in relation to his dealings with his second set of solicitors in July 2007 and his letter to Mrs Kreis' solicitors in August 2007, of which she had no direct knowledge. She had filed her caveat on 10 August 2007 on the basis of information received from Mr Devivo. She had not responded to Mrs Kreis' solicitors' letter of 24 August 2007, because she did not trust Mrs Kreis and thought if the caveat were removed she and other family members would not "see [their] father's money again"; she appears to have regarded that as including the funds held in Italy. She mistrusted Mrs Kreis because she regarded her as having improperly taken funds from the testator's account when he was alive and also because (according to Mr Devivo) Mrs Kreis had told medical staff that she was an only child and in that capacity had instructed them not to carry out surgery on her father as he neared the end of his life.
- [15] Mr Devivo deposes that he attended the Supreme Court Registry again in August 2007 and was advised that if he did not withdraw the caveat, the matter would be dealt with by a judge, and he would be able to raise his concerns about his father's will. That advice seemed to him to conflict with his earlier advice, so "to be safe" he filed another caveat. In early February 2008 he became concerned that he had heard nothing from the Court and consequently filed yet another caveat, in the hope that it would prompt a hearing. When nothing came of that, he assumed that the caveats would remain in place.
- [16] In January 2008 (the date being evidenced by the postmark on the envelope) Mrs Kay wrote to Mrs Kreis saying that she wished to discuss legal matters with her before Mr Devivo went to Italy "to finalise estate matters". (It is not clear what that was a reference to; Mrs Kay said she could not recall the particular letter.) If Mrs Kreis did not comply, they would take action to remove her as a beneficiary, which, Mrs Kay asserted, was "quite easy".

- [17] Meanwhile, annexures to Mrs Kreis' affidavit show, Mr Devivo was emailing her then solicitors in early 2008, asserting that Mrs Kreis should refund monies removed from the testator's bank account, which would then provide funds to the estate so that the matter could be mediated and litigated. The solicitors responded, saying that their client had no knowledge of any such monies owing, and noting that she was the sole beneficiary and that no one had instituted family provision proceedings. Mr Devivo's caveat did not constitute a claim. Mrs Kreis had not been informed where Mr Devivo had moved the funds in his control (which they understood to be approximately \$600,000), other than that they had been sent to Italy.
- [18] The solicitors went on to point out that if Mr Devivo were to make a family provision claim, he would have to demonstrate need, a lack of adequate provision, and the ability of the estate to meet the claim, in circumstances where it was understood (presumably on the basis of Mr Devivo's assertion) that he would receive an equal share of the Italian funds, and there would be little left in the Australian estate after payment of debts. Finally, the solicitors said, Mrs Kreis had no funds with which to take any court action and was unable to prepare tax returns for the estate without provision of information by Mr Devivo.
- [19] According to Mr Devivo, after February 2008 he had very little contact with Mrs Kreis. In such contacts as there were, she demanded that he and his sister remove the caveats; she refused to mediate or negotiate before that occurred. Mrs Kay said that she visited Mrs Kreis on three occasions to try and resolve the matter. Mrs Kreis deposes that because of the caveats she was unable to obtain probate and could not make use of estate funds to pursue the assets in Italy, including the money transferred there by Mr Devivo. In any case, he had refused to provide details of the account.

Developments in 2016/17

- [20] There matters stood until August 2016, when both Mrs Kreis and Mr Devivo received advice from an Italian official described as the "curator" (administrator) of the testator's Italian estate. She advised that the estate consisted of the Trestina apartment and that it was necessary for the heirs to advise within 10 years of the testator's death (i.e. by 3 December 2016) whether they wished to accept the inheritance. The email also asked for information about any other children of the deceased.
- [21] Mrs Kreis responded by retaining an Italian lawyer to act on her behalf to prevent the forfeiture of the Italian assets, while Mr Devivo's Italian lawyer also contacted the administrator, advising of a contest in relation to the will. The result was that an Italian court ordered the administrator to suspend any further proceeding in relation to the estate pending resolution of the Australian proceeding. Meanwhile, Mr Devivo saw a Legal Aid solicitor who told him that a caveat was not the proper mechanism to seek family provision and advised him to file an originating application.
- [22] In accordance with that advice, Mr Devivo and Mrs Kay filed an originating application. The application asserted that they were contesting their father's will, claiming a right to inheritance and seeking that the court divide the remaining assets of their father's estate between them because of alleged misappropriation by Mrs Kreis. On the return date, a judge of this Court advised them to seek legal advice and representation. They went to their current solicitors, who had first acted for them in February 2007, and were told that they could obtain funding for fees. They duly

obtained a joint loan of \$30,000 from a litigation funder. Their application was subsequently amended (one infers with the benefit of advice from their solicitors) to seek family provision pursuant to s 41 of the *Succession Act*. A consent order was made for the removal of the caveats, so that in late January 2017, Mrs Kreis was finally able to obtain probate of the testator's will. She was then able to gather in the proceeds (about \$47,000) of the Australian bank account and a further \$6,000 by way of a medical insurer's reimbursement. The applicants' solicitors also provided her with the details of the Italian bank account. Mrs Kreis instructed an Italian solicitor to obtain a grant of probate in Italy and to take the necessary steps to retrieve the funds held in the Italian bank account.

A credit issue

- [23] I should start my examination of the considerations in this case by saying that I found Mr Devivo's explanation of the transfer of the proceeds of the sale of the testator's property to Italy, that it was done with a view to finding his father a position in a nursing home there, implausible. Both he and Mrs Kay said that, given the testator's ill-health, they proposed to send him by boat; Mr Devivo added the helpful detail that most boats had a chiller room for those who died en route. Asked how it was that they could contemplate moving their father to Italy when Mrs Kreis had been able to stop them from transferring him to a Brisbane nursing home, Mrs Kay made the assertion that Mrs Kreis had opposed both courses but then relented on the Italian proposal.
- [24] I do not accept that statement as truthful. It emerged for the first time in evidence and was entirely at odds with Mrs Kreis' statements in her affidavit that she was unaware of any desire on the testator's part to be taken to Italy, and that it would have made no sense, given his state of health and lack of family there; she was not required for cross-examination. Mrs Kreis' point was well-made: it would be a very strange thing to send a man who could no longer communicate effectively and was severely disabled on an ocean voyage to another country where he had no near relations. Mrs Kay said that she had no funds to travel overseas, while Mr Devivo said his only income was the pension; presumably both would have lost all personal contact with their father and he would have died far from his family.
- [25] It seems to me far more probable that Mr Devivo, being aware of the terms of his father's will, transferred the money so as to keep it out of the reach of Mrs Kreis, because of his various reservations about her (which included a belief that she was not really his father's daughter) and about the validity of the will. It does not follow that Mr Devivo had any nefarious intent in relation to the money. He told Mrs Kreis that he had transferred it, although he did not give her the details of the account. The funds have not, it seems, been dissipated in any way and seem likely, if a grant of probate is made in Italy, to be recouped by the estate. But the fact that I do not accept the applicants as truthful about why the moneys were transferred causes me generally to approach their evidence with caution.

Strength of the applicants' case

- [26] Mr Devivo and Mrs Kay both maintained that they had a good relationship with their father. Mrs Kay said that when her father was ill, she visited him monthly. Mr Devivo deposed that while his father was in the Gold Coast nursing home he visited him at least fortnightly and took him to medical appointments. He said also that he had contributed

to his father's estate; when he undertook the role of administrator of his father's financial affairs, he stepped in to prevent a mortgagee sale of the latter's residence, undertook necessary repairs and arranged its auction.

- [27] Mr Devivo's affidavit says that he currently suffers from a chronic pain disorder and depression as well as lower back pain. He owns a house in need of repair and an old and worthless motor vehicle. Although a schedule sets out as his liabilities a small credit card debt and two loans, a personal loan of \$15,822 and another loan of \$15,000, which he describes as his share of the litigation loan, it appears he may have inadvertently recorded the same loan twice; the former figure represents his account balance after payment into it of the litigation loan. If there is another loan in that amount, it is not explained or documented. He does not elaborate on his position at the time of his father's death, other than to say that he was in poor health and his only income was a pension.
- [28] Mrs Kay says that she and her husband are the directors of a family company which operates a Mexican food restaurant for the benefit of a family trust. Because they are both in ill health, they have had to employ a manager for the business, from which they draw a fortnightly income of about \$3,000 between them. The company is substantially in debt to the Australian Taxation Office. Mrs Kay says that she and her husband own their home but for the last 10 years have only paid the interest component of the mortgage. They are behind on their house payments; their present equity in the property appears to be about \$200,000. She is liable for the borrowing from the litigation funding company for this proceeding and owes about \$20,000 in credit card debts. She and her husband live with their adult son and two daughters, and the four children of one of the daughters. The son is entirely dependent on them, while the daughters have limited means and do not contribute to general household expenses.
- [29] As to the state of affairs at the time of the testator's death in 2007, Mrs Kay says that the Mexican restaurant was already struggling, having difficulty meeting its taxation liability. She and her husband were only drawing \$1,500 per week from the business, which met the interest payments on their house and basic living expenses. She did not have any savings or superannuation. Their son was a dependant at that time.
- [30] The evidence is limited as to Mr Devivo's need for provision in 2007, and neither applicant has provided any documentation for that period. Nonetheless, Mrs Kreis accepts, for the purposes of the application, that the applicants have an arguable case for provision. I consider that an appropriate concession and will proceed on that basis.

Prejudice to Mrs Kreis

- [31] This is not a case in which any prejudice arises by reason of distribution of the estate's assets, because nothing has been done in the administration of the estate until very recently. But there is a general prejudice which arises from the lapse of time since the relevant events, with the difficulties of fading recollection and loss of records which occur with the passage of years. The applicants' counsel suggested that it was they who would be disadvantaged by any loss of records, particularly bank records, since they had to prove their case for provision. That is not really an answer. Mrs Kreis might well want to adduce evidence about her own financial needs as bearing on what provision the testator should have made, and to counter assertions made by the applicants about their relationships with the testator and their financial circumstances at the time of his death.

She too will face the difficulties inherent in attempting to assemble evidence after the lapse of a decade. That is a relevant consideration, although not a decisive one, in determining what justice requires in this case.

Unconscionable conduct

- [32] It was contended for Mrs Kreis that it would be unconscionable to allow the applicants to benefit from their conduct in refusing to withdraw their caveats so that the estate could be administered. That refusal had been maintained, notwithstanding Mrs Kreis' solicitors' requests that the caveats be withdrawn and their offer to give an undertaking not to distribute the estate until the family provision claims were dealt with. I do not need to make any finding on the issue of unconscionability; I will instead deal with the issue of the applicants' conduct in considering their explanation for delay.

Explanation for delay

- [33] Both Mrs Kay and Mr Devivo say they were not in a financial position to commence proceedings in 2007. Mr Devivo's sole income was a pension. Mrs Kay says that her drawings from the restaurant business were only enough to meet interest payments and basic living expenses. In addition, in 2008, she was distracted by her daughter's marriage breakdown. She had also hoped that the Italian funds could be shared amongst her father's children according to Italian law.
- [34] Counsel for both applicants argued that while neither was in a position to fund a proceeding, they had taken steps which were reasonable for a lay person in filing the caveats, the notices supporting which referred to family provision proceedings. Their confusion was apparent. While they knew that there was a nine month time limit in which they were required to commence any family provision application, they did not understand what it was necessary to do for that purpose. It was reasonable for Mr Devivo to suppose that the caveats would bring the proceedings before the court. The Legal Aid solicitor who spoke to him in 2016 was the first to advise him that what he had done was not sufficient and that he should file the family provision application. Justice would be done between the parties by excusing the applicants' delay, given that they thought they were protecting their interests by filing the caveats, while Mrs Kreis had done nothing to remove them or to proceed with the administration of the estate. Her delay was as long as the applicants'.
- [35] I do not find the attempted equation of Mrs Kreis' delay with the applicants' delay compelling. Firstly, she is not seeking any indulgence from the court. Secondly, she says that she did not seek to have the caveats removed because she did not have the financial means to seek legal advice about the status of the Italian assets, did not have the details of the account held there and did not think she would be able to recover those funds. That was a reasonable decision, given that she was the only beneficiary of what would without those funds have been a very small estate, and (with the possible exception of whomever was owed the funeral expenses shown as an estate liability) was the only person whose interests were affected.
- [36] The applicants offer, in essence, two explanations for their delay: that they did not have the means to proceed and that they were under the impression they had taken appropriate steps to seek family provision. (Mrs Kay's additional contention that she was distracted in 2008 by her daughter's marriage breakdown was not pressed in

argument, unsurprisingly since it could hardly explain a failure to file by September 2007, or to do so over the next nine years.) I do not accept either explanation as a matter of fact.

- [37] Both applicants say that they were deterred by the fee estimate of \$81,000 for the matter proceed to trial, but that was plainly a worst-case scenario. Mrs Kreis' solicitors had made it clear that she was willing to negotiate, provided the caveats were removed. Mr Devivo owned an unencumbered house property. There was no reason to suppose he could not have raised a loan sufficient to fund the making of an application, as he has now done. Mrs Kay also owned a property with her husband; she has not given any indication of what equity they held as at 2007 or whether they had a capacity to borrow enough to make the application.
- [38] Nor is it correct to say that it was only in 2016 when Mr Devivo saw the Legal Aid solicitor that it became apparent to him and Mrs Kay that they needed to file a different application. Mrs Kreis' solicitors had written courteously and helpfully to the applicants in 2007, referring them to the *Succession Act* and advising of the relevant time limits. Mr Devivo was specifically advised of the need to commence a separate proceeding. (I infer, from the evidence and the applicants' joint approach in this application, that Mrs Kay was privy to any information that Mr Devivo had.) In February 2008, the solicitors pointed out once more that Mr Devivo's caveat did not constitute a claim and that no family provision claim had been made.
- [39] The applicants could not, in light of the solicitors' responses have had a justifiable belief that the caveats would somehow constitute an application for provision. If they had any hesitation in accepting what Mrs Kreis' solicitors had told them, they could, as Mr Devivo did in 2016, have sought further advice from a Legal Aid lawyer. And if Mr Devivo had seriously thought that his caveat would somehow bring about a hearing of his claim for family provision, one might have expected him to take steps when the passage of three, four, and more years disabused him of that notion.
- [40] It seems to me far more likely that the applicants did not proceed with any application because they did not think it worthwhile. They were content to thwart Mrs Kreis' attempt to obtain probate, thus preventing her from getting access to the limited part of the estate comprised by the accounts held in Australia, while being under the impression that they would ultimately share in the far more substantial assets held in Italy. Mrs Kay said explicitly that it was her hope that the funds would, under Italian law, be shared amongst her father's children; Mr Devivo conveyed that expectation in his correspondence with Mrs Kreis' solicitors. What triggered their current action was the realisation firstly, that the funds were at risk of forfeiture and secondly, that they may form part of the Australian estate.
- [41] It has been held that the fact that an estate is more significant than an applicant has previously appreciated cannot justify a failure to make an application for provision within time.² Certainly in the present case, I do not consider that the applicants' hope or expectation that that they would be entitled to share in the Italian funds, in circumstances where Mr Devivo had moved them out of the jurisdiction and was withholding information as to the account, and both applicants were actively preventing

² *Re Lauer, deceased* [1984] VR 180 at 185.

Mrs Kreis from obtaining probate, justifies their failure to make their application within time.

Conclusion

- [42] Both applicants knew of their rights to apply for family provision as early as February 2007 and of the relevant time limits. There is no compelling explanation of why they could not have found the means to make the application (as they have now done) within time. They have not satisfied me that they have a reasonable explanation for their delay of almost a decade in making their application, and I consider that the delay has occasioned some prejudice to Mrs Kreis should she now have to defend the application. Contrary to the applicants' submission, I do not consider that justice would be done by extending time.

Order

- [43] The application for an extension of time within which to commence a family provision application is refused. I will hear the parties as to costs.