

SUPREME COURT OF QUEENSLAND

CITATION: *Lambert v Lambert & Ors* [2018] QSC 304

PARTIES: **GABRIEL MARGARET LAMBERT**
(applicant)
v
**CHRISTOPHER JAMES LAMBERT, FRANCES MARY RABBITT AND
GABRIEL MARGARET LAMBERT AS EXECUTORS OF THE WILL OF
JOSEPHINE LAMBERT**
(respondents)

FILE NO/S: BS No 7240 of 2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 15 March 2018

JUDGE: Douglas J

ORDER: **1. Further and better provision for the proper maintenance and support of Gabriel Margaret Lambert be paid from the estate of Josephine Lambert (deceased) in the sum of \$200,000.**

2. I shall hear the parties further as to costs.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY CHILDREN – where the applicant was the daughter of the deceased – where the applicant was of limited means – where the applicant lived with the deceased while she was alive – where the applicant was the deceased’s primary carer – where the applicant was left a one-third share in the estate, the other two-thirds being left to her brother and sister – whether the applicant ought to receive further and better provision from the estate

Succession Act 1981, s 41

Darveniza v Darveniza [2014] QSC 37, applied
Gorton v Parks (1989) 17 NSWLR 1, cited
Pizzino v Pizzino [2010] QSC 35, cited

Singer v Berghouse (1994) 181 CLR 201[1994] HCA 40, applied
Vigolo v Bostin (2005) 221 CLR 191; [2005] HCA 11, cited
Young & Grainger v Outtrim [2011] NSWSC 39, cited

COUNSEL: A P Collins for the applicant
 L J Nevison for the respondents

SOLICITORS: Walker Lawyers for the applicant
 Hede Byrne & Hall Solicitors for the respondents

[1] This is an application for further provision out of the estate of Josephine Lambert deceased. She died on 20 October 2015 aged 92 survived by three adult children, the applicant, Gabriel Lambert, and the respondents, Christopher Lambert and Frances Maw (formerly Frances Rabbitt). The applicant is the youngest of the children having been born on 24 July 1954. Christopher Lambert was born on 13 January 1948 while Frances Maw was born on 26 January 1952. Frances Maw has two children while Christopher Lambert has one. Each of the grandchildren was given \$30,000 in the will.

[2] The relevant provisions of the will include:

“3. I GIVE AND BEQUEATH the sum of ONE THOUSAND DOLLARS (\$1,000.00) to the Administrator of ST PATRICK’S CATHEDRAL TOOWOOMBA for the saying of masses for the repose of my soul.

4. I GIVE AND BEQUEATH:-

- (a) All my shares in THE BROKEN HILL PROPRIETARY COMPANY LIMITED to my said son CHRISTOPHER JAMES LAMBERT PROVIDED THAT he shall survive me for his own use and benefit absolutely;
- (b) All my shares in JUPITERS LIMITED together with my brass statue of a man and dog to my said daughter FRANCES MARY RABBITT PROVIDED THAT she shall survive me for her own use and benefit absolutely;
- (c) All my shares in METWAY BANK and piano to my said daughter GABRIEL MARGARET LAMBERT PROVIDED THAT she shall survive me for her own use and benefit absolutely;
- (d) All my watches, rings, trinkets and jewellery to such of my said daughters FRANCES MARY RABBITT and GABRIEL MARGARET LAMBERT who shall survive me and if more than one in equal shares as tenants in common for their own use and benefit absolutely.”

[3] The will was dated 18 May 1994. There was also a codicil dated 22 December 2000 and both instruments were admitted to probate on 19 February 2016. The codicil provided:

“(a) I DIRECT that the following clause 4(e) be added to my said Will:-

- ‘4(e) ALL furniture, furnishings, electrical appliances and other articles and effects of domestic or household use or ornament located in

my home at 208 Herries Street, Toowoomba, not including any item left to another Beneficiary under this Clause 4, to my daughter GABRIEL MARGARET LAMBERT PROVIDED THAT she shall survive me for her own use and benefit absolutely.”

- [4] The deceased’s husband, Francis Lambert, died in 1988 at the age of 68. The applicant has never married and has no children.
- [5] The residue of the estate is left to each of the three children in equal shares. At the date of death of the deceased the executors estimated the value of the estate at \$1,649,488.29 net of the liabilities. Since then, as a result of the realisation of some assets at lower values than the estimates, the net value was estimated at the time of trial to be \$1,391,603.86. Because of the particular bequests of shares and jewellery in cl 4 of the will, however, the estimated value of the residuary estate was \$1,271,603.88. A notional distribution of both the specific bequests and the residual estate to each of the children results in a figure of \$461,999.16 for the applicant while Christopher Lambert would notionally receive \$449,065.29 and Frances Maw would receive \$437,230.12.
- [6] From the respondents’ point of view, there is no controversy that the applicant is eligible for further and better provision from the estate as a daughter of the deceased. The issues in contest were whether adequate provision had been made for her by the terms of the will and codicil and, if not, what, if any, provision should be made for her.

The circumstances of the applicant

- [7] The applicant had a close relationship with the deceased having spent most of her life living with her. She began work at 18 at a bank and stayed in that position for approximately two and a half years and then travelled overseas for about 12 months. When she returned from that trip in December 1975 she began again to live with her parents and to work as a nurse’s assistant for about four months. She then studied behavioural science for four years but did not complete a degree and was then employed for about 12 months as an office coordinator at the Brisbane Youth Service.
- [8] Then she worked as a nanny to a family in Brisbane as well as working as a kitchen hand in the hospitality industry. She stayed in those roles for two years and then returned to Toowoomba to live with her parents in 1985. She was then working at a restaurant as a kitchen hand and as a cleaner at a motel. When her father died in 1988 she continued to live with her mother at home and, at the end of 1988 began to work as a customer services officer with the Metway Bank in Toowoomba.
- [9] By the early 1990s her mother began to show symptoms of difficulty in movement and was later diagnosed with osteoarthritis and later again with Parkinson’s Disease. By the early 1990s her mother had stopped driving and she drove her anywhere she needed or wanted to go. She noticed her mother progressively having difficulty with movement and supporting herself when standing and walking.
- [10] Since late 1989 the applicant attended to the grocery shopping, ran errands, did chores and organised the payment of household bills. Her mother had three rental properties in Toowoomba acquired during her career in real estate. From 2000, the applicant began to

manage and perform the tasks needed in renting out those properties, including receiving the rents, confirming rental information with tenants, organising repairs and handling tenant concerns. She organised the preparation and signing of rental agreements and arranged bonds and cleaning of the premises when they were vacated.

- [11] The deceased was formally diagnosed with Parkinson's Disease in the late 1990s and, in about 2000, the applicant found the impact of the ongoing deterioration of her mother's health and the level of extra care required from her to be stressful. She took leave from work and when she contemplated returning to work as her leave came to an end her mother told her that she was not keen on her doing that. The applicant told the deceased that she had to return to work as she needed to earn money to pay her way and get her own home. Her mother had said to her on numerous occasions since she was a child that she did not want to go to a nursing home and at some stage they spoke about the applicant being the deceased's carer and not returning to work. She ultimately did become her mother's carer and says that the deceased said to her she could leave her the house they lived in at Herries Street in Toowoomba to which the applicant replied: "Well I would still need to go back to work because I still need money".
- [12] About that time her mother said to her that she would get her solicitor to come over to talk about the will. The applicant made an appointment with Mr Hede of Hede Byrne & Hall. He came to the house at Herries Street. She went out in the car to give them some privacy. She believed that, at that meeting, her mother and Mr Hede were discussing leaving the applicant the house in her will. That did not occur, however, as what was added was the codicil leaving her the furniture and household effects.
- [13] In December 2001, the deceased asked her to apply for a carer's benefit so that the applicant could continue to care for her mother. She did that and was given an allowance of only \$100.60 per fortnight because the deceased was a self-funded retiree. Subsequently, in 2002, she needed to get back to work to earn money to cover her expenses, including half the groceries and some joint household expenses to which she felt obliged to contribute. She then returned to part time employment at a Suncorp call centre for 20 hours per week for which she was paid overtime on Sundays.
- [14] From 2002, on the days that she was at work, RSL Home Care visited the house to assist in her mother's care. She liaised with that service to tell them what needed to be done for her mother. She did not pay board to her mother but contributed jointly to the groceries, mowing money and paid her own personal expenses. That arrangement continued for about eight years.
- [15] From July 2007 to about October 2007, her mother had an operation to remove her gallbladder and attended respite care. When she returned to the house at Herries Street in October 2007 she was less mobile than she had been before and more reliant on third party care for assistance. The applicant found the care role much more time consuming and intensive for her as a result of the side effects of the operation her mother had undergone. She was then assessed formally as "high care" by the aged care assessment team.
- [16] The RSL Home Care team told her they could only handle low care clients. She then contacted Ozcare for high care assistance but that organisation was not able to provide carers

immediately for her mother. She then took unpaid leave from work again in order to care for her mother until a care provider could be found. She was not paid during that three months she took leave from work and supported herself by living on the money she had saved. She continued to pay for her expenses while the deceased paid for electricity, rates, the telephone bill and the water bill.

- [17] At the end of that three month leave period an officer from Suncorp contacted her and advised her that she was required to start work again. Ozcare was still unable to provide help to look after her mother so she told Suncorp that she could not go back to work and her employment was terminated. She has not done significant work in a paid job since that time.
- [18] From early 2008, therefore, her full time occupation was as a carer for her mother. In that role she looked after her during each day, helping her to dress, toilet and shower, providing her with meals and attending to domestic chores around the house as well as keeping her company during the day. She was subsequently provided with assistance by Ozcare workers but they did not wash or toilet the deceased but would assist with some of the household duties.
- [19] She says that she did not have much of a social life and survived financially from 2008 onwards by progressively selling shares she owned. She sold her last shares by the end of 2010 and then exited her superannuation fund using its proceeds to buy some more shares which she then sold to cover her personal and household expenses. By 2013 she had spent all of her money and was using her credit card and paying for everything on that. When she told her mother that she could no longer contribute to their joint costs her mother agreed to pay her share of the groceries and mowing expenses while her personal expenses were put on to her credit card.
- [20] She then, again in 2013, applied for the Newstart Allowance through Centrelink and was initially granted a carer's payment as her mother's carer from April to December 2013 when it was withdrawn. She understood that this was because her mother had \$6,000 in her bank account. She then applied to Centrelink again for a Newstart Allowance which required her to apply for jobs. She had interviews with two potential employers but was not successful and was advised by Mission Australia that she could perform voluntary work for 15 hours per week instead of applying for outside jobs under Newstart. She did do that voluntary work from April 2015 on three days a week for five hours per day in broken shifts. Ozcare assisted on each of those days by spending about two hours with her mother.
- [21] By the time of this trial she was still in receipt of the Newstart benefit at about \$595 per fortnight. She had about \$1,900 in a bank account but owed money to a friend who had given her a loan of about \$4,020. She also owed close to \$28,000 on a credit card. She used that card mainly to buy food and to pay for medical expenses and other direct debits such as a monthly payment for medical insurance and her car.
- [22] From September 2017 she was in a paid trainee position with Lifeline Darling Downs for a period of six months which expired on 9 March 2018. She was receiving \$1,138.26 per fortnight during that period. She drives a 1993 Nissan Pulsar motor vehicle which she said was becoming more expensive to service and repair when it broke down.

- [23] She continued to live in her mother's house at Herries Street until it was sold in about October 2017 and then relocated, with her siblings' agreement, to another smaller estate property which was a home unit in Kenric Street, Toowoomba. She has lived there rent free since about October 2017. She wishes to purchase suitable alternative residential accommodation and anticipates that the cost of a comfortable two bedroom home in Toowoomba would be about \$400,000. There was evidence that the valuation of the two bedroom unit she currently lives in was \$210,000. An exhibit to her affidavit indicated that houses were available in Toowoomba of the type she was interested in for around that price of \$400,000.
- [24] She also anticipates that she will need assisted retirement accommodation in her mid to later years and produced evidence that the cost of a private one bedroom accommodation suite with ensuite only and subsidised care for a client over 65 would be between \$350,000 and \$470,000 as a refundable accommodation deposit while the cost of a one bedroom suite with sitting area, kitchenette and private ensuite and subsidised care was then \$677,500 as a refundable accommodation deposit. She has also made enquiries from BUPA Aged Care in Toowoomba and been advised that the current cost of a private one bedroom suite with ensuite only and subsidised care for a client over 65 years of age would be between \$396,000 and \$535,000.
- [25] She says that she is currently in good health but has limited prospects for earning an income from employment. She anticipates receiving a Newstart Allowance until she qualifies for an aged pension when she turns 66 in 2020. In order to satisfy the Centrelink asset test threshold for a single pension, she is entitled to hold between \$253,750 and \$552,000 as cash and other assessable assets without the complete loss of her entitlement to a pension or part pension or pension benefits. I understand that that is in addition to the value of any house that she owns. She expects, that if she has a residence valued at about \$400,000, it would appreciate in capital value over time so as to generate sufficient funds for her, upon sale, to pay for and enter secure suitable assisted retirement accommodation when she needs to.

The circumstances of the respondents

- [26] Christopher Lambert was in a better financial position than both of his sisters with net assets in his own right totalling approximately \$2.8 million including about \$1.3 million in superannuation and a share of a house with his wife which, as that half share, was worth approximately \$750,000.
- [27] He is a retired academic who taught in the accountancy field. At the time of the hearing he was 70 years old and generally in good health. He relies on his investment properties and savings for income. I infer that his wife had a reasonable sum in superannuation also although he refused to give evidence about the amount of any such sum. He did not know of the deceased promising the applicant to leave her house to her in her will.
- [28] Frances Maw is in more modest circumstances. She was 66 years of age at the hearing of the trial and generally in good health but had not worked for 11 years as she cares for her husband who has significant medical problems. Her assets consist of a total value of approximately \$420,000 including her half share with her husband in a house in Toowoomba. That half share is worth about \$215,000 and her superannuation is worth about \$159,000. She receives a disability pension and a carer's pension. She also says that she had a discussion with her

mother about her mother leaving the applicant her house in her will. She told her mother that it was a matter for her what she did with the house.

- [29] Frances Maw and her husband had joint assets, therefore, of approximately \$825,000 given the purchase price of their house. She now receives about \$430 per fortnight as a pension, a decrease from what she received previously, and an additional \$127 per fortnight as a carer's pension. They have recently purchased a \$55,000 motor vehicle less about \$13,000 representing the value of the car they traded in for it. The new car was needed to allow her husband to get into and out of it more comfortably.

Relevant legal principles

- [30] Section 41(1) of the *Succession Act* 1981 provides:

"41 Estate of deceased person liable for maintenance

- (1) If any person (the *deceased person*) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.
- (1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant."

- [31] In *Singer v Berghouse*,¹ Mason CJ, Deane and McHugh JJ identified two questions or stages in resolving applications such as these:

"The first question is, was the provision (if any) made for the applicant 'inadequate for [his or her] proper maintenance, education and advancement in life'? The difference between 'adequate' and 'proper' and the interrelationship which exists between 'adequate provision' and 'proper maintenance' etc. were explained in *Bosch v. Perpetual Trustee Co. Ltd*. The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the

¹ (1994) 181 CLR 201, 209-210 (footnotes omitted); see also *Vigolo v Bostin* (2005) 221 CLR 191.

deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.

The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like *Ellis v. Leeder*, where there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors."

- [32] The appropriate time to look at the question whether adequate provision has not been made from the estate for the proper maintenance and support of the applicant is the date of the deceased's death, 20 October 2015.

Adequate provision

- [33] The first question, therefore, is whether adequate provision was made for the applicant by the deceased. The deceased's estate was reasonably substantial, if not very large. Mr Collins for the applicant submitted that there was no competing claim by Christopher Lambert and argued that Frances Maw's position was moderate but comfortable.
- [34] The deceased, in permitting the applicant to live with her, helped set a standard for her appropriate accommodation. The deceased also benefited from being able to maintain her standard of living in her own property through her long life. The authorities establish that it is not the case that the applicant, being an abled bodied adult, has no claim.²
- [35] Here, Mr Collins submitted, the applicant is in a poor financial position with no real assets and no contingency fund to support her for the future. She and her mother were extremely close for the whole period of their relationship and the applicant was effectively her carer for the last 15 years of her life. The applicant is now 64 and is likely to require greater care as she becomes older when she may incur substantial needs.
- [36] The fact that she was left homeless by the deceased's death seems to me to weigh heavily in assessing whether or not adequate provision was made for her. The evidence suggests that the legacy she would receive under the will of approximately \$462,000 would barely be enough to purchase a house for her worth enough to provide a capital asset sufficient to allow her to enter into modest assisted care when she becomes older. She also has debts and the need for a better car than her current one which would eat up any further amount available to her from the bequest. It is also highly significant that the applicant has made substantial

² See, e.g., *Gorton v Parks* (1989) 17 NSWLR 1, 7; *Young & Grainger v Outtrim* [2011] NSWSC 391; *Pizzino v Pizzino* [2010] QSC 35 at [49]-[51].

personal sacrifices in looking after the deceased. In addressing these issues I have found the summary by Martin J in *Darveniza v Darveniza*³ of the relevant principles useful.

- [37] It was also submitted for the applicant that, absent the care provided by the applicant, the deceased may have needed to realise a large proportion of her estate to go into a high quality care facility. The submission was made that the applicant's work in looking after her mother helped preserve the assets of the estate against such an eventuality. That likelihood is difficult to assess on the evidence provided to me as it depends on the occurrence of contingencies that did not happen and where there is no real evidence before me about the costs that may have been incurred by the deceased had she done that and the effect on the assets of the estate had it occurred. Nonetheless, however, it seems to me to be a relevant feature in this case, reinforcing the approach that the provision made for the applicant in the will was not adequate.
- [38] The respondents conceded that the applicant was indisputably a person of limited means but argued that there was no rational explanation for her current station in life because she had no dependants, had been employed and in receipt of Centrelink benefits and has had her existence subsidised by the deceased for many years. Their primary submission was that adequate provision had been made for her in the will. I do not accept that submission.
- [39] In my view, the role undertaken by the applicant in caring for her mother is the likely explanation for her current limited means. It was also submitted for the respondents that it would be appropriate for her to live where she lives currently, the estate property at Kenric Street, which is worth approximately \$210,000. Her wish to have a more valuable property seems to me to be prudent, however, bearing in mind the likely expense of entering into supported accommodation in her future and the desirability of her owning a home which would be capable of providing the source of funds for such accommodation.
- [40] I have detailed the assistance provided by the applicant to the deceased over the last 15 years approximately of the deceased's life. It was clearly very significant and would have inhibited her ability to earn income otherwise. That was evidenced by the progressive selling by her of her shares from 2008 onwards. Bearing in mind also the moral obligation owed to her by the deceased because of the work done for the deceased by the applicant over many years, it is my view that adequate provision has not been made for her under the will.

Appropriate provision

- [41] The amount of provision it is appropriate to make is to be assessed at the time of the hearing. The applicant submitted, through Mr Collins, that she was entitled as a starting point to quality accommodation in the Toowoomba area which provides her with ongoing security. The submission was that provision should be made for a lump sum which will permit her complete flexibility for her ongoing requirements. Mr Collins submitted that proper provision should include a sum sufficient to buy her an unencumbered moderate but suitable house in Toowoomba where she can live independently. The evidence, he submitted, was that such a house would be worth between \$400,000 and \$450,000. He argued it should be of sufficient

³ [2014] QSC 37 at [15]-[16].

quality as to retain its market value so as to provide an ongoing increasing asset not the subject of capital gains tax.

- [42] He also submitted that she should receive an amount to discharge all of her indebtedness on her credit card and in respect of the loan to her by a friend. That amount is in excess of \$32,000. He submitted that she should receive a further amount for additional furniture to supplement that left to her in the estate of \$5,000 to \$10,000 and a sum of \$25,000 to permit her to purchase a reasonably sized new motor vehicle. He also argued for a contingency sum going forward to cover medical expenses and other unforeseen expenses including additional costs associated with obtaining entry to residential care in the range of amounts I have referred to earlier.
- [43] He pointed out that if the applicant chose to live in Kenric Street and then sell it she would be the person exposed to capital gains tax liability rather than the estate. That was not necessarily the case on the respondents' submission but it is not an issue I need to resolve. It seems to me that it is not appropriate that she be limited in her choice of accommodation in that manner. Mr Collins submitted, in the circumstances, that a distribution to the applicant of \$800,000 plus the shares given to her in the will as well as the furniture and other items given to her by the codicil was a reasonable amount for her proper provision and maintenance having regard to the competing interests particularly of her sister.
- [44] The respondents' submission, through Mr Nevison, was that, if I were satisfied that adequate provision had not been made for the applicant, that an award of no more than \$100,000 to \$125,000 should be made and that the applicant should not be rewarded for pursuing a "marginal, if not unmeritorious claim".

Discussion

- [45] I do not regard the applicant's claim as marginal or unmeritorious. Nor am I confident, however, that the applicant's proposal adequately takes into account the competing claim of Frances Maw. As Mr Nevison submitted, she is in quite modest circumstances, is also reliant on Centrelink benefits but has dependants, unlike the applicant. Nor is it necessarily appropriate to aggregate her assets together with her husband's in considering her competing claim to benefit from the mother's estate. One does not know what may happen in the future with her husband's assets, given, for example, that they have children.
- [46] Balancing those competing claims as best I can while taking a minimalist approach to the alteration of the will, leads me to the view that it would be appropriate to order a pecuniary sum be paid from the estate in addition to the provision already made for the applicant in the will and codicil. Taking into account her likely needs as well as those of her sister in particular, it is my view that an appropriate further provision to be made is for the payment of \$200,000 from the estate. Together with her current entitlements under the estate, that seems to me to provide an adequate amount to provide her with accommodation, the discharge of her debts, a modest new car and a contingency fund for her future which should not impinge on her rights to a pension but which will preserve a significant proportion of the estate for her brother and, in particular, her sister.

Order

[47] Therefore, I shall order that:

- (a) Further and better provision for the proper maintenance and support of Gabriel Margaret Lambert be paid from the estate of Josephine Lambert (deceased) in the sum of \$200,000.
- (b) I shall hear the parties further as to costs.