DISTRICT COURT OF QUEENSLAND

CITATION:	*Mullins v Dihm & Dihm* [2020] QDC 107
PARTIES:	**BERNARD EDMUND MULLINS** (Applicant) v **JOHN MICHAEL DIHM AND PETER JAMES DIHM** (Respondents)
FILE NO/S:	90 of 2019
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland, Cairns
DELIVERED ON:	29 May 2020
DELIVERED AT:	Cairns
HEARING DATE:	21 & 22 May 2020
JUDGE:	Morzone QC DCJ
ORDER:	**1. I will hear from the parties as to the terms of orders in accordance with this judgment and any issue as to costs.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION –REQUIREMENT FOR ADEQUATE PROVISION – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY SPOUSE OR PARTNER – entitlement to adequate provision from the deceased's estate and further provision should be made for the applicant's proper maintenance and support for accommodation commensurate with his age and health - portable life interest preferred over specific legacy from the proceeds of sale of the house property - applicant ought be responsible for continuing all fees and expenses associated with his accommodation - upon his death the life interest fund, after deduction of administration of that fund and final distribution of the estate, will be the distributable residue for the respondents - in the meantime, the respondents ought to receive an interim distribution of the residuary.

Legislation

Succession Act 1981 (Qld) s 41

Cases

Blore v Lang (1960) 104 CLR 124
Bosch v Perpetual Trustee Co Ltd (1938) AC 463
Freeman & Ors v Jacques [2006] 1 Qd R 318
Hertzberg v Hertzberg [2003] NSWCA 311
Hills v Chalk & Ors [2008] QCA 159
Kowalski v Public Trustee & Ors [2011] QSC 323
Milillo v Konnecke [2009] NSWCA 109
Perpetual Trustee Queensland Ltd v Mayne [1992] QCA 417
Sellers v Scrivenger & Anor [2010] VSC 320
Singer v Berghouse (1994) 181 CLR 201
Stewart v Stewart [2015] QSC 238
White v Barron [1980] HCA 14

COUNSEL: C Ryall for the applicant
A Fraser for the respondent

SOLICITORS: The Will & All for the applicant
O'Connor Law for the respondent

Summary

[1] The applicant claims a further legacy of $350,000 as adequate provision from the estate of his wife of 28 years. This is opposed by the respondents who are the deceased's surviving adult children, residuary beneficiaries and executors under the Will.

[2] The evidence was adduced by affidavit and supplemented by oral testimony of some witnesses. The relevant facts are largely uncontroversial.

[3] I have found that the applicant is entitled to adequate provision from the deceased's estate, and further provision for his proper maintenance and support in accommodation commensurate with his age and health.

[4] I have adjudged that the further provision be by way of a portable life interest of $300,000 from the proceeds of sale of the house property for appropriate accommodation, without disturbing the specific legacy of $100,000 and personal effects and household chattels. The applicant ought be responsible for all fees and expenses associated with his accommodation, including any exit fee depending upon his longevity in a Villa. Upon the applicant's death the life interest, after deduction of administration of that fund and final distribution of the estate, will be the distributable residue for the respondents. In the meantime, the respondents ought to receive an interim distribution of the residuary after accounting for the

establishment of the life fund, any costs of sale of the house property and outstanding debts of the estate at that time.

Background

[5] The applicant was born on 15 May 1928 and has 3 children from his first marriage - John Patrick Mullins, Peter Edmund Mullins and Paul Gerald Mark Mullins.

[6] He was widowed before marrying the deceased on 14 January 1990. The couple lived together as husband and wife with separate bank accounts, but shared most living expenses. The couple rationalised their assets with the applicant selling his property to one of his sons. They then continued to live in the deceased's house property located at 25 Clifton Road at Clifton Beach.

[7] Upon her death on 2 September 2018, the deceased left an estate valued at about $804,114.78 mainly comprising the house property valued at $465,000, cash at bank of $309,114.78, and personal effects and household chattels valued at about $30,000. The applicant, then 90 years old, had personal assets of $109,881.46 cash at bank, a car worth about $10,000, and a credit card liability of about $786.01.

[8] The applicant has benefited under the deceased's last Will by way of a pecuniary legacy of $100,000 to the applicant, her personal effects and household chattels, and permission to reside in the house property for life, provided that he paid the outgoings on the property and maintained the property in a clean and tidy state. He will continue to receive a pension of about $1,746.60 per fortnight from the Department of Veteran Affairs.

[9] The deceased is survived by two adult children of her first marriage – Peter Dihm born on 11 October 1946 and John Dihm born on 13 April 1944. They are executors of the deceased's last Will and are the residuary beneficiaries under the Will. The four other beneficiaries under the Will are the deceased's grandchildren. Their gifts are to be exonerated from any order in the applicant's favour.

[10] The applicant is now 92 years old with failing health. He continues to live in the house property in accordance with the deceased's wishes, but he now seeks a further legacy of $350,000 as adequate provision to enable him to transition to residential facilities commensurate with his age and health.

Last Will

[11] It is undisputed that by her last Will made on 29 April 2016 the deceased:

(a) appointed her two sons as executors;
(b) gave pecuniary legacies of $20,000 to each of her grandchildren (cl. 3(a)-(e));
(c) gave the applicant as follows (clause 3):

> *"(e) To give $100,000 to my husband **BERNARD EDMUND MULLINS ("BERNARD");***
>
> *(f)(i) to permit **BERNARD** to reside in my property located at 25 Clifton Road, Clifton Beach in the State of Queensland ('the premises') for life with all usual facilities of the house free of charge, provided that **BERNARD** pay the rates, levies and taxes, premiums on any insurance policies taken out by my executors in respect of the premises, and provided that he*

maintain the premises in a clean and tidy state to the reasonable satisfaction of my executors; and

*(ii) When **BERNARD** has in the opinion of my executors ceased to live in the premises permanently or to comply with the conditions of the right of occupation referred to in the preceding sub-clause, the premises shall form part of the residue of my estate.*"

(d) also gave the applicant her personal effects and household chattels (cl. 3(g));

(e) gave the residue of her estate to her sons John Dihm and Peter Dihm in equal shares, including the house property upon termination of the applicant's right of residence (cl. 3(h)).

Adequate Provision

[12] Section 41(1) of the *Succession Act* 1981 (Qld) provides:

> "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 dependent, 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."

[13] In determining an application for family provision pursuant to s 41 of the Act, the cases provide that a two-stage process is employed:[1]

1. First, the court must determine a jurisdictional question of whether the applicant has been left without adequate provision for his or her proper maintenance and support; and
2. Secondly, if so, the court will then determine what provision ought to be made in the circumstances.

Is the applicant left without adequate provision?

[14] The first stage of the inquiry is whether the disposition of the estate by the Will made adequate provision for the proper maintenance and support of the applicant.

[15] This goes to jurisdiction and is to be determined at the date of the death of the deceased, including matters which could be reasonably foreseen at that time.[2] The fact that a Will is morally unjust is not enough to warrant alternation to the disposition of the property.[3]

[16] *Singer v Berghouse*,[4] provides that the jurisdictional question requires:

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1 J K de Groot and B W Nickel (2007) *Family Provision in Australia*, Third Edition, Butterworths, Australia at [2.3]; *Singer v Berghouse* (1994) 181 CLR 201; *Vigolo v Bostin* (2005) 221 CLR 191.

2 *Singer v Berghouse* (1994) 181 CLR 201 at 209-10; *Vigolo v Bostin* (2005) 221 CLR 191 at [4]; *Green v Holtom* [2006] WASC at [20]; *Family Provision in Australia*, 3 ed, de Groot & Nickel, para [2.26].

3 *Bosch v Perpetual Trustee Co Ltd* (1938) AC 463 at 478-479.

4 *Singer v Berghouse* (1994) 181 CLR 201 at 209-210 per Mason CJ, Deane and McHugh JJ; See also *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 19.

> *"[A]n 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 deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.*

[17] The inquiry is more than an assessment of an applicant's needs. It involves an evaluative balancing of all the relevant considerations to determine what provision a wise and just person in the position of the deceased would have made.[5]

[18] As Keane JA (as his Honour then was) observed in *Hills v Chalk & Ors*:[6]

> "Judicial statements of high and longstanding authority explain that the evaluative assessment whether 'adequate provision' has not been made for the 'proper maintenance and support' of an eligible person must be made from the perspective of the deceased person on the assumption that the deceased was alert to the considerations relevant to the making of 'adequate' provision for the 'proper maintenance and support' of the claimant. In *Bosch v Perpetual Trustee Co* ([1938] AC 463) Lord Romer, delivering the advice of the Judicial Committee of the Privy Council said that 'in every case the Court must place itself in the position of the testator, and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father'."

[19] In summary, considerations relevant to the resolution of the jurisdictional question include: the applicant's financial circumstances; the size of the deceased's estate; the competing claims upon the deceased's estate; the nature of the relationship between the deceased and the applicant; any contribution made by the applicant to the deceased's estate; any special need of the applicant that was known and should have been known by the deceased; and the deceased's wishes.

The applicant's financial circumstances

[20] The applicant's current assets as at 14 April 2020 are estimated as comprising of $98,404.48 cash at bank, $10,431.20 held in his solicitor's trust account on account of legal fees, and his car worth about $10,000. He carries a small credit card liability. He has incurred a liability for legal costs of $69,968.95 as at 14 April 2020, and may incur further legal costs subject of this court's consideration in due course.

[21] The applicant's current pension is $3,794.69 per month, which leaves him with about $300 per week after his expenses of an estimated $2,462.00 per month.

[22] The applicant is challenged by age and failing health. According to his cardiologist, Dr Chin Lim, the applicant: "*has had complex cardiovascular issues dating back to*

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5 *Freeman & Ors v Jacques* [2006] 1 Qd R 318 at [29].
6 *Hills v Chalk & Ors* [2008] QCA 159 at [40].

1988 when he first had an aortic valve replacement"; suffers from ischaemic heart disease, paroxysmal atrial fibrillation, hypertension, coronary artery disease and obstructive sleep apnoea; has had "*multiple admissions to Cairns Private Hospital toward the end of 2019 for stabilisation of chronic airways disease as well as heart failure*"; and has a prognosis which is "*guarded, given his multiple co-morbidities and [that] he is at the advanced age of 91*".[7]

[23] The parties agree that the average life expectancy of a 92 year old male is a further 3.85 years. This may be eroded by the applicant's particular ailments. Dr Lim is unable to provide a time frame for his life expectancy, saying "*it could be months or it could be years*."[8]

[24] The applicant finds it too hard to maintain the garden at the house property and do most daily chores except clothes washing. The applicant manages to comply with the conditional permit to live in the house property but he will lose that accommodation if he leaves to take up accommodation in a retirement village commensurate with his age and health. In that event, the property would fall into the residuary estate for distribution, and the applicant will be left with his $100,000 legacy, household furniture and effects, and his personal assets as they are.

[25] The applicant is desirous of living in a villa at Regis Woodward Retirement Village. The associated costs for that accommodation, and for higher care in a retirement home at Regis Whitfield Aged Care are in evidence. I discuss the relative financial arrangements and costs of those facilities. On my reckoning the applicant will not have the financial capacity to transition to this suitable accommodation without further provision from the estate.

[26] I accept that the applicant is in a necessitous position in relation to his future maintenance while appropriately accommodated.

The size of the deceased's estate.

[27] The deceased's estate is modest. As at the time of trial it comprised:

Assets	**Amount**
Personal effects (jewellery/artwork) and household chattels	$30,000.00
Proceeds of NAB accounts	$299,336.24
Estate property	$465,000.00
Ergon Energy Refund	$114.00
Total Assets	**$794,450.2**4
Liabilities	

[7] Affidavit of Dr Chin Lim sworn 30 April 2020 [CFI-28] at Exhibit CL-1.
[8] Affidavit of Dr Chin Lim sworn 30 April 2020 [CFI-28] at paragraph 7.

Department of Veteran Affairs Pension Overpayment	-$1,723.91
Herron Todd White Valuation Fee	-$1,320.00
O'Connor Law Professional Costs and Outlays to 12 May 2020 for Estate Administration	-$8,412.94
Total Liabilities	**-$11,456.85**
Net Position of Estate	**$782,993.39**

[28] Further adjustments may be necessitated by matters of and incidental to the legal proceeding such that the net distributable estate will be about $590,000:

1. Exoneration of the legacies to the grandchildren totalling $80,000 (excluding any interest);
2. Further estate administration costs of $1,000 to $2,000.
3. Legal costs of the proceeding subject to the court's determination:
   (a) For the applicant - outstanding tax invoice to 8 April 2020 for legal work for $69,968.85 and having $10,431.10 in trust for Counsel's fees at 14 April 2020 totalling $80,399.95 (before the trial); and
   (b) For the respondents – the estimated costs to the end of trial are approx. $85,101.79 to $90,101.79.
4. An allowance of $23,000 is made for sale costs including commission and conveyancing costs (with estimated net proceeds of $445,000).

[29] Even a modest provision for the applicant will impact upon the dispositions made to the respondent beneficiaries.

The competing claims upon the deceased's estate.

[30] The respondent beneficiaries, the deceased's adult children, have been provided for under the Will. Their financial position is very modest.

[31] John Dihm is 76 years of age. He and his wife have two adult children aged 42 and 40. He is an Ordained Minister with the Uniting Church. He is remunerated with $60,300 plus a base loading of 10% totalling $66,330 gross, and he is provided accommodation while employed. His most recent tax return for the 2018/2019 financial year shows his taxable income as $55,993 with tax payable of $9,744.72. John has superannuation of $70,605.05 and he receives a pension payment of $5,910.00 per annum. His wife receives $834.44 fortnightly substantially constituted by superannuation and the disability support pension. They otherwise have modest assets worth about $39,800.00 comprising their car, house contents, and nominal savings. The couple have combined weekly expenses of $971.69, and they also help their 40 year old daughter and 5 children pay rent and school fees. They have no liabilities. John has medical history of pancreatic cancer, arthritis and breathing difficulties. Marilyn has asthma, arthritis and a fractured spine (following a recent fall), and requires medication to manage her pain and conditions. She is also required to fly to Perth for specialist medical appointments at considerable cost. They do not hold health insurance.

[32] Peter Dihm is 72 years of age. He remarried in 2013 and has two adult children from a previous marriage. Peter and his wife are retired and both receive the age pension. They live from week to week with a combined weekly income of $690.00 and a budgetary surplus of barely $20 per week. Peter's only asset is nominal savings of $20.00. The couple live together in the wife's house. They have entered into a Binding Financial Agreement, which provides that Peter has no interest in or entitlement to any of his wife's assets. Peter required an aortic valve replacement and a double bypass in 2014 and has other medical conditions including severe arthritis requiring a knee replacement and an inflamed sacroiliac nerve due to calcification on his pelvis.

[33] John and Peter's father died in 1978. Their mother, the deceased, was the sole beneficiary of his estate and received all joint assets by survivorship, and neither John nor Peter received an inheritance. Of course, their father's estate merged into the deceased assets and estate.

The nature of the relationship between the deceased and the applicant.

[34] The applicant and the deceased enjoyed a very long 28 year marriage.

[35] Their financial arrangements reflected their respective second time marriage. They came to live in the deceased's house by turn of life's circumstances. They had initially agreed to live in the applicant's house with a plan of vertical extensions and renovations. The applicant was a carpenter. To this end, the deceased entered into a contract for the sale of her house property but the buyer fell ill and could not complete. The couple then reassessed their position and instead decided to live together in the deceased's house with a view to renovating that property.

[36] The applicant retired from work in 1990. He received a lump sum superannuation between $170,000 to $180,000 and later sold his house to one of his sons for $135,000 in reliance on a market valuation. I accept that these funds were more or less used towards their shared life together including contributions to renovation costs. I also accept that the couple received differential incomes by the time of the deceased's death. She was receiving about $2,185 per fortnight and the applicant was receiving about $992 per fortnight at the time of her death. In 1996 they explored the prospect of developing the house property with a unit complex in conjunction with a builder/developer and acquiring one unit for themselves. That never came to fruition.

[37] The applicant and the deceased lived in the deceased's house property as their matrimonial home and for their mutual enjoyment. They shared the household tasks, companionship, life and holidays together as a married couple. And although they maintained separate bank accounts and did not share a joint bank account, they did pool their resources for joint expenses such as groceries, gardening, house maintenance, entertainment and holidays. I accept that the applicant paid for house and contents insurance, car insurance, car maintenance and running costs of four cars. I also accept that the decease paid for telephone and electricity, rates, domestic cleaner, and the current car. There was no arrangement for payment of use and occupation, by way of board or rent, consistent with their shared use and enjoyment as a matrimonial asset.

[38] I also accept that there was tension in the relationship about the disposition of the deceased's estate. However, I prefer the applicant's evidence that he preferred to discuss such matters in private. I find that he was deferential and quiet when such topics were raised in the presence of others, especially during the periods of her poor health and during confrontations with her sons.

[39] These matters did not seem to fracture the mutual respect as a married couple. I think that the nature and quality of their loving, mutual and committed relationship endured until the deceased's death.

Any contribution made by the applicant to the deceased's estate

[40] In my view, the applicant made a significant contribution to the building up and maintaining of the deceased's house property over the 28 year marriage, but the deceased continued to substantially meet related utility and maintenance costs as her own asset.

[41] I accept that the applicant used his skills as a carpenter to make significant structural and aesthetic improvements to the house property including:

1. Building a new bedroom, walk through robe and ensuite;
2. Roofing the breezeway between the existing building and new bedroom;
3. Building a workshop;
4. Building a separate car port beside the workshop;
5. Building cupboards in the lounge;
6. Building frames for the pictures adorning the walls;
7. Building a veranda and landscaping along the street frontage; and
8. Landscaping the garden.

[42] I accept that the applicant also provided funds towards these renovations drawing on his superannuation lump sum and later the proceeds of his house sale. He retained and paid the cabinet maker to build the new kitchen using rare tropical timber that the applicant supplied from his own collection.

[43] There is no evidence equating the applicant's financial and non-financial contributions with any appreciation in the value of the house property. Clearly enough the improvements increased the home's bedroom capacity, added structures, and improved landscaping. Further, the applicant did not exhaust all his funds accumulated from superannuation, his house sale and a small inheritance of $20,000. He still has savings in excess of $100,000.

[44] Of course it must be remembered, that the deceased owned the house property free from encumbrances at the commencement of the marriage, and had by then carried out substantial improvements to the property, at her own expense drawing from her own resources, or her first husband's estate, or both.

[45] The valuation relied upon by the respondents in respect of the estate property states that the highest and best use of the property is for redevelopment, therefore, any improvements have less relevance.

The deceased's wishes

[46] The deceased's wishes are embodied in her Will made on 29 April 2016 being the last Will before her death one and a half years later on 2 September 2018. Her

wishes are similarly embodied in her earlier Wills made 27 August 2012 and 19 December 2014, save that she later increased the grandchildren's legacies and extended the duration of the applicant's permit to reside in the house property.

[47] Courts are properly reluctant to interfere unduly with a deceased's wishes expressed in their Will, and more so when there is a relatively short period of time between the making of the Will and their death. This would support a minimalist approach to adequate provision, a court should adopt a minimalist approach to an award of adequate provision being tailored to perfect the terms of the Will, rather than radically rewrite it.[9] Perhaps this approach is further galvanised by the deceased's similarly expressed intent in her successive Wills.

[48] The deceased clearly intended for the applicant to continue in the matrimonial home to enjoy independent, dignified and secure living for the term of his life, whilst preserving it for her sons.[10] It seems incongruous that the applicant would lose the benefit of secure accommodation, or exist at the behest of the executors, at a time when he is more needy of appropriate accommodation on account of his failing health with added financial stress.[11]

[49] In any event, it is not possible to contract out of the provisions of the Act.[12] A wise and just testator having regard to the longstanding nature of the relationship and continuing maintenance should have made some provision for the applicant in the Will.

Inadequate provision

[50] On my analysis, I find that provision for the applicant under the Will was inadequate.

[51] It does not provide the applicant with sufficient resources to move to accommodation, commensurate with his age and health that he will need in the foreseeable future. The estate is sufficient to provide further and adequate provision.

[52] I conclude that the applicant is entitled to adequate provision from the deceased's estate, which takes me to the second stage of the process.

What provision ought to be made?

[53] The second stage involves a determination of what provision, having regard to all the circumstances, would be proper maintenance and support for the widowed applicant.

[54] "Adequate provision for the proper maintenance etc" means more than maintenance at a basic level. It means maintenance and support at a level or degree appropriate

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9 Cf. *Sellers v Scrivenger & Anor* [2010] VSC 320 per Daly AsJ

10 *Hertzberg v Hertzberg* [2003] NSWCA 311 at [35] per McColl JA, referring with approval to *Golosky v Golosky* (unreported, Sup Ct CA, NSW, 5 October 1993).

11 *White v Barron* [1980] HCA 14; (1980) 144 CLR 431 at [13] Wilson J cited the dicta of Lord Romer in *Bosch's case* (1938) AC 463.

12 See J K de Groot and B W Nickel (2007) *Family Provision in Australia*, Third Edition, Butterworths, Australia at [2.45].

to the applicant in all of the circumstances,[13] which is judged according to prevailing community standards of what is right and appropriate at the time of the trial.[14] As to a capital sum Mason J remarked in *White v Barron*:[15]

> "A capital provision should only be awarded to a widow when it appears that this is the fairest means of securing her proper maintenance. However, the provision of a large capital sum for a widow who is not young, may, in the event of her early death, result in a substantial benefit to her relatives, contrary to the wishes of the testator, when a benefit of another kind would have afforded an adequate safeguard to her personally, without leaving her in a position in which she could benefit her relatives from the proceeds of the legacy."

[55] Applegarth J described this stage in *Stewart v Stewart*,[16] as follows:

> "If inadequate provision was made for the applicant, then the court determines what amount the applicant should properly receive from the deceased's estate. This requires the court to exercise its discretion in determining what provision a "wise and just testator" would have made in the circumstances. In exercising its discretion, the matters already considered in connection with the adequacy of any provision become relevant to the determination of what provision should be made."

[56] But the court has no power to re-write or make a new Will to effect a "fair" distribution of the testator's estate among the family.[17]

[57] As it was put in *Blore v Lang*:[18]

> "The jurisdiction conferred by the Act is to interfere with the testator's dispositions when he has left a member of his family without adequate provision for his or her proper maintenance, etc., and the extent of the interference authorized is to order such provision as the court thinks fit for that person's proper maintenance. Bad conduct or character may disentitle a member of the family to needed assistance, but good conduct and honest worth are not to be rewarded by a generous but second-hand legacy at the hands of the court. Nor, in a case where a testator has chosen to dispose of his estate according to his inclination, ought the generous treatment of a child who has no need of the testator's bounty, be used to determine the provision to be made for a child whose need has been disregarded or overlooked. The measure to be applied is not what has been given to one, but what the other needs for his or her proper maintenance, giving due regard to all the circumstances of the case. The Testator's Family Maintenance Act is legislation for remedying, within such limits as a wide discretion would set, breaches of a testator's moral

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13 *Family Provision After Death*, Dickey, p.102.
14 *Singer v Berghouse* (1994) 181 CLR 201; *White v Barron* (1980) 144 CLR 431 at 440.
15 *White v Barron* (1980) 144 CLR 431 at 444 per Mason J.
16 *Stewart v Stewart* [2015] QSC 238 at [13].
17 *Perpetual Trustee Queensland Ltd v. Mayne* [1992] QCA 417; *Hobbs v Russo* [2005] QSC 201 at [72]; *Gray v Mather* [2016] NSWSC 699 at [76]; *Sung v Malaxos* [2015] NSWSC 186 at [5].
18 *Blore v Lang* (1960) 104 CLR 124 at pp.134-5.

> duty to make adequate provision for the proper maintenance of his family – not for the making of what may appear to the court to be a fair distribution of a deceased person's estate among members of his family."

[58] The respondent beneficiaries' circumstances are also strained, they are younger, but have no real capacity to improve their situation into the future. Of course, the beneficiaries do not have to justify their receipt of benefits under the Will, rather it is for the applicant to demonstrate that he requires further provision for his proper maintenance and support. The applicant is aging, has failing health and is likely to live in intolerably tight economic circumstances necessitating further provision. The applicant now seeks a capital sum of $350,000 founded on a need for secure appropriate accommodation, while using the legacy of $100,000 (together with his own funds) for reasonable and relevant expenses.

[59] While I accept that the applicant should receive adequate provision to secure appropriate accommodation commensurate with his age and health, I do not accept that it should take the form of an additional legacy of a capital sum. It seems to me that a benefit in the form of a portable life interest in the proceeds of sale of the house property will afford an adequate safeguard to him personally.[19]

[60] This is sometimes called a "Crisp Order". The nature and purpose of such an order was described by Ipp JA in *Milillo v Konneck*,[20] by reference to its genesis:

> "A Crisp Order is an order of the kind made by Holland J in *Crisp v Burns Philp Trustee Co Ltd* (NSWSC, 18 December 1979, unreported). Generally speaking such an order gives a plaintiff an interest for life in real property or in an interest in the property, with the right to it (should the need arise) for the purpose of securing, for the plaintiff's benefit, more appropriate accommodation. In *Court v Hunt* (NSWSC, 14 September 1987, unreported), Young J (as he then was) said that a Crisp order was intended to provide flexibility, by way of a life estate, the terms of which could be changed to 'cover the situation of the plaintiff moving from her own home to retirement village to nursing home to hospital'.
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> Thus, for example, a Crisp order may entitle a plaintiff, from time to time, to require the executor of a Will to sell a home devised by the Will, or otherwise owned by the estate, and to use the proceeds for purposes that may include purchasing another home for the plaintiff's use and occupation, or providing accommodation for the plaintiff in a retirement village or similar institution, or in like accommodation providing hospitalisation and nursing care. The flexibility provided by such an order underlies the notion that a Crisp order confers a 'portable life interest'."

[61] The acquisition of a license to live in a Retirement Villa is between $315,000 and $325,000. The applicant would be responsible for organising and funding his own cleaning, purchase of groceries and meals (being the chores he anticipates needing

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19 *Kowalski v Public Trustee & Ors* [2011] QSC 323 affirmed on appeal in *Kowalski v Kowalski & Ors* [2012] QCA 234; *Winsor v Winsor* [2018] QDC 149.

20 *Milillo v Konnecke* [2009] NSWCA 109 at [47]-[48], referred to in *Kowalski v Kowalski & Ors* [2012] QCA 234 at [29].

assistance). There are also additional charges by way of a general service fee and maintenance reserve contribution. Depending upon the length of time in occupation, an exit fee of between 5% and 33% is applied when a resident leaves, even if moving to the higher care adjoining Regis Whitfield Aged Care Facility.

[62] The applicant will be responsible for his fees, living expenses, costs and outgoings estimated as follows:

Income	
DVA Pension	$3,794.69
Interest on bank account $200,000 at 1.73%	$288.33
Total monthly income	**$4,083.02**
Resident Expenses	
General service fee @ $76.32 per week	($330.72)
Maintenance reserve fund @ 26.87 per week	($116.44)
Total Fees	**($447.16)**
Other expenses	
Electricity	($330.72)
Telephone – Home and mobile	($116.44)
Contents Insurance ($500/y)	($41.66)
Food, toiletries, cleaning products, including meals on Wheels evening meal per day ($12.50 x 7 = $87.50/w)	($379.17)
Cleaner ($50.20/hr weekly)	($851.73)
Clothing ($1000/y)	($83.33)
Car Expenses (Insurance $68/m + registration $47.16 + maintenance $75/m + Petrol $60/w + RACQ $82.50/y)	($457.03)
Entertainment & newspapers ($40/w)	($173.33)
Haircuts ($10/m)	($10.00)
Medical and pharmaceutical ($50.00/w)	($216.67)
Total monthly expenses	**($2660.08)**
Total monthly surplus	**$975.78**

[63] Having regard to these figures, it seems to me that the applicant ought be provided with estate funds to enable his choice to live in a Villa until he needs to move to the higher care adjoining Regis Whitfield Aged Care Facility. But he has the financial capacity using the monthly surplus income, his own funds and his legacy to both (a) contribute to the license fee to make up the total required on entry, and (b) meet the exit fee of between 5% and 33% that will be applied when he leaves. On this basis, support by a portable life interest amount of $300,000 from the proceeds of sale of the house property will facilitate secure appropriate accommodation, while using his surplus income for reasonable relevant expenses and drawing on the legacy (and/or his own funds) to make up the shortfall in entry fee and meet the exit fee. To be clear, in my view, the applicant ought bear the cost of the exit fee so that the life interest amount is preserved as much as possible (save for administration costs of that fund).

[64] Residents entering the Regis Whitfield Aged Care Facility can pay a Refundable Accommodation Deposit (RAD) towards the value of the room in the facility they are entering. This can be paid in full or in part if they do not pay the RAD in full, they have the ability to part pay of that amount. Exhibit 1 outlines the relative costs to a resident to secure accommodation in an identified aged care facility depending on the amount of lump sum payment of a RAD ranging from $100,000-$465,000. The applicant can obtain appropriate alternative accommodation more suited to his age and health in a villa at an aged care facility for between 315,000 to $350,000. The portion of the unpaid amount of the RAD will be used to calculate the Daily Accommodation Payment. The daily accommodation payment is less if more RAD is paid upfront. Other fees payable by residents include a daily fee for day-to-day services such as meals, cleaning, facility management, and laundry, a means care tested fee and a daily service fee. The fees cover food costs, toiletries, podiatry, dietician, laundry services and electricity, which will subsume many of his current recurring expenses. Even so, if the applicant paid no RAD his liability for daily fees would be $123.53 per day, or $45,088.45 per annum after applying his entire pension towards the costs of accommodation. If he used all of the $100,000 legacy towards a RAD he would have a deficit of income as against expenses.

[65] For the Regis Whitfield Aged Care Facility, based on a RAD of **$300,000** using the portable life interest fund from the estate, the applicant's expenses will likely deplete as shown below, but he will otherwise preserve much of his remaining cash assets for unexpected events:

Income	
DVA Pension	$3,794.69
Interest on bank account $140,000 - $200,000 to at 1.73% (depending whether he moved to age care forthwith, or takes a Villa and pays an exit fee)	$201.83 - $288.33
Total range of monthly income	**$3,996.52 to $4,083.02**
Residential Fees	

Daily Accommodation payment (DAP) based on $300,000 RAD	($672.38)
Daily Care Fee	($1,589.27)
"Regis Classic" Daily Service Fee	($279.83)
Means Care Tested Fee	($760.72)
Total monthly fees	**($3,302.20)**
Other expenses	
Telephone – Home and mobile	($116.44)
Contents Insurance ($500/y)	($41.66)
Snack food, toiletries & clothing ($1000/y)	$0 to ($83.33)
Car Expenses until incapacity to drive (insurance $68/m + registration $47.16 + maintenance $75/m + Petrol $60/w + RACQ $82.50/y)	$0 to ($457.03)
Entertainment & newspapers	($100) to ($150)
Haircuts ($10/m)	($10.00)
Medical and pharmaceutical ($50.00/w)	($216.67)
Total range of other monthly expenses	**($484.77) to (1,075.13)**
Mean total monthly expenses[21]	**$4,082.15**
Total monthly deficit using the mean of monthly income and monthly fees and expenses[22]	**($42.38)**

[66] F urther provision in this form will not result in an undue benefit to the applicant's own sons at the expense of the deceased's sons' share in the residuary estate. It is generally consistent with the deceased's intent to provide the applicant with an appropriate species of accommodation for life on the basis that he meets all outgoings and expenses. In that regard I think a fund of $300,000 in the form of a portable life interest strikes the right balance for accommodation appropriate to the applicant's age, health and care needs. This will necessitate him using his own funds, including interest on the remaining $100,000 legacy, to meet his necessary and reasonable living expenses as he ought, but without the burden of financial anxiety.

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21 Calculated using the mean of total range of monthly fees and expenses being ½ [($3,302.20 + $484.77) + ($3,302.20 + $1,075.13)] = $4,082.15.

22 Calculated as the difference of the mean of the total range monthly income of $4,039.77 being ½ [$3,996.52 + $4,083.02], and the mean of the total range of monthly fees and expenses of $4,082.15 = $42.38.

[67] For all these reasons, I conclude that the appropriate order is for the Will to be read and construed to provide for a portable life interest of $300,000 from the proceeds of sale of the house property, whilst preserving the legacy of $100,000 and the gift of personal effects and household chattels. To be clear, in my view, the amount of the life interest should be preserved as much as possible except for deduction of administration of that fund and final distribution of the estate. In this way, the balance of the life interest fund will form the residue of deceased's estate for the benefit of her sons upon the applicant's death.

[68] In the meantime, the respondents ought to receive an interim distribution of the residuary after accounting for the establishment of the life fund, any costs of sale of the house property and outstanding debts of the estate at that time.

Orders

[69] I will hear from the parties as to the terms of orders in accordance with this judgment and any issue as to costs.

Judge D P Morzone QC