SUPREME COURT OF QUEENSLAND

CITATION:	*Bird v Bird* [2002] QSC 202
PARTIES:	**ALAN LINDSAY BIRD** (applicant) **v** **LAURIE WILLIAM BIRD and WILLIAM JOHN BIRD as executors of the estate of CLYDE RUSSEL BIRD deceased** (respondent)
FILE NO/S:	SC 5774 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	18 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2002
JUDGE:	White J
ORDER:	**The application for an extension of time be refused.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – whether the applicant gives a satisfactory explanation for the delay – whether the applicant was left without adequate provision under the will *Family Provision Act* 1982 (NSW) *Succession Act* 1981 *Clayton v Aust* (1993) 9 WAR 364 *Re Salmon (deceased)* [1981] Ch 170 *Re Terlier (deceased)* [1959] QWN 5 *Re Walker* [1967] VR 890 *Singer v Berhouse* (1994) 181 CLR 201 *Warren v McKnight* (1996) 40 NSWLR 390
COUNSEL:	Mr P Hackett for the applicant Mr D Mullins for the respondent
SOLICITORS:	John M O'Connor & Company for the applicant Primrose Cooper Cronin Rudkin for the respondent

[1] This is an application for an extension of time in which to bring an application for provision from the estate of Clyde Russel Bird pursuant to s 41(8) of the *Succession Act* 1981. The title of the respondent to the application is incorrect. Leave was given at the hearing to amend the application and all other documents so that the respondent is "Laurie William Bird and William John Bird as executors of the estate of Clyde Russel Bird deceased" which is reflected in the title to these reasons.

[2] The applicant who is aged 49 years is the only child and son of the late Clyde Russel Bird who died in Queensland on 10 April 2001. The testator's wife and applicant's mother died in 1994. Probate of his will was granted on 10 July 2001 to his named executors. Those executors are the nephews of the deceased aged 42 and 39 respectively. They farm a number of properties in the Gold Coast Hinterland, at Mundoolan and near Beaudesert.

[3] Section 41(8) of the *Succession Act* 1981 provides:

> "Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made."

Accordingly, any application pursuant to s 41(1) of the *Succession Act* needed to have been commenced by 10 January 2002. This application was filed on 26 June 2002 and is thus five and a half months late. The application for extension of time is strenuously opposed by the executors.

[4] The will is a complex, detailed and carefully drawn document. It makes a cash gift of $5,000 to a person not connected with these proceedings, bequeaths the testator's furniture and personal effects and his one-quarter interest in a 20 acre parcel of land to the applicant and gives him a life interest to live on and operate a farming property which is the principal asset in the estate. The residuary beneficiaries are the applicant's two sons, James, born 7 May 1992 and Cameron, born 7 April 1996 of whom the applicant has custody.

[5] The applicant was divorced from his wife after periods of separation. He reached agreement with her by order made in the Family Court on 20 November 2001 in respect of property matters. The company, C R Bird Pty Ltd, which owns *Mona Vale,* the principal asset, and the testator were joined as respondents in the Family Court proceedings. A Deed was entered into by the applicant, his former wife, companies associated with the applicant, C R Bird Pty Ltd and the executors in which, *inter alia*, the applicant agreed not to bring proceedings such as an application pursuant to Part 4 of the *Succession Act*. It is accepted by the executors that those provisions in the Deed do not prevent this application but it may be taken into account, particularly when considering the explanation for the delay in bringing the proceedings.

[6] The applicant contends that a satisfactory explanation has been given for the delay so that the court ought to exercise its discretion favourably and that he has an arguable case for further provision from the estate. The executors oppose the extension of time because they contend that there has been a failure satisfactorily to explain the delay and that the applicant's prospects of obtaining an order are negligible. This is because he has received substantial financial assistance from the testator during his lifetime; that he has wasted those significant financial assets which he has received; that the sole asset of the estate is inflexible; that he has received adequate recognition in the will; and that the estate will be eroded by the legal costs of an application and impact upon the interests of the applicant's two children.

[7] Desmond Bertram Bird, ("Mr Bird") the brother of the deceased, who was, until his retirement, the manager of finance and control for Tubemakers of Australia Limited and a member of the National Institute of Accountants was appointed by the testator together with the executors under an enduring power of attorney in February 1999 in relation to the testator's financial, health and personal matters. On 1 August 2000 C R Bird Pty Ltd executed a general power of attorney to Mr Bird and the executors. Mr Bird deposes that he has become familiar with the deceased's affairs having assisted him whilst he was alive and he has been consulted by the executors during their administration of the deceased's estate. He has sworn an affidavit in these proceedings which the executors adopt.

[8] The principal asset owned by the testator was his shares in C R Bird Pty Ltd ("the company"). The company owned and operated *Mona Vale* situated at Guanaba in the Gold Coast Hinterland. It comprises some 350 acres and is essentially unencumbered. The shareholding in the company gave the testator approximately 75 percent control. The remaining shares were held by the applicant's mother and he owned one ordinary share. The applicant was the sole beneficiary of his mother's estate, an arrangement which the testator states was with his concurrence. Apart from her interest in the company her estate included a unit on Marine Parade, Labrador which has passed to the applicant's former wife in the property settlement. The shares in the company held by the testator have passed to the executors.

[9] The applicant resides at *Mona Vale* with his two sons in the homestead. He runs approximately 70 head of cattle. It is recognised by the executors that that level of farming does not provide a realistic living for a family and there is no prospect of improving that appreciably. However the applicant has throughout his life engaged in other work whilst living on *Mona Vale*. The applicant deposes to a real estate agent at Nerang estimating the value of *Mona Vale* as between $4 million and $4.5 million if it is subdivided. The property is unencumbered apart from easements and reservations to the Crown. The executors have not obtained a valuation of the land although they and Mr Bird are of the opinion that parts would be unsuitable for residential use due to flooding and difficult terrain so that the valuation may well be unduly optimistic. The applicant agrees but still holds to the appraisal. It is unlikely that *Mona Vale* could be farmed on a more intensive basis in a way that would be financially more productive. There is no other substantial asset in the estate but the farm does have a block described as Big Forest Block of 101 hectares. This does not support many cattle. Although it was the testator's

preference that it not be sold it is open to the executors to consider selling part of that block and investing the proceeds of sale in order to create a substantial fund for the generation of income. The impression gained from the material is that the executors may well do this to enable them to benefit James and Cameron during their dependency.

[10] The will provides for the applicant during his lifetime to live in the homestead on *Mona* Vale, subject to conditions which are not onerous, to farm *Mona Vale*, and use whatever equipment is on the property, again subject to non onerous conditions, and to be paid an annual income for life indexed to CPI of $50,000 from the trust fund established under the will. The testator has provided for the applicant should he become disabled from continuing to live at *Mona Vale* to be reaccommodated appropriately by the executors.

[11] James and Cameron are the residuary beneficiaries provided they attain the age of 25 years.

[12] The applicant was the registered proprietor of a quarter share in a 20 acre property situated at Stewart Road, Guanaba. The testator left him his quarter share in the property and it was recently sold for $440,000. The applicant expects to receive approximately $212,000 from the sale.

[13] In paragraph 8 of his will the testator declared:

> "I have made my will after taking into careful consideration the more than adequate provision that has been made directly or indirectly by me for ALAN LINDSAY BIRD during my lifetime. Aside from the fact that I consider that more than adequate provision has already been made directly or indirectly by me for Alan, I must take this opportunity to state that Alan has over the years demonstrated an inability to manage large sums of money and has also been reckless when it comes to gambling: I have also taken these things into consideration when making my will. I intend making a Statutory Declaration which will set out these matters in more detail."

In the statutory declaration executed on 1 February 1999 the testator sets out various interest free loans and gifts which he caused the company to make to the applicant or his family trust. These amounted to approximately $200,000. The loans of about $180,000 were forgiven by the company as at 30 June 2001.

[14] In about 1979 the company gifted approximately 124 acres of land to the applicant. Part was resumed for road purposes for which he received $40,000 and the balance he sold for about $400,000. That money was invested by the applicant in a venture involving The Playroom, an entertainment facility, at Tullebudgera which was unsuccessful and the applicant lost his investment. The testator noted that pursuant to an agreement between himself and his late wife she left her entire estate to the applicant including a unit at Marine Parade, Labrador. In 1998 the testator caused the company to provide a loan facility of $100,000 on favourable terms to Eagle Concrete Pumping Pty Ltd, which operated a business controlled by the applicant.

Of that loan $50,000 has been repaid. It no longer trades and has no assets and the executors do not expect the balance to be repaid.

[15] The applicant does not dispute that he has had and lost these sums of money. He contests that he has been a significant gambler although admits to gambling but says it has not been a costly activity. He contends that he has been unlucky in his investments but would not go into risky ventures in the future. He says he has been too busy looking after his children and his matrimonial affairs to attend to his other businesses. He says that ABC Pumping Service Pty Ltd was a successful concrete pumping business which he sold earlier this year from which he received approximately $137,000 much of which was spent paying Family Court legal expenses and in the property settlement with his former wife. He deposes that from income received from that business he lent a friend at Beaudesert approximately $145,000 to invest in new technology for the manufacture of house bricks but that it was unsuccessful and he lost his investment.

[16] The applicant deposes that his net asset position is now $73,250 although he anticipates legal expenses associated with this application and $20,000 for the purchase of a car. He complains that he has never been adequately recompensed by his parents for the work that he did for them on *Mona Vale* from the time when he left school at 15. He had other employment off the farm and worked there on weekends or in the late afternoon. He estimated that he averaged from the age of 15 until the present at various times between 10 hours per week, 12 hours per week and 20 hours per week. He deposes that he has spend $70,000 to $80,000 from his own funds in the refurbishment of the cottage on *Mona Vale* where he lived with his wife rent free for many years. He deposes to spending almost $6,000 on improvements to the homestead in the past six months. He concedes that in addition to free accommodation at *Mona Vale* he received a half share in all cattle killed from the property and sold privately. He estimates this at no more than about $2,000 a year over approximately 10 years. The testator gave him $100 per month for the children from the income which the testator received from the Labrador unit after the applicant's mother died. The applicant notes that he permitted his father to receive all the income from the unit after his mother's death and that he did spend that money on his children.

[17] The applicant deposes that in 1994 he suffered a stroke as a result of which he was off work for approximately four months, that he still suffers weakness on his right side if fatigued or after hard work but notes that it is only a modest disability now.

[18] The applicant and his former wife reach a settlement in respect of matrimonial property matters. By way of spousal maintenance he was to pay his former wife $105,800 in lump sum settlement, $50,000 being paid within two months and the balance on or before 31 March 2002. The applicant sought the assistance of the executors and the company to fund the settlement. The executors gave the sum of $50,000 to the applicant to enable him to pay the first instalment. The applicant, his wife and his companies as well as the executors and the company entered into a Deed to reflect the settlement in the Family Court. The Deed released the executors and/or the company from any other claims in relation to the assets of the estate by

the applicant. It is wide enough to encompass an application brought pursuant to Part 4 of the *Succession Act* but as mentioned it is not a bar to these proceedings.

[19] The applicant does not say how much he needs nor what he intends to do if he had more money. He has told the executors and Mr Bird that he plans to live on *Mona Vale* and farm it.

Explanation for delay

[20] The applicant says that since his father died he has been engaged in legal proceedings with his former wife until the order made in November 2001. He was then involved in arranging payment and property transfers. He deposes that he has had the constant care of his children which is more demanding when living in a rural environment. He has had to run two concrete pumping businesses until recently and has been in continuous discussions with the executors of the estate and his solicitors. In his principal affidavit the applicant said that he believed that his financial position would have been better after the sale of the land at Stewart Road. In his recent affidavit he says that he had hoped to exchange his interest in the Stewart Road property for part of another property in the estate which had better subdivisional potential "and from which I foresaw a generous return after development running into several hundred thousand dollars". These negotiations have come to an end with the sale of the Stewart Road property. The applicant thought that he would be better off from his concrete pumping business. He acknowledges that he received advice from the solicitors who represented him in his matrimonial proceedings of the time limitation for making an application pursuant to Part 4 of the *Succession Act*.

[21] This is hardly unsatisfactory. No doubt the applicant was concerned about all the things which he mentions. In light of the history which he relates particularly in his more recent affidavit of his hopeful dealings in various enterprises the true explanation may be that he thought that he could do well out of an exchange of land with the executors which would give him, as he puts it, several hundred thousand dollars.

[22] Time limits in statutes are for good reason. Malcolm CJ in *Clayton v Aust* (1993) 9 WAR 364 quoted with approval the approach of Megarry VC in *Re Salmon (deceased)* [1981] Ch 170 at 175:

> "… the time limit is a substantive provision laid down in the Act itself, and it is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules. The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extent the time."

[23] In *Warren v McKnight* (1996) 40 NSWLR 390 Hodgson J (as his Honour then was) said that there were four factors which can be relevant to the exercise of discretion

to extend time for bringing an application under the analogous *Family Provision Act* 1982 (NSW).

> "First, the sufficiency of the explanation of delay in making the claim; secondly, would there be any prejudice to the beneficiary; third, has there been any unconscionable conduct by the plaintiff; and fourthly, the strength of the plaintiff's case."

[24] As is well known, there can be delays of many years and yet an extension of time has been granted. Neither can there be said to be any prejudice to the beneficiaries apart from the prejudice which would come from the need to defend a claim brought out of time and the limited cash assets of the estate.

[25] An important consideration in the exercise of the discretion to extend time is the likelihood of success of the application pursuant to s 41(1). Townley J in *Re Terlier (deceased)* [1959] QWN 5 said at p 6:

> "But there is another factor which to my mind plays an important part in such an application as this. If it is improbable that the substantive application will succeed it seems idle to grant the extension."

This proposition was quoted with approval by Lush J in *Re Walker* [1967] VR 890 at 892 which was in turn quoted with approval by Malcolm CJ in *Clayton v Aust* at p 368.

[26] Section 41(1) provides:

> "If any person (the "deceased person") dies … and in terms of the will … adequate provision is not made from the estate for the proper maintenance and support of the deceased person's … child … the court may, in its discretion, on application by … the said … child … order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such … child."

Over the years expressions such as "moral duty" or "moral obligation" have been used when speaking of the testator's obligations. But these are glosses which the language of the section does not invite. The question simply put is whether adequate provision has been made for an applicant.

[27] Mason CJ, Deane and McHugh JJ in *Singer v Berghouse* (1994) 181 CLR 201 considering the approach to analogous New South Wales legislation said:

> "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 inter-relationship which exists between "adequate provision" and "proper maintenance" etc were explained in *Bosch v Perpetual Trustee Co. Ltd* [1938] AC 463 at 476. 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, among other things, to

> the applicant's financial position, the size and nature of the deceased's estate, the totality o 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."

[28] When the whole of the relationship between the testator and the applicant is considered it is clear that the applicant has more than generously provided for his son during his lifetime. There is no doubt that had his son not been so unfortunate in his handling of quite large sums of money which came to him through his father's bounty that he may have inherited *Mona Vale*. But because he was not, apparently, wise or prudent with large sums of money the testator turned his mind to the problem and worked out an arrangement which the testator believed would provide the applicant with a home for himself and anyone with whom he chose to live in a pleasant rural environment together with an income producing asset, albeit of a modest nature, and an indexed income of $50,000 per year. In this way the testator clearly hoped and anticipated that there would be something of substance for his grandsons to enjoy when they reached maturity as well as providing for his son in a way which would not give him the freedom to lose what he had.

[29] The applicant's complaints that he has had inadequate recognition for the work that he did on *Mona Vale* over the years for his parents is hardly to be credited when the benefits which his parents have provided to him are considered. There is presently insufficient in the trust fund to allow the executors to pay the whole of the annual sum to the applicant but if, as it seems clear they are contemplating, they sell the Big Forest Block they believe that this will give a fund from which he can be paid this sum and the executors will be able to contribute to the education and support of the applicant's children, James and Cameron.

[30] Whilst it could be argued that to decide the outcome of an application pursuant to s 41(1) on an extension of time application is premature, there is little in the extensive material which is contested. The applicant's view of his own entitlement is not at one with that of the executors but the reason for this does not come from disputed questions of fact but from inferences to be drawn from the facts.

[31] I cannot conclude that the applicant has crossed the threshold of section 41(1) by demonstrating that he has been left without adequate provision for his proper maintenance and support by virtue of the terms of the will, taking into account the *inter vivos* gifts.

[32] When that conclusion is reached and the less than persuasive explanation for the delay considered I would decline to extend the time for the applicant to file his application.

[33] The order is that the application to extend time be refused.