SUPREME COURT OF QUEENSLAND

CITATION:	*Holman v McClelland & Ors* [2003] QSC 110
PARTIES:	**TAMAR ANN HOLMAN** (applicant) **v** **ANN LOVEDAY TREVENEN McCLELLAND and NICHOLAS JOHN HOLMAN (as executors of the estate of NICHOLAS PAUL TREVENEN HOLMAN, deceased)** (respondents)
FILE NO/S:	SC No 10900 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2003
JUDGE:	Mackenzie J
ORDER:	**Application dismissed** **Costs to be assessed**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – where claim that testator failed to make sufficient provision for applicant spouse – where limitation period for bringing action had expired – where testator and applicant had lived separately and pursued their own interests for extended period prior to testator's death – where contentious evidence of provision being made for applicant otherwise than in the will – where contentious evidence of their interests being finalised previously – where applicant had changed solicitors – where explanation for such and failure to comply with time limit deficient – whether merits of the case dictated extension of time – whether satisfactory explanation for delay in commencing proceedings *Succession Act* 1981 (Qld), s 41(8) *Bird v Bird* [2002] QSC 202, cited *Clayton v Australia* (1993) 9 WAR 364, cited *Re: Terlier, dec'd,* [1959] QWN 5, cited *Singer v Berghouse* (No 2) (1994) 181 CLR 201, applied

Warren v McKnight (1996) 40 NSWLR 390, cited

COUNSEL: D Murphy for the applicant
R D Peterson for the respondent

SOLICITORS: Anderssen & Company for the applicant
Mallesons Stephen Jaques for the respondent

[1] This is an application for a direction under s 41(8) of the *Succession Act* 1981 (Qld) that an application for further and better provision from the testator's estate be heard notwithstanding that the application will have been instituted more than nine months after the date of death of the deceased. The testator died on 24 December 2001. By his will executed on 27 April 1999 the applicant, who is the testator's wife, is entitled to 10 per cent of the residue of the estate after certain specific bequests to her and others. Each of the daughter of the testator, her children, his son and his children were entitled to 20 per cent of the residue. The remaining 10 per cent was to be divided between the Salvation Army and medical research. The applicant wishes to exonerate the last mentioned 10% share from any order made. It is estimated that her share of the estate would be about $120,000. It is convenient also to mention that there is a trust fund of which the applicant is not a beneficiary, believed to be worth about $8,000,000. However, the evidence suggests that this trust fund was set up for tax planning purposes at about the time he sold his share in a family business in the United Kingdom, having regard to the state of the law at the time it was established, before the relationship between the applicant and the deceased began.

[2] The testator, who was estranged from his first wife at the time he met the applicant, married the applicant on 20 November 1981. He was about 55 at the time. She was about 24. After living together for about ten years, the applicant who had established either with the testator or with his assistance, a business concerned with importing fabrics, went overseas to undertake a course and perhaps other studies funded by the testator in connection with the fashion industry. While she was there, she developed a preference for living in Europe and did not return permanently to Australia. They kept in contact while she was overseas and visited each other on an approximately annual basis for at least part of the period. There is evidence of substantial financial support given by him to her in this period. However while they remained married, there is some evidence suggesting that they predominantly pursued their own separate interests, including friendships, in the period she remained overseas. There is evidence suggesting wistful acceptance of the situation rather than willing acquiescence in it on his part.

[3] In August 1991, a deed was executed pursuant to which the applicant and the testator disentangled their interests in the premises from which business was conducted and the matrimonial home. She received the fabric business. There was a provision that each was to make no further claim upon the other. She says she did not give consideration to the implications of this document at the time. The applicant resided in and established a business in Ireland in the period of her absence. There is no evidence about what happened to this business before, upon or after her return to Australia. In 1994, the testator gave the applicant the benefit of an insurance policy of the value of almost £39,000 sterling.

[4] The applicant suffered a lung condition in 1992 which recurred from time to time. In 1999 and 2000 she had operations in connection with it. In 1997 and 1998, the testator underwent treatment for cancer and his health deteriorated through 2001 after the illness recurred in late 2000. The applicant returned to Australia in about May 2001, which she says was the earliest time she was allowed by her doctor to travel.

[5] When she returned, she lived in the second bedroom of the deceased's unit for a period and then in a unit nearby. As she put it, it was agreed that she should have her own place where she could have some time to herself. In this period, she developed friendships with various people, including an artist. She appears to have been the primary carer for the testator from July until September 2001 after which he was admitted to a hospice. He then returned home and was cared for commercially until his death. At the time of the applicant's return from Ireland, the testator had a gallery which the applicant ran until about October 2001 when a manager was appointed to assist in its operation. The testator gave the applicant a car, cash and the benefit of an insurance policy in and around this period, of an estimated total value of $125,000.

[6] It was accepted by the applicant that a sufficient statement of the law for present purposes is to be found in *Bird v Bird* [2002] QSC 202 where *Clayton v Australia* (1993) 9 WAR 364, *Warren v McKnight* (1996) 40 NSWLR 390, *Re: Terlier, dec'd*, [1959] QWN 5 and *Singer v Berghouse* (No 2) (1994) 181 CLR 201 are discussed. The last mentioned case emphasises that there are two stages involved. The first calls for a determination whether the applicant has been left without adequate provision for her proper maintenance. The question at this stage is one of fact, although exercise of value judgments is involved. Reaching a conclusion on this question involves an assessment of whether what was provided was inadequate for the proper level of maintenance appropriate to the applicant. The applicant's financial position, the size and nature of the testator's estate, the totality of the relationship with the testator and the relationship between the testator and others having legitimate claims on his bounty are all relevant factors. The second stage involves an exercise of discretion. It is not determinative of the relevant issues, but it is apparent from the evidence that the testator expressed the opinion that he had made adequate provision for the applicant during his lifetime. There is a question of fact whether he had said things detracting from this at other times that cannot be resolved on the evidence as it stands.

[7] What has been summarised above represents a broad outline of the circumstances of the case although it should be said that if the matter were to go to trial the precise nature of the relationship, its financial aspects and some other matters of detail would in all probability be in contention. The recitation above represents the kind of framework within which the factual issues would arise at the trial. It can also be said that, at the highest for the applicant, the relationship has unusual features not often encountered in exactly the same way in cases of this kind. The applicant's decision to reside overseas and pursuit of an essentially separate life is the most significant element. Her case appears to be not without difficulty but while this is so, it cannot be said definitely that it is a case without any merit. There are some unresolved evidentiary issues concerning the relationship that make it unsafe to say more than that as the matter stands.

[8] The other substantial issue is whether there is a satisfactory explanation for the delay in commencing proceedings, which is not long. The applicant had solicitors acting on her behalf from no later than March 2002. They corresponded with the solicitors for the defendants with a view to obtaining information about the estate, with reference to a claim under the family provision part of the *Succession Act*. On 6 June 2002 the issue of notice of a claim, which was required to be given within six months of the testator's death, was raised with the other solicitors and the need to protect themselves from a claim for negligence was referred to. Shortly after that a copy of the will and the testator's death certificate were provided to the applicant's solicitors and they were advised that information was being sought from the estate accountant.

[9] Formal notice of intention to make a claim under s 41 was given on 21 June 2002. Further correspondence about provision of information was sent to the estate's solicitors, culminating in a letter of 16 September 2002, about a week before the prescribed period expired, stating that unless the information requested was provided by return mail the applicant would have little alternative but to commence proceedings. From that point until 28 November 2002 the documentary record in evidence is blank. On 28 November 2002 the applicant's current solicitors wrote to the effect that they had taken the matter over from the previous solicitors. A copy of the present application and the applicant's affidavit were enclosed.

[10] By way of explanation of what had happened, the applicant deposed that she had had a meeting with her original solicitors and was aware that there was correspondence between that firm and the solicitors for the executors. She said that she was informed that there was a time limit for claims against the estate but "did not recall being told what it was". She went on to say that due to a lack of progress in obtaining information and what appeared to be a lack of initiative, she became concerned and felt the need for alternative advice on the management of her interests in the estate.

[11] As a result of that she sought advice from her present solicitors on 9 October 2002. After payment of fees to the original solicitors, the file had been received on 1 November 2002. She says that for the first time she was informed that "there was a time limit within which to make such an application and that that period had expired". In a subsequent affidavit she says the following:

> "Whilst I note that the date, 24 September 2002 was referred to in a letter from my former solicitors to the solicitors for the executors dated 16 September 2002, I do not believe that I was aware that the date referred to was the date on which a limitation period expired within which to bring any application. It was following my seeking alternative advice from my present solicitors that I was made aware that the time for bringing an application had passed. One of the reasons for my seeking alternative advice was that I was aware that many months had passed during which information sought from the executors had not been forthcoming and I was concerned that something more could be done to address that situation before making a decision as to whether or not to make an application for further provision."

[12] In a case where the applicant is required to account satisfactorily for failing to comply with a statutory time limit it is necessary to make a sufficiently satisfactory

case for allowing a matter to proceed out of time. No specific prejudice has been identified by the respondents. However, the lack of any more detail than what is stated in the affidavits of the applicant is of some concern. The applicant's affidavit quoted in the previous paragraph suggests that she had not, at that point, made up her mind whether to go ahead with proceedings. If there was no contact between the original solicitors and her in this regard in the period immediately preceding the expiry of the time in which proceedings could be brought, it is an almost inevitable conclusion they were negligent. It is not a case where the solicitors had misunderstood their obligations, as the correspondence shows.

[13] The evidence does not say whether there was any such contact and if so what it comprised. The separate references to not recalling being told what the relevant date for commencing proceedings was and to not being aware of it are vague. The absence of evidence as to whether the applicant received a copy of the letter of 16 September 2002 from the solicitors prior to the expiry of the relevant period, whether there had been any conversation between her and the solicitors in the period between that letter and the expiry of the prescribed period and evidence as to any subsequent interaction between her or her representatives and the solicitors in the period prior to 28 November 2002, which is a subject peculiarly within the knowledge of the applicant, leaves one with the concern that there is a gap of some importance in the evidence as to why the application was not brought within time.

[14] Because of the combination of the difficulties with the applicant's case and the inadequacy of information about the events in the critical period in the days immediately prior to the limitation period expiring, I am not persuaded that, on the evidence presented, a case has been made for a direction that the matter be heard notwithstanding that it has been commenced outside the statutory period. The application is dismissed with costs to be assessed.