# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Freeman & Ors v Jaques* [2005] QCA 423 |
| PARTIES: | **SHERYL ANN FREEMAN**<br>(applicant)<br>**LYNELL CORAL NICOL**<br>(applicant/appellant)<br>**RHONDA KAY RETTKE**<br>(applicant/appellant)<br>**DERINDA JOYCE SMERDON**<br>(applicant)<br>**LEONARD THOMAS FREEMAN**<br>(applicant/appellant)<br>**DENISE GAY HANCOCK**<br>(applicant/appellant)<br>**ROBERT WARREN FREEMAN**<br>(applicant)<br>**v**<br>**HEATHER EVELYN JAQUES**<br>(respondent/respondent) |
| FILE NO/S: | Appeal No 6962 of 2005<br>SC No 6343 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Extension of Time/General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 18 November 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 November 2005 |
| JUDGES: | de Jersey CJ, McPherson and Keane JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal dismissed**<br>**2. Appellants to pay the respondent's costs of the appeal to be assessed** |
| CATCHWORDS: | SUCCESSION - FAMILY PROVISION AND MAINTENANCE - PRINCIPLES UPON WHICH RELIEF GRANTED - GENERAL MATTERS - PRINCIPLES OF EXERCISE OF DISCRETION - where a close friend of the respondent had recently died - where the will of the deceased left her entire estate to the respondent - where the stepchildren of the deceased had made application for an |

order for provision to be made for them out of the estate pursuant to s 41(1) *Succession Act* 1981 (Qld) - where the learned primary judge held that all but two of the stepchildren had failed to show, having regard to the size of the estate, the totality of their relationship with the deceased and their personal financial circumstances, that the deceased had not made adequate provision for their maintenance and support - where the unsuccessful stepchildren appealed that decision - whether the learned primary judge applied the correct legal test to determine whether or not adequate provision had been made for the unsuccessful stepchildren - whether the learned trial judge had been mistaken as to the existence or importance of certain important facts in relation to the personal circumstances of the unsuccessful stepchildren

APPEAL AND NEW TRIAL - APPEAL – PRACTICE AND PROCEDURE - QUEENSLAND - POWERS OF COURT - COSTS - where costs at first instance paid out of deceased estate - where unsuccessful claimants for provision from the estate appealed - whether unsuccessful claimants were justified in seeking a "second opinion" - whether appellants should be personally liable to pay the costs of the appeal

*Succession Act* 1981 (Qld), s 41

*James v Day* [2004] VSC 290; No 454 of 2003, 17 August 2004, distinguished
*MacEwan Shaw v Shaw* [2003] VSC 318; No 5291 of 2002, 2 September 2003, cited
*McKenzie v Topp* [2004] VSC 90; No 4847 of 2003, 30 March 2004, distinguished
*Singer v Berghouse* (1994) 181 CLR 201, cited
*Vigolo v Bostin* [2005] HCA 11; (2005) 213 ALR 692, applied

COUNSEL: A J H Morris QC, with P A J Howard, for the appellants
D G Mullins SC for the respondent

SOLICITORS: Martinez Quadrio Lawyers for the appellants
Schultz Toomey O'Brien Lawyers for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by his Honour, and with his reasons.

[2] **McPHERSON JA:** I agree with the reasons of Keane JA for dismissing this appeal, and with the orders his Honour proposes including the order as to costs.

[3] **KEANE JA:** The appellants are some of the stepchildren of Mrs Leone Freeman ("the deceased") who died on 13 January 2003. The appellants are the natural children of the deceased's husband who had died on 23 September 1998. The deceased left the whole of her estate to the respondent, a friend of the deceased for more than 30 years who cared for the deceased during the later years of the deceased's life and particularly after the death of the deceased's husband.

[4] The appellants and their siblings, Ms Sheryl Freeman and Mr Robert Freeman, sought an order, pursuant to s 41(1) of the *Succession Act* 1981 (Qld) ("the Act"), for provision from the estate of the deceased. There was one other sibling, Mr Lyndon Freeman, who was not a party to the application having pre-deceased both his father and stepmother. At first instance, Ms Sheryl Freeman and Mr Robert Freeman were successful; but the learned primary judge dismissed the applications made by the appellants.[1]

[5] The learned primary judge held that the appellants had not shown that, having regard to each appellant's financial position, the size and nature of the deceased's estate, the totality of the relationship between each appellant and the deceased and the relationship between the deceased and other persons who had claims upon her bounty, the failure of the deceased to make any provision for their maintenance and support was a failure by the deceased to make adequate provision for their proper maintenance and support.[2] Following the terminology used by the High Court in *Singer v Berghouse*,[3] the learned trial judge's determination of this issue was conventionally referred to in argument, and will be referred to in these reasons, as the determination of the "jurisdictional issue".

[6] The appellants contend that the learned primary judge's discretion miscarried in that her Honour acted upon a wrong principle and a mistaken view of the facts. It is also contended that her Honour failed to take material considerations into account. An appreciation of the appellants' contentions requires some further reference to the facts of the case as found by her Honour.

**The relationship between the parties**

[7] The appellants' father and mother had eight children. They separated in or about 1972 and their marriage was dissolved in 1976. The appellants' father paid their mother $17,000 by way of property settlement. The deceased and the appellants' father lived together from about 1972. They were married in 1984.

[8] The appellants' father, by his will, left the deceased a life interest in the income from his investments on the basis that, after her death, the whole of what remained of his estate was to be divided amongst his surviving children.

[9] In June 1999, the deceased applied under s 41 of the Act for further provision out of the estate of her deceased husband. That estate had a value of approximately $1.1 million. Those proceedings were settled between the parties on 14 May 2001 with the deceased receiving $150,000 and her stepchildren's entitlements being accelerated. The costs of all parties were paid out of the estate of the deceased's late husband.

[10] There had never been any familial relationship at all between the deceased and her stepchildren.

[11] The deceased had no family of her own. As I have said, the respondent had been her friend for many years. The respondent had cared for the deceased prior to her death. The respondent was 87 years of age at the date of the hearing.

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1 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005.
2 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [57] - [60].
3 (1994) 181 CLR 201 at 208.

**The size and nature of the deceased's estate**

[12] The deceased's estate was worth $1,063,675. There was a dispute between the parties as to the extent to which the estate of the deceased reflected contributions made to her by the appellants' father.

[13] When the deceased died, she held shares worth $910,000. When her husband died, her share portfolio was then worth $560,000. It appears that the share portfolio was originally generated by investments made by the appellants' father from about July 1991 through Mr Raymond Harbert, a sharebroker. The funds for these investments came from the farming operations which the deceased and the appellants' father conducted together. They had purchased their first farm using the proceeds of sale of a house in Brisbane owned by the deceased. The proceeds of the sale of the first farm were used to buy a second farm which was owned by the appellants' father.[4]

[14] The learned primary judge found that the deceased's husband arranged for some share purchases to be made solely in his name and others to be solely in her name.[5] Her Honour inferred from these facts and from the terms of the deceased's husband's will that he was alive to the "competing claims on his bounty by both his children and the deceased".[6]

[15] Her Honour found that the assets which comprised the estate of the deceased's husband and the estate of the deceased were:

> "built up from the assets held by the deceased at the commencement of their relationship together, [the deceased's husband's] borrowings and inheritance from his father, the moneys earned from the hard work of both [the deceased's husband] and the deceased during their relationship and the provident investments in property and shares which they made".[7]

[16] Her Honour found that the deceased's husband had quarantined "the major portion of their jointly produced wealth into his name" at the date of his death.[8]

[17] On the evidence which was available, the learned primary judge was not able to make any precise finding as to what part of the assets owned by the deceased in her own name was sourced from her deceased husband. Her Honour found, however, that "the source of the substantial part of the deceased's assets was the joint efforts of [the deceased's husband] and the deceased during their relationship".[9]

**The financial position of each appellant**

[18] The appellant Lynell Nicol was born in 1952. She is employed as a receptionist and earns $200 net per week. With her husband she owns a house, the equity in which is valued at about $60,000. Mrs Nicol received $130,000 in shares from her father's estate, of which approximately $100,000 worth was retained by her at the time of her application for provision from the estate of the deceased.

[19] The appellant Denise Hancock was born in 1949. She and her husband own an unencumbered farm worth approximately $85,000. Mrs Hancock inherited $20,000

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4 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [11].
5 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [51].
6 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [51].
7 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [52].
8 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [53].
9 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [53].

in cash and $140,000 from her father. She has retained about half of that inheritance, being obliged to sell the remainder to meet living expenses because of poor returns from the farming business.

[20] The appellant Rhonda Rettke was born in 1956. She currently earns $24,000 gross per annum. With her husband she had a combined annual income of $68,000. Together with her husband, she owns net assets valued at approximately $199,000.

[21] The appellant Leonard Freeman was born in 1944. He earns a gross wage of approximately $577 per week. He and his wife have net assets of $356,000. His superannuation entitlement totals some $30,000.

[22] Ms Sheryl Freeman was born in 1951. She is unemployed. Her assets totalled only $72,000 at the time of her application.

[23] Mr Robert Freeman was born in 1945. He suffers from a long term physical disability. He and his wife own a property worth approximately $175,000 free of encumbrances but he earns no income and receives the disability support pension. They owned other assets worth approximately $120,000 at the time of his application for further provision from the estate of the deceased. Mr Freeman and his wife support their intellectually disabled daughter.

**The conclusions of the learned primary judge**

[24] The learned primary judge held that:

> "A wise and just stepmother in the deceased's position whose assets were contributed to some degree by [the deceased's husband] (although not the major extent when the division of matrimonial assets prior to [the deceased's husband's] death is taken into account) would be expected to consider making some provisions for at least the children of [the deceased's husband] who remained in extremely modest and necessitous circumstances, despite benefiting from their father's estate".[10]

[25] Her Honour concluded that Ms Sheryl Freeman and Mr Warren Freeman:

> "were in the most necessitous circumstances of all the applicants, so as to place them in a category which should have attracted the support of the deceased … The extreme need of each of these applicants can be contrasted with the comfortable circumstances of Mrs Smerdon [another unsuccessful applicant who has not appealed] and the slightly better circumstances of the other siblings than the circumstances of the applicants".[11]

[26] Her Honour concluded that the "jurisdictional issue"[12] was satisfied only in respect of Ms Sheryl Freeman and Mr Warren Freeman.

**The appellants' arguments**

[27] The appellants' first contention is that the learned primary judge acted upon a wrong principle in her approach to determining whether the appellants had enlivened the jurisdiction of the court to order further provision from the estate of the deceased.

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10 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [58].
11 *Freeman v Jaques* [2005] QSC 200; SC No 6343 of 2003, 22 July 2005 at [59].
12 *Singer v Berghouse* (1994) 181 CLR 201 at 208.

The appellants' contention is that the learned trial judge erroneously applied a test of "extreme need" in order to determine the jurisdictional issue.

[28] In my respectful opinion, the appellants' contention in this regard seeks to put an impermissible gloss[13] on the reasons of the learned primary judge. Her Honour was plainly not applying a test of "extreme need" in relation to the determination of the jurisdictional issue. Rather, her Honour was making the point that necessitous circumstances would be necessary to give rise to a moral claim on the bounty of a stepmother, who has had no familial relationship at all with the claimant, where the claimant has already received a distribution from the estate of his or her natural parent, and where the estate of the stepmother substantially reflects her contribution to the joint wealth of herself and her deceased husband.

[29] It is clear from the authorities that the resolution of the jurisdictional issue necessarily involves an evaluative balancing of relevant considerations.[14] The more exiguous and distant the familial relationship between the deceased and a claimant, the greater must be the need of the claimant for maintenance or support if it is to give rise to the obligation, postulated of a wise and just stepmother,[15] to make adequate provision for the proper maintenance or support of the claimant. Similarly, the greater the extent to which a stepparent's estate reflects her own contributions and efforts, the greater must be the need in the claimant for maintenance or support if a stepmother is to be regarded as subject to a moral claim to make adequate provision for proper maintenance and support.

[30] It follows that, understood correctly, her Honour's references to "extreme need" do not suggest that the correct text was not applied. The appellant's first criticism of the learned primary judge's reasons must be rejected.

[31] Next, the appellants contend that the learned primary judge was mistaken as to the facts of, or failed to take into account considerations material to, the application by Mrs Nicol. The basis for this contention was that the learned primary judge, in summarising Mrs Nicol's financial position, referred to the circumstance that she has three sons who reside at home who are supported by Mrs Nicol and her husband, whereas the evidence in Mrs Nicol's affidavit was that Mrs Nicol's sons are supported solely by her.

[32] This criticism of the learned trial judge's reasons is really insignificant. Mrs Nicol's affidavit was sworn on 12 November 2003. The hearing before the learned primary judge took place on 29 March 2005. No attempt was made to update Mrs Nicol's evidence or to provide any particulars of the financial burden involved in supporting these three sons who were aged between 28 and 18 years as at November 2003. Even if these adult men were still dependent on Mrs Nicol as at the date of the hearing, there was no sound evidentiary basis on which the learned trial judge could have come to a view as to how long that dependency was likely to continue or the

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13 In the sense described by Gummow and Hayne JJ in *Vigolo v Bostin* [2005] HCA 11 at [ 70]; (2005) 213 ALR 692 at 710, that is to say "a paraphrase which is apt to mislead".

14 *Vigolo v Bostin* [2005] HCA 11 at [6], [16] - [18], [22], [25], [27], [74] - [75] and [114]; (2005) 213 ALR 692 at 694, 697 - 698, 698 - 699, 700, 701, 711 - 712, 719.

15 *Vigolo v Bostin* [2005] HCA 11 at [15], [21] - [22], [58], [112] - [122]; (2005) 213 ALR 692 at 697, 698 - 699, 707, 718 - 721. As Callaway JA said in *Grey v Harrison* [1997] 2 VR 359 at 365, the touchstone of what a wise and just testatrix would have thought to be her moral duty "supplies the norm that the legislature left unexpressed". See also *Lee v Hearn* [2005] VSCA 127; No 4163 of 2001, 20 May 2005 at [4].

extent to which that continued dependency might require Mrs Nicol to incur expense. Further, there was no evidence to suggest that Mrs Nicol's husband was unwilling or unable to contribute to the further support of his sons, as he might reasonably be expected to do, to the extent that any such further support might continue to be required.

[33] The appellant advances a similarly insignificant criticism in relation to the learned trial judge's summary of the position of Mrs Hancock. Mrs Hancock, in an affidavit sworn on 10 November 2003, deposed: "My husband and I grow vegetables on the farm lot. It is a particularly hard life and not financially rewarding." Mrs Hancock also deposed that the farm has been subject to drought. The appellants contend that, because these matters were not mentioned by the learned trial judge, they must be taken to have been overlooked.

[34] In this regard, there is no reason to assume that the learned primary judge was not cognisant of the modest circumstances of Mrs Hancock and her husband simply because she failed expressly to advert to this particular aspect of the evidence. The learned primary judge did not say anything which might suggest that she assumed that Mrs Hancock and her husband had an income or earning capacity consistent with her Honour having failed to appreciate the evidence of their modest circumstances. On the other hand, the farm property is unencumbered, and, importantly, there was no evidence to suggest that it is unsuitable for the life which Mrs Hancock and her husband wish to lead, or that they are unable to meet their costs of living.

[35] While it is of no consequence in the present case, it is worth emphasising that the question of whether a testator has made "adequate provision" for "proper maintenance" of a relevant party is "to be determined by the primary judge by reference to circumstances as they existed at the date of the testator's death".[16] Many of the matters deposed to in the affidavits sworn in November 2003 appear to have been of long standing and so may be taken to also reflect the situation that obtained in January 2003 when the deceased passed away. That may not always be so.

[36] In relation to Mrs Rettke, the appellants argue that her Honour overlooked the incidence of capital gains tax payable in consequence of the realisation of shares received by her from her father's estate. This criticism is made in relation to each of the appellants. It is true that the learned primary judge did not expressly advert to this circumstance in her reasons; but as Mr Mullins SC pointed out, the appellants had not pressed this point upon the learned trial judge as a circumstance of need. That counsel for the appellants took this course at the hearing below is hardly surprising given the insignificance of the point.

[37] Mrs Rettke and her husband have no dependent children. Mrs Rettke identified no likely financial burden on herself or her husband which they are unlikely to be able to meet from their own resources, including any liability for capital gains tax. In any event, this point is not compelling. The capital gains tax liability only arose upon the realisation by Mrs Rettke of the property she received from her father's estate. She can hardly be said to have been driven into necessitous circumstances

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16 *White v Barron* (1980) 144 CLR 431 at 441.

because she has been required to part with some of the proceeds of what might be fairly characterised as a windfall gain.

[38] In relation to Mr Leonard Freeman, the criticism is advanced that the learned trial judge has overlooked the circumstance that Mr Freeman is rapidly approaching retirement age. But, once again, there is no reason to assume that her Honour overlooked this fact, which is obvious having regard to Mr Freeman's date of birth. In any event, the evidence showed that Mr Freeman owns his own home free of encumbrances. He is in employment and retained $112,000 worth of shares from his father's estate. Mr Freeman did not identify any contingencies associated with his approaching retirement which could not be met from his own resources.

[39] It will be apparent from the foregoing discussion of the appellants' criticisms of the reasons of the learned primary judge that the appellants' criticisms are not apt to demonstrate that the difficult evaluative exercise performed by her Honour has miscarried.

[40] The appellants urge that this case is directly analogous with the decisions of the Victorian Supreme Court in *McKenzie v Topp*[17] and *James v Day*.[18] But both these decisions concerned claims made against the estate of a deceased step-parent where the whole of the estate of the natural parent had earlier been left to the step-parent. They were cases where the stepchild had received nothing from the estate of the natural parent. In those circumstances, one may more readily conclude that a wise and just step-parent would recognise a moral claim in a stepchild to maintenance or support from an estate which was derived, in whole or in part, from the stepchild's natural parent.

[41] The appellants' attempt to press the analogy with *McKenzie v Topp* and *James v Day* extends to the contention that the generous provision made by a natural parent for a second wife carries with it a moral obligation on the second wife, generated by the natural parent's "reasonable anticipation that she, in turn, would make appropriate provision for his children after her death".[19] In the present case, the facts found by the learned primary judge deny the existence of any such "reasonable anticipation" on the part of the appellants' father. The appellants' father had deliberately segregated the proceeds of the joint efforts of himself and the deceased into two categories of assets, the first of which he kept in his own name to give to his children on his death, and the second category which he dedicated to the separate enjoyment of his wife.

[42] In my respectful opinion, the arguments advanced by the appellants by way of challenge to the learned trial judge's decision have little substance.

[43] For the sake of completeness, I should say that I was, for a time, concerned by the circumstance that, having regard to the advanced age of the respondent and the absence of any other moral claims on the bounty of the deceased, the deceased could have made ample, and indeed handsome, provision for the respondent while at the same time recognising moral claims in the appellants arising if for no other reason, because of their abandonment by their father when they were relatively young and the absence of proper maintenance and support by him at that time. The

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17 [2004] VSC 90; No 4847 of 2003, 30 March 2004.

18 [2004] VSC 290; No 454 of 2003, 17 August 2004.

19 Appellants' written submissions at [33].

matrimonial property settlement of $17,000 upon an ex-wife with eight children was a paltry sum even in 1976.

[44] It might well be thought in such circumstances that a wise and just stepmother, with no other claimant on her bounty other than an elderly friend, would have been moved to attempt to make up to her deceased husband's children something of the material loss likely to have been suffered by them as a result of his withdrawal of support from their lives when they were either in adolescence or relatively early adulthood.

[45] On the evidence adduced at trial, however, it is not possible even to speculate upon the extent to which, notwithstanding the provision made for the appellants by their father on his death, the withdrawal by the appellants' father of his financial support more than three decades ago so adversely affected their lot in life, or their present material circumstances, as to give rise to a moral obligation upon the deceased to make provision for any of the appellants from her own wealth.

[46] In my opinion, the appeal must fail. No doubt the appellants would each have found a legacy "advantageous"; but to say that falls far short of casting doubt on the learned primary judge's conclusion that the appellants had not been left by the deceased without adequate provision for their proper maintenance and support.[20] The evidence adduced on behalf of the appellants fell short of establishing a real need for any further provision to be made. As Dodds-Streeton J said in *MacEwan Shaw v Shaw*:[21] "If the need is not established, the court has no jurisdiction to make an order, no matter how large the testator's estate."

**Costs**

[47] The respondent submitted that, if the appeal were to fail, the appellants should be ordered to pay the costs of the appeal personally rather than having any costs paid out of the estate.

[48] In this regard, the question is whether the appellants were "justified in taking what the Court of Appeal in England called a second opinion".[22]

[49] In my respectful opinion, the points sought to be taken by the appellants were not apt to cast doubt on the decision of the learned primary judge. The appellants have made much of minor factual matters, each of which has been found to have no real significance. The estate and, by extension, the respondent should not be forced to bear the expense involved in being obliged to respond to this appeal.

**Conclusions and orders**

[50] The appellants have failed to demonstrate any basis on which the decision of the learned primary judge might be set aside. The appeal should therefore be dismissed.

[51] The appellants should pay the respondent's costs of the appeal to be assessed.

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20 *Ruddy v Clarke* [1996] QCA 254; Appeal No 304 of 1996, 2 August 1996 at [15].

21 [2003] VSC 318; No 5291 of 2002, 2 September 2003 at [214].

22 *Re Blyth (deceased)* [1959] NZLR 1313 at 1314; *Re McIntyre* [1993] 2 Qd R 383 at 388.