

SUPREME COURT OF QUEENSLAND

CITATION: *Lamond v Public Trustee of Queensland & Ors* [2009] QSC 247

PARTIES: **LINDA DIANA LAMOND**
(applicant)
v
THE PUBLIC TRUSTEE OF QUEENSLAND (as
executor of the will of **DORIS IDA DALTON**, deceased)
(respondent)
DESMOND JOHN MORRIS
(applicant)
OLIVER JAMES LAMOND
(respondent)
TESS OLIVIA LAMOND
(respondent)

FILE NO: BS4097 of 2006

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 27 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 21-22 April 2009

JUDGE: Mullins J

ORDER: **Adjourn the application to a date to be fixed for further submissions on the form of the orders that should be made to reflect the reasons for judgment, orders for costs and consequential orders**

CATCHWORDS: SUCCESSION – FAMILY PROVISION AND MAINTENANCE – JURISDICTION – BASIS AND EXTENT OF JURISDICTION – where applicant the son of the deceased – where applicant has been deaf since birth – where deceased’s duty to provide for applicant not displaced by deceased’s estrangement from applicant – where applicant in modest financial circumstances but where applicant owns a modest residence – where applicant’s claim had to be balanced against the claims of the deceased’s daughter, granddaughter and grandson – where deceased’s daughter in modest financial circumstances with no prospects of significant improvement and does not own a residence – where deceased’s grandson suffers from severe autism and requires fulltime care and supervision for the remainder of his life – where deceased’s granddaughter a student in modest financial circumstances but capable of earning of living –

whether applicant left without adequate provision for his proper maintenance

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – claims by children – where applicant the son of the deceased – where applicant has been deaf since birth – where deceased gave interests in real property to her daughter, granddaughter and grandson – where applicant given a one-quarter share of the residue of the deceased's estate – where provision required to ease burdens caused by applicant's disability, including to give capacity to relocate, make improvements to his residence and address his limited employability and social interaction – where provision for applicant must be funded from deceased granddaughter's share of the residue – what provision ought to be made out of the deceased's estate for the applicant

Succession Act 1981, s 41

Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494, considered

Hills v Chalk [2008] QCA 159, considered

Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134, considered

Singer v Berghouse (1994) 181 CLR 201, followed

Vigolo v Bostin (2005) 221 CLR 191, considered

White v Barron (1980) 144 CLR 431, considered

COUNSEL: GW Diehm SC for the applicant DJ Morris
MK Conrick for the respondent The Public Trustee of Queensland
DG Mullins SC and M Hindman for the respondent LD Lamond
RT Whiteford for the respondent OJ Lamond
PW Hackett for the respondent TO Lamond

SOLICITORS: de Groot for the applicant DJ Morris
The Official Solicitor to The Public Trustee of Queensland for the respondent The Public Trustee of Queensland
Adamson Bernays Kyle & Jones for the respondent LD Lamond
McCowans for the respondent OJ Lamond
Bernard Ponting & Co for the respondent TO Lamond

[1] **MULLINS J:** Mrs Doris Ida Dalton (the deceased) died on 27 August 2005 aged 70 years. She was survived by her two children from her first marriage, Mrs Linda Diana Lamond (born in 1952) and Mr Desmond John Morris (born in 1953). Mrs Lamond is married and is the mother of Tess Lamond (Tess) born in 1985 and

Oliver Lamond (Oliver) born in 1988. The deceased had made a will on 11 August 1997 (the will) by which she appointed The Public Trustee of Queensland as executor and trustee. By order of the court made on 14 November 2005, the Public Trustee was authorised to administer the deceased's estate in accordance with the will.

- [2] By originating application filed on 17 May 2006, Mrs Lamond applied to the court for an order that adequate provision be made for her proper maintenance and support out of the deceased's estate pursuant to s 41 of the *Succession Act* 1981 (the Act). On 26 May 2006 Mr Morris gave notice that he intended to appear and be separately represented as an applicant in the application. Solicitor Mr Gerard Murphy consented to act as the litigation guardian of Oliver and gave notice of intention on behalf of Oliver to participate in the application as a beneficiary under the will. Tess also elected to be separately represented and participate actively in the application.

- [3] In late January 2009 Mrs Lamond notified the solicitors for the other parties that, because of the adverse effect of the economic downturn on the value of the estate, she had decided not to press her family provision application, but she would continue to be separately represented as a beneficiary under the will to defend her entitlement against Mr Morris' claim and otherwise seek to uphold the will. The dismissal of Mrs Lamond's application was formalised on the first day of the hearing. The question of the costs of Mrs Lamond's application was reserved.

- [4] Because all interested parties under the will were separately represented, the Public Trustee left the running of the litigation to those parties. Mr Conrick of counsel appeared for the Public Trustee at the commencement of the hearing, provided written submissions to the court contending what the outcome of the application should be, and was given leave to withdraw from the hearing of the application, subject to being heard on the question of costs.

The deceased's estate

- [5] At the time of her death, the deceased's estate consisted of a duplex at Mermaid Beach valued at approximately \$1.2m together with cash and shares valued at approximately \$1m. Apart from administration expenses and a funeral account of less than \$6,000, there were no liabilities except for capital gains tax and other realisation costs with respect to the assets.

- [6] There has been some diminution in the value of the net distributable estate since that time, primarily because of a reduction in the value of the shares. The market value of the deceased's shares at the date of her death was \$863,350, but as at 14 April 2009 the value was calculated to be \$570,212 (net of estimated capital gains tax and realisation costs). In addition, the following interim distributions have been made: \$41,500 to Mrs Lamond; \$45,000 to Tess and \$10,000 to Oliver.

- [7] As at 14 April 2009, the net distributable estate was valued at \$2,036,195 (net of estimated capital gains tax and realisation costs) before taking into account the interim distributions. The market value of the duplex as at 14 April 2009 was \$1.4m. In calculating the net distributable estate, estimated capital gains tax and realisation costs of \$110,773 were set off against the value of the duplex.
- [8] At the hearing each of the parties gave an estimate of the legal costs spent by the party on the proceeding to the conclusion of the hearing. The estimate for the Public Trustee was \$33,000. Mr Morris' legal costs and outlays were estimated at \$155,000. Mrs Lamond's costs to the conclusion of the hearing were estimated to be approximately \$182,000 which was based on her lawyers reducing their fees, in order to allow the duplex to be maintained, in the event that the decision did not interfere with that entitlement. By the time Mrs Lamond notified the other parties on 28 January 2009 of her decision not to continue with her application, she had incurred costs in the amount of \$138,000. The litigation guardian's costs to the conclusion of the hearing were \$112,000. The estimated costs for Tess' legal representation were \$95,000. Apart from the Public Trustee, the total legal costs of the parties for this proceeding were therefore at least \$544,000.

The deceased's will

- [9] By her will, the deceased provided Mrs Lamond with a life interest in the real property (subject to obligations of repair, insurance and the payment of all periodical outgoings payable on the property) and household furniture and effects with half of the remainder to Tess and the other half of the remainder to be held on trust as to the income and capital for Oliver's benefit during his lifetime and, on his death, to pass to Tess.
- [10] The deceased divided the residue of her estate equally among her two children, Mrs Lamond and Mr Morris, and her two grandchildren, Tess and Oliver, with Oliver's one-quarter share of the residue held on trust with the income and the capital applied for his benefit and on his death to pass to Tess.
- [11] But for this proceeding, each of the four beneficiaries would have received an immediate cash distribution of approximately \$250,000 from the residue under the will.

Background

- [12] The deceased separated from her first husband in 1953. Mr Morris was born deaf and is mute. At the age of three years, he boarded at an institute for the deaf. Until he was 13 years old, he would go home approximately three times each year. He remained at the institute until he was 16 years old. Initially home for the family was with the deceased's parents on a farm property in Victoria. When the deceased left the farm to move to Melbourne for work, Mrs Lamond remained living with her grandparents. The deceased married her second husband Mr John Dalton in about 1960. Mrs Lamond relocated from her grandparents' farm property to live with the

deceased when she was about 11 years old. Between the ages of 13 and 16 years, Mr Morris was able to stay with the deceased and Mrs Lamond on weekends.

- [13] The deceased and Mr Dalton moved to the Gold Coast, Queensland in about 1973.
- [14] Mr Dalton died in November 1993. The deceased acquired the Mermaid Beach duplex. Unit 2 is on the ground and first floors, contains three bedrooms and became the deceased's home. Unit 1 is on the ground floor, contains two bedrooms and was rented by the deceased.
- [15] At a birthday party of a relation in 1994, the deceased and Mr Morris had an argument over Mr Morris' failure to attend Mr Dalton's funeral which resulted in the complete breakdown of their relationship.
- [16] The deceased was diagnosed with gradual dementia in May 2001. When Mrs Lamond visited the deceased in May 2003, the deterioration in the deceased's health was apparent.
- [17] Mrs Lamond and her family relocated from Perth to the Gold Coast in November 2003 and rented a unit at Surfers Paradise, so that Mrs Lamond was able to assist and support the deceased.
- [18] On 3 September 2004, the deceased went for a walk without her carer and fell and was hospitalised. She was assessed as requiring high care, as she was in the advanced stages of dementia. In early October 2004 the deceased moved from hospital into a nursing home. Soon after, Mrs Lamond and her family moved into unit 2 of the Mermaid Beach duplex.

Mr Morris' circumstances

- [19] Mr Morris is single and has no dependants.
- [20] Mr Morris communicates by the sign language Auslan. He does not lip read.
- [21] Mr Morris considers that the education he received at the institute for the deaf was substandard and at about primary school level.
- [22] Mr Morris left school in December 1969, at age 16, and worked as a labourer and spray painter until 1973. Between 1973 and 1979 he had a series of odd jobs and was unemployed for periods.
- [23] In 1979, Mr Morris commenced working as an administrative officer with the Australian Taxation Office (ATO). He remained there as an administrative officer at the lowest level until 1996 when he accepted a voluntary redundancy package on

the second occasion it was offered to him, as the alternative was to transfer to a role in the mailroom that he knew he would not enjoy. At the time of his redundancy, Mr Morris was earning \$26,457 gross per annum.

- [24] In 1985 Mr Morris purchased his own home at Belgrave which is 35 radial kilometres east of central Melbourne. (Mr Morris describes the property as about 50kms from the centre of Melbourne which is not disputed.) His house was built in the 1940s, is constructed of weatherboard and contains two bedrooms. The train journey to the centre of Melbourne takes just over an hour. Mr Morris purchased the property at Belgrave, because it was in the area where he could afford to make a purchase, as his bank at the time would lend him only \$32,000.
- [25] After leaving the ATO, Mr Morris worked casually as an Auslan teacher and also was in receipt of a Newstart allowance from Centrelink. The work was variable from as little as three hours per week. The greatest number of hours he worked as an Auslan instructor for the one employer was 16½ hours per week for the Shepparton Deaf Facility for over two years ending in December 2002. Mr Morris commenced working as an Auslan tutor for the Victorian Deaf Society (VicDeaf) in 2004. He originally worked over six hours per week, but in 2006 that reduced to four hours per week. It is now a requirement of VicDeaf that Auslan tutors hold a Certificate IV in Training and Assessment. Mr Morris has been unable to successfully complete this course, because of his lack of competency in English and intends obtaining further qualifications in English, before undertaking the Certificate IV in Training and Assessment course again. (Mrs Lamond disputed the extent of Mr Morris' claim that he lacked competency in English, but the course results that Mr Morris obtained for this Certificate IV confirm that he does have the difficulties with English that he asserts.)
- [26] Mr Morris has tended to socialise primarily with other deaf people and, over the years, through the Deaf Club in East Melbourne. His closest friends are 40 minutes away by car. There are no deaf people residing in Belgrave and no services or facilities for deaf people in Belgrave or the vicinity of Belgrave. Mr Morris played table tennis in a team of deaf people and was selected to represent Australia in the 2005 Deaf Olympics. He has not continued with table tennis, as there was too much travelling involved from Belgrave to Melbourne for training and the competitions.
- [27] Mr Morris provided a list of assets prepared by State Trustees as at 20 September 2006 (rather than the date of the deceased's death). Because of the nature of the assets and Mr Morris' circumstances, any difference between values on those respective dates is unlikely to be material for this application, except for the investment in the common fund. The reason that the list of assets was prepared by State Trustees is that Mr Morris appointed State Trustees as his attorney for financial affairs, because of his disability. In respect of the investment in the common fund with State Trustees, Mr Morris conceded in cross-examination (at Transcript 1-73) that the investment fluctuated and that it may have been as high as \$90,000 when the deceased died. The list of assets, as at 20 September 2006, is:
- | | |
|----------------------------|---------|
| Cash at bank | \$4,815 |
| Superannuation entitlement | 91,137 |
| Motor vehicle | 3,000 |

Belgrave property	150,000
Common fund State Trustees	73,791
	\$322,743

[28] Mr Morris exhibited estimated retrenchment figures from the Commonwealth Superannuation Scheme to his affidavit filed on 11 April 2007 that were prepared in 1996 in anticipation of his retrenchment on 1 November 1996. In view of his evidence, however, about rolling over two amounts when he got his payout in 1996, one of which went to Perpetual and the other to Colonial State from where it was transferred to State Trustees (at Transcript 1-74 to 1-75) which accords with the statement of assets prepared by State Trustees, as at 20 September 2006, that shows a Perpetual Superannuation plan and an investment in the common fund of State Trustees, Mr Morris' superannuation must be through Perpetual, rather than the Commonwealth Superannuation Scheme.

[29] Mr Morris' tax return for the year ended 30 June 2006 showed his gross income from VicDeaf as \$8,099. He also received a travel allowance from VicDeaf of \$1,414 which he fully expended in work related travel expenses. He also received a Newstart allowance in the sum of \$6,501. Mr Morris also earned \$3,311 by way of interest on his investment in the common fund of State Trustees.

[30] In calculating his monthly income at the time Mr Morris affirmed his affidavit on 29 November 2006, he allowed \$500 from VicDeaf and \$520 from the Newstart allowance, making a total net income of \$1,020. He did not take into account the interest that he was earning on his investment. Mr Morris calculated his monthly expenses at that time at between \$1,286 and \$1,404. A number of expenses associated with his vehicle and travel are included in those expenses. It is not clear to the extent (if at all) that some of those expenses were met from the travel allowance provided by VicDeaf.

[31] Mr Morris' assets at the date of the hearing of this application were:

Cash at bank	\$172
Superannuation entitlement	66,337
Motor vehicle	350
Belgrave property	240,000
Common fund State Trustees	7,237
	\$314,096

[32] Mr Morris has been funding his legal costs for this proceeding from his investment in the State Trustees common fund. That explains the significant reduction in the funds in that investment. At the date of the hearing he owed his lawyers the sum of \$13,843.50. It appears that the value of Mr Morris' superannuation entitlement has decreased as a consequence of the impact of the global financial crisis.

[33] I have used \$240,000 as the value of the Belgrave property. The property is in fair to poor condition and requires repairs including replacement of some rotted external weatherboards and repair of the timber decking. It also requires repainting. Mr

Morris obtained a market appraisal from Stockdale & Leggo that supported an expected selling range of between \$220,000 and \$245,000. Mrs Lamond's lawyers obtained a report and valuation from Hollingsworth St Clair Property Pty Ltd (exhibit 1) which suggested that the property had a market value between \$250,000 and \$260,000.

[34] At the date of the hearing, Mr Morris estimated that his monthly net income was \$1,124, comprising \$644 from the Newstart allowance and \$480 from VicDeaf. He calculated his monthly expenses to be \$1,144. He was endeavouring to moderate his expenditure, so that he did not exceed his income.

[35] Because of Mr Morris' isolation from his deaf friends, activities that he enjoys and services for deaf people, he wishes to relocate closer to Melbourne. He requires funds to assist him in buying a residence closer to the centre of Melbourne and anticipates increased expenses due to the higher cost of living closer to the city. He also wishes to purchase a number of items that would make life easier for him as a deaf person including a telephone typewriter, door flashing light (instead of door bell), wakeup alarm, telephone flashing light, fire alarm flashing light and a television incorporating subtitle closed caption device. The cost of these items when Mr Morris affirmed his affidavit filed on 11 April 2007 was \$2,330. The list of such items had changed slightly by the time that Ms Avenell, Mr Morris' solicitor, swore her affidavit that was filed by leave on 21 April 2009 to show that the cost of the current technology devices available to assist a deaf person together with an appropriate television is \$2,718. It was asserted against Mr Morris that he has always had sufficient funds to purchase these items from his own resources. It is clear, however, that Mr Morris has been cautious about his expenditures, because of his limited income. Mr Morris uses email and text messages, but he would like to acquire a webcam, so that he could communicate over the internet using sign language. His studies to achieve Certificate IV in Training and Assessment would be expedited, if he were able to afford an interpreter service to assist him in the courses.

[36] Mr Morris set out an estimate in his affidavit filed on 11 April 2007 of what his monthly expenses would be if he moved closer to the centre of Melbourne. His estimate was \$2,735 to \$2,950. Although that estimate was proposed two years prior to the hearing, it was relied on by Mr Morris at the hearing. Significant increases were in expenses related to general social activities (increasing from \$34 to \$360), rates and levies and home maintenance. Some of the estimated costs were based on information provided to Mr Morris by his friends, such as the cost of home and contents insurance. It is obvious that Mr Morris' expenses would increase with increased opportunities for social activities and access to services for deaf persons such as the interpreter service. In view of the manner in which Mr Morris compiled this list of anticipated expenses by largely speculating on what the figures would be, I place little weight on the final figures. Mr Morris has no firm idea for the purchase of a replacement property, but general inquiries made by his solicitor indicate that a small two bedroom house within a radius of 15kms of the centre of Melbourne is upwards of \$400,000.

Mr Morris' relationship with the deceased

- [37] Mr Morris lived with the deceased for about two years after finishing at the institute for the deaf. He then lived with some deaf friends. Mr Morris visited the deceased every three or four months, until the deceased moved to Queensland in 1973. She relocated without telling Mr Morris. Mr Morris paid for and organised his own 21st birthday party. Over the next 20 years, Mr Morris saw the deceased on three occasions: in about 1978 Mr Morris drove with a friend for a three day visit with the deceased; he visited again in 1980 for one week when he was playing sport in the deaf games; and he and his girlfriend visited for two days in 1993. Mr Morris had tried to visit his mother in 1984, when he was in Brisbane, but his mother refused his offer to visit. When the deceased visited Melbourne with her husband on a couple of occasions during the 1980's, neither the deceased nor Mr Morris visited each other.
- [38] The deceased (and Mrs Lamond) mainly used finger spelling and written notes to communicate with Mr Morris. When he did stay and live with his mother, he found it frustrating that he could not join in family conversations. Mr Morris never received any cards or gifts from the deceased for Christmas or his birthday. After Mrs Lamond left Melbourne, Mr Morris and Mrs Lamond maintained contact through letters and, later, email. Mr Morris also visited the Lamond family in Hong Kong, twice in London and in Singapore. Mrs Lamond and her children stayed at Mr Morris' Belgrave home for some of the time when they returned to Australia in 1993. Particularly when the deceased's health was deteriorating, Mrs Lamond kept Mr Morris informed about the deceased.
- [39] Mr Morris considered that he received no support, either financially or emotionally, at any time from the deceased. He described their relationship as "bizarre" and that his mother never showed him care or love or hugged him (at Transcript 1-58).
- [40] Mr Dalton had been ill for some time before his death in November 1993. Mr Morris had seen Mr Dalton on his visit to the deceased in September 1993. Mr Morris did not attend Mr Dalton's funeral because it was organised quickly and Mrs Lamond was unable to notify him about it until the day of the funeral. Mr Morris sent the deceased a sympathy card. She replied by letter expressing significant disappointment in his not visiting Mr Dalton while he was ill and not attending the funeral. Mr Morris wrote to the deceased explaining his position, but the deceased did not respond. At a relation's birthday party in 1994, Mr Morris attempted to apologise to the deceased, but she refused to talk to him.
- [41] During 2003 Mrs Lamond encouraged Mr Morris to contact and visit the deceased. A couple of emails sent by Mr Morris to the deceased were not successful in re-establishing contact.
- [42] Mr Morris went to the Gold Coast in June 2005 for two weeks and visited the deceased at the nursing home, although she did not recognise Mr Morris due to her dementia. He attended the deceased's funeral.

Mrs Lamond's circumstances

- [43] Mrs Lamond married in 1981. Mr Lamond was a film producer who produced a number of successful films throughout the 1970s and 1980s. Some business deals turned sour in about 1988 which resulted in significant losses for Mr and Mrs Lamond. They relocated to Hong Kong in 1988 and then to Thailand. They returned to Australia for about a year in 1993 and then in 1994 moved to London. In 2000 the Lamond family relocated to Singapore. In November 2002 they relocated to Perth.
- [44] Oliver was diagnosed with autism in early 1994.
- [45] Mr Lamond was diagnosed with early onset of Parkinson's disease in February 1997.
- [46] Mrs Lamond's personal and financial circumstances at the date of the deceased's death are summarised as follows. Mrs Lamond lived in unit 2 of the Mermaid Beach duplex with Mr Lamond and Oliver. She was their primary care giver. She received a carer's allowance from Centrelink of \$46.20 per week in respect of Oliver. Mr Lamond could work part-time only. In the 2006 tax year, Mr and Mrs Lamond were paid \$31,450 (before tax) from a film production company owned by Mr Lamond. Their monthly expenses exceeded their monthly income by about \$64 per month. Neither Mrs Lamond nor her husband owned any real estate. The joint assets were about \$15,392, but the liabilities were about \$24,900. The film production company had assets of \$1,250, but liabilities of \$6,000.
- [47] Mrs Lamond's personal and financial circumstances at the date of the hearing are summarised as follows. Mrs Lamond's living arrangements remain unchanged from the date of the deceased's death. Mr Lamond's health has further deteriorated. There has been some associated increase in the average weekly cost of Mr Lamond's medical and pharmaceutical expenses. In addition, Mrs Lamond is provided with some limited assistance from Blue Care for six hours per week at \$10 per week and domestic assistance for two hours per fortnight at \$10 per fortnight. Mrs Lamond pays the Commonwealth Respite and Carelink centre an average of \$50 per month to obtain respite care for Mr Lamond. Mrs Lamond receives a carer's allowance from Centrelink in the amount of \$100.60 per week for caring for both her husband and Oliver. The film production company has generated net losses for the 2006, 2007 and 2008 calendar years, but Mrs Lamond estimates that the business provides them with an average weekly income of \$500. The joint assets of Mrs Lamond and her husband are about \$6,592, and their joint liabilities are about \$15,022. The company's assets are \$10,000, with liabilities of \$6,000. Mrs Lamond commenced a post graduate diploma in Teaching English to Speakers of Other Languages (TESOL) in September 2008 and expects to complete that course in April 2010. This requires her to attend university for four hours of classes and she undertakes her studies at home. Mrs Lamond hopes to secure part-time employment in the TESOL field to help support her family, but is mindful in pursuing such work of the demands on her time from both her husband and Oliver.
- [48] Since the deceased's death, the Public Trustee has spent about \$14,000 to refurbish unit 1 and it is tenanted. Mrs Lamond describes her family as comfortable living in

unit 2. Mrs Lamond considers her family's financial position is worse, in overall terms, than it was at the deceased's death. She conceded in cross-examination (at Transcript 1-83) that a suitable residence on the Gold Coast for her family could be purchased for upwards of \$600,000.

Mrs Lamond's relationship with the deceased

- [49] The detailed evidence that was given about Mrs Lamond's relationship with the deceased was in relation to the period of about 10 years leading up to the deceased's death
- [50] When Mrs Lamond and her family lived in London between 1994 and 2000, the deceased visited them on four or five occasions for a few days on each occasion. The deceased visited the Lamond family twice during their stay in Singapore. While overseas, Mrs Lamond wrote letters regularly to the deceased. In September 2002, Mrs Lamond and Oliver spent ten days with the deceased at the Gold Coast. During that visit Mrs Lamond noted the deceased's speech was faltering, she appeared anxious a lot of the time and appeared more alert some days than others.
- [51] By May 2003 Mrs Lamond had become very concerned for the deceased's health and well-being, as the deceased had trouble speaking on the telephone and her email messages were almost incomprehensible. In June 2003 Mrs Lamond travelled to the Gold Coast and consulted with the deceased's doctors. In-home care was arranged for the deceased. The deceased requested Mrs Lamond and her family to move to the Gold Coast and live in unit 1 of the duplex, so Mrs Lamond could help her. Mrs Lamond was unable to relocate until the end of the school year. The deceased gave Mrs Lamond a sum of money to cover the cost for the Lamond family to relocate to the Gold Coast.
- [52] In mid July 2003 Mrs Lamond returned to the Gold Coast with her husband and Oliver to visit the deceased. On returning to Perth, Mrs Lamond tried to maintain contact with the deceased via email and the telephone. That was not successful, because of the deceased's deteriorating condition. Mrs Lamond sent letters instead.
- [53] When the Lamond family relocated to the Gold Coast, Mrs Lamond visited the deceased at weekends when the paid carers did not attend, but also visited her several times during the week.
- [54] While the deceased was at the nursing home from October 2004 until her death, Mrs Lamond regularly visited and took her on outings.

Oliver's circumstances

- [55] Oliver is cared for by his parents, although Mrs Lamond is the primary care giver because Mr Lamond's limitations due to Parkinson's disease restrict the assistance he provides to supervision of Oliver whilst at home.

- [56] Oliver's litigation guardian had him assessed by psychiatrist, Dr David Eyears, in July 2008. Dr Eyears' report noted as follows. Oliver's primary diagnosis is autistic disorder, but he has associated intellectual deficits ranging from the bottom of the normal range of intelligence into the mild intellectual impairment range. Oliver's disability is severe and requires him to be given supervision and assistance 24 hours per day each day of the week. Oliver is unable to carry on any meaningful employment. He requires support and guidance in prompting him to maintain hygiene and personal care; supervision and reinforcement of the skills of basic living tasks such as cleaning; preparation of meals as Oliver can cook only simple snacks under supervision; the maintenance of a high degree of structure and predictability to his lifestyle; supervision and guidance to mitigate the effects of Oliver's poor social judgment, particularly in public places; vigilance to protect Oliver from exploitation; vigilance to mitigate the effects of Oliver's idiosyncratic phobic and aversive reactions to dogs and specific noises; supervision in relation to exercise and diet; and supervision of medications. If Oliver were not residing with his parents, or his parents were unable to provide the level of supervision and care the he requires, Oliver would require a 24 hour residential care placement with trained residential care staff.
- [57] Mr and Mrs Lamond have assisted Oliver in becoming as independent as possible, having regard to Oliver's limitations. He is able to be left alone in his home for a limited period of up to two hours. He walks alone to the local shops which are seven minutes' walk away from his home. He can walk alone around familiar shopping centres. He is able to use a mobile telephone. He is unable to be left unsupervised at night, because he becomes anxious. He responds negatively when he hears sounds that he does not like. He does not like loud, guttural coughs, the sound of a cappuccino making machine, building site sounds such as hammering and the beeping of computerised equipment such as the metre in a taxi. Oliver will walk around public places such as shopping centres with his fingers in his ears, because he is anxious that he will hear a sound that he does not like.
- [58] At the date of the hearing, Oliver had no assets of significance. He is in receipt of a fortnightly disability support pension in the sum of \$431.40. His fortnightly expenses at the time of trial were \$817.50 comprising:
- (a) House With No Steps - \$38.00
 - (b) Golf lessons - \$60
 - (c) Crossing Divides- Access Arts - \$60
 - (d) Personal fitness training at the Police Citizens Youth Club - \$60.00
 - (e) Gold Coast Sport and Recreation - \$76.00
 - (f) Shepherd Community Services or Gold Coast Family Support Group - \$45
 - (g) Psychologist out of pocket costs from Dr V Bitsika - \$47.50
 - (h) Medication - \$10.00
 - (i) Art therapy- private tuition - \$50.00
 - (j) Swimming lessons - \$50.00
 - (k) Southern Star Respite - \$20.00
 - (l) Gold Coast Community Care - \$30.00
 - (m) Transcord Transport - \$16.00
 - (n) Miscellaneous clothing, transport, pocket money, mobile phone, toiletries, food and other expenses - \$255.00

- [59] The shortfall between Oliver's pension and his expenses is met by his parents from their savings.
- [60] Many of Oliver's expenses relate to the activities that he undertakes either by way of therapy or to keep him active and healthy. The House With No Steps is a program that offers services for people with intellectual disabilities who have finished school. Oliver attends that program each Monday to Wednesday from 9am to 2pm. On each Thursday between 10am and 3pm Oliver attends "Crossing Divides" which provides a program for young people with special needs who have an interest in visual and performing arts. He has a Friday night outing with one of the community groups, such as Shepherd Community Services or Gold Coast Family Support Group.
- [61] Oliver sees psychologist Dr Bitsika for counselling each month to assist with his behavioural and anxiety issues. He is on daily prescription medication.
- [62] The litigation guardian obtained a report from occupational therapist, Ms Rebecca Hague, who considers that Oliver may benefit from participation in an auditory integration program that would address his sound sensitivity. Mrs Lamond considers that a major impediment to Oliver's participation in community activities is his sound sensitivity. Ms Hague costs one course in Brisbane at \$1,700 (without taking account of travelling costs) and another course based at the Gold Coast for about \$1,000.
- [63] According to Mrs Lamond, the deceased was always interested in Oliver's progress and researched autism and appropriate therapies and treatment. Mrs Lamond considered that Oliver and his grandmother related well to each other and that the deceased made a fuss of Oliver and could deal with his obsessions. Mrs Lamond stated:
"Mum told me she was concerned about Oliver's financial security and the cost of providing him with adequate care and support so that he could become as independent as he could be. She told me she wanted to provide for him after her death to ensure that he received that care and support."

Tess' circumstances

- [64] Tess is 24 years old. She has been living in London since October 2004. At the time of the deceased's death, she was working part-time in a children's nursery earning about \$102 per week. In September 2006, she commenced university studies in early childhood education. She has met the fees for this three year course from the interim distribution made to her from the deceased's estate. She has no assets of any significance.
- [65] Because Tess spent most of her childhood overseas, she saw the deceased only on her visits to the Lamond family. They also kept in touch through the telephone,

mail and email. Sometimes Tess would add a note at the end of one of her mother's letters to her grandmother.

- [66] Tess shared a "special" and "close" relationship with the deceased as her only granddaughter. The deceased was generous to Tess with gifts for her birthday and at Christmas. In one of her letters to the deceased's attorney in March 2005, Mrs Lamond referred to the deceased's usual gift of \$500 for each of her grandchildren for Christmas and birthday since they became teenagers.
- [67] By the time Tess moved to the Gold Coast in 2003, she found it difficult to communicate with her grandmother, but would spend time watching television with her. Tess stayed at the Gold Coast with her family between November 2003 and March 2004 and between July and October 2004.

The law

- [68] Section 41(1) of the Act provides:
 "(1) If any person (the 'deceased person') dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or 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."
- [69] The two stage process that provisions such as s 41(1) of the Act require the court to undertake was explained in the joint judgment of Mason CJ, Deane and McHugh JJ in *Singer v Berghouse* (1994) 181 CLR 201, 208-209 (*Singer*):
 "It is clear that, under these provisions, the court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question'."
- [70] What is involved in the jurisdictional question was described in *Singer* at 209-210:
 "The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty."

- [71] This approach to the jurisdictional question was applied by Gleeson CJ and Gummow and Hayne JJ in *Vigolo v Bostin* (2005) 221 CLR 191, 207-208 [37], 218 [74], 220 [82]-[83] (*Vigolo*). Compare the approach of Callinan and Heydon JJ in *Vigolo* at 230-231 [121]-[123].
- [72] The jurisdictional question is one of fact determined at the date of the hearing, even though it involves the making of value judgments on whether the applicant has been left without adequate provision for his proper maintenance, education and advancement in life: *Singer* at 210, 211. See also *Hills v Chalk* [2008] QCA 159 at [39]-[41] (per Keane JA), [128]-[139] (per Muir JA) and [212] (per Fraser JA).
- [73] If it is necessary to proceed to the second stage of the process, it involves similar considerations to the jurisdictional question: *Singer* at 210. Section 41(1A) of the Act becomes applicable:
- “(1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependent was being maintained or supported by the deceased person before the deceased person’s death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.”
- [74] In determining the second stage, the court exercises its discretion on whether to order adequate provision for the proper maintenance of an applicant by reference to the circumstances, as they exist at the date of the order: *White v Barron* (1980) 144 CLR 431, 444. The question remains, however, one of adequate provision for proper maintenance and support as at the date of the deceased’s death: *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494, 508.

Submissions of the parties on the jurisdictional question

- [75] The Public Trustee approaches the jurisdictional question by looking at the circumstances of Mrs Lamond and Mr Morris that existed at the time of the deceased’s death. On the one hand, the deceased had a daughter who was without her own home, whose husband had a severe progressive illness, whose son was severely autistic requiring extensive care and had no prospect of ever making his own way in the world, and whose daughter she had no prospect of giving a start in life. On the other hand, the deceased had a son in very modest circumstances and suffering from the huge disadvantages of profound deafness, but with his own modest home. It is therefore submitted that the deceased’s decision to provide a residence and modest income for her daughter by way of a life interest, to provide a quarter of the residue on trust for her autistic grandson and her decision to split the balance of the residue between her granddaughter and her two children, which gave each of them approximately \$250,000, could not be criticised. It is further submitted that, having provided for her two children by an absolute and immediate gift of approximately \$250,000 each meant that her decision to benefit her granddaughter was one that was open to her as a matter of law, because she had provided adequately for her children. The Public Trustee submits that as the

deceased had met her obligations to provide support to her children, the will should not be disturbed.

- [76] The approach that is taken on behalf of Mrs Lamond is to value Mr Morris' entitlement under the will at the time of deceased's death as \$267,896 and to consider that in conjunction with his net assets of \$313,044 disclosed in his affidavit affirmed on 29 November 2006. The submission is then made that an amount of \$267,896 was at the outer limit of appropriate awards (if no provision had been made for Mr Morris under the will) and was adequate for his proper maintenance and support. This is on the basis that an amount of \$267,896 would significantly supplement his available superannuation or allow him to substantially renovate his existing house or allow him to sell his current home and purchase a flat closer to the city centre of Melbourne.
- [77] The litigation guardian also supports the submission that Mr Morris could not satisfy the jurisdictional question. The points that are made by the litigation guardian include that Mr Morris' modest income position was largely of his own doing, the distance he lived from the city was not extraordinary, there was no evidence that as at the date of death the cost of suitable accommodation closer to Melbourne exceeded what he could afford from his own assets and his entitlement under the will of about \$250,000. In any case it is submitted that only in exceptional circumstances would an adult family provision applicant be entitled to an unencumbered residence or the means to acquire one. Reliance is also placed on the estrangement between Mr Morris and the deceased and the constraint imposed by the deceased's duty to provide for Mrs Lamond and the deceased's desire to provide for Oliver, even though he was not strictly a dependant of the deceased.
- [78] The submissions made on behalf of Tess also support the rejection of Mr Morris' application on the failure to satisfy the jurisdictional issue. It is submitted that Mr Morris was capable of fully supporting his needs, even without the significant entitlement to one-quarter of the residue, and had been doing so since the age of 18 years. It could not be said that his entitlement under the will of about \$267,000 at the time of the deceased's death was not adequate provision, when the other claims upon the estate were significant and by some who had a greater need than Mr Morris.
- [79] The only party who supports Mr Morris' satisfaction of the jurisdictional question is Mr Morris himself. Reliance is placed on Mr Morris' limited employment options because of his disability and the need to address his increasing isolation from other deaf people and the majority of services provided in Melbourne for deaf people because of the distance between his home and the centre of Melbourne. Having regard to the size of the deceased's estate, the failure of the deceased to provide better for Mr Morris' needs as a child and her responsibility for their estrangement during her lifetime, and even allowing for the claims upon the estate of Oliver and Mrs Lamond, it is submitted that the provision made for Mr Morris could not be regarded as adequate. It is put that a larger sum than \$250,000 which allowed for him to live closer to the deaf community in Melbourne and provide him with enough funds to meet his living expenses without reliance on his modest savings was appropriate.

Whether the deceased made adequate provision for Mr Morris

- [80] For the purpose of considering the jurisdictional question, I will proceed on the basis that, but for this proceeding, Mr Morris' share of the residue was, in round terms, \$250,000. This is based on the value of the deceased's assets at the date of her death and allows for capital gains tax and the costs of realisation in respect of the shares and the Public Trustee's costs of the administration of the estate.
- [81] The jurisdictional question is not based on subjective perceptions of unfairness that Mr Morris expressed by reference to the proportion of his mother's entire estate that he calculated he was to receive under the terms of the will.
- [82] There are, however, a number of flaws in the arguments advanced against Mr Morris on the jurisdictional question.
- [83] The Public Trustee's submissions quarantine the real estate because it is used to provide a residence and income for Mrs Lamond that is said to be justifiable and then reach the conclusion about the adequacy of the provision for Mr Morris on the basis of it being one-quarter of the residue which, though not generous, was not inadequate. This analysis therefore does not give weight to the totality of the benefit given under the will to Tess. Tess is in that category of beneficiary who was the subject of the deceased's affection and for whom the deceased could choose to benefit, but who was not one who could be said to have a legitimate claim on the deceased's bounty in the respective ways in which Mrs Lamond, Mr Morris and Oliver did. The analysis undertaken by the Public Trustee also fails to consider the quantum of the benefit given to Mr Morris in the context of the size of the entire estate of the deceased.
- [84] A similar error is made on behalf of Mrs Lamond who considers the value of Mr Morris' entitlement under the will at the deceased's death as a discrete sum separate from both the size of the estate and the other gifts made under the will.
- [85] The focus of the litigation guardian in endeavouring to show that Mr Morris could not expect to receive provision to the extent that he seeks to enable him to purchase an unencumbered residence closer to Melbourne and to supplement his income does not assist in disposing of the jurisdictional question which starts with the adequacy of the entitlement under the will.
- [86] Another way of putting the submissions that were made by both the litigation guardian and Tess against Mr Morris is that the applicant should have accepted what he was given under the terms of the will, because he had been successful in meeting his needs largely from his own income since he was 18 years old. This places undue weight on one factor out of the several factors that must be taken into account in considering the jurisdictional question: *Singer* at 209-210.
- [87] It is relevant in considering the jurisdictional question that Mr Morris has been deaf since birth which had always presented difficulties for him in every day activities,

communication with others and employability. In the circumstances in which the voluntary redundancy package was offered to Mr Morris when he was still employed at the ATO, the decision that Mr Morris made to accept that package was unexceptional and related to his disability and was not one that should count against him in determining the jurisdictional question.

- [88] The deceased was remote in her parenting of Mr Morris and did not provide him with any financial or emotional support after he moved from her home at age 18 years. The original source of their estrangement must have been the deceased's attitude to Mr Morris from the time he was a small child. The spasmodic contact by Mr Morris with his mother after she relocated to Queensland and the period of no contact between 1994 and 2003 was the unsurprising outcome of the dysfunctional relationship the deceased created with her son and could not in the circumstances displace the deceased's duty to provide for Mr Morris.
- [89] Even taking into account that Mr Morris had about \$90,000 on investment with State Trustees at the time of the deceased's death which has largely been used for legal costs of this proceeding, Mr Morris' financial circumstances were and remain modest. It is to his credit that he has acquired the modest home at Belgrave. To the extent that his complaints about his present circumstances relate to the distance of Belgrave from the services provided in Melbourne for deaf persons and the location of his deaf friends, it is not irrelevant that the location of this property at the time of his purchase was directly related to his limited financial resources.
- [90] At the date of the deceased's death Mr Morris had been able to obtain part-time employment only for some nine years. Even with the further study he proposes in order to maintain his casual employment as an Auslan tutor, his disability makes it unlikely that his employment situation will improve.
- [91] Mr Morris' claim has to be balanced against that of Mrs Lamond who was also in modest financial circumstances and, apart from her inheritance from the deceased, had no prospect of any significant improvement to her financial situation due to the poor health of her husband and the care and supervision that she provides for Oliver. Even if she manages to complete the TESOL study and obtain some employment in that field, her availability for employment will be restricted by the demands of her husband and Oliver. Mrs Lamond did not even own a modest home or hold any significant assets. Taking into account the closer relationship that Mrs Lamond enjoyed with the deceased, Mrs Lamond's claim on the deceased's bounty was much greater than that of Mr Morris.
- [92] Oliver requires fulltime care and supervision for the remainder of his life. It facilitates the provision of that care, if Mrs Lamond is able to provide a home for Oliver. Mrs Lamond also indirectly benefits from the gifts to Oliver under the will. Although Oliver would not have been able to apply for further provision under the Act, if the deceased had not provided for him under her will, he has been provided for under the will and there is no dispute that Oliver has a high level of need that it was appropriate for the deceased to recognise. It would have been apparent at the time of the deceased's death that Oliver's parents were unable to finance from their

own resources the purchase of a house to provide a stable residence and environment for Oliver.

- [93] Unlike her mother and brother, Tess is capable of earning a living and, although in modest financial circumstances due to her age and current studies, she has the potential and the time to prosper.
- [94] It is clear that the gifts under the deceased's will were made with regard to the nature and composition of her assets and her desire to keep her real estate intact, so that she could provide a home for Mrs Lamond and some income for Mrs Lamond that would also give some stability to Oliver's position for the foreseeable future. The jurisdictional question still requires the value of this real estate to be taken into account as part of the estate.
- [95] The deceased may not have shown any great affection for Mr Morris during his lifetime, but his needs and claim on the deceased's bounty were significant in comparison to the position of Tess. Tess not only received one-quarter of the residue under the terms of the will, but she has the prospect of succeeding to at least one-half of the real estate that then exists after the life interest in favour of Mrs Lamond. The deceased's decision to benefit Tess was not a response to a legitimate claim on her bounty.
- [96] The determination of the jurisdictional question is not a matter of precision. It requires the weighing up of all the relevant factors and deciding whether at the date of the deceased's death adequate provision was made for the proper maintenance and support of Mr Morris. This is not an easy question. In all the circumstances, however, I have concluded that the jurisdictional question must be answered in Mr Morris' favour.

Submissions on the extent of the provision for Mr Morris

- [97] For the purpose of considering the second stage of the inquiry, the circumstances at the date of the hearing need to be taken into account. The residue has reduced in value as a result of the drop in value of the shares and, at the least, by the Public Trustee's costs of the proceeding of \$33,000. Even without making any decision about what extent (if any) the costs of the other parties should be borne by the estate, the fact that those parties have incurred in total legal costs of at least \$544,000 for which they will be looking to the estate or their interests in the estate to fund jeopardises the capacity for the estate to maintain the Mermaid Beach duplex for the purpose of providing the residence for Mrs Lamond and her family.
- [98] For the purpose of the cross-examination of Mr Morris, it was suggested that at the date of the hearing his one-quarter interest in the residue had reduced to about \$180,000 (before taking into account the costs of the parties to this proceeding, apart from the Public Trustee) (at Transcript 1-52). Acknowledging that there is the potential for that figure to further reduce to the extent that any party's costs are subsequently ordered to be paid out of the residue, it is reasonable to use the

suggested figure of \$180,000 as the value of the one-quarter interest in the residue at the date of the hearing for the purpose of the second stage of the inquiry.

- [99] It is submitted on behalf of Mr Morris that a larger sum than \$250,000 is required to assist him in upgrading his housing, purchasing the aids and a motor vehicle that would improve his lifestyle and assist in meeting the additional expenses that he would incur, as a result of not being constrained as he has been by his limited resources. In written submissions (exhibit 15), it was put that \$600,000 was an appropriate lump sum for Mr Morris. It is also submitted that the sum should be charged against the real estate so that the interest of Tess is extinguished in the real estate and the interest of Mr Morris and Tess in the residue should be extinguished as a consequence.
- [100] Mrs Lamond has two responses to the second stage of the inquiry. The first is that, even if Mr Morris satisfies the jurisdictional question, his need is not significantly greater than the competing calls upon the estate and his application should fail. The second is that, if Mr Morris' entitlement under the will is to be disturbed, the gift in lieu should be no more than what Mrs Lamond's lawyers calculated as his original entitlement of \$267,896.
- [101] Whilst Mrs Lamond had previously expressed in correspondence that she did not wish Oliver's entitlement under the will to be interfered with in any way, circumstances had changed for Mrs Lamond by the conclusion of the hearing and the stance adopted in the written submissions (exhibit 14) was that it was better for Oliver to lose some of his current entitlement, than for the home to be lost or for Mrs Lamond to be under financial strain. It is therefore submitted that any increase in Mr Morris' entitlement should come from the residue in the proportions of 10 per cent (Mrs Lamond), 60 per cent (Tess) and 30 per cent (Oliver).
- [102] The litigation guardian submits that the decrease in the size of the estate since death should affect the quantum awarded and that the court cannot substitute what it regards as a fair distribution of the estate in favour of Mr Morris. It is therefore submitted the amount awarded by way of further provision should not exceed \$100,000 to \$150,000, in addition to Mr Morris' one-quarter share of the residue, and that the burden of paying the award should fall on Tess' share.

What is adequate provision for Mr Morris

- [103] One of the factors that assisted Mr Morris in satisfying the jurisdictional question was the size of the deceased's estate at the date of her death. That it has been reduced is pertinent to the second stage of the inquiry.
- [104] The claims of Mrs Lamond and Oliver on the deceased's bounty remain strong and are a constraint on what can be considered as adequate provision for Mr Morris. The position advanced by the lawyers for Mr Morris at the second stage of the inquiry in contending for a lump sum that approaches one-third of the total value of the deceased's estate at the date of the hearing and to make that a charge on the real

estate looks like blatant re-writing of the will. That offends the long established principle that the jurisdiction conferred by s 41 of the Act does not permit the court to re-write the will in accordance with its own ideas of fairness or justice: *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 146.

- [105] The approach taken by the litigation guardian is consistent with the authorities, including *Singer* at 210, and more properly reflects the comparative needs of Mr Morris, Mrs Lamond and Oliver and that the jurisdiction of the court is limited to ordering adequate provision for the proper maintenance and support of Mr Morris.
- [106] Further provision for Mr Morris will ease the burdens caused by his disability. It will give him the capacity to choose to make improvements to his home or relocate and address the difficulties caused by his limited employability and current limited social interaction. Again, the determination of the second stage of the inquiry is not a matter of precision. In the circumstances that have come to exist at the conclusion of the hearing, further provision should be made for Mr Morris out of the estate of the deceased by increasing the amount of his gift above the one-quarter share of the residue, so that the amount that Mr Morris receives under the will is \$280,000. Although this sum is not much more than the value of one-quarter of the residue at the date of the deceased's death, it has been determined by taking into account the diminution in the value of the estate. I accept the appropriateness of the submission of the litigation guardian that the increase in the gift for Mr Morris must be funded from Tess' share of the residue. As I have yet to hear submissions on costs, it is possible that the net residue will be affected to the extent that any claims for costs of this proceeding are successful. It may be that further orders about the funding of the further provision for Mr Morris may need to be made after the disposal of the claims for orders for costs of this proceeding.

Conclusion

- [107] I will give the parties an opportunity to consider these reasons of judgment, before formally pronouncing orders that reflect the conclusion I have reached about the further provision for Mr Morris. The parties have also indicated that they wish to make further submissions on the question of costs in the light of the reasons for judgment and I anticipate that there may be consequential orders as a result.
- [108] I therefore adjourn the application to a date to be fixed for further submissions on the form of the orders that should be made to reflect the reasons for judgment, orders for costs and consequential orders.