SUPREME COURT OF QUEENSLAND

CITATION:	*Mark Joseph O'Donnell v Colleen Mary Gillespie & Anor* [2010] QSC 22
PARTIES:	**MARK JOSEPH O'DONNELL** Applicant **v** **COLLEEN MARY GILLESPIE and GERALDINE JANET STICKLAN (as executors of the will of MARCUS WILLIAM O'DONNELL deceased)** Respondents
FILE NO/S:	BS 1360 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26-29 October 2009
JUDGE:	McMurdo J
ORDER:	**There should be an order for provision of a sum of $500,000, diminishing the residuary legatees' share in the estate by $100,000 each.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIM BY ADULT SON – where applicant worked on testator's farm for 25 years, under the impression that applicant would inherit part of the farm – where applicant and testator became estranged and testator subsequently disinherited applicant – whether adequate provision has been made for the proper maintenance and support of the applicant *Evidence Act* 1977 (Qld) s 92 *Succession Act* 1981 (Qld), s 41(1), s 41(2)(c) *Daley v Barton* [2008] QSC 228 *Hastings v Hastings* [2008] NSWSC 1310

Hughes v National Trustees, Executors & Agency Company of Australasia Limited (1979) 143 CLR 134

Kay v Archbold [2008] NSWSC 254

Lumb v McMillan [2007] NSWSC 386

Palmer v Dolman [2005] NSWCA 361

Re Buckland [1966] VR 404

Singer v Berghouse (1994) 181 CLR 201

Vigolo v Bostin (2005) 221 CLR 191

Wheatley v Wheatley [2006] NSWCA 262

COUNSEL: Mr GW Diehm SC for the applicant

Mr R Traves SC with Mr C K George for the respondents

SOLICITORS: de Groots for the applicant

McCullough Robertson Lawyers for the respondents

[1] The applicant seeks an order for provision out of the estate of his late father, Marcus William O'Donnell, who died on 30 May 2007. He had been married to Kathleen O'Donnell who died about a year earlier, on 9 May 2006. They had seven children of whom the applicant, who was born in 1953, is the oldest. Then there were five daughters and the youngest child was Tom O'Donnell who was born in 1967.

[2] As at the testator's death, the estate had a net value of approximately $9.3 million. By his last will and testament made on 7 July 2006, the testator gave his apartment in Mackay, which was worth about $850,000, to his daughter Colleen Gillespie, who is one of the respondent executrices. There was a gift of his shares in a company called MW O'Donnell Properties Pty Ltd to his solicitor and his accountant. But that was the trustee company for the Marcus William O'Donnell Family Trust and the shares were of no substantial value. The balance of the estate, according to the will, was to be divided equally between the testator's five daughters. There was no provision for either of his sons. The applicant's brother also brought proceedings for provision out of the estate, which have been settled upon the basis that he receives $605,000 and his costs.

[3] This claim is resisted effectively on two bases. The first is that the applicant has not satisfied what is described as the jurisdictional test, which in terms of s 41(1) of the *Succession Act* 1981 (Qld) ("the Act"), is that he has not established that provision should have been made from the estate for his proper maintenance and support. Secondly, it is argued that the court should refuse to make an order in his favour because his character or conduct is such as to disentitle him to the benefit of an order: s 41(2)(c). That argument relies upon alleged offending by the applicant in relation to cannabis.

[4] The testator's fortune was built upon cane farming in north Queensland. For most of his adult life the applicant worked on those farms and various wills made by the testator until 2006 provided for some of the farms to be left to him. The applicant

claims that he worked on the farms over many years for less than a proper remuneration and that he substantially contributed to their value. There seems to be no dispute that he was an able worker and, subject to the ultimate supervision of the testator, an able manager. There is an issue as to whether he was properly remunerated. He left the farms in 1995 after a falling out with this father. Since then he has worked on other farms. From then, he had practically no contact with his parents prior to his mother's death in 2006, and in turn with the testator prior to his death.

The applicant's circumstances at 2007 and now

[5] The following are the circumstances of the applicant, both at the date of the testator's death and at present, except where I refer to some significant difference.

[6] Upon the death of the testator in 2007 the applicant was aged 53 years and he is now 56. He and his wife Dianne O'Donnell married in 1977. She also was born in 1953. She works part-time as a teacher-librarian. She is limited to about two-and-a-half days per week because of limited employment opportunities. They live in a house which they own, free of mortgage, at Bloomsbury which is south of Proserpine. That house is worth about $350,000.

[7] They have three sons, born in 1985, 1987 and 1988. All have undertaken tertiary study. Two of the sons have now graduated but at least two were studying in 2007. The youngest is still at university and financially dependent upon his parents.

[8] The applicant works on cane farms as a farmhand. Most of his work involves the driving of tractors. He is now paid about $36,000 gross per annum. He works for eight or nine months a year. He says that this is due to the unavailability of work during the wet season. It was suggested to him that he could do other work for the remainder of the year but I accept his evidence that there are no other substantial opportunities for him in the area, given his lack of qualifications. He completed secondary school but has worked on nothing but cane farms since then.

[9] Dianne O'Donnell's income is about the same or perhaps a little higher. In the five years to 30 June 2008 her gross income was in a range of about $37,000 to $45,000. I accept her evidence that she would prefer to work longer hours but is unable to do so because of the job sharing arrangements within local schools.

[10] I find that at the date of the testator's death and at present the combined incomes of the applicant and Mrs O'Donnell were and are more than their expenses. In his affidavit sworn on 13 March 2008, the applicant compared his income of $49,656[1] for the year to 30 June 2007 with an amount of $51,988 as his estimate of "family expenses" for the same year. But when Mrs O'Donnell's income is considered, the combined family income well exceeded the family expenses at the time of the testator's death. In his affidavit sworn on 22 October 2009, the applicant compared his income and the expenses of the family based upon figures for the financial year ending 30 June 2009. He said that his income per month was $2,530 and that the family expenses were $7,355.65, resulting in a deficit of $4,824 per month. However, again he failed to include his wife's income in that comparison with the expenses of the entire family. Secondly, his income for that year was unusually low because of health difficulties which are not affecting his work at present. In cross-

[1] Comprising gross salary of $36,957 and investment income of $13,059.

examination he conceded that it was probable that he would continue to work and earn an income of about $36,000 per year. In the four years to 30 June 2008 his taxable income was in the range of about $35,000 to $39,000. Thirdly, his recent estimate of monthly family expenses includes an amount of $1,260 for "loan repayments", for which there is no direct documentary proof. The applicant and Mrs O'Donnell now have two loans. One is a margin loan for investment in shares and managed funds. As at July 2007, the amount owing (to Colonial Geared Investments) was $85,562, and as at June 2009, the amount owing (by then to Macquarie Margin Lending) was $85,000. The applicant's evidence is that the current balance is about $80,000. The monthly interest on these loans has been in the range of $500 to $700. The other loan is effectively an overdraft facility with Westpac, with a limit of $200,000. It is entirely for the purpose of funding these proceedings. So notwithstanding the impression which his affidavit of 22 October 2009 may have given, the combined family income meets the family expenses, as Mrs O'Donnell conceded.[2]

[11] The applicant and his wife own land near to their house upon which they run some cattle. The land is worth $540,000 and there is no borrowing in relation to it. The livestock is worth about $40,000. This cattle enterprise is conducted by them as a partnership and the tax returns show that it has made losses of the order of $5,000 to $11,000 per year. The land is held with a view to its increasing in value. The applicant says that he would prefer to leave it to his sons. But the land could be sold and the proceeds invested to provide some further income.

[12] The applicant held 356 shares in Commonwealth Bank in mid-2007 (then worth about $19,000) and now holds 390 shares. The applicant and Mrs O'Donnell jointly hold shares in Telstra worth about $6,000. Mrs O'Donnell held in 2007 and still holds shares worth about $9,000 in her name.

[13] They jointly hold investments in managed funds which as at 30 June 2007 were worth $238,749.12. In October 2008 they redeemed these investments and the balance paid to them was $195,103.74. Of this, $86,021.07 was used to repay the loan from Colonial and the balance was invested through Macquarie Bank. As at 30 June 2009 there were investments in managed funds through Macquarie worth $187,756.89. Accordingly, in net terms these investments in mid-2007 were worth about $155,000 and in mid-2009, about $100,000. The applicant's share was and is one half.

[14] At the date of the hearing they jointly held bank accounts worth about $30,000 and Mrs O'Donnell had a credit union account worth about $35,000. The balances in those accounts were little different at the testator's death. They have household items worth about $50,000 and a car worth $3,000 ($18,000 in 2007).

[15] At the date of the testator's death, the applicant had an insurance policy with a surrender value of about $35,000 and he appears to have maintained that policy. As at 1 July 2007 the applicant held superannuation with AustSafe Super with a balance of $37,124 which as at 15 September 2009 was worth almost the same amount. As at 31 March 2007 he had a further superannuation fund with a balance of $152,826.[3] This was replaced by a superannuation fund with Macquarie Bank for which the balance as at 17 August 2009 was $124,081. Mrs O'Donnell held

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2 Transcript D2/81.

3 with Skandia One Super Solutions.

superannuation[4] at 30 June 2007 worth about $93,000 and which, as at 30 June 2009, was worth about $115,000. She is said to also hold superannuation with Macquarie Bank which as at August 2009 was worth about $102,000. However, it appears that this is the result of the application of at least some of the QSuper funds.

[16] In summary, the net wealth of the applicant and Mrs O'Donnell in mid-2007 was about $1.4 million, of which their house and its contents accounted for about $400,000. Apart from the house and its contents, the applicant's property as at the testator's death was approximately as follows:

Half share in cattle land	$270,000
Half share in cattle	$ 20,000
Commonwealth Bank shares	$ 19,000
Half share in Telstra shares	$ 3,000
Half share in managed funds (net of borrowings)	$ 77,000
Half share in bank accounts	$ 15,000
Insurance policy	$ 35,000
Superannuation funds	$190,000
Approximate total of applicant's assets apart from house and contents	$629,000

[17] The applicant was educated to year 12. He impresses as a man of practical intelligence and determination. As mentioned, he has no formal qualifications and his work experience has been entirely upon farms. Undoubtedly he has developed a wide range of skills in that regard, such as with farm machinery.

[18] He is not in perfect health. He suffers from haemochromatosis which is currently being successfully treated and does not appear to affect his ability to work. He has also been treated for a heart complaint known as atrial fibrillation. This is being successfully treated but according to his doctor, any "significant improvement in his cardiac function [must] await the passage of time and use of medication". In the doctor's opinion, if the applicant avoids heavy manual duties he ought to be able to continue in his current employment, most of which seems to involve driving machinery. The applicant also complains of symptoms relating to low back and knee pain. As to these complaints, his doctor says that the applicant "knows to rest when uncomfortable and perform those duties which do not exacerbate his symptoms". So whilst the applicant's health problems do not now prevent him from working, he has been at risk of having to give up work because of his heart problem, at least since 2007.

The applicant's work on the farms: 1970 – 1995

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[4] with QSuper.

[19] The testator's father owned and operated this farm near Bloomsbury. Subsequently the holdings were worked by a partnership between the testator, his brother and for some of the time their father, known as O'Donnell & Co. The partnership was dissolved apparently sometime in the mid-1970s. The wage records for the farms show that the wages were paid by O'Donnell & Co until July 1977 and thereafter by MW O'Donnell Properties Pty Ltd which, as already mentioned, was a trustee company controlled by the testator. The different holdings within the overall operation were described as "Home Farm", and "Postlethwaites", the latter description sometimes applying also to the properties described as "Boundary Block" and "Bush Block". A further property called "Brown Snake" was added in 1991.

[20] Soon after finishing school in 1970, the applicant went to work on these farms. Over the years the testator told him that he would one day inherit them or at least part of them. As I will discuss, that would have been the result under wills which he made prior to 2006. He worked on the farms until 1995.

[21] His departure followed a dispute with the testator. No doubt there were many circumstances which were relevant to that dispute. The applicant's evidence identifies two matters. One was a disagreement as to the way in which the farms should be managed and the extent to which the applicant was to have the management role. Another was the testator's rejection of the applicant's proposal to buy some of the farms, which the testator justified on the basis that he wished to allow his daughters to inherit some of them. The respondents were critical of the applicant's decision to leave in 1995. A basis for that criticism is not established. I have the impression that after 25 years of working under the firm direction of his father, the applicant wanted some independence which is father was unwilling to give him, either by selling some of the holdings or by giving him the management role. It was not that he left for financial reasons. Rather, in 1995 he was in receipt of a good income.

[22] Thereafter he lost contact with his parents. His relationship with his parents had wholly broken down. He visited his mother only once before her death in 2006 but did not visit or telephone her at all after 1998. During these years his mother suffered from Parkinson's disease and her condition deteriorated from 1994. There was only one contact by the applicant with the testator which was in about November 2006 when the applicant wrote to him upon learning that the testator intended to sell the farm known as Postlethwaites. The applicant there argued that the testator should not do so but that he should retain it for the benefit of the applicant's sons. There is also evidence of remarks made by the applicant at the testator's funeral which were consistent only with a deep ill feeling towards his father.

[23] The respondents' submissions included an extensive comparison of the wages paid to the applicant from 1971 with the award rates at the same time for farm workers. I accept, as that comparison demonstrates, that from the outset the applicant was paid more than the award wage for a normal week. His income seems to have risen significantly in about 1989. Until then, the wage records show that his income was generally higher, although at times by not that much, than the award weekly wage. However, at least for that period, the weight to be given to this comparison is affected by a number of things. The first is that it appears that very often other workers, who were unrelated to the testator, were receiving as much as was being

paid to the applicant. That applies also to bonuses paid to farm staff. Secondly, there is force in the submission for the applicant that these wage records do not provide an entirely reliable record of the hours actually worked by the applicant. I accept his evidence that he always worked long hours and the submission on his behalf that the wages paid to him did not accurately reflect those hours of work. I infer that this was because he simply accepted what his father would pay. The circumstances were not that of a normal employer/employee relationship. The testator would often say to him that he, or he and his brother, would inherit the farms. On the other hand, the applicant and his family were also receiving free accommodation in a farm house as well as free fuel and electricity.

[24] The applicant's brother Tom came to work on the farms in 1984 and stayed until 1989. The applicant's relationship with his brother was not a close one.

[25] In about 1991 a cane farm called Brown Snake was purchased by the applicant and his wife and the applicant's parents. The price was $140,000 and each couple contributed $70,000. This property was worked by a partnership consisting of the four owners. The profits from it were not substantial. But there was a large capital gain derived by the applicant and his wife when they sold their one-half interest to the applicant's parents in 1997 for $300,000. There is some evidence that the applicant boasted at the time that he had received more than this share was worth. There is also a handwritten note to that effect by the testator. I am unable to assess whether that was so, there being no valuation of the property.

[26] From 1991 to 1996 the applicant was granted a lease by the testator to grow cane on a certain part of the farms at a nominal rent of $1 per year. The applicant obtained a cane assignment for this land and was thereby able to farm it profitably for practically no capital investment. The evidence does not enable a finding to be made as to the extent of those profits.

[27] At least from about 1989, the applicant's income from the farming operations was, on any view, substantial. He was paid wages of the order of $2,000 or more per month. He and his wife also received distributions from the MW O'Donnell Family Trust, largely from the farm profits. The distributions from this trust to the applicant or his wife were as follows:

1989	-	the applicant	-	$10,000
1990	-	the applicant	-	$ 3,600
		Dianne O'Donnell	-	$20,000
1991	-	Dianne O'Donnell	-	$20,000
1992	-	Dianne O'Donnell	-	$10,000
1993	-	Dianne O'Donnell	-	$10,000
1994	-	Dianne O'Donnell	-	$10,000
1995	-	Dianne O'Donnell	-	$ 5,000

Then there were distributions from the partnership of the applicant, his wife and the applicant's parents in relation to Brown Snake. The distributions in favour of the applicant and his wife from 1995 to 1998 were as follows:

13 February 1995	$40,000
17 March 1995	$15,000
9 June 1995	$24,000
5 March 1996	$28,000
17 June 1996	$ 8,800
5 May 1997	$18,840
24 July 1997	$12,420
17 March 1998	$ 7,000
20 August 1998	$17,996

[28] There is also evidence in the form of a two page document handwritten by the testator that at the time that the applicant departed the farms, his income was of the order of $100,000 together with "free house, power, fuel, truck, meat etc."[5] Ultimately, the applicant's counsel accepted that the applicant's income, at least in the 1995 year, was of the order of $100,000. But it was argued that this was an exceptional year.

[29] Overall the position was that the applicant was adequately remunerated. Until the end of the 1980s, his remuneration was relatively modest but he had the benefit of free accommodation for his family. But from about 1989 he was well remunerated in the various ways which I have discussed. Undoubtedly he worked diligently throughout the 25 years he was on his father's farms. There is no suggestion in any of the evidence that he was not a capable and diligent cane farmer. But I am not persuaded that this is a case where a son has long undertaken work for well less than a proper remuneration upon the expectation that the farm or some of it would be left to him. In this case, the applicant had that expectation. But he was also remunerated adequately.

[30] Although the applicant has failed to demonstrate that he was inadequately remunerated, he has demonstrated that he played a major part in maintaining and developing the cane farms and that contribution is certainly relevant in the assessment of whether provision should have been made for him in the testator's will and, if so, what should now be the relief.

1995 – 2007

[31] The applicant left the farm in 1995 and the final wages paid to him were on 30 June of that year. The partnership in respect of the Brown Snake property was yet to be

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5 Exhibit 52 to the Affidavit of the respondents sworn 1 June 2008.

dissolved. The testator then asked his son Tom to come back to the farms. He returned in about early 1996 and undertook the work of a farm manager although he was paid, he says, only as a farm worker. From 1997 Tom and his wife lived in a house on the farm which he describes as poor accommodation. It appears that Tom effectively took over the work which had been performed by the applicant.

[32] Although the applicant and the testator had fallen out, the applicant was included in wills made by the testator and his wife in 1996. These replaced wills made by them in 1989. Under the 1989 wills, if one predeceased the other, the property was to be distributed as follows. The farms were to go to the applicant and Tom equally but they would pay $500,000 to each of their five sisters at the rate of $50,000 per year. The balance of the estate was to be left equally to the sisters.[6] They each executed codicils in 1994 which are not presently relevant.

[33] On 23 May 1996 they each executed new wills. In the event of one predeceasing the other, the farms were to be divided between the applicant and Tom as follows. The applicant was to be given Postlethwaites, which included the land described as Bush Block and Boundary Block. Tom was to be given Home Farm and Brown Snake. All of these properties together were valued in September 2006 as having a total value of $4,620,000, and most but not all of the property described as Postlethwaites[7] was then valued at $2,490,000. It was agreed, apparently before these wills were executed, that the applicant's half interest in Brown Snake would be transferred to his parents, although that transfer was not made until 1997. Tom was also to be given a property in Proserpine and one-fifth of the shares in a company called Gumrossa Pty Ltd, the net assets of which were valued in March 2008 at $1,191,219. There was a gift of a property at Beaconsfield to one of the respondents, Mrs Sticklan. The residue of the estate was to go to the five daughters equally.

[34] Thus according to the 1996 wills, the applicant was to receive most (in value) of the cane farms and overall in value probably more than 25 per cent of the testator's property. This will is of particular relevance in considering the respondent's case that the applicant was disinherited because of his father's disapproval of his alleged involvement with drugs. As I will discuss, it is not demonstrated that it was anything about drugs, which emerged only after 1996, which was important to the testator.

[35] On 21 May 1998 the applicant's parents made new wills. Again the applicant was to be left the three lots constituting Postlethwaites and Tom was to be left Home Farm and Brown Snake.

[36] In 2000 the testator and his wife transferred Brown Snake to Tom and his wife.

[37] In November 2002, the testator gave instructions to his solicitor, Mr Telford, for a new will. It was to result in only part of Postlethwaites[8] being left to the applicant with the balance of the farms to be left to Tom. A draft was sent to the testator but it was not executed.

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6 The 1989 will of the testator is not in evidence. However, as appears to be common ground, I infer that the terms of his will corresponded with that made in 1989 by his wife, which is in evidence.

7 i.e. Lot 2 on RP749807 and Lot 34 on Plan CI3635 but not also Lot 28 on Plan CI3635.

8 The part being Lot 2.

[38] In 2004 the applicant was diagnosed as suffering from haemochromatosis.

[39] The applicant's mother died on 9 May 2006. On 26 May 2006, the testator instructed Mr Telford that he wished to divest himself of assets to reduce the size of his estate against the prospect that the applicant would apply for further provision, as he has by these proceedings. Mr Telford was instructed to draft a new will and this was executed on 2 June 2006. Under that will the applicant was to receive nothing and all of the farms were to be given to Tom.

[40] But then the testator and Tom had a falling out. As a result the testator executed what became his last will on 7 July 2006 in which Tom was disinherited.

[41] Just two days earlier the testator had been taken by Mrs Sticklan to see a psychologist. According to the psychologist's report, the testator was anxious, depressed, disappointed and overwhelmed. This is not to say that he lacked capacity. But his mood was greatly affected by the recent death of his wife and his falling out with Tom.

[42] On 8 August 2006 the testator was diagnosed with prostate cancer, from which he died on 30 May 2007.

[43] In late March 2007, Mr Telford was contacted by the applicant's wife whom he saw on 30 March. She gave him a letter written by the applicant to pass on to the testator. This asked him to reconsider his will so that it would make some provision for the applicant's sons. Mr Telford was instructed that the testator would not change his will "because Mark and his children had not visited [the applicant's mother] toward the end of her life when she was suffering with illness".

[44] On 20 April 2007 Mr Telford conferred with the testator and his accountant, Mr Jackson. The conference had been arranged by Mr Jackson for the purpose of discussing what could be done to prevent the applicant and Tom from contesting the will. Mr Telford advised the testator that he should take advice from a specialist lawyer in the field of wills and estates. Consequently, in this conference Mr Whitney of McCullough Robertson was telephoned. He advised that the testator should put his reasons for excluding his sons into the form of a statutory declaration. After the conversation with Mr Whitney, Mr Telford suggested to the testator that he consider leaving some money in his will to each son or to their children. However, says Mr Telford, the testator was adamant that he did not want to leave anything to the applicant because the applicant and his children had not visited the late Mrs O'Donnell when she was suffering with her illness. Over the next few hours Mr Telford then took the testator's instructions for the purpose of preparing the suggested statutory declaration. After the conference a draft was typed and sent to the testator. About a week later, Mr Telford received back his draft statutory declaration which had been amended by various hand writing. Mr Telford prepared a typed version amended accordingly, which he sent to the testator. But the testator died before any statutory declaration was executed.

[45] The draft statutory declaration containing the handwritten amendments is in evidence. The oral evidence proves that most of the amendments were made by Mrs Sticklan or by the other executrix, Mrs Gillespie. It is unnecessary to discuss the detail of their contributions. Plainly they were keen to assist in the preparation of this document and their amendments were manifestly intended to improve their prospects in the apprehended litigation.

[46] It is necessary to discuss one of the amendments made by the daughters. Mrs Sticklan added the following:

> "In addition to the number of opportunities I provided for Mark one significant financial gain for him was the purchase of 2 5 acre blocks at Flametree Shute Harbour. Mark went halves in one block where no $ was paid to me and it was later sold at double the price where Mark received that half share."

There is no other evidence of this transaction and the applicant has no recollection of it. I am not persuaded that there was such a benefit conferred upon the applicant. The only amendments written by testator were his insertion of the dates of birth of his seven children.

[47] The typed draft prepared by Mr Telford, absent the handwritten amendments, is some indication of the testator's then reasons for excluding his sons from his will. Notably this draft makes no reference to the failure by the applicant and his family to visit the late Mrs O'Donnell during her years of illness. This is difficult to understand for it is a circumstance which must have influenced the testator. I find that it did influence him, accepting as I do Mr Telford's evidence that the testator made statements to that effect.

[48] The typed draft referred to the applicant's alleged involvement with drugs. The draft also referred to the purchase of the applicant's half share in Brown Snake suggesting that the price at $300,000 was generous to the applicant. Otherwise the statutory declaration seemed more concerned with explaining why, with apparent reluctance, the testator had disinherited Tom.

[49] The testator's wishes were also evidenced by a handwritten statement which he made on an identified date. The relevant parts of that statement are as follows:

> "My trust in Mark was shattered when I discovered he was growing drugs on the farm and was involved in the drug trade. The majority of the employees he engaged were involved in drugs. At the time he spat the dummy [apparently a reference to his departure in 1995] his income was $100,000 cane $45,000 wages bonus $10,000 free house, power, fuel, truck, meat etc. When Tom requested to come back on the farm he was employing two druggies … I couldn't see the sense in this situation. Mark wrecked the house and took the shed without any discussion. He has not shown any respect for his mother after all she has done for him over the years … I bought his ½ share in Brown Snake for $300,000 + $25,000 for the crop - $100,000 above market price … Because Tom would not join him in the drug trade, Mark then victimised, threatened and traumatised him."

In what appears to be a separate document, again undated, the testator wrote:

> "Tom has been victimised/traumatised and threatened by Mark because he would not join him in the drug venture + the fact he told me of his plantings."

The cannabis issue

[50] Tom O'Donnell's evidence is that he and the testator saw cannabis growing in the Bush Block in about 1988 or 1989. He said that he and the testator believed that the

applicant was responsible for these plants and the testator confronted the applicant at the time. His evidence was that the applicant and the testator then pulled the plants out of the ground and burnt them. All of this seems to be accepted in the applicant's case. In one of his affidavits, the applicant said that "the first allegations about illegal crops were made in 1986" and that these allegations "did create difficulties between my father and I, however, my father and I resolved these matters to our mutual satisfaction". In cross-examination there was this question and answer:

> "What was the understanding?—Never to grow drugs on the farm again and I never did."

[51] The applicant also admitted to engaging workers whom he knew or believed to use cannabis. Otherwise the applicant claimed privilege against self-incrimination when cross-examined about this issue. There is also evidence from the applicant's wife which concedes that cannabis was sometimes used at parties they held at the family farm.

[52] There was evidence from another daughter, Josephine O'Donnell, that the applicant grew, stored and supplied cannabis on the farm over a period of about 10 years from the late 1970s to the late 1980s. She attributes statements to Tom O'Donnell as to his concern about the cannabis, which Tom O'Donnell denied in his evidence. It is unnecessary to resolve that contest. It may be the case that each has an imperfect recollection about what, after all, happened decades ago. And Josephine O'Donnell's evidence was in an affidavit sworn only very shortly prior to the trial.

[53] On all of this evidence, including the applicant's own evidence, I conclude that at some stage at least during the 1980s he grew cannabis on the farms. I find also that he was then confronted by his father and agreed not to do so again. I am not persuaded that he thereafter persisted. There is evidence of cannabis growing at various points across these extensive holdings but that may or may not have been grown by the applicant. It is not unlikely that other workers on the farm were using some remote corner to cultivate plants.

[54] I am not persuaded that the applicant was involved in the "drug trade", as the testator wrote.[9] I accept the submission for the respondents that the testator's handwritten documents are admissible as evidence, not only of his wishes and beliefs but also of the facts stated in them.[10] However, the basis for the testator to say those things of his own knowledge is not at all demonstrated. It is unlikely that the applicant admitted to the testator that he was involved in the drug trade.

[55] Nor is there anything to suggest that the testator came to learn significantly more about the applicant's use or other dealings with cannabis only after the applicant left the farms. This is important because, as already discussed, the testator made wills in 1996 and 1998 under which the applicant was to receive a significant part of his estate. On whatever was the testator's then understanding of the applicant's involvement with cannabis, it was not so serious as to deprive him of those gifts, in the testator's, view for many years after their falling out. The testator was ultimately minded to disinherit the application by other circumstances and influences.

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9 As set out above at [49].

10 *Evidence Act* 1977 (Qld) s 92.

[56] The applicant's involvement with cannabis, whatever was its extent, did not affect the value of the estate. Nor apparently did it detract from the applicant's substantial contribution to the maintenance and improvement of the farms. In my view, his conduct, although discreditable, would not warrant the refusal of an order in his favour if an order was otherwise appropriate.

The jurisdictional question

[57] In assessing whether provision should have been made for the applicant, it is necessary to consider amongst other things, the applicant's financial position, the size and nature of the estate, the totality of the relationship between the applicant and the testator and the relationship between the testator and other persons who have legitimate claims upon his bounty: *Singer v Berghouse* per Mason CJ, Deane and McHugh JJ. [11]

[58] In *Vigolo v Bostin*[12], Callinan and Heydon JJ said that this question is not answered by looking simply at whether the "applicant has enough upon which to survive or live comfortably" but that the answer will depend upon all the relevant circumstances, including "any promise which the testator made to the applicant, the circumstances in which it was made, and .. changes in arrangements between the parties after it was made".

[59] As to a claim by an adult son, in *Hughes v National Trustees, Executors & Agency Company of Australasia Limited*[13], Gibbs J said:

> "There are no rigid rules; the question whether adequate provision has been made for the proper maintenance and support of the adult son must depend on all the circumstances – that is, on all the facts that existed at the date of the death of the testator, whether the testator knew of them or not, and all of the eventualities that might at that date reasonably have been foreseen by a testator who knew the facts."

His Honour identified as one example of a case where an able bodied adult son may be entitled to provision is where he has contributed to building up the testator's estate.[14]

[60] The applicant's conduct in relation to cannabis is relevant not only to an issue under s 41(2)(c) but also to this question whether provision ought to have been made: *Hastings v Hastings*.[15]

[61] I have discussed already the applicant's financial position as at the date of the testator's death. He was not then in need of provision from this estate in the sense that he and his wife were unable to support themselves. They were each employed and able to meet their expenses. They owned their house and had no significant debt and they had other real property which they were able to sell and use to invest for further income. They had some superannuation entitlements. It is necessary to focus upon the financial position of the applicant rather than looking simply and more broadly at their joint position. However, his position was affected by the fact

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11 (1994) 181 CLR 201 at 210.
12 (2005) 221 CLR 191 at 230-231.
13 (1979) 143 CLR 134 at 147-148.
14 (1979) 143 CLR 134 at 147.
15 [2008] NSWSC 1310 at [31].

that his wife was able to make, and did make, a substantial contribution to the expenses of the household and by the value of the property which they jointly held.

[62] The estate was a large one. The competing claims were those of the applicant's siblings. It is necessary to say something of their positions.

[63] Mrs Sticklan is employed as a school teacher and is married to a self employed boat builder. They have a young child and provide some financial support for Mr Sticklan's parents. As at the testator's death, their financial position was comparable to that of the applicant and Mrs O'Donnell. Mrs Sticklan had net assets of about $1,000,000 and her husband's net worth was about $550,000. Her annual income was about $74,000 and his income about $23,000.

[64] Mrs Gillespie is currently unemployed and suffers from anxiety and depression. She is married to a school teacher. He also suffers from atrial fibrillation. His annual income is about $56,000. In 2007, she had net assets of about $530,000 and his net assets were about $900,000.

[65] Another sister is Pauline Summers. There is no direct evidence of her financial position or that of her husband. She has six children of whom the youngest was then aged about 15 years. They lived in a house in Townsville which the applicant estimated to be worth about $800,000.

[66] Another sister is Kathleen Gaynor. There is no direct evidence as to her financial position. She is married with two teenage children. She and her husband own a house and a small business.

[67] Josephine O'Donnell is divorced. She has three children, all less than 18 years at the testator's death. She works part-time in a retirement home.

[68] As mentioned, Tom O'Donnell's claim has been compromised for the sum of $605,000.

[69] It was argued for the applicant that there should be an order for provision in his favour in the sum of $750,000. Even if that relief were granted, the result would not be to leave any of the other beneficiaries without adequate provision, because of the size of this estate. Nevertheless, that factor does of itself warrant an order. In *Hughes*[16], Gibbs J emphasised that the power given by a provision such as s 41 does not entitle the court to rewrite the will of a testator in accordance with its own ideas of fairness or justice.[17]

[70] In *Kay v Archbold*[18], White J remarked that a testator is often better placed than the court to make a just assessment of all of the claims upon his or her estate, thereby providing "a very sound reason for the court to be slow to depart from the testator's testamentary wishes". That proposition is relevant here in at least this way. The various wills made by the testator and his wife, prior to his wills of 2006, provided for substantial gifts to the applicant of some of the farms. I infer that this was the result of the testator's opinion that the applicant had provided valuable assistance in working the farms over a period of some 25 years and in the context of assurances

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16 (1979) 143 CLR 134 at 146.

17 See also *Re Buckland* [1966] VR 404 at 414; *Lumb v McMillan* [2007] NSWSC 386 at [26] and *Daley v Barton* [2008] QSC 228 at [170]-[172].

18 [2008] NSWSC 254 at [124].

by the testator that he would be left the farms or part of them. Importantly, the testator and his wife saw fit to make this provision for the applicant notwithstanding the applicant's falling out with them which led to his departure in 1995 and notwithstanding what had passed between them in relation to cannabis. These proceedings have been strongly contested. Yet there has been no suggestion that the applicant did not make a substantial contribution to the maintenance and improvement of the farms, as he claims.

[71] Whilst the applicant and Mrs O'Donnell were able to continue to work as they were in 2007, they were in a reasonable financial position. Their income allowed for little as discretionary spending but they could make their own way. They had savings which could be applied to meeting some contingencies. But they were each then about 53 and their future working lives were not assured. Mr O'Donnell had significant health problems for a man in his line of work. There was the possibility that he would have to give up work relatively early, or that the ability of either to earn income would be affected by having to care for the other in the event of some serious illness. In such an event they would have to draw upon their savings of which only some would have the benefits of being superannuation. It is necessary to consider also the prospect that they could have decades beyond their working lives for which their savings would have to suffice. It was necessary for the testator to consider such possibilities. In such circumstances, a further amount of capital of the order of $500,000 could be significant. It would be likely to assure them of economic independence.

[72] In some circumstances at least, an estrangement between a parent and a child may reduce the claim that the child has to provision from the parent's will.[19] It is that estrangement which explains the change in the testator's intentions, evident from as early as 2002 when he gave instructions for an amended will. Then in the distressing circumstances of the death of his wife the testator decided that the applicant should be disinherited entirely. Whatever cause the testator had for falling out with the applicant, his disinheritance of Tom shows a lack of judgment as to what should be in his will.

[73] Ultimately I am persuaded that, in terms of s 41(1), adequate provision was not made for the applicant's proper maintenance and support. The principal reasons for that conclusion are that the applicant's circumstances as at 2007 did not make free of a real risk he would be forced to resort to his savings to continue to support his family and that ultimately he would be deprived of economic independence, coupled with his substantial contribution to this estate upon the expectation that some of it would be left to him.

[74] The question then is what order should be made. Much of what I have said already is relevant here. And as I have discussed, his present financial position is little different from that at the testator's death. In my conclusion there should be an order for provision of a sum of $500,000, diminishing the residuary legatees' share in the estate by $100,000 each.

[75] I will hear the parties as to what orders should be made to give effect to that conclusion and as to costs.

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19 *Palmer v Dolman* [2005] NSWCA 361 at [118]; *Wheatley v Wheatley* [2006] NSWCA 262 at [37].