

# SUPREME COURT OF QUEENSLAND

CITATION: *Kowalski v Kowalski & Ors* [2012] QCA 234

PARTIES: **LEIGH ANNE-LOUISE KOWALSKI**  
(appellant)  
v  
**ELIZABETH ANN KOWALSKI**  
(first respondent)  
**THE PUBLIC TRUSTEE AS EXECUTOR FOR THE  
ESTATE OF STAN KOWALSKI (Deceased)**  
ACN 099 042 547  
(second respondent)  
**JOHN SHANAHAN AND JOANNE DUNN AS  
TRUSTEES FOR THE BANKRUPT ESTATE OF  
LEIGH ANN-LOUISE KOWALSKI**  
(third respondent)

FILE NO/S: Appeal No 11418 of 2011  
SC No 243 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING  
COURT: Supreme Court at Rockhampton

DELIVERED ON: 31 August 2012

DELIVERED AT: Brisbane

HEARING DATE: 7 August 2012

JUDGES: Margaret McMurdo P, Gotterson JA and Douglas J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDERS: **1. Appeal dismissed.**  
**2. Costs of the first respondent and of the second  
respondent of the appeal be assessed on the indemnity  
basis and be paid out of the estate.**

CATCHWORDS: SUCCESSION – FAMILY PROVISION AND  
MAINTENANCE – APPEALS – where second respondent  
widow applied successfully under Part IV of the *Succession  
Act* 1981 for further provision out of the testator's estate –  
where appellant daughter of testator challenged the provision  
provided for the widow – where a comparatively small estate  
with several serious and deserving claims – where appellant  
economically disadvantaged – whether trial judge had little or  
no regard for the claim of the appellant upon the testator's  
bounty – whether there has been a miscarriage in the exercise  
of discretion by the primary judge as conferred by the Act

*Succession Act 1981 (Qld), Part IV*

*Court v Hunt*, unreported, New South Wales Supreme Court, 14 September 1987, cited

*Crisp v Burns Philp Trustee Co Ltd*, unreported, New South Wales Supreme Court, 18 December 1979, cited

*Golosky v Golosky* [1993] NSWCA 111, applied

*Milillo v Konnecke* [2009] NSWCA 109, cited

*Singer v Berghouse* (1994) 181 CLR 201; [1994] HCA 40, cited

COUNSEL: The appellant appeared on her own behalf  
D Ryan for the first respondent  
J I Otto for the second respondent  
J Shanahan, with J Dunn, for the third respondent

SOLICITORS: The appellant appeared on her own behalf  
South & Geldard Solicitors for the first respondent  
Official Solicitor for the second respondent  
Dibbs Barker for the third respondent

- [1] **MARGARET McMURDO P:** This appeal should be dismissed for the reasons given by Gotterson JA. I agree with the orders proposed by his Honour.
- [2] **GOTTERSON JA:** The testator, Stanislaw Kowalski, died on 15 August 2009 aged 83 years.
- [3] The appellant, Leigh Anne-Louise Kowalski is the daughter and only natural child of the testator. She was born on 25 June 1969. She has four children. She has never married. She was declared bankrupt on 16 March 2010 on a debtor's petition.
- [4] The testator and the appellant's natural mother separated when she was about two years old. On 25 January 1984, the testator married Elizabeth Ann Kowalski who survived him. They had cohabited for about five years prior to marriage. She was born on 21 December 1921 and had previously been married. There is one son of the earlier marriage.
- [5] At the date of his death, the testator's principal asset was his high-set house and land at 6 Slepner Street, Mt Archer, Rockhampton. His only other substantial assets were household furniture and effects, a Westpac Bank account credit balance of a little over \$5,000 and a motor vehicle worth about \$3,000.

### **The Will**

- [6] By his last will made on 1 November 2005, the testator appointed the Public Trustee of Queensland to be the executor and trustee thereof. By clause 6 of the will, he gave the house property, his furniture and household effects to his trustee on trust to permit his widow to reside there during her lifetime or until she ceased to reside there permanently. This right of residence was subject to certain requirements on the widow's part of keeping the property in a satisfactory state of repair, insuring it and paying rates, taxes, insurance premiums and other periodical outgoings in respect of it.

- [7] Clause 6 further provided that on value or termination of the right of residence, the trustee was to hold the property on trust to form part of the residue of the testator's estate. By clauses 7 to 9 of the will, the appellant was appointed residuary beneficiary and, in default of her so taking, her children living at the testator's death were to take the residuary estate in equal shares.

### **The Part IV application**

- [8] The widow applied under Part IV of the *Succession Act* 1981 for further provision out of the testator's estate. Her application was filed in the Supreme Court at Rockhampton on 27 April 2010. The named respondent was the Public Trustee as executor of the testator's estate. Pursuant to a directions order filed in the court on 14 September 2010, the appellant was notified of the proceedings. She filed a substantial affidavit as to her circumstances and the widow's claim in the proceedings on 12 October 2010. She was then, and remains, a bankrupt.
- [9] On 20 May 2011 the widow filed a further application in the proceedings which sought several orders including an order that further provision be provided to her in accordance with the terms of a Deed of Settlement dated 12 April 2011 which had been entered into between her, the Public Trustee and the appellant's trustees in bankruptcy. The Deed provided for sale of the house property.
- [10] The proceedings were reviewed by the learned Judge at Rockhampton on 17 June 2011. That day, the appellant, who was self-represented, filed an application in the proceedings which proposed what might be called "a scheme" for disposal of the house property with some provision from the proceeds for accommodation and contingencies for the widow, and distribution of the balance variously to her trustees in bankruptcy and to meet her needs and those of her children.
- [11] Thus, on that day, the learned Judge had before him the primary application and the applications filed on 20 May and 17 June 2011 respectively. On that occasion, his Honour expressed his view that in the absence of evidence as to what it might cost for the widow to re-accommodate herself if the house was sold, he would have real difficulty in approving the proposed compromise<sup>1</sup>. There was also some debate over whether the appellant's bankruptcy precluded her from being a party to the proceedings.
- [12] After hearing from legal representatives and the appellant in person, the learned Judge made a series of orders and directions that day. He ordered that the appellant and her trustees in bankruptcy be joined as second and third respondents respectively to the primary application. He made a series of directions for filing and serving further affidavits and written submissions with respect to both the sanction application and the primary application. He directed that the sanction application and the primary application be determined consecutively and, significantly, that the sanction application and primary application be heard and determined on the papers. This latter direction was made in the interests of containing legal costs. The legal representatives and the appellant concurred in that course.

### **Determination of applications and orders**

- [13] Final submissions were filed on 7 September 2011. On 10 November 2011, reasons were published. In summary, the learned Judge held<sup>2</sup> that the widow had been left

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<sup>1</sup> AB 12 LL42-45.

<sup>2</sup> Reasons [49].

without adequate provision with the consequence that the jurisdiction under s 41 of the *Succession Act* was triggered. He declined<sup>3</sup> to sanction the proposed compromise, not being satisfied that it struck “the right balance” between the interests of the widow and the appellant. His Honour outlined<sup>4</sup> alterations to the Deed of Settlement which he considered would be appropriate to achieve that balance. The parties were directed to make submissions as to a form of orders to give effect to the reasons.

[14] Having received such submissions, the learned Judge made orders on 12 December 2011. The principal order varied the will by directing that it be read and construed as if clauses 6, 7, 8 and 9 were deleted therefrom and replaced by the following clauses 6, 7 and 8:

“6. **I DIRECT** my Trustee to:

- (a) forthwith list my property at 6 Sleipner Street, North Rockhampton (**Property**), for sale with three real estate agents in Rockhampton, namely, Think Real Estate, Pat O’Driscoll Real Estate and Ray White (Cnr Yaamba Road & McCartney Street, North Rockhampton) with a listing price recommended by those agents, but for no less than \$400,000;
- (b) use reasonable endeavours to sell the Property for a price not less than \$383,000, unless the prior consent in writing of my wife, ELIZABETH ANN KOWALSKI, is first obtained to its sale for a price less than \$383,000 (which consent is to be requested by my Trustee in writing addressed to my wife’s solicitors, South & Geldard);
- (c) not disclose to any prospective purchaser or agent retained for the sale of the Property that my wife’s consent must be obtained as a pre-condition to my Trustee selling the Property for less than \$383,000;

7. **I GIVE** my estate, both real and personal and wheresoever situate, including the net proceeds of sale of the Property (being the proceeds of sale remaining after the payment of agent’s commission), to my Trustee **UPON TRUST**:

- (a) *first*, to pay my Trustee’s costs and expenses incurred in relation to:
  - (i) the administration of my estate;
  - (ii) the sale of the Property; and
  - (iii) the collection, storage and sale of my personal items;
- (b) *secondly*, to pay \$100,000 to my wife, ELIZABETH ANN KOWALSKI, for her own use and benefit absolutely;
- (c) *thirdly*, as to any balance remaining (**the Trust Fund**), to hold the same:

<sup>3</sup> At reasons [68].

<sup>4</sup> Reasons [74].

- (i) for my wife, ELIZABETH ANN KOWALSKI, for life on the terms set out in clause 8 of this my Will;
  - (ii) upon the death of my said wife, as to any amount of the Trust Fund then remaining:
    - (A) *first*, to pay any of my Trustee's outstanding costs and expenses incurred in relation to the administration of my estate or the Trust Fund;
    - (B) *secondly*, to pay such sum to the trustees in bankruptcy of my daughter, LEIGH-ANNE KOWALSKI, as is sufficient to annul her bankruptcy;
    - (C) *thirdly*, to pay what then remains of the Trust Fund to my daughter, LEIGH-ANNE KOWALSKI, for her own use and benefit absolutely;
8. For the purposes of clause 7(c)(i) of this my Will, my Trustee will hold the Trust Fund **UPON TRUST** as follows:
- (a) to invest any part of the Trust Fund from time to time held by it but not required for or in connection with the carrying out of purposes referred to in the following sub-paragraphs of this clause, and to pay the income therefrom to my wife, ELIZABETH ANN KOWALSKI;
  - (b) at the written request of my wife, ELIZABETH ANN KOWALSKI, to apply all or any part of the Trust Fund for her benefit as follows:
    - (i) to purchase, either solely or as tenants-in-common with my said wife in shares reflecting their respective contributions to the purchase price, a dwelling or other accommodation, and to hold my Trustee's share of the said dwelling or other accommodation for the use and occupation of my said wife, rent free and at a net cost to the Trust Fund;
    - (ii) to purchase, from time to time, either solely or as tenants-in-common with my said wife in shares reflecting their respective contributions to the purchase price, a substitute dwelling or other accommodation, and to hold my Trustee's share of the said substitute dwelling or other accommodation for the use and occupation of my said wife, rent free and at a net cost to the Trust Fund;

- (iii) to purchase or join with my said wife in purchasing for her benefit, whether by way of lump sum or periodical payments, the right to have accommodation provided to or for her by a church, government or other reputable private institution or organisation providing the same for elderly, retired, sick or incapacitated persons, with or without health care, hospitalisation and nursing, or any one or more of the said or like services, for her lifetime, at a cost not exceeding the Trust Fund (which for that purpose will include any net profit or capital gain retained by my Trustee as part of the Trust Fund, arising from the sale of my Trustee's share of any dwelling or other accommodation purchased pursuant to sub-paragraphs (b)(i) or (ii) hereof), and whether or not the cost of such purchase, or any part thereof, will be recoverable upon my said wife ceasing to remain in such accommodation, or upon her death;
- (c) **I DIRECT** that, should my Trustee in its discretion pay an accommodation bond in order to secure proper accommodation for my wife, ELIZABETH ANN KOWALSKI, pursuant to sub-paragraph (b)(iii) hereof, then as between my Trustee and my said wife, my said wife, is to bear the liability for the difference between the amount of any such accommodation bond paid by my Trustee and any amount refunded to my Trustee on account thereof, with any necessary adjustment to be made as between my Trustee and my said wife's personal representative after her death;
- (d) should my wife, ELIZABETH ANN KOWALSKI, request the purchase of a substitute dwelling or other accommodation pursuant to sub-paragraph (b)(ii) hereof, or that any part of the Trust Fund be applied pursuant to sub-paragraph (b)(iii) hereof, **I DIRECT** my Trustee to use reasonable endeavours to sell or otherwise dispose of its share in any dwelling or other accommodation held by it for the use and occupation of my said wife, as soon as practicable and for its market value;
- (e) **I DIRECT** that my wife, ELIZABETH ANN KOWALSKI, shall be responsible for the payment of all local government rates and charges, insurance premiums and the cost of repairs in respect of any dwelling or other accommodation purchased for her use and occupation pursuant to paragraph (b) hereof,

excepting fair wear and tear and structural repairs (which are not caused by my said wife's wilful or negligent act or omission), the cost of repairing which shall be borne by my said wife and my Trustee in proportions reflecting their respective shares in the said dwelling or other accommodation;

- (f) **I DIRECT** that any stamp duty assessed as payable on the purchase of a dwelling or other accommodation for the use and occupation of my wife, ELIZABETH ANN KOWALSKI, pursuant to paragraph (b) hereof, shall be borne by my said wife and my Trustee in proportions reflecting their respective shares in the said dwelling or other accommodation;
- (g) **I DIRECT** that my wife, ELIZABETH ANN KOWALSKI, shall be responsible (without a claim upon my trustee or the Trust Fund) for the payment of any capital gains tax liability arising out of the disposal by my said wife of any interest she holds in any dwelling or other accommodation purchased for her use and occupation pursuant to paragraph (b) hereof, and that my Trustee shall be responsible (without a claim upon my said wife) for the payment of any capital gains tax liability arising out of the disposal by it of any interest it holds in any such dwelling or other accommodation;
- (h) the life interest of my wife, ELIZABETH ANN KOWALSKI, in the Trust Fund shall be subject always to the right of my Trustee to be reimbursed out of the Trust Fund for its costs and expenses incurred in and incidental to its administration of the Trust Fund. For the avoidance of doubt, my Trustee shall also be entitled to have recourse to the Trust Fund for the payment of any costs and expenses incurred by it in the due and proper administration of my estate;
- (i) my Trustee shall have such further and additional powers as are conferred upon trustees by the *Trusts Act 1973* (Qld), as amended or re-enacted from time to time.<sup>5</sup>

[15] The learned Judge also made an order dismissing the sanction application and orders with respect to costs. The Public Trustee's costs were ordered to be paid out of the estate on an indemnity basis. No order was made as to the costs of the widow, the appellant or her trustees in bankruptcy.

### **The appeal**

[16] The appellant filed a Notice of Appeal on 9 December 2011. The appeal was listed for hearing on 18 April 2012. Shortly prior to that date, a firm of solicitors filed an

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<sup>5</sup> AB pp560-563.

application for an adjournment on the basis that they had been recently engaged by the appellant to advise her with respect to the appeal and required time to do so. The appeal was delisted and directions made for the filing of a revised Outline of Argument for the appellant. Those solicitors filed a Notice of Withdrawal on 8 May 2012.

- [17] By letter dated 18 May 2012, the court notified the appellant that the appeal had been listed for hearing on 7 August 2012. On 1 August, the appellant sent a letter by facsimile to the court referring to her domestic circumstances and requesting a hearing date after 15 August. She was informed that the appeal remained listed for 7 August.
- [18] At the hearing on that date, the appellant appeared in person. She explained to the court that her expectation had been that she would have assistance from a Mr Bruce Bell to present her appeal, but that Mr Bell had just notified her of his unavailability for that. She informed the court that notwithstanding his absence, she wished to proceed with the appeal herself.
- [19] In the course of hearing the appeal, the court received two affidavits of the appellant, one that had been filed on 9 January 2012 and the other that was sworn that day and filed by leave. The court also received an affidavit sworn on behalf of the Public Trustee which disclosed that the house property had been sold in July 2012 and that the current net value of the estate is a little over \$349,000 without allowing for the Public Trustee's unpaid legal costs and outlays estimated at \$55,000 including GST and future tax liabilities and other outlays of a little over \$16,000. Also received was an affidavit on behalf of the widow which gave details of proposed temporary accommodation arrangements for the widow and of her legal costs, including costs of the appeal.

### **The grounds of appeal**

- [20] The Notice of Appeal contains some nine grounds of appeal. There is no challenge to the learned Judge's finding that adequate provision had not been made for the widow by the will. Indeed, it would have been difficult for the appellant to mount such a challenge given that the scheme she had proposed in her application was more beneficial to the widow than the provision for her in the will.
- [21] A recurring theme in the grounds of appeal is that the exercise of the discretion conferred by s 41 by the learned Judge miscarried. The first and fourth grounds express the theme by criticising the exercise as one that "gave only secondary consideration to the testator's singular, preferred beneficiary" and "failed to appropriately balance the competing interests of the parties". This theme encapsulates the principal ground of appeal. A second theme to which the eighth ground relates concerns costs orders.
- [22] In the Notice of Appeal and perhaps more so in her affidavit filed by leave, the appellant has ventilated a litany of complaints and criticisms she has about the administration of the testator's estate by the Public Trustee and the discharge of their duties by her trustees in bankruptcy. Without meaning to imply that any of those complaints or criticisms has substance, I observe that these proceedings do not invoke a jurisdiction for adjudication upon them.

- [23] Before turning to the principal ground of appeal, I observe also that the reasons for judgment reveal that the learned Judge gave careful and detailed consideration to factual matters relevant to the exercise of the discretion and assessed them against the applicable legal principles. He was evidently conscious that this was a comparatively small estate of a testator upon whose bounty, several serious and deserving claims were being made. No complaint is made in the grounds of appeal of error in fact finding or in articulation of relevant legal principle.

### **Miscarriage of discretion ground of appeal**

- [24] In so far as this ground might imply that the learned Judge had no, or little, regard for the claim of the appellant upon the testator's bounty, it must be said at once that that was not so. His Honour referred at length to the appellant's family circumstances, health and financial position,<sup>6</sup> describing her plight as one of having "a very genuine need",<sup>7</sup> of being "in a vulnerable position" and having "many demands on her resources".<sup>8</sup> She was described as being at risk of "serious financial difficulty" in the future.<sup>9</sup> Moreover, it was the appellant's own significant needs which motivated him not to sanction the agreed arrangements.<sup>10</sup>

- [25] Against those circumstances, the learned Judge described the balancing exercise he had to undertake in the following terms:

"The balancing exercise is in adequately catering for the [widow's] need for reasonable and appropriate accommodation and the provision of some amount to provide for some comforts in life and a buffer against unforeseen events and the [appellant's] need for the financial assistance that the deceased wished to provide for her."<sup>11</sup>

- [26] Counsel for the Public Trustee has provided the court with an accurate summary of how the learned Judge undertook the balancing exercise. As appears from his Honour's reasons and that document, he:

- (a) was mindful that a large capital sum should not be provided to an elderly widow when proper provision can be made for her in some other way;<sup>12</sup>
- (b) did not accord primacy to the claim of the widow merely on account of her status as widow and regardless of the circumstances,<sup>13</sup> but instead considered the circumstances in detail;
- (c) considered that the widow's "principal need is ... not only for a home suited to her age, health and circumstances but for flexibility as well";<sup>14</sup>
- (d) took into account that "the size of the estate and the demands upon it" made it impossible to achieve what would

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<sup>6</sup> Reasons [31]-[38].

<sup>7</sup> Reasons [58].

<sup>8</sup> Reasons [66].

<sup>9</sup> Reasons [38].

<sup>10</sup> Reasons [76].

<sup>11</sup> Reasons [72].

<sup>12</sup> Reasons [63]-[65].

<sup>13</sup> Reasons [66].

<sup>14</sup> Reasons [45].

be ideal, namely the provision for the widow of “a substantial lump sum as well as a suitable home”;<sup>15</sup>

- (e) concluded that in order to make proper provision for the widow, the appellant’s needs must be postponed to those of the widow;<sup>16</sup>
- (f) concluded, ultimately, that “the only viable alternative” was an order providing a “portable life interest” in favour of the widow, that “enables some balancing of the competing interests”;<sup>17</sup>
- (g) considered that the widow ought nonetheless have the benefit of a capital sum of “a little over \$50,000” after the payment of costs, which his Honour considered to be “the smallest amount ... that I envisage as reasonable to enable her to cope with the contingencies of life.”<sup>18</sup>

The figure of \$100,000 mentioned in clause 7(b) of the will would leave the widow a little over \$50,000 in-hand after meeting her own legal costs.

- [27] The provision for the widow for which the learned Judge’s orders make is consistent with current notions that a mere right of residency will usually be an unsatisfactory method of providing for a surviving spouse’s accommodation. As Kirby P explained in *Golosky v Golosky*:<sup>19</sup>

“This is because a spouse may be compelled by sickness, age, urgent supervening necessity or otherwise, with good reason, to leave the residence. The spouse [so provided] will then be left without the kind of protection which is normally expected will be provided by a testator who is both wise and just.”

It can be expected where, as here, an estate consists of little more than a place of residence, a mere right of residency in it will have significant shortcomings in providing for the contingent needs of a surviving spouse.

- [28] The widow is generally in good health. She is able to live independently and wishes to continue doing so. Upon the sale of the house at Sleipner Street, she began living in temporary rented accommodation pending the determination of this appeal. She would prefer to live in a low-set residence close to shops and medical services. Her sole income is from her pension. She has bank account savings of a little over \$30,000.
- [29] Under the orders, provision is made for the widow to have a life interest in the testator’s estate with sufficient flexibility to cater for her changing accommodation needs. This form of provision is sometimes called a Crisp order. The purpose of such an order was described in the following terms by Ipp JA in *Milillo v Konnecke*:<sup>20</sup>

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<sup>15</sup> Reasons [67].

<sup>16</sup> Reasons [72].

<sup>17</sup> Reasons [73].

<sup>18</sup> Reasons [76].

<sup>19</sup> [1993] NSWCA 111 at 10.

<sup>20</sup> [2009] NSWCA 109 at [47]-[48].

“A *Crisp* order is an order of the kind made by Holland J in *Crisp v Burns Philp Trustee Co Ltd* (NSWSC, 18 December 1979, unreported). Generally speaking such an order gives a plaintiff an interest for life in real property or in an interest in the property, with the right to it (should the need arise) for the purpose of securing, for the plaintiff’s benefit, more appropriate accommodation. In *Court v Hunt* (NSWSC, 14 September 1987, unreported), Young J (as he then was) said that a *Crisp* order was intended to provide flexibility, by way of a life estate, the terms of which could be changed to ‘cover the situation of the plaintiff moving from her own home to retirement village to nursing home to hospital’.

Thus, for example, a *Crisp* order may entitle a plaintiff, from time to time, to require the executor of a will to sell a home devised by the will, or otherwise owned by the estate, and to use the proceeds for purposes that may include purchasing another home for the plaintiff’s use and occupation, or providing accommodation for the plaintiff in a retirement village or similar institution, or in like accommodation providing hospitalisation and nursing care. The flexibility provided by such an order underlies the notion that a *Crisp* order confers a ‘portable life interest’.”

- [30] Thus the learned Judge adopted an orthodox solution for providing for the widow’s needs. The question that next arises is whether in so doing, the learned Judge committed an appealable error.
- [31] In *Singer v Berghouse*,<sup>21</sup> Mason CJ, Deane and McHugh JJ gave<sup>22</sup> express endorsement to, and quoted, the following comments of Kirby P in *Golosky*:<sup>23</sup>
- “Unless appellate courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first. Second opinions in such cases would be bought at the cost of diminishing the finality of litigation in a troublesome area and, sometimes at least, with a burden of costs upon the estate which should not be encouraged.”
- [32] In the paragraph which follows, their Honours said that, accordingly, Sheller JA had been correct on the hearing of the appeal below to have regarded it as necessary for the appellant to show that the Master at first instance, had made “an entirely erroneous estimate of what, in the circumstances, was an adequate provision for the [appellant’s] proper maintenance, education and advancement in life”.
- [33] The two aspects of the orders for provision by way of a portable life interest which I have earlier identified – its consistency with current notions and its orthodoxy – present insurmountable obstacles for the appellant with this ground of appeal. The same may be said for the provision of \$100,000 to meet her legal costs and to cater for contingencies. The orders made were comfortably within the discretion. The appellant has not made out any basis for categorising it as deriving from an “entirely erroneous estimate” of the widow’s needs.

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<sup>21</sup> (1994) 181 CLR 201.

<sup>22</sup> At 212.

<sup>23</sup> At 13-14.

### Costs ground of appeal

- [34] As noted, the learned Judge took into account costs of the proceedings that the widow must meet in fixing the sum of \$100,000 to be paid to her. There can be no legitimate complaint about that. It was necessary for her to bring those proceedings in order to obtain further and adequate provision for herself from the testator's estate.
- [35] The appellant complains also with respect to the costs order made by the learned Judge in favour of the Public Trustee. The appellant had submitted that no such order ought to have been made. Rejecting that submission, his Honour said:<sup>24</sup>
- “As to the [Public Trustee's] costs, I order that they be assessed on an indemnity basis and paid out of the estate. They are not guilty of disqualifying conduct as the [appellant] alleged. As executors they have a ‘fiduciary duty to which they must have regard in conducting litigation affecting the estate.’<sup>25</sup> Their proposal to compromise the suit, a suit which I found to be a valid application for family provision, and one that involved a difficult balancing exercise, was in keeping with this duty.”<sup>26</sup>
- [36] The appellant has not demonstrated any misapprehension of fact concerning the Public Trustee's conduct or misapplication of legal principle by the learned Judge in the exercise of the discretion as to the Public Trustee's costs.

### Disposal

- [37] For these reasons, this appeal must be dismissed.
- [38] It is a matter of considerable regret that the estate is exposed to further diminution by the costs of an appeal which had negligible prospects of success. However, I do consider it appropriate that the costs of the widow and of the Public Trustee of this appeal be assessed on the indemnity basis and be paid out of the estate. In view of her bankruptcy, there would be little point in ordering the appellant to pay those costs.
- [39] The trustees in bankruptcy who were represented at the hearing of the appeal sought no order as to costs.

### Orders

- [40] I would propose the following orders:
1. Appeal dismissed.
  2. Costs of the first respondent and of the second respondent of the appeal be assessed on the indemnity basis and be paid out of the estate.
- [41] **DOUGLAS J:** I agree with the reasons of Gotterson JA and with the orders proposed by his Honour.

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<sup>24</sup> Reasons delivered 12 December 2011 at [14].

<sup>25</sup> *Underwood & Anor v Sheppard* [2010] QCA 76.

<sup>26</sup> *Collette v Knox* [2010] QSC 132 at [167].