SUPREME COURT OF QUEENSLAND

CITATION:	*Richards v Augustine No 2* [2012] QSC 278
PARTIES:	**CAROL ANN RICHARDS** **(applicant)** **and** **COLIN BRUCE AUGUSTINE** **(first respondent)** **and** **MERVYN CLIVE AUGUSTINE** **(second respondent)**
FILE NO:	5634 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	14 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2011- 28 October 2011
JUDGE:	Peter Lyons J
ORDER:	**1. Order as per annexure C**
CATCHWORDS:	PROCEDURE - COSTS - GENERAL RULE- COSTS FOLLOW THE EVENT - COSTS OUT OF A FUND - WHEN COSTS ALLOWED OUT OF A FUND - LITIGATION CAUSED BY TESTATOR, EXECUTOR OR BENEFICIARY - EXECUTION OR REVOCATION OF WILL - where applicant contended provision in her father's will was insufficient - where respondents challenged application in circumstances where there was reason for them to recognise merit in the applicant's contention - where the applicant was successful - where parties were directed to submit a proposed form of order - where the sister of the applicant and the respondents was entitled to one quarter of the residue of the estate and a specific legacy of $45,000 under the will - where the sister did not take part in the litigation and assisted in attempts to settle the litigation - where the effect of the proposed order submitted by the parties would be that no residue remained; and that the sister would receive only the legacy - whether the legacy to the applicant's sister should be varied *Re Hall* (1959) 59 SRNSW 219 *Re Lanfear* (1940) 57 WN (NSW) 181, considered

Re Scali [2010] NSWSC 1254, considered
Szlazko v Travini [2004] NSWSC 610, considered
Vasiljev v Public Trustee [1974] 2 NSWLR 497, considered

COUNSEL: D Schneidewin for the applicant
D Morgan for the respondents

SOLICITORS: De Groots Wills & Estates Lawyers for the applicant
Payne Butler Lang for the respondents

[1] On 12 March 2012, reasons were given in which I determined that the sum of $250,000 should be paid to the applicant out of the estate of her deceased father. I invited the parties to make submissions about the form of order to be made, to give effect to this determination.

[2] I was subsequently provided with a draft order, a copy of which is annexure A to these reasons, including an order making provision for the applicant out of the estate in the sum mentioned. However, the order also provided that the costs of the applicant be paid out of the estate; as well as the costs of the respondents.

[3] The respondents are the sons of the deceased, and the brothers of the applicant. They are also the executors of the deceased's will.

[4] The parties have a sister, Marie. She had not taken an active part in the proceedings. Under the will, Marie was to receive a specific legacy of $45,000, together with a one-quarter share of the residue of the estate. The earlier reasons recorded the result of a calculation of the value of the residue of the estate, at August 2010, at $126,781.24. That calculation allowed for the specific legacy to Marie, and an identical legacy to the applicant, for which the will made provision.

[5] The effect of the draft orders previously mentioned would have been that no residue remained; and that accordingly Marie would receive only the legacy. In view of the effect which those orders would have had on her, arrangements were made that she be provided with a copy of the earlier reasons and the proposed order; and be given the opportunity to make submissions about the orders to be made.

[6] Marie has taken that opportunity. She provided a submission dated 27 April 2012. In it, she made factual assertions, not otherwise proven. The parties agreed to the admission of her submission as evidence of the truth of the factual matters so asserted.

[7] Marie submitted that the amount to come to her from the estate should not be affected by the costs of the litigation. She said that at the time of her father's death, she and her husband were financially secure. However, in 2012 her husband was suffering from acute depression and was forced to cease work. She is now the primary income earner for the family and has to pay off several loans. She stated that she made attempts to assist in the settlement of the current litigation, which would have avoided much of the costs.

[8] Marie also contended that the net value of the residue of the estate on her father's death was expected to be close to $260,000. She made reference to paragraph 140 of the earlier reasons, where the net value of the estate (excluding land, left specifically to the respondents) was said to be $224,284.61. Marie's submissions

identified some property items which she contended were not taken into account, and some possible liabilities, resulting in a net value, by her calculation of $252,768.46.

[9] The applicant has put in submissions contending that, as proposed in the draft order, she should be awarded her costs out of the estate. She generally supported the submissions made by Marie.

[10] The respondents contended that, while Marie should receive the legacy of $45,000, the usual approach should otherwise apply. A consequence of that contention is that the costs orders and the order in favour of the applicant would exhaust the residue, and Marie would be confined to the specific legacy. They also provided schedules relating to the assets of the estate, controverting to some extent the material provided by Marie.

[11] The estimated value of the residue in August 2010 has not been challenged. The amount of $126,781.24 reflects the amount of residue that would then have been available for distribution, after the payment of the specific legacies to Marie and the applicant. While, if Marie's contentions were correct, the value of the residue would be greater, the difference in her share of residue on that basis would be of the order of $10,000. Since she did not participate in the trial, and I have had the benefit of a hearing at which I had to consider evidence about the value of the estate, where witnesses could be cross-examined about these matters, it seems to me inappropriate to reconsider the value of the residue. Accordingly, I intend to proceed on the basis that, at that point in time the value of the residue in August 2010 was $126,781.24. Marie's share, if the estate had then been distributed, would have been a little more than $31,000. Allowing for some further small expense to finalise the estate, it seems to me appropriate to round that figure to $30,000.

[12] In my view, the amount that Marie should receive from the estate should not be diminished because of the litigation. She has attempted to assist to resolve it. Her financial circumstances have worsened materially since her father's death. She has been delayed for some years now in the receipt of anything from the estate.

[13] It is sometimes said that the primary duty of the person or representative is to uphold the will.[1] However, it has also been said over many years that it is the duty of executors either to compromise a claim for further provision out of an estate, or to contest it and to seek to uphold the provisions of the will.[2] In the present case, the respondents went well beyond what they were required to do by their duty to uphold the will. They had an obvious personal interest in opposing the applicant's application. They appeared quite unwilling to recognise any merit in the applicant's claim, though there seems to me to have been obvious reason for them to have done so. The fact that the costs of the proceedings have eaten up so much of the estate seems to me to be in no small part due to the approach taken by them to these proceedings. In those circumstances, and having regard to Marie's needs, it seems appropriate to me that an order be made which would place her in a position roughly equivalent to that in which she would have been but for the conduct of the respondents.

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1 See for example De Groot and Nickel *Family Provision in Australia* (4th ed) para 6.6.

2 *Re Lanfear* (1940) 57 WN (NSW) 181, 183; *Re Hall* (1959) 59 SRNSW 219, 226-227; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497, 503; see also *Szlazko v Travini* [2004] NSWSC 610 at [11]; *Re Scali* [2010] NSWSC 1254 at [10].

Conclusion

[14] I propose to make the order provided by the parties, which is annexure A to these reasons; save that in paragraph 2 the amount will be $76,000. Accordingly, the order is as per annexure B to these reasons.

[15] Since this order was made on 14 September 2012, it has come to my attention that the order which is annexure B did not have the effect which was intended by these reasons. Accordingly, with the consent of the parties and Marie, I have varied it. The order as varied is annexure C to these reasons.

ANNEXURE A
SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 5634/10

Applicant:	**CAROL ANN RICHARDS**
	AND
First Respondent:	**COLIN BRUCE AUGUSTINE**
Second Respondent:	**MERVYN CLIVE AUGUSTINE**

ORDER

Before:	Hon Justice Peter Lyons
Date:	Judgment 12 March 2012
Initiating document:	Originating application filed 1 June 2010

THE ORDER OF THE COURT IS THAT:

1. Provision be made for the applicant from the estate of the late Mervyn Augustine ("the deceased") in the sum of $250,000.00.

2. Clause 6 of the will of the deceased dated 2 October 2003 ("the will") be read and construed as if it provided:

   "I GIVE the sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) to my daughter MARIE HELEN KAVANAGH for her sole use and benefit absolutely."

3. The gift of the legacy to Marie Helen Kavanagh provided for in clause 6 of the will be exonerated from the burden and incidence of this Order.

4. That clause 8(a) of the will be read and construed as if it contained no reference to the applicant.

5. The applicant's costs of and incidental to the proceeding be paid from the estate on the indemnity basis as agreed or failing agreement as assessed.

6. The respondent executors' costs of and incidental to the proceeding be paid from the estate on the indemnity basis.

Signed:

ORDER

filed on behalf of the Applicant

Form 59 R 661

de Groots
wills and estate lawyers
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Ref: JDG:HB:2009451

ANNEXURE B
SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 5634/10

Applicant:	**CAROL ANN RICHARDS**
	AND
First Respondent:	**COLIN BRUCE AUGUSTINE**
Second Respondent:	**MERVYN CLIVE AUGUSTINE**

ORDER

Before:	Hon Justice Peter Lyons
Date:	14 September 2012
Initiating document:	Originating application filed 1 June 2010

THE ORDER OF THE COURT IS THAT:

1. Provision be made for the applicant from the estate of the late Mervyn Augustine ("the deceased") in the sum of $250,000.00.

2. Clause 6 of the will of the deceased dated 2 October 2003 ("the will") be read and construed as if it provided:

   "I GIVE the sum of SEVENTY-SIX THOUSAND DOLLARS ($76,000.00) to my daughter MARIE HELEN KAVANAGH for her sole use and benefit absolutely."

3. The gift of the legacy to Marie Helen Kavanagh provided for in clause 6 of the will be exonerated from the burden and incidence of this Order.

4. That clause 8(a) of the will be read and construed as if it contained no reference to the applicant.

5. The applicant's costs of and incidental to the proceeding be paid from the estate on the indemnity basis as agreed or failing agreement as assessed.

6. The respondent executors' costs of and incidental to the proceeding be paid from the estate on the indemnity basis.

Signed:

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ANNEXURE C
SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 5634/10

Applicant:	**CAROL ANN RICHARDS**
	AND
First Respondent:	**COLIN BRUCE AUGUSTINE**
Second Respondent:	**MERVYN CLIVE AUGUSTINE**

ORDER

Before:	Hon Justice Peter Lyons
Date:	20 September 2012
Initiating document:	Originating application filed 1 June 2010

THE ORDER OF THE COURT IS THAT:

1. Provision be made for the applicant from the estate of the late Mervyn Augustine ("the deceased") in the sum of $250,000.00.

2. Clause 6 of the will of the deceased dated 2 October 2003 ("the will") be read and construed as if it provided:

   "I GIVE the sum of SEVENTY-SIX THOUSAND DOLLARS ($76,000.00) to my daughter MARIE HELEN KAVANAGH for her sole use and benefit absolutely."

3. The gift of the legacy to Marie Helen Kavanagh provided for in clause 6 of the will be exonerated from the burden and incidence of this Order.

4. That clause 8(a) of the will be read and construed as if it contained no reference to the applicant or to Marie Helen Kavanagh.

5. The applicant's costs of and incidental to the proceeding be paid from the estate on the indemnity basis as agreed or failing agreement as assessed.

6. The respondent executors' costs of and incidental to the proceeding be paid from the estate on the indemnity basis.

Signed:

ORDER

filed on behalf of the Applicant

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