SUPREME COURT OF QUEENSLAND

CITATION:	*Dymott v Hall* [2015] QSC 58
PARTIES:	**Jean DYMOTT** (Applicant) **v** **Kevin James HALL (as executor of the will of Ronald Albert Frank Dymott (deceased))** (Respondent)
FILE NO/S:	SC No 6 of 2013
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Bundaberg
DELIVERED EX TEMPORE ON:	16 March 2015
DELIVERED AT:	Bundaberg
HEARING DATE:	16 March 2015
JUDGE:	Atkinson J
ORDER:	**1. That pursuant to section 41 of the Succession Act 1981, further provision be made for the Applicant from the estate of the late Ronald Albert Frank Dymott, deceased ("the deceased"), by the will of the deceased dated 23 April 2012 being read and construed as if the residential property of the deceased at 17 McCavanagh Street Bargara QLD, described as Lot 22 on RP6770 had been devised to the Applicant, rather than to the Respondent, subject to the Applicant paying the sum of $170,000 to the estate of the deceased.** **2. That the parties bear their own costs of and incidental to these proceedings.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY SPOUSE OR PARTNER – where the testator and the applicant spouse had married late in the testator's life – where the testator left only personalty to the applicant – where the testator left a residential property part of the estate to the respondent – where the residential property was subject to a lease to the applicant and was the applicant's place of residence – where the applicant's future

needs would include different residential arrangements – where the applicant's family was interstate – whether the testator had failed to make adequate provision for the proper maintenance and support of the applicant.

LEGISLATION: *Succession Act* 1981 (Qld) s 41(1)

SOLICITORS: Highland Ferguson Lawyers for the applicant
Baker O'Brien & Toll for the respondent

[1] **ATKINSON J**: An application was filed in this court on 3 September 2013 for orders that adequate provision be made for the proper maintenance and support of the applicant, Jean Dymott, out of the estate of the deceased, Ronald Albert Frank Dymott. At that time no grant of representation had apparently been made on the estate of the deceased. However, a will dated 23 April 2012 was admitted to probate on 3 December 2013.

[2] That will was quite a simple will. It appointed Mr Dymott's son-in-law, Kevin James Hall, who lives in the United Kingdom, as his executor and trustee. It gave to Mr Hall a two-unit residential property at 17 McCavanagh Street, Bargara, being Lot 22 on Registered Plan 6770 in the County of Cook, Parish of Barolin, Title Number 14561075 ("the McCavanagh Street property"), subject to a lease to which I will later refer. The property was valued at $400,000.

[3] Mr Dymott gave to his wife, the applicant Jean Dymott, his household furniture and personal effects; to his daughter, Jenny Wilcox, $10,000; to his daughter, Nicola Hall (the wife of Kevin Hall), $10,000; and to Kevin Hall, the residue of his estate.

[4] The lease to which I have earlier referred enabled Mr Dymott's widow, the applicant, to reside in one unit of the two-unit property for the remainder of her life. However, apart from the furniture and other matters in the house, which Mrs Dymott says were in fact jointly owned, she was not left anything under the estate.

[5] There are some factual disputes between the parties, but they have nevertheless agreed on a settlement of this application in a way that makes further provision for the applicant and yet leaves the majority of the estate as proposed under the will.

[6] Nevertheless, it is a matter for the Court whether or not to make such an order. I have informed the parties that I will make the order because it appears to me that it complies with the requirements of s 41(1) of the *Succession Act* 1981 (Qld), which provides, relevantly, as follows:

> *If any person (the deceased person) dies … and in terms of the will … adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, … the court may, in its discretion, on application by or on behalf of the said spouse, … order that such provision as*

> *the court thinks fit shall be made out of the estate of the deceased person for such spouse…*

[7] Clearly, Mrs Dymott falls within that category.

[8] Briefly, my reasons for making the order which is sought are as follows. Mr Dymott was born in Somerset in England on 12 June 1923. He was therefore 89 years old when he died. At that time, he was married and had two children. Those two children, the daughters to whom I have already referred, were born of his first marriage. The present applicant, Mrs Dymott, was married to Mr Dymott on 14 September 1998. That marriage continued until Mr Dymott's death.

[9] Mr Dymott's estate when he died was in the order of about $800,000. Mr Hall says that Mr Dymott told him that when he married, he would keep his assets separate from those of his wife and leave them within his own family, although, as I have said, he left them to his son-in-law rather than to his daughters or grandchildren.

[10] That is contrary to what Mrs Dymott understood was the arrangement between herself and Mr Dymott. She said that he assured her that their assets would be shared equally and that she would thereby be looked after when he died. Perhaps he thought that allowing her to stay as a lessee in one of the units owned by the estate would be sufficient, but clearly, it is not. As she is now a widow, Mrs Dymott is required to consider her own needs; being unable to leave one property for the rest of her life is not suitable to the needs of an aging person. It is particularly inappropriate in Mrs Dymott's case, as she moved to Queensland to live with Mr Dymott. However, she has no relatives here, all of them being located in Perth, where she met Mr Dymott.

[11] It is obvious that, in order to secure her proper maintenance and support, the applicant needs to have at least the capacity to move from that unit and purchase or rent another property, as she desires. She ought not to be tied, as she is by this will, to stay in the McCavanagh Street property for the rest of her life.

[12] It is clear that Mr Dymott remained close to his daughters in England and it is appropriate that he provided for them and his grandchildren in his will, albeit through the vehicle of his son-in-law. Nevertheless, Mr Dymott obviously owed a moral duty to his wife, which is recognised by s 41(1) of the *Succession Act* 1981 (Qld), to provide for her proper maintenance and support.

[13] Accordingly, I am satisfied that the first stage of such an application, which is a determination of whether the applicant has been left without adequate provision for her proper maintenance and support in life has been satisfied. That test is set out in the High Court case of *Singer v Berghouse* (1994) 181 CLR 201 at 208-209.

[14] The second stage the Court is required to determine, which arises only if the first stage has been determined in favour of the applicant, is to decide what provision ought to be made out of the deceased's estate for the applicant. The settlement reached by the parties is an appropriate one which recognises the interests and rights of all parties involved. To have transferred all of the McCavanagh Street property to the applicant

would have been too generous and too detrimental to the testamentary provisions made by the deceased. To have left the applicant without the capacity to purchase property of her own and, as she describes it, virtually "a prisoner" in that property would not have been appropriate, as I have already set out.

[15] The settlement reached by the parties is that the McCavanagh Street property will be transferred to the applicant upon her paying the sum of $170,000 to the estate of the deceased. The effect of this, as her solicitor submitted, is that she will effectively receive the sum of $230,000 from the estate; obtain an income of approximately $12,000 per annum from the lease of the other unit at that property; and give up, in return, the value of the lease of the unit in which she is currently living, which must be about the same as the other unit ($12,000 per annum), for the rest of her life. This represents about a 30 per cent division of the estate. As well as being entirely appropriate in its own terms, this agreement has the great advantage for the parties that they are not throwing away money on legal costs, which would diminish the estate for all of them.

[16] Accordingly, I make the order as per the draft that the parties have agreed: "That pursuant to section 41 of the [*Succession Act* 1981 (Qld)], further provision be made for the Applicant from the estate of the late Ronald Albert Frank Dymott, deceased ("the deceased"), by the will of the deceased dated 23 April 2012 being read and construed as if the residential property of the deceased at 17 McCavanagh Street Bargara QLD [*sic*], described as Lot 22 on RP6770 had been devised to the Applicant, rather than to the Respondent, subject to the Applicant paying the sum of $170,000 to the estate of the deceased."

[17] The parties have agreed to bear their own costs of and incidental to these proceedings.